

THE BULLETIN

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

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

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

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

The decisions are presented in the following way:

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

T. Markert

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.

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Republic of Korea	S. Kim / K. Lim		

European Court of Human Rights

Court of Justice of the European Union

Inter-American Court of Human Rights

Strasbourg, July 2017

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

Albania, Finland, Japan, Monaco.

Armenia

Constitutional Court

Statistical data

1 September 2016 – 31 December 2016

- 59 applications have been filed, including:
 - 26 applications filed by the President
 - 24 applications as individual complaints
 - 4 applications by domestic courts
 - 2 applications by the Prosecutor General
 - 2 applications by the Human Rights Defender
 - 1 application by Members of Parliament
- 46 cases have been admitted for review, including:
 - 26 applications on the compliance of obligations stipulated in international treaties with the Constitution
 - 20 cases concerning the constitutionality of certain provisions of laws, including:
 - 3 applications by domestic courts
 - 2 applications by the Prosecutor General
 - 2 applications by the Human Rights Defender
 - 1 application by Members of Parliament
 - 12 applications on the basis of individual complaints
- 40 cases heard and 39 decisions delivered, including:
 - 23 decisions on the compliance of obligations stipulated in international treaties with the Constitution
 - 16 decisions on the constitutionality of certain provisions of laws, including:
 - 13 decisions on the basis of individual complaints
 - 2 decision on the basis of application by the courts
 - 1 decision on the basis of application filed by the Prosecutor General

Important decisions

Identification: ARM-2016-3-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 04.10.2016 / **e)** DCC-1310 / **f)** On the constitutional compliance of provisions of the Civil Procedure Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Appeal, proceedings, third parties.

Headnotes:

A provision whereby only the parties to the proceedings (and in cases concerning the protection of the interests of the state, the Prosecutor General and his or her deputies) are entitled to appeal to the Court of Cassation against a judicial act of a lower court was in conformity with the Constitution; the list of persons authorised to submit a cassation appeal prescribed by the provision was not exhaustive and did not restrict the right of persons who were not party to the proceedings to appeal against judgments of the Court of Appeal where these judgments concerned the rights and responsibilities of the person in question.

Summary:

I. The applicant challenged certain regulations of the Civil Procedure Code which stated that persons participating in the proceedings have the right to appeal to the Court of Cassation against a judicial act of a lower court, deciding on the merits of the case.

An appeal by the applicant (who was not involved in the case) against the court's judgment was returned by the Civil Court of Appeal on the basis that the appealed judgment did not concern the applicant's rights; the appeal had in effect been lodged by a person who did not have the right to appeal a judicial act of lower court.

II. The Constitutional Court declared that the provision described above was in conformity with the Constitution; the list of persons authorised to submit a

cassation appeal prescribed by the appealed provision was not exhaustive and did not restrict the right of persons who were not party to the proceedings to submit cassation appeal against judgments of the Court of Appeal where these judgments concerned the rights and responsibilities of the person in question.

Languages:

Armenian.



Identification: ARM-2016-3-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 18.10.2016 / **e)** DCC-1315 / **f)** On the conformity with the Constitution of provisions of the Administrative Procedure Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Case, fresh examination, counter-claim.

Headnotes:

Regulations to the effect that during a fresh examination of a case the cause of action, the subject-matter of the claim or the amount being demanded in the claim cannot be changed and a counter-claim cannot be filed are out of line with the principles of proportionality, effective judicial protection and fair trial.

Summary:

I. The applicant challenged certain regulations of the Administrative Procedure Code which stated that during a fresh examination of a case the cause of action, the subject-matter of the claim or the amount being demanded in the claim cannot be changed; a counter-claim cannot be filed.

II. The Constitutional Court noted that this restriction on the opportunity to file a counterclaim did not stand in the way of the right to access to court as such; the person concerned could always file a separate claim in accordance with the Administrative Procedure Code. However, this type of limitation in the framework of concrete legal relations could be out of line with the constitutional principle of proportionality and inconsistent with the right to effective judicial protection and the constitutional provisions whereby everyone should have the right to a fair and public hearing of his or her case, within a reasonable time period and by an independent and impartial court.

Languages:

Armenian.



Identification: ARM-2016-3-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 22.11.2016 / **e)** DCC-1322 / **f)** On the conformity with the Constitution of provisions of the Administrative Procedure Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Cassation appeal, norm, interpretation, analysis.

Headnotes:

A provision to the effect that a person lodging a cassation appeal must be able to show that the decision which they wish the Court of Cassation to take would promote uniform application of the law is in line with the Constitution. Any comparative analysis they submit at this stage cannot be dismissed; this would constitute blocking access to court.

Summary:

I. The applicant took issue with a provision of the Administrative Procedure Code to the effect that a person lodging a cassation appeal on the grounds set out in the above Code must show that the decision which he or she would like the Court of Cassation to take would promote the uniform application of the law. The appellant in such proceedings has to take particular care to demonstrate that the interpretation of any norm of the judicial act under appeal contradicts the interpretation made in the Decision of the Court of Cassation; he or she would need to attach the acts in question, highlighting, through comparative analysis, the contradiction that exists between the judicial act in dispute and the judicial act of the Court of Cassation in cases with similar factual circumstances.

II. The Constitutional Court found that the term “making comparative analysis” in the above provision of the Administrative Procedure Code was in conformity with the Constitution. At the stage of receiving the application, examination of such comparative analysis cannot be dismissed as this would constitute blocking access to court.

Languages:

Armenian.

*Identification:* ARM-2016-3-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 20.12.2016 / **e)** DCC-1333 / **f)** On the conformity with the Constitution of provisions of the Criminal Procedure Code / **g)** *Téghékagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Child, interests, priority.

Headnotes:

The right of the child to be heard should not be subject to age limitations; this is not required by the Constitution and the legislative provisions in question did not envisage this. The body conducting the proceedings must facilitate the child’s right to be heard and make its decision with the interests of the child as its guiding principle.

Summary:

I. The applicant challenged a regulation of the Criminal Procedure Code whereby the rights of a juvenile or an incapacitated injured person are not exercised by them but by their legal representatives.

II. The Constitutional Court noted the constitutional provisions to the effect that a child is entitled to express his or her opinion freely. This opinion, along with the age and maturity of the child, will be taken into consideration in matters concerning him or her. In matters concerning the child, the main focus must be the interests of the child.

These constitutional provisions did not envisage any limitation depending on age or any other matter, although the child’s age and level of maturity would be taken into account. They also placed the public authority under a clear obligation to pay primary attention to the interests of the child.

The Constitutional Court found that the objective of the constitutional norm was, in matters concerning the interests of the child, if different interests were in play, to protect the interests of the child as a priority. Where there is a collision between these interests, the public authority must protect the interests of the child.

The Constitutional Court stated that the provisions of the Constitution were of direct application; judicial practice had to be guided by the demands therein.

Languages:

Armenian.



Austria

Constitutional Court

Important decisions

Identification: AUT-2016-3-003

a) Austria / b) Constitutional Court / c) / d) 15.10.2016 / e) G 7/2016 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.18 General Principles – **General interest**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Alpine forests, protection / Hunting rights.

Headnotes:

The legal obligation imposed on landowners in the *Land* of Carinthia to allow hunting on their plots pursues the goal of protecting mountain forests from destruction. As Austria has a duty under international law to protect its mountain forests, the landowners' right to property cannot outweigh the general interest in the effective management of game stocks.

Summary:

I. Under the Hunting Act of the *Land* of Carinthia, hunting rights are inseparable from private ownership of land. However, they may only be exercised either in private hunting districts or in municipal hunting districts. Private hunting districts are plots of at least 115 hectares owned by the same person which can be used for hunting. If the landowner renounces his or her right to exercise hunting in a private hunting district, the district concerned will be included in neighbouring hunting districts. All land in the same municipality which does not belong to a private hunting district constitutes a municipal hunting district if it has an overall surface area of at least 500 hectares. At the request of the landowner or (in

the case of a municipal hunting district) of the person entitled to exercise hunting, the hunting authority is to suspend the hunt on plots that are enclosed by a fence.

The applicant, the owner of landholdings in Carinthia of 6,5 hectares, is opposed to hunting "on fundamental grounds". He therefore filed a request with the hunting authority seeking to exempt his plots from hunting so that neither hunting nor feeding of game nor any other measures of management of game stock could take place on his land. He argued that owing to the systematic feeding of game, game stocks were so abundant that it appeared nearly impossible to grow young trees. In his view, the natural system of self-regulation of wild game should be restored by relocating lynx, wolf and bear and by not feeding game in winter.

The hunting authority dismissed this request on the grounds that the exercise of hunting was governed by the law and that there was no provision for the exemption requested.

In his constitutional complaint, the applicant challenged the Carinthian Hunting Act, claiming that the provisions applied by the hunting authority ran counter to his constitutional right to property. In this respect, the applicant referred to the case-law of the European Court of Human Rights according to which imposing on a landowner opposed to the hunt on ethical grounds the obligation to tolerate hunting on his or her property is liable to upset the fair balance between protection of the right of property and the requirements of the general interest and to impose on the person concerned a disproportionate burden incompatible with Article 1 Protocol 1 ECHR.

II. The Constitutional Court agreed with the applicant that his legal obligation to allow hunting on his property interfered with his right to the peaceful enjoyment of his property. However, it found that the situation in Carinthia differed substantially from that criticised by the European Court of Human Rights in France, Germany and Luxembourg.

In Austria the population and diversity of hoofed game is the highest in Europe. Consequently, the forests, in particular young trees, are heavily affected by game browsing; approximately half of the forest area lacks the requisite natural rejuvenation. It is therefore necessary, in order to safeguard the national forests, that game stocks are subject to an active management including measures to reduce the population of wild game. In Carinthia, the effective protection of the forests is all the more important as most of the forested areas there are suffering from erosion caused by wind, water or gravity. In addition,

there are international law obligations for Austria to protect forests in the alpine areas. According to two protocols to the Alpine Convention, the Contracting Parties undertake to keep game stocks at a level that allows the mountain forests to regenerate. The specific public interest in a systematic management of game stocks extending to the whole territory of Carinthia is also reflected by wildlife aspects being expressly taken into account in spatial planning (“wildlife spatial planning”). This clearly demonstrates that the Carinthian Hunting Act does not serve the leisure interests of those who exercise the hunting rights but imposes obligations on them which serve the general interest.

If the applicant’s landholding – and those of other owners who were opposed to hunting – were taken out of the municipal hunting districts, the whole system of management of game stocks would be jeopardised. Since the general interests at stake outweigh the landowner’s individual right to property, the Constitutional Court reached the conclusion that a legal obligation to allow hunting (except on enclosed properties) does not impose a disproportionate burden on landowners.

Cross-references:

European Court of Human Rights:

- *Chassagnou and others v. France* (GC), nos. 25088/94, 28331/95, 28443/95, 29.04.1999, *Reports of Judgments and Decisions* 1999-III;
- *Schneider v. Luxembourg*, no. 2113/04, 10.07.2007;
- *Hermann v. Germany* (GC), no. 9300/07, 26.06.2012.

Languages:

German.



Identification: AUT-2016-3-004

a) Austria / **b)** Constitutional Court / **c)** / **d)** 13.12.2016 / **e)** G 494/2015 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 3.19 General Principles – **Margin of appreciation**.
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
- 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

Keywords of the alphabetical index:

Paternity, judicial recognition.

Headnotes:

Under Article 8 ECHR there is no duty for a State to allow an alleged biological father to establish a relationship with a child living in an intact family under any circumstances.

Summary:

I. Under § 188.2 of the Austrian Civil Code, the court may allow a third person to establish a relationship with a child if such personal contacts are considered to be in the child’s best interests. However, such contact rights can only be granted if the third person is, or was, already in a “particular social or familiar relationship” with the child.

In October 2013, the applicant before the Constitutional Court had entered into a relationship with Ms A, who became pregnant. Before the birth Ms A left the applicant and married another man (“Mr A”). In July 2014 she gave birth; according to the Austrian Civil Code, Mr A is the legal father of the child.

Although both the applicant and Ms A assume that the applicant is the biological father of the child, Ms A repeatedly refused requests made by the applicant to be allowed contact with the child.

In March 2015 the applicant filed a request with the civil court seeking access to the child and to receive information about important events in the child’s life. The court dismissed this request; it found that the applicant did not fulfil the requirements of § 188.2 of the Civil Code, as he had no (particular) social or familiar relationship with the child. Instead, the applicant, like any other third person, might only “suggest” being allowed contact with the child provided that without this measure the child’s best interests would be at risk.

The applicant appealed against this decision; at the same time, he filed a normative constitutional complaint with the Constitutional Court, claiming that § 188.2 of the Civil Code infringed his right to respect for his private and family life as well as the child's right to establish a relationship with his parents.

II. The Constitutional Court agreed with the European Court of Human Rights that the notion of "family life" under Article 8 ECHR is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. However, a biological kinship between a natural parent and a child alone, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8 ECHR. As a rule, cohabitation is a requirement for a relationship amounting to family life.

The Court also accepted that intended family life may, exceptionally, fall within the ambit of Article 8 ECHR, notably in cases in which the fact that family life has not yet fully been established was not attributable to the applicant. In particular, where the circumstances warrant it, "family life" must extend to the potential relationship which may develop between a child born out of wedlock and the natural father. Relevant factors which may determine the real existence in practice of close personal ties in these cases include the nature of the relationship between the natural parents and a demonstrable interest in and commitment by the father to the child both before and after the birth.

In any event, the determination of the legal relations between the applicant and his putative biological child (namely the question of any right of access he might have to his child), even if it fell short of family life, concerned an important part of the applicant's identity and thus his "private life" within the meaning of Article 8.1 ECHR. The legal provision at issue therefore interfered with the applicant's right to respect, at least, for his private life.

The Constitutional Court found this interference with the biological father's right to respect for his private life was justified.

According to the case-law of the European Court of Human Rights, Article 8 ECHR can be interpreted as imposing on the Member States an obligation to examine whether it was in the child's best interests to allow a biological father to establish a relationship with his child, in particular by granting contact rights. This may imply the establishment, in access proceedings, of biological as opposed to legal

paternity if, in the special circumstances of the case, contact between the alleged biological father (presuming that he was in fact the child's biological parent) and the child were considered to be in the child's best interests. However, this does not imply a duty under the Convention to allow the alleged biological father to challenge the legal father's status or to provide a separate action to establish biological as opposed to legal paternity. The decision whether the established or alleged biological father should be allowed to challenge paternity falls within the State's margin of appreciation.

Against this background the Constitutional Court held that the right to respect for private and family life did not go so far as to allow the alleged biological father to interfere with an intact family under any circumstances. The challenged provision therefore struck a fair balance between the interests of the alleged biological father, the legal parents and the child. It did not violate Article 8 ECHR.

Cross-references:

European Court of Human Rights:

- *Anayo v. Germany*, no. 20578/07, 21.12.2010;
- *Schneider v. Germany*, no. 17080/07, 15.09.2011;
- *Ahrens v. Germany*, no. 45071/09, 22.03.2012;
- *Kautzor v. Germany*, no. 23338/09, 22.03.2012;
- *Koppikar v. Germany*, no. 11858/10, 11.12.2012;
- *Hülsmann v. Germany*, no. 26610/09, 05.11.2013;
- *Adebowale v. Germany*, no. 546/10, 02.12.2014.

Languages:

German.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2016-3-003

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 12.07.2016 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Property, right of use, termination, compensation.

Headnotes:

Termination under a provision of the Civil Code of the right of use of an integral part of a residential building where agreement has not previously been reached about such termination is aimed at protecting property rights but it can also result in rights being lost. It is admissible for a higher instance court to change the sum in question; it is also open to the owner to challenge and refuse it.

Summary:

I. The Court of Appeal of Baku City asked the Constitutional Court for an interpretation of the provision of Article 228.2 of the Civil Code against the background of Articles 53, 149.2.3 and 218.3 of the Civil Procedure Code. Under this provision, where agreement has not been reached on the termination of the right of use of an integral part of a residential building, this right may be terminated by court order through the payment of compensation equal to market price.

The Baku City Appeal Court noted the lack of uniform approach in case law to the question of the inclusion of the sum of compensation in claims provided for under Article 228.2 of the Civil Code. It had made the

reasonable consideration of such cases difficult, paving the way for breaches of the principle of legal certainty.

II. The Constitutional Court resolved to clarify the issue of determination of the sum of compensation according to market price when the right of use of an integral part of a residential building has been terminated.

Under Article 228.2 of the Civil Code the creation, conditions for enforcement and procedure for termination of the right to use an integral part of a residential building are established by a notarised written agreement concluded with the owner. In the absence of agreement, the right to use an integral part of a residential building can be terminated on the basis of a claim through judicial proceedings by means of payment of compensation equal to market price.

The termination of right of use of integral part of residential building by payment of the corresponding compensation provided by Article 228.2 of the Civil Code is aimed at property rights but may also lead to the loss of the right of use of property.

Under the above norms, when the court of the first instance is considering a claim for the termination of the right of use of an integral part of a residential building, it must determine the compensation sum at the market price.

The Constitutional Court pointed out that once a court has specified the facts of the case and the proofs forming the conclusion established in the decision, the arguments it has rejected and the laws by which it was guided, it must substantiate its decision from a legal perspective. The court should not restrict itself to listing the evidence; it must show the way the various pieces of evidence connect and clearly specify the reasons for accepting or rejecting the evidence it has studied.

In terms of satisfaction of a claim for the termination of the right of use of an integral part of a residential building by payment of the corresponding compensation, the court of the first instance must consider the issue of the owner's consent. He or she has the right to agree or disagree with the compensation at market rate, to refuse the claim or to appeal to a higher instance court in cases of refusal of satisfaction of his or her claim.

In terms of whether the compensation sum is included within the subject matter of the claim, and whether a court of higher instance has the ability to alter its size, the Constitutional Court emphasised

that current procedural legislation does allow for the meeting of two elements that individualise the claim (the subject of the claim and its basis.) An example can be seen in Articles 53 and 153 of the Civil Procedure Code. These elements allow for the concretisation not only of the claim but also of the trial, establishing its nature, volume and special features and the direction the court is taking.

It should be noted that the subject of the claim for the termination of the right of use by means of payment of compensation is asserting the property right of a claimant wishing to protect his or her property rights over the house, having been relieved of the encumbrance of the right of use. It cannot therefore be considered as correct to refer the sum of compensation to a subject of the claim. Therefore, compensation cannot be considered as the subject of the claim; changes to the size of the claim requirement as provided by Article 53 of the Civil Procedure Code are not connected with the compensation sum in this context.

The Constitutional Court took the view that termination of right of use of an integral part of a residential building by payment of compensation is the subjective right of the owner. In this case, compensation serves not as a requirement but only as an offer.

As the sum of compensation does not belong to a subject of the claim, a change to this sum by a higher instance court would be admissible. However, courts will have to take into consideration the fact that the first instance court has determined the market rate for the compensation in accordance with the evidence which it will have studied in accordance with the requirements of civil procedure legislation.

The Constitutional Court accordingly resolved that a sum of compensation for termination of the right of use as provided by Article 228.2 of the Civil Code does not belong to a subject of the claim. When considering such cases, first instance courts must determine a compensation sum at market rate regardless of whether a sum has been specified within the claim. When it assesses whether the claim has been satisfied by means of payment of compensation at the market price, the court will need to consider whether the owner has consented to it.

Languages:

Azeri, English (translation by the Court).



Belarus

Constitutional Court

Important decisions

Identification: BLR-2016-3-005

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 27.12.2016 / **e)** D-1079/2016 / **f)** On the conformity of the Law on Making Addenda and Alterations to the Law on the Bases of Administrative Procedures to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2016; 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.**
- 3.13 General Principles – **Legality.**
- 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**
- 5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**
- 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**
- 5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

Keywords of the alphabetical index:

Administrative proceedings, submissions, format / Legal aid, equal access.

Headnotes:

A party to administrative proceedings who submits an application in electronic form can only have legal representation in the instances specified by law. If legal representation is not specified, this will not impede the administrative proceedings from going ahead. This stems from the constitutional right to legal assistance for the exercise and protection of rights and freedoms, with state bodies and in relations with officials and individuals.

Summary:

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

II. The ability to carry out a number of actions in electronic form through a single portal of electronic services provided for by the Law (Article 1.15, 1.21, 1.24 and 1.25) is one of the measures for further implementation of e-Government, with a view to increasing the effectiveness and responsiveness in the field of administrative proceedings, removing unnecessary administrative barriers when individuals and legal entities turn to state bodies and other authorities, simplifying their interaction and creating favourable conditions to solve the urgent life problems of individuals and for the exercise of economic and other activities.

The management of administrative procedures in electronic form and the use of this format meet international approaches to the development of e-governance. The use of information and communication technologies is considered by international practice, in particular by the Recommendation of the Committee of Ministers of the Council of Europe of 15 December 2004 Rec(2004)15 “On e-governance”, as a means of enhancing the effectiveness of democratic processes; providing a framework for partnership between the public authorities, the private sector and other organisations of civil society; strengthening the participation, initiative and engagement of citizens in national, regional and local public life; improving the transparency of the democratic decision-making process and the accountability of democratic institutions; improving the responsiveness of public authorities; fostering public debate and scrutiny of the decision-making process.

The Law on the Bases of Administrative Procedures has been augmented by provisions allowing for the expansion of the number of participants in the administrative proceedings by third parties and establishing their rights and obligations (Article 1.1.3 and 1.13 of the Law). The third person is defined as an individual or legal entity other than the person concerned, whose participation in the proceedings is provided for by legislative acts and whose rights and obligations are affected by an administrative decision.

The Constitutional Court found that the fact that the Law includes third parties as parties to administrative proceedings whose rights and obligations by virtue of legislation are affected during the proceedings satisfies the constitutional rules on the priority of the individual and the safeguarding of his rights and freedoms, on the equality of all before the law and on the state's obligation to take all measures at its disposal to exercise and protect those rights and freedoms (Articles 21, 22 and 59 of the Constitution). The measure is aimed at safeguarding and protecting the rights, freedoms and legitimate interests of individuals and legal entities. The rationale behind including third parties as participants in administrative proceedings is to put their status on a legal footing and to provide them with the legal means to protect their rights and legitimate interests, reduce the number of public conflicts and ensure a fair administrative decision.

A provision has also been added to the Law which stipulates that the collection, processing, storage and use of personal data of individuals during administrative proceedings is carried out without their written consent in compliance with the requirements specified by the legislative acts on the protection of information; the provision and distribution thereof is restricted (Article 20.2). This indicates a degree of limitation of the constitutional right to privacy of individuals whose personal data is used in the course of administrative proceedings (Article 28 of the Constitution), including the rights of an individual at his sole discretion to dispose of such information, allow or restrict access to it and to determine the procedure and conditions of access in accordance with the legislative acts (Article 33.1 of the Law on Information, Informatisation and Protection of Information).

The Constitutional Court noted that Article 28 of the Constitution allows for the possibility of interference with privacy on a legal basis. The provision in the Law on the collection, processing, storage and use of personal data of individuals during administrative proceedings complies with Article 23.1 of the Constitution; it satisfies the requirements of the level of the normative legal act and orientation towards the achievement of the constitutionally significant goals of protecting the rights and freedoms of others. Such restriction, in view of the protection of personal data against unauthorised access by others, would appear acceptable, not excessive and in line with the Constitution.

The rights and legitimate interests of individuals and legal entities are limited to an extent by virtue of Article 15.3.2 of the Law on the Bases of Administrative Procedures as set out in the new

wording. Under this provision, a person who submits an application in electronic format can only participate in administrative proceedings through their legal representatives in cases provided for by legislative acts. These provisions relate to the exercise of the constitutional right to legal assistance in order to exercise and protect one's rights and freedoms, and the possibility of availing oneself of the assistance of legal representation in dealings with state bodies, officials and individuals (Article 62.1 of the Constitution).

The Constitutional Court noted that parties to proceedings who make submissions in written or oral format are not precluded from involving a legal representative; non-involvement of a representative should not stand in the way of the administrative proceedings taking place. It should also be taken into account that modern technology makes it possible to confirm the powers of a representative in electronic form, and that representation in administrative proceedings is not limited to submission of the application and all necessary documents. Article 8.3 of the Law provides that representatives of the person concerned are entitled during the administrative proceedings to take the same actions as the person concerned, including obtaining clarification of rights and obligations, acquainting themselves with the materials related to consideration of the application, taking extracts and appealing against administrative decisions. Such a restriction in relation to submission of the application in electronic form, based on the meaning of Article 23.1 of the Constitution, is permissible. It does not violate the optimal balance of interests of the individual, society and state, it is proportionate to the protected constitutional values – such as the rights of individuals, including parties who may be affected by unfair actions on the part of persons who have submitted documents in electronic form for the exercise of administrative procedures without having duly granted representative powers.

The Constitutional Court held that the challenged provisions of the Law were aimed at improving the legal regulation of social relations in the field of administrative proceedings in order to safeguard the constitutional rights and legal interests of individuals and legal entities, at the elimination of bureaucracy and corruption, the avoidance of unnecessary administrative barriers, reduction of the degree of discretion of public authorities in administrative decision-making and at the further development of Belarus as a democratic state based on the rule of law.

The Constitutional Court recognised the Law on Making Addenda and Alterations to the Law of the Republic of Belarus on the Bases of Administrative Procedures to be in conformity with the Constitution.

Supplementary information:

Recommendation of the Committee of Ministers of the Council of Europe, Rec(2004)15 "On e-governance", 15 December 2004.

Languages:

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



Belgium Constitutional Court

Important decisions

Identification: BEL-2016-3-012

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 13.10.2016 / **e)** 130/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 15.12.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

3.18 General Principles – **General interest.**

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

5.2 Fundamental Rights – **Equality.**

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

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

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

Keywords of the alphabetical index:

Election, promises / Wages, indexation / Wages, reduction / Work, employment, conditions, standstill obligation / Remuneration, standstill obligation / Right to social assistance, standstill obligation / Constitution and treaty, combination / Constitution and treaty, similar provisions / Wages, collective bargaining / Trade union, collective bargaining / Property, right, decrease in purchasing power.

Headnotes:

Members of Parliament are not bound by statements made prior to elections.

A decrease in the purchasing power of persons receiving salaries, remuneration and social benefits affected by variations in the "flat health index" (see

below) may be justified by aims pursued by the legislative authorities in the general interest.

It is not contrary to the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) for a decrease in salary as a result of a “jump” and “block” of the flat health index to affect only those categories of people whose income is pegged to that index.

In determining the scope of freedom of association (Article 27 of the Constitution), regard must also be had to Article 11 ECHR, which is comparable in scope.

The jumping and blocking of the flat health index amounts to interference by the authorities with the right of collective bargaining to determine salary levels. This interference must be in compliance with the conditions laid down in Article 11.2 ECHR.

Summary:

I. Belgium has a system which guarantees that employees’ and civil servants’ salaries and welfare benefits (pensions, etc.) increase because they are indexed to retail prices to ensure that inflation does not reduce people’s purchasing power. In principle salaries and benefits increase by two percent when the “flat health index” reaches a certain pivot level. The “flat health index” is a retail price index that does not take into account certain consumer products which are bad for the health, such as alcohol and tobacco.

Various trade unions, a number of individuals and a non-profit association lodged an appeal with the Court seeking judicial review of the law of 23 April 2015 “on promoting employment”, which blocked the flat health index at a certain level and deferred the usual two percent increase in salaries and benefits (index jump). According to the preparatory work on this law the main aim of the disputed measures was to close the salary gap that had developed since 1996 between Belgium and its three neighbouring countries and largest trading partners, so as to make Belgian firms more competitive again. Another aim was to reduce public spending.

II. The Court began by pointing out that the Federal Government had the power to take such a measure because it was responsible for “price and income policy”.

Concerning the complaint relating to peoples’ voting rights, the Court replied that the constitutionality of a law could not be challenged solely on the basis that

the MPs who voted for its adoption had not announced their intention to do so, or had actually said they would not vote for it.

One of the complaints concerned the alleged violation of the right to fair working conditions and a fair wage (Article 23 of the Constitution). According to the applicants, the right to social security and the right to family allowances were also violated.

The Court reiterated that the right to a fair remuneration was guaranteed by Article 4 of the European Social Charter (Revised) and Article 7 of the International Covenant on Economic, Social and Cultural Rights, and that the right to social security was guaranteed by Article 12 of the European Social Charter (Revised) and Article 9 of the International Covenant on Economic, Social and Cultural Rights. The Court then noted that Article 23 of the Constitution, regarding working conditions and remuneration, contained a “standstill” obligation prohibiting the legislature from significantly reducing the level of protection offered by the applicable law unless it was in the general interest.

The Court referred to the intentions expressed by the legislature in the preparatory work on the disputed law (namely, to preserve the competitiveness of the country’s firms and to limit public spending) and pointed out the wide margin of appreciation governments enjoyed in economic matters. The measure could be justified by the general-interest aims pursued and had no disproportionate effects as long as the decrease in purchasing power remained limited and compensatory measures were taken in respect of those on the lowest incomes.

As to the complaint that the law in issue only affected salaried employees, civil servants and people on welfare benefits, and not self-employed people or people with other sources of income, the Court found that the measures in issue were based on objective criteria and were conceivable only where incomes were linked to the index in question. As it was not manifestly unreasonable to consider, like the Government, that the reduction in salary had a positive impact on firms’ ability to compete, it was within reason to opt for measures aimed specifically at restricting increases in salaries and to consider that no such measure was necessary in respect of other sources of professional income. The scope of the measure was limited and compensatory measures had been introduced for those at the lower end of the income scale. In addition, provision had apparently been made for other measures which fell outside the scope of those examined by the Court in the instant applications.

The applicants also objected that the impugned law infringed the right of collective bargaining (Article 23 of the Constitution), the right to freedom of assembly (Article 26 of the Constitution) and association (Article 27 of the Constitution), and the related rights guaranteed at the international level (Article 6 of the European Social Charter (Revised), Article 11 ECHR, Article 28 of the Charter of Fundamental Rights of the European Union and Article 4 of Convention no. 98 of the International Labour Organisation (ILO) on the Right to Organise and Collective Bargaining). As a general rule measures affecting wages are the result of negotiations between the social partners (associations representing employees and employers).

The Court took into account those provisions of international law with a scope similar to that of the relevant provisions of the Constitution, in this case the freedom of association guaranteed both by Article 27 of the Constitution and by Article 11 ECHR, as well as the case-law of the European Court of Human Rights. According to the Constitutional Court the disputed measure amounted to interference by the authorities with the fruit of collective negotiations concerning remunerations and salaries which provided for these to be indexed to changing prices. The Court considered that the measures were provided for by law, pursued a legitimate aim, were necessary in a democratic society and were not disproportionately detrimental to the right of collective bargaining.

Lastly, without it being necessary to examine whether measures adversely affecting purchasing power could be considered to amount to a deprivation of property, the Court found that the disputed measure did not contravene the right not to be deprived of one's property (Article 16 of the Constitution) as it was justified by the general-interest objectives mentioned above.

Supplementary information:

As regards other austerity measures (tax measures in respect of pensions) and pensioners' right to social security, see also Judgment no. 129/2016 of 13 October 2016 (www.const-court.be, in French, Dutch and German).

Regarding the right of collective bargaining, see also Judgment no. 152/2016 of 1 December 2016 (www.const-court.be, in French, Dutch and German).

Languages:

French, Dutch, German.



Identification: BEL-2016-3-013

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 20.10.2016 / **e)** 134/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 28.10.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Law of the European Union/EU Law.**

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

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

5.2 Fundamental Rights – **Equality.**

5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation.**

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

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

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

Keywords of the alphabetical index:

Animal, protection, fur production / Animal, welfare / Animal, breeding, prohibition / Animal, welfare, protection / Animal, intra-community trade, restriction.

Headnotes:

When issuing legislative decrees in the socio-economic field the authorities enjoy a wide margin of appreciation. In the light of the aims they pursue in order to protect animal welfare, they might reasonably consider that differences exist between the possession of animals for the sole purpose of fur production and the possession of animals for other purposes, and that those differences justify prohibiting the possession of animals solely for their fur.

Summary:

Associations active in the production of animal furs, and in particular the international non-profit

organisation “Fur Europe”, lodged an appeal with the Constitutional Court seeking review of the Walloon Region’s decree of 22 January 2015, amending the law of 14 August 1986 on animal protection and welfare so as to prohibit the possession of animals for the sole or principal purpose of fur production. The Constitutional Court acknowledged the interest of the associations concerned in taking legal action in so far as the disputed decree was directly detrimental to their stated aim, even though for the time being there were no breeders raising animals for fur production in the Walloon Region.

As their first ground of appeal, the applicant parties claimed that there had been a violation of the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution). They accused the Walloon legislative authority of introducing a difference of treatment between people keeping animals exclusively for fur production and those keeping animals for other purposes, such as the production of meat for consumption.

The Constitutional Court considered that the differential treatment was based on an objective criterion and that the ban was pertinent to guarantee effective protection of the welfare of the animals concerned. The ban also pursued the government’s environmental protection aims by avoiding the waste produced by animals reared for their pelts, and tied in with the ethical considerations on which the ban was based. The Court further pointed out that Article 11 of the Constitution did not prevent the legislative authorities from introducing laws in favour of animal welfare in spite of the opinion of a minority hostile to the political choice entailed, as that choice fell within their margin of appreciation.

The appellants’ second ground of appeal was an alleged violation of their right to the protection of their property as embodied in Article 16 of the Constitution in conjunction with Article 1 of Protocol 1 ECHR. In keeping with its case-law the Court agreed that the provisions concerned formed an indivisible whole and that it would have to take that into account when examining the constitutionality of the measure. Based on several judgments of the European Court of Human Rights, however, it found that the impugned decree had not violated any property rights as there were no animal breeding facilities for fur production in the Walloon Region.

Nor could it accept that anyone could legitimately expect to be authorised to possess animals in the Walloon Region for the sole or principal purpose of producing fur, or to be able in the future to derive income from such activity.

Thirdly, the appellants alleged that there had been a violation of Articles 11 and 23 of the Constitution, in conjunction with Articles 34, 35 and 49 TFEU. The Court considered the complaint inadmissible as far as the alleged violation of Article 23 of the Constitution was concerned, as no details were given in the appeal. It accepted, on the other hand, that the legislative ban was capable of obstructing, at least indirectly, intra-community trade in the animals concerned and should be viewed as a measure with an effect equivalent to a quantitative restriction, in principle prohibited under Articles 34 and 35 TFEU. The ban could be justified, however, under Article 36 of that Treaty or on the strength of other imperatives, regard being had to the case-law of the Court of Justice of the European Union, in so far as the ban could be considered necessary to guarantee the effective protection of the welfare of the animals concerned and to rule out any risk of physical or psychological ill-treatment. In issuing the decree the authorities might reasonably have considered that imposing less extreme measures, such as conditions for the possession of animals for fur production, would not have sufficed to guarantee the minimum standard of welfare they wished to achieve.

The Court found the three grounds of appeal unfounded and dismissed the appeal.

Languages:

French, Dutch, German.



Identification: BEL-2016-3-014

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 10.11.2016 / **e)** 140/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 09.01.2017 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

3.18 General Principles – **General interest.**

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

Keywords of the alphabetical index:

Regional development, urban planning / Regional development, building restrictions / Regional development, loss suffered as a result of planning regulations / Building, planning permission / Property, value, decrease / Constitution and treaty, combination / Constitution and treaty, similar provisions.

Headnotes:

The simple fact that the authorities impose restrictions on property rights in the general interest does not oblige them to pay compensation, but, in the event of a serious breach of the right to protection of one's property, such as a refusal of permission to build on it or to subdivide it, such a burden must not be imposed on an owner without reasonable compensation for the loss of value of the land.

In certain conditions compensation for a loss sustained as a result of planning policy will be payable to offset the effects of a ban on building on or dividing up a property, or a change in planning regulations affecting the use to which the property may be put. It is for the relevant regulatory authority to determine the conditions in which such compensation should be awarded, subject to the scrutiny of the Constitutional Court as to the reasonable and proportionate nature of the action taken.

Summary:

I. The owner of a piece of land located, according to the regional development plan, in a zone earmarked for craft trades or small and medium-sized firms, sued for damages when changes made to planning regulations placed his land in an agricultural zone where no building was permitted.

Under Article 2.6.1.2 of the Flemish Regional Development Code "compensation for loss resulting from spatial planning regulations" was awarded when changes in planning regulations made it impossible to build on or subdivide a piece of land which had not previously been subject to such restrictions.

In order to qualify for such compensation, certain criteria must be met:

1. the land must be adjacent to a sufficiently well-equipped road;
2. the land must have been designated in a development plan for the construction of a building, in compliance with the town planning rules and using specified construction techniques;

3. the land must be located in a zone where building was permitted, as defined in a development plan or land improvement scheme;
4. only the first 50 metres measured from the boundary line entered into account when calculating the loss resulting from spatial planning;
5. under Article 2.6.2.2 of the Flemish Regional Development Code, compensation for losses resulting from spatial planning was equal to 80% of the decrease in value.

The Court with which the case was lodged asked the Constitutional Court whether condition (4) above and the means of calculating compensation for losses resulting from spatial planning explained in (5) above were compatible with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) and with the property right protected by Article 16 of the Constitution together with Article 1 Protocol 1 ECHR.

II. According to the Court Article 1 Protocol 1 ECHR was similar in scope to Article 16 of the Constitution and the guarantees enshrined in it were inseparable from those embodied in the Constitution. The Court bore this in mind when examining compatibility with the constitutional provisions guaranteeing property rights.

The Court considered that the mere fact that the authorities imposed restrictions on property rights in the general interest did not mean that they were obliged to offer compensation. In the event of serious breaches of respect for property, however, such as a ban on building, or on the subdivision of land, the burden could not be imposed on an owner without reasonable compensation for the loss of value of the land. The Court referred on this matter to a judgment of the European Court of Human Rights (*Varfis v. Greece*, 19 July 2011).

It was for the competent legislative authority to determine in which cases restrictions on property rights should give rise to compensation, and on what conditions, subject to the scrutiny of the Constitutional Court as to the reasonable and proportionate nature of the measures taken.

In providing for compensation for loss resulting from spatial planning to amount to 80% of the loss of value and to be limited to the first fifty metres from the boundary, the disputed legislative measure was not manifestly disproportionate to the aim pursued and could not be considered as an unlawful violation of property rights.

The twofold restriction on compensation for loss resulting from spatial planning was linked to the condition that the compensation be awarded only to the owner of building land, who also had to have suffered a definite, current, objectively definable loss, for which he or she received only partial redress in order to make up for the fact that there was, as a matter of principle, no compensation for public utility easements.

It was for the legislative authorities to determine in which cases restrictions on property rights should give rise to compensation, and in so doing they enjoyed a wide margin of appreciation. As a general rule, particularly in residential areas, no disproportionate burden was placed on owners of building land as it was generally not possible to build any structure extending further than fifty metres from the boundary. The same could not be said, however, of land not located in a residential area, such as land in industrial estates, or zones reserved for craft trades or small and medium-scale industrial activities, where buildings on a larger scale were authorised. In cases of this type the restriction of compensation for loss resulting from spatial planning to the first fifty metres from the boundary was not reasonably justified.

The Court accordingly concluded that there had been a violation of Articles 10, 11 and 16 of the Constitution, in conjunction with Article 1 Protocol 1 ECHR, but only in respect of land not located in residential areas.

Supplementary information:

For the Court's examination of the second condition for compensation mentioned above, see Judgment no. 164/2016 of 22 December 2016 (www.const-court.be in French, Dutch and German).

For other planning restrictions on ownership rights, see Bulletin 2015/3 [BEL-2015-3-009].

Cross-references:

European Court of Human Rights:

- *Varfis v. Greece*, no. 40409/08, 19.07.2011.

Languages:

French, Dutch, German.



Identification: BEL-2016-3-015

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 22.12.2016 / **e)** 168/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 18.01.2017 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality.**

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

5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

Keywords of the alphabetical index:

Criminal penalty, concept / Sentence, concept / Constitution and treaty, combination / Constitution and treaty, similar provisions / Penalty, classification / Penalty, protective measure / Penalty, protection / Penalty, preventive safety measure / Driving licence, renewal, test / Safety measure / Road safety / Driving licence, test / Driving licence, withdrawal / Vehicle, right to drive / Criminal law, more lenient / Criminal law, retroactive effect.

Headnotes:

The Court has no authority to review a law with regard to legislative standards. It does, however, when examining compliance with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), take into account the general principle of non-retroactivity of criminal law embodied, *inter alia*, in Article 15 of the International Covenant on Civil and Political Rights and Article 2 of the Criminal Code.

Unlike being banned from driving, the obligation to pass theoretical, practical, medical and psychological tests in order to be allowed to drive again after having been banned by a court judgment is not a criminal penalty but rather a preventive safety measure in the general interest.

Summary:

The Liège Criminal Court submitted preliminary questions to the Constitutional Court concerning Section 38.6 of the Road Safety Act. The questions concerned the compatibility of the law with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), combined with Article 2 of the Criminal Code, Article 15 of the International Covenant on Civil and Political Rights and Article 6 ECHR, in so far as it required the court to which a case was referred subsequent to the entry into force of the law, when a repeat offender had been banned from driving because of an offence committed before the law entered into force, to make the lifting of the driving ban conditional on the subject passing theoretical, practical, medical and psychological tests, when this requirement placed the offender in a worse situation than he would have been in under the earlier legislation.

The Court agreed to take into account the general principle of non-retroactivity of criminal law when examining the matter.

It rejected the argument that the preliminary question was unclear because it made no distinction between different categories of people. The Court's task was to compare the situation of repeat offenders convicted of offences committed before the law came into force, depending on whether their conviction pre- or post-dated the law's entry into force. The Court added that when a violation of the principles of equality and non-discrimination was alleged in conjunction with another fundamental right guaranteed by the Constitution or a provision of international law or a generally recognised principle of law, the category of people whose fundamental right was violated must be compared with the category of people in respect of whom the fundamental right concerned was guaranteed.

The Court then noted that it was for the legislative authority, especially in its attempts to combat scourges that other preventive measures had thus far failed to remedy, to decide whether to opt for the harsher repression of certain types of offence. The number of road accidents and their consequences justified subjecting drivers who jeopardised road safety to special procedures and penalties.

The Court must nevertheless examine whether the obligation to pass theoretical, practical, medical and psychological tests in order to be allowed to drive again after having been banned by a court judgment was a penalty. To do this it focused on the three criteria set forth by the European Court of Human Rights in order to determine the existence of a criminal charge within the meaning of Article 6 ECHR.

According to the Court of Cassation the obligation to take the tests concerned was a safety measure. The Court still examined whether, because of its nature or its severity, this obligation should be considered as a penalty. It referred in this regard to the judgment of the European Court of Human Rights of 28 October 1999 in the case of *Escoubet v. Belgium*. It found that the obligation concerned was a preventive safety measure in the general interest. The tests helped to ascertain whether the medical and psychological state of dangerous drivers came up to the minimum standards required for them to be able to drive a vehicle safely, in order to reduce the risk of them re-offending and to guarantee safety on the roads. The authorities subjected the right to drive to the passing of certain tests. That measure was designed to ensure road safety by restricting the right to drive a motor vehicle to individuals who had demonstrated their knowledge of the Highway Code and their ability to drive and were therefore sufficiently capable of driving safely in road traffic.

The Court found that the obligation in question was not meant to punish drivers convicted of repeat offences but rather to protect society against irresponsible conduct on the roads. The measure aimed at ensuring that an individual possessed all the skills and qualifications needed to drive safely was proportionate to the aim pursued and could not be considered as a criminal penalty solely because of its severity.

The Court accordingly found that the preliminary question must be answered in the negative.

Cross-references:

European Court of Human Rights:

- *Escoubet v. Belgium*, no. 26780/95, 28.10.1999, *Reports of Judgments and Decisions* 1999-VII.

Languages:

French, Dutch, German.



Identification: BEL-2016-3-016

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 22.12.2016 / **e)** 170/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.12.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

1.5.4.5 Constitutional Justice – Decisions – Types – **Suspension.**

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

5.2 Fundamental Rights – **Equality.**

Keywords of the alphabetical index:

Law, suspension, serious loss / Law, suspension, serious ground / Profession, access, psychotherapy / Profession, access, transitional provision / Profession, regulation, conditions / Expectation, legitimate, transitional provision.

Headnotes:

Having satisfied itself that the conditions set forth in Section 11 of the special law of 6 January 1989 for a law to be suspended had been met, the Court suspended a law which made no provision for transitional measures for people who, prior to the entry into force of the law, worked as psychotherapists, and which had serious consequences for those people and their patients, for want of foreseeability.

Summary:

A large number of psychotherapists (148) applied to the Constitutional Court to review or suspend two provisions of a law of 10 July 2016 regulating access to the profession of psychotherapist. They objected to the fact that no provision was made in the law for transitional measures authorising them to continue practising psychotherapy, in spite of the fact that they had been practising that activity for ten years and had undergone extensive training.

Judgment no. 170/2016 addressed only the request for suspension. The Court accepted that in this context the applicants had grounds for legal action in so far as they were banned once and for all from practising psychotherapy, or could no longer practise it independently.

The Court then deemed that the lack of transitional provisions in favour of the applicants had faced them with a risk of serious damage that would be difficult to remedy, in the guise of a form of ban on exercising their profession, at least as independent practitioners. Repealing the impugned provisions would not repair the damage done.

Lastly the Court had to examine whether the grounds relied on were serious. In order for a ground of complaint to be considered serious it was not sufficient for it not to be manifestly ill-founded within the meaning of Article 72; it also had to appear to be well founded after an initial examination of the elements at the Court's disposal at this stage of the proceedings.

The first ground of complaint was the alleged violation of Articles 16, 22 and 23 of the Constitution, alone or in conjunction with Article 8 ECHR, Article 1 Protocol 1 ECHR, Article 6.1 of the International Covenant on Economic, Social and Cultural Rights, and with the general principles of legal certainty and legitimate confidence. The second ground was the alleged violation by the impugned provisions of Articles 10 and 11 of the Constitution, combined with the above-mentioned provisions and principles.

The Court pointed out first of all that no one could expect policy to be unchanging or, in the instant case, the practice of psychotherapy to remain unregulated indefinitely. Without rendering any amendment of existing legislation or the introduction of any new regulations impossible, it could not be argued that a new provision was contrary to the principle of legal certainty because it modified the conditions of application of the former legislation, because it introduced an entirely new prohibition or because it brought certain professional choices into question.

If the authorities considered that a change of policy was necessary they could decide to give it immediate effect and were not, in principle, required to make transitional provisions. The constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) were violated only if the transitional measures or the absence thereof gave rise to a difference of treatment that could not reasonably be justified, or if they excessively undermined the principle of legitimate confidence. Such was the case when the legitimate expectations of a particular category of people were disregarded without there being any compelling reason for the lack of transitional measures in their favour.

The principle of confidence was closely linked to the principle of legal certainty – also relied on by the applicant parties – according to which the legislative

authority must not, without objective and reasonable justification, undermine citizens' interest in being able to foresee the legal consequences of their actions.

In examining the seriousness of the grounds of complaint, the Court took into account the fact that the impugned law replaced a law of 4 April 2014 which had never been applied, but which had been intended to regulate, for the first time, the practice of psychotherapy and contained a transitional provision which allowed practitioners who could show that they had sufficient experience of practising psychotherapy, and had received proper training in the subject, to continue to practise until the entry into force of a royal decree that was to lay down the procedure that would allow them to officially practise psychotherapy on the strength of their previous training and experience.

The Court accordingly considered that the legislative authority had taken a measure that had serious consequences for the people concerned, in so far as the introduction of the new regulation had not been sufficiently foreseeable either for the psychotherapists or for their patients. The law had thus disregarded the legitimate expectations of the people concerned without any compelling general-interest motive capable of justifying the lack of any transitional provisions to cover their situation.

That being so, the Court decided to suspend the impugned law. People who had practised psychotherapy prior to the entry into force of that law but did not meet its requirements could therefore continue to practise psychotherapy pending the outcome of the application for judicial review.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2016-3-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 01.12.2016 / **e)** AP 1634/16 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Police, powers, force, use.

Headnotes:

Deprivation of liberty is not lawful if it is not undertaken in compliance with the substantive and procedural rules of the national law.

Summary:

I. The applicant made particular reference to an occasion when police officers had used force to bring him to the police station where, according to the records prepared on the same day, he was deprived of liberty on the grounds of suspicion that he had committed a minor offence under Article 11 of the Law on Public Order and Peace. He was released on the same day, after having been held for eight hours. He claimed that his rights under Article II.3.d of the Constitution and Article 5 ECHR had been violated.

II. In this case, the applicant did not initiate proceedings before the ordinary courts. However, because the appeal indicated serious violations of rights under the Constitution and the European Convention on Human Rights, and because requesting the applicant to seek the most effective way of protecting his rights would have resulted in an excessive burden being placed upon him, the

Constitutional Court found that the appeal was admissible in terms of Article 18.2 of the Rules of the Constitutional Court.

Documents submitted to the Constitutional Court show that on 19 February 2016 at around 13.30 hrs, police officers, using physical force and handcuffs, brought the applicant to the police station, for disobeying their verbal summons for him to attend the Police Administration official premises to give a statement regarding the circumstances of a report on disturbance of public order and peace, and that after he had been brought to the Police Administration official premises, he was placed in the room designated for detained persons. He was eventually released at 21.50 hrs the same day. As the detention lasted for eight hours, the deprivation of the applicant's liberty fell under Article 5.1 ECHR.

The Constitutional Court noted that under Article 9 of the Law on Police Officers of the West Herzegovina Canton, a police officer must exercise police powers based on his or her own decision, in keeping with the law. Under Article 10 of the Law on Police Officers, police powers include summoning, conducting interviews, and apprehension. Article 15 of the above Law allows a police officer to summon a person, where there is legitimate reason, to attend the official premises of a police body for an interview. Article 15 prescribes the content of the summons for an interview and stipulates that in exceptional circumstances a police officer may issue a verbal summons. He or she must inform the person concerned of the reason for the summons and warn them of the possibility that they might be brought in under coercion. Article 16 of the Law on Police Officers allows a police officer, without written warrant from a competent body, to bring to the official premises of a police body a person who has failed to respond to a summons, whether written or verbal, made in accordance with Article 15. Under Article 27 of the Law on Police Officers, a police officer may only use force when this is necessary in order to pursue a legitimate goal. Coercion, such as physical force and restraint, may therefore be used when necessary to protect human life, to repel an assault, to overcome resistance and to prevent flight. Finally, whether it concerns summoning and conducting interviews within the meaning of Article 15 or apprehension without warrant within the meaning of Article 16 of the Law on Police Officers, an interview or detention may last no longer than six hours.

The Constitutional Court observed that the applicant, along with other participants in the disputed event, had been verbally summoned to attend the Police Administration in order to make a statement. After repeating the order a number of times for the

applicant to sit in the official vehicle, which he disobeyed, the police used coercion and physical force against him, handcuffed him, and brought him to the official premises.

The Constitutional Court could not conclude that exceptional circumstances existed in the present case which indicated the necessity of verbally summoning the applicant for interview at the Police Administration, i.e. to apprehend him without a warrant. There appeared to be no reason either, and no explanation was offered, as to why his detention at the Police Administration lasted for over six hours.

The Constitutional Court further observed that under Article 17 of the Law on Minor Offences, a police officer may, at the request of an authorised official person, detain a person who is suspected of having committed a minor offence and bring him or her before the court within a time frame of no more than twelve hours, in order to ensure their presence in court. This would apply where the person concerned is refusing or is unable to disclose his or her identity, where he or she is not domiciled in Bosnia and Herzegovina or is temporarily living outside the country and there is a suspicion that he or she might abscond in order to evade responsibility for the minor offence, or where there is a risk that he or she will either keep committing the minor offence or an offence of the same type. Article 17 also stipulates that such deprivation of liberty may only be ordered if the same purpose cannot be achieved by another measure. It must be reasonable and in compliance with the nature of the alleged offence and must take into account the age and other personal features of the person; the duration of detention must be proportionate to the circumstances. Finally, anyone deprived of liberty must be informed as soon as possible, in detail and in a language which he or she understands, of the reasons for such deprivation of liberty and of the minor offence of which he or she is accused.

The applicant in this matter had, indisputably, been at the scene and had taken part in the disturbance of public order and peace, over which police officers had taken action. A conclusion could therefore be drawn that there was evidence to suspect he had committed the offence. However, the records on the deprivation of liberty, as well as the reply to the allegations stated in the appeal, mention none whatsoever of the special conditions prescribed by Article 17.1 of the Law on Minor Offences. It cannot be concluded either from the documents presented to the Constitutional Court that the applicant was in any way familiar with them. Thus, the allegation in the official record that it had not been possible to establish contact with the applicant because he "was impudent and brazen" and

“shouted and made noise” does not fall within any of the special conditions under Article 17.

For deprivation of liberty to be lawful in accordance with Article 17 of the Law on Minor Offences, it must be carried out for the purpose of bringing the suspect before the court within a maximum timespan of twelve hours. The applicant had been released after eight hours. The time limit mentioned above was not actually exceeded. However, the conclusion cannot be drawn from the documents presented to the Constitutional Court that the only way to ensure that the applicant appeared before the court was to deprive him of his liberty and that no other measures could have been deployed.

Although the time limit had not been exceeded, and there were grounds to suspect the applicant had committed a minor offence, it cannot be determined from the evidence adduced which of the special conditions prescribed by Article 17 came into effect, or that he was made aware of them. The Constitutional Court therefore held that the procedure set out in the law was not adhered to and that there had been a breach of the applicant's rights under Article II.3.d of the Constitution and Article 5.1 ECHR.

Languages:

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



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2016-3-014

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 15.10.2015 / **e)** Direct claim of unconstitutionality 5127 / **f)** Members of parliament amendments to conversion bill of provisional decree with diverse subject of the provisional decree / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 94, 11.05.2016 / **h)**.

Keywords of the systematic thesaurus:

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**
 4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**
 4.5.6.4 Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

Keywords of the alphabetical index:

Decree having force of law / Executive, powers to initiate legislation / Exclusive law-making initiative / Law, amendment / Law, Trojan horse / Legislative procedure, amendment, law, object, connection, absence / President, acting, powers.

Headnotes:

The presentation of parliamentary amendments without thematic relevance to a provisional decree submitted to the National Congress is unconstitutional. The validity of laws when this practice has occurred (lack of thematic pertinence) is preserved if they were enacted until the judgment of this direct claim.

Summary:

I. The National Confederation of Liberal Professions filed this direct action of unconstitutionality against Article 79 of Law 12249/2010, which amended the legal framework for the exercise of the accounting profession, extinguishing the technical profession in this area. The author reported that this item had been included as a parliamentary amendment to conversion bill of Provisional Decree 472/2009 (which

resulted in the aforementioned law). The National Confederation of Liberal Professions asserted that the Article 79 would have no thematic relationship with the object of this standard, which deals with the introduction of tax incentives to infrastructure projects and transport sectors and creates a computer purchase programme for educational use. The author argued that this is a case of formal unconstitutionality, as the exclusive competence of the President to impose provisional decrees would be violated by National Congress when presenting completely a new matter in the conversion bill. It also claimed that this is a case of material unconstitutionality because it would limit the free practice of profession, which has not been established by a specific law.

II. The Supreme Court dismissed the claim, although it has consolidated the understanding that it is unconstitutional to present parliamentary amendments unrelated to the theme of provisional decrees submitted to the National Congress. Moreover, it cautioned the validity of all laws resulting from the conversion bill of a provisional decree, enacted from this practice until the date of the judgment of this direct claim, including the contested law, for reasons of legal certainty.

Regarding the material unconstitutionality, the Court found that there was no violation of the principle of legality, since the provisional decree is comparable to the ordinary law. Furthermore, the regulation of professions is not excluded from issues that could be standardised by provisional decrees.

On the formal unconstitutionality, the Court stated the legitimacy of the change in the original text of provisional decrees by parliamentarians in the legislative process of converting these provisions into law, according to Article 62.12 of the Federal Constitution. It highlighted that the power to submit amendments is inherent in parliamentary activity. In this way, the approval of provisional decrees turns government acts into acts of parliament. Although the parliament cannot initiate the legislative process of these acts, it may expand, restrict or modify the proposal submitted by the holder of the initiative power.

Notwithstanding the possibility of presenting amendments, the Court considers that amendments unrelated to the theme of the original provision violate the competence of initiative regarding laws initiated by the President of the executive power. This understanding should also be applied to the provisional decrees, because only urgent and relevant matters considered by the head of the executive power may follow the exceptional rite of conversion into law. While this understanding is

implicit in the Federal Constitution, the National Congress has expressly recognised it in Article 4.4 of its Resolution 01/2002, which prohibits amendments without thematic relevance to the provisional decree. Likewise, in Italy and Spain, where there is a similar legal institution, the principle of congruence between the parliamentary amendment and the matter of the provisional appointment of the executive power prevails.

The Court recognised that the submission of amendments with no correlative issue in the provisional decrees has become a routine practice in Brazil. However, even if such acts are important for the coupling of the agendas of the executive and legislative branches, they are an anomalous procedure for establishing the rule of law. Through this practice, new laws are created without public debates and deliberations, which are characteristics of the ordinary legislative procedure.

Specifically, the changes in the legal framework for the practice of the accounting profession were not submitted to opinions nor examined by legislative committees. Those changes also have not been verified by parliament, subjected to discussion in public hearings nor subordinated to the possibility of "sub amendments" because these acts of the ordinary legislative procedure shall be excluded from the conversion of provisional decrees. Therefore, in-depth reflection is prevented in order to mature and legitimate normative content, even by negotiating concessions and consensus building. This procedure violates the principle of due process.

III. In a dissenting opinion, a Justice stated that the Court could not examine the thematic relevance of amendments to the provisional decree, since the details of preparation, drafting, amendment and consolidation of laws shall be provided in a supplementary law, according to Article 59, sole paragraph of the Federal Constitution. Currently, there is already the Complementary Law 95/1998, which regulates this matter, prohibiting, in Article 7.II, the inclusion of foreign matter to the object of the law or not bounded by affinity, relevance or connection. Thus, the issue could not be analysed in a direct action of unconstitutionality, because it would be attached to the scope of legality. In addition, the Court could not adjudicate the Resolution 01/2002 of the National Congress. According to its terms, the evaluation of the thematic relevance of the amendments is a responsibility of the President of the Joint Committee, which has competence for analysing the conversion bill.

Supplementary information:

- Articles 59, sole paragraph, and 62.12 of the Federal Constitution;
- Article 7.II of Complementary Law 95/1998;
- Article 4.4 of Resolution 01/2002 of the National Congress.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2016-3-015

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 28.10.2015 / **e)** Claim of noncompliance with a Fundamental Precept 291 (ADPF 291) / **f)** Non-reception of crime of pederasty by the Constitution / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 094, 11.11.2016 / **h)**.

Keywords of the systematic thesaurus:

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.
 5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel**.
 5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

Keywords of the alphabetical index:

Army, homosexual, discrimination / Homosexual, act / Homosexual, offence, punishment / Military, discipline, offence / Military, offence, sanction / Sexual orientation / Sodomy, crime.

Headnotes:

To define as crime sexual acts committed by military personnel in places subject to military administration is consistent with the Federal Constitution and aims to protect the Armed Forces hierarchy and discipline. However, the law cannot have pejorative and discriminatory expressions; neither can it punish

conduct strictly directed to homosexual relations, as it would violate the principle of human dignity and the right to sexual freedom.

Summary:

I. The Federal Attorney General, based on representation from several non-government organisations, filed a complaint of non-compliance with a fundamental precept (a subsidiary mechanism for filing constitutional challenges) to declare that Article 235 of the Military Criminal Code (CPM, in the Portuguese acronym), which was enacted before the democratic Constitution of 1988, was not received by the Constitution and was therefore invalid. The Article defines as a crime “pederasty or other libidinous act”, as follows: “military personnel shall not practice, or allow one to practice with them, libidinous act, homosexual or not, in a place subject to the military administration”. The claimant requested successively, at least, the acknowledgement of non-reception of the expressions “pederasty or other” and “homosexual or not” from the definition of the crime, due to its discriminatory nature which is inconsistent with the constitutional text.

The claimant acknowledged that sexual practice while on military duties is inappropriate, and, therefore, punishable under the disciplinary framework. However, he stated there is no reason to criminalise consensual sexual acts when the military is not in service, even in the military environment, under penalty of violating human dignity, mental health and the right to happiness. He criticised the use of pejorative (“pederasty”) and discriminatory (“homosexual”) expressions in the crime definition, which punishes conducts strictly directed to same-sex relations. He indicated that the provision falls within the context of international anti-sodomy laws that violate fundamental rights. He pointed out that the contested rule, created during the Brazilian military dictatorship, reflects an outdated worldview. In this sense, he mentioned that the purpose of a provision of this kind, manifested in the statutes’ exposition of motive, is “to make the repression of evil more severe”, which highlights the dismissive attitude of the legislator towards homosexual relations.

II. The Supreme Court, by majority, partially granted the request, declaring that the expressions “pederasty or other” and “homosexual or not”, under Article 235 of the CPM, were not received by the Constitution due to its discriminatory and offensive nature to sexual freedom.

The Court accepted the successive plea and held that the criminalisation of libidinous acts committed by military personnel in places subject to military

administration is compatible with the Constitution and justified in order to protect the Armed Forces hierarchy and discipline (Article 142 of the Constitution). However, the law cannot have pejorative and discriminatory terms to safeguard legally protected interests, nor punish conducts strictly directed to homosexual relations, under penalty of violating human dignity and the right to sexual freedom. Ultimately, it aims to define as a crime the libidinous act itself, practiced in a typical military activity situation, no matter how the act was practiced.

In this regard, the Court held unconstitutional the expressions “pederasty or other” and “homosexual or not”, under Article 235 of the CPM, as it shows inadmissible intolerance towards same-sex relations, and it reaches groups traditionally marginalised. The Court withdrew the terms and settled the following wording to the provision: “Article 235. Libidinous Act: Military personnel shall not practice or allow one to practice with them libidinous act in place subject to military administration.”

III. In dissenting opinions, Justices fully granted the request due to the understanding that Article 235 of the CPM is unconstitutional, thus, not received by the Constitution. The Justices considered to be unacceptable a discriminatory definition of crime, based solely on the military sexual orientation, in the light of the principles of criminal law minimum intervention, human dignity, equality and the ban on odious discriminations (Articles 1.III, 3.IV, 5.*caput* of the Federal Constitution). In addition, the severe disciplinary regime of the Armed Forces is able to punish improper behaviour without inciting prejudice or violating sexual freedom.

Supplementary information:

- Articles 1.III, 3.IV, 5.*caput* and 142 of the Federal Constitution;
- Article 235 of the Military Criminal Code.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-016

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 11.11.2015 / **e)** Direct action for declaration of unconstitutionality 3165 / **f)** Gender discrimination and legislative power / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 93, 10.05.2016 / **h)**.

Keywords of the systematic thesaurus:

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

1.3.4.4 Constitutional Justice – Jurisdiction – Types of litigation – **Powers of local authorities.**

1.3.4.10.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – **Limits of the legislative competence.**

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

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

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

Keywords of the alphabetical index:

Civil servant, motherhood and employment / Employment, access / Employment, conditions, criteria / Employment, discrimination / Federal entity, territorial powers, principle of exclusivity / Government, exceeding of powers / Incompetence / Jurisdiction, exclusive competence / Labour market / Local government, competence / Maternity, protection / Pregnancy / Right to work / Woman, special protection / Work, condition, determination.

Headnotes:

A state law that penalises companies and officials for requiring a pregnancy test or medical certificate of tubal ligation as a condition to allow a woman to work is formally unconstitutional. Although the objective of fighting gender discrimination in the labour market is laudable, the state law breached the exclusive competency of the Federal Government to legislate on labour law and to organise, maintain and carry out labour inspection.

Summary:

I. The Governor of the State of São Paulo filed this direct action of unconstitutionality against Law 10849/2001 of that State, which penalises companies and officials with the loss of state

registration if they require a pregnancy test or a medical certificate of tubal ligation as a condition for women being admitted or promoted in a job. The plaintiff argued that the norm is formally unconstitutional, because the State usurped the exclusive competency of the Federal Government to legislate on labour law, stated in Article 22.I of the Federal Constitution. He argued that the Federal Government had already exercised its competency concerning the matter in Federal Law 9029/1995, which forbids discriminatory practices in labour relations.

II. The Supreme Court, by majority vote, granted the action and declared the unconstitutionality of Law 10849/2001 of the State of São Paulo. Despite the social relevance of the norm, the Court stated that the protection against gender discrimination in labour relations is a matter of federal competency. The majority understood that the state law is formally unconstitutional, because it is about labour law, a subject under the exclusive legislative competence of the Federal Government (Article 22.I of the Federal Constitution). Furthermore, the Court asserted that, since the challenged law established the power to oversee labour relations to a state body, it usurped the exclusive competence of the Federal Government to “organise, maintain and carry out labour inspection” (Article 21.XXIV of the Federal Constitution). Another breach of the Constitution is due to the fact that the state law was proposed by the legislative assembly, but it governed both private companies and civil servants.

The Court noted that the matter has already been regulated in a federal law enacted prior to the challenged norm. The Law 9029/1995 rendered it a crime to require a test, a medical certificate or any other procedure related to sterilisation or pregnancy, as well as other discriminatory practices in labour relations, imposing severe penal and administrative punishments to offenders. As the Federal Government was not guilty of legislative omission (i.e. it did not fail to enact legislation in this area), constitutional rigour concerning competency should not be relaxed in order to admit the action of the State in enacting legislation on this subject.

III. In a separate opinion, a concurring Justice stated that the punishment set forth in the state law (exclusion from the record of state tax) was disproportionate. Besides not restraining discrimination against women, it would hinder businesses' operation, with wide-ranging effects on individuals' employment.

In separate opinions, dissenting Justices argued for the denial of the action and for the constitutionality of

Law 10849/2001, on that basis that it was protective legislation against gender discrimination and that it forbade restrictions on access to employment on the grounds of (female) gender (Articles 3.IV, 5.I and 7.XXX of the Federal Constitution). They defended a construction of the repartition of competences less centralised in the role of the Federal Government and more collaborative among the other federated entities (States, Federal District and Municipalities). In this context, an expansive construction of the common competences set in the Article 23.I of the Federal Constitution was developed, in order to comprise the Law 10849/2001 as a part of a public policy against women's discrimination in the labour market, being a result of a cooperative effort among the federated entities, which are interested in jointly ensuring and safeguarding the Constitution and the Brazilian laws about the subject.

Supplementary information:

- Articles 3.IV, 5.I, 7.XXX, 21.XXIV, 22.I and 23.I of the Federal Constitution;
- Law 10849/2001 of the State of São Paulo;
- Law 9029/1995.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-017

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 03.12.2015 / **e)** Extraordinary Appeal 581488 / **f)** Public Health System and care based on social class differences / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 65, 08.04.2016 / **h)**.

Keywords of the systematic thesaurus:

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Health, public, care, free / Health system, direct assistance / Medical practitioner, participating in the health-insurance system / Right to health.

Headnotes:

It is constitutional the rule that prohibits, within the National Health System, hospitalisation in superior accommodations, as well as a distinct treatment by doctors of the System itself, or who are accredited to it, by means of paying the corresponding values.

Summary:

I. The Regional Council of Medicine from Rio Grande do Sul (CREMERS, in the Portuguese acronym) filed an extraordinary appeal against a decision of the Federal Regional Court of the 4th Region, which affirmed the ruling set in a civil action banning different treatment in the public health system.

In the case, the civil action aimed to assure users of the National Health System (hereinafter, "SUS", in the Portuguese acronym) of the possibility to improve their type of accommodation in the event of hospitalisation, to choose the doctor of preference, accredited or not to SUS, and finally not to go through a triage process to determine the priority of patients in health centres. The procedure, called treatment "by different class" in the National Health System, would be subject to users' payment of the difference between the real value of a service and the one passed by SUS to medical institutions. The Court concluded that admitting the option for "different class" means granting special and differential treatment to patients, which is unacceptable in a system that provides universal and equal access for the underprivileged to the SUS's actions and services.

The applicant claimed that the decision, when ruling legitimate the norms that forbid the establishment of different treatment, violates the right to health (Article 196 of the Federal Constitution), since the administrative authorities would be rendering access to the SUS difficult. The difference in services would not mean breach of equality, because it does not establish unequal treatment to people in equal situations. Indeed, it would only provide different services in different situations, when the user has financial conditions to pay for it. It neither promotes expansion of constitutional law nor generates additional burdens on the public system, given that the burden would be on the user. The applicant argued against the triage procedure, on the grounds that it violates the patient's right to choose to be treated by the doctor of his preference and it hinders doctors to be valued by their qualified service. Finally, the applicant stated that the Supreme Court has already ruled in favour of distinct medical care.

II. The Supreme Court, unanimously, in accordance with the opinion of the Rapporteur Justice, denied the extraordinary appeal and established the following thesis "it is constitutional the rule that prohibits, within the National Health System, the hospitalisation in superior accommodations, as well as a distinct treatment by doctors of the National Health System itself or who are accredited to it, by means of paying the corresponding values."

The Court ruled that the SUS is guided by the criteria of universality, equity and integrality of access and treatment (Law 8080/1990). In this line, different medical care is not allowed, except in extreme and justifiable cases, under penalty of generating two different treatment regimens in the National Health System, going against the principles of equality and oneness. Moreover, the public health care network shall not be submitted to the profit logic. The service "by distinct class" breaches the urgency criteria as a fair defining for priority assistance and replaces it with the economic criteria in the selection of patients. This is an unacceptable circumstance within an egalitarian and universal system. Therefore, this system subverts the logic of the Brazilian social security system and violates equal and universal access to actions and services for the promotion, protection and recovery of health, violating also the principles of equality and human dignity (Article 1.III, Article 5.I and Article 196 of the Constitution).

III. In one of the opinions, a Justice stressed that this Court has precedents allowing different treatment only when it is based on the patient's clinical condition, in order to preserve their health in the context of severe diseases. Other than this situation, those who can afford different treatment have to seek the private system of health.

Supplementary information:

- Articles 1.III, 5.I, 196 and 200 of the Federal Constitution;
- Articles 5 and 6 of the Law 8080/1990;
- Normative Act INAMPS 283/91 and Normative Act from the Health Department 113/97 (rules that establish the prohibition of distinct treatment);
- This case is number 579 of the theses of general repercussion: improvement of accommodation in the event of hospitalisation of patient in the National Health System, by means of paying different value.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2016-3-018

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 09.12.2015 / **e)** Motion for clarification on extraordinary appeal received as Internal Appeal 249003 (RE 249003 ED) / **f)** Benefit of free legal aid / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 93, 17.12.2015 / **h)**

Keywords of the systematic thesaurus:

1.4.14.1 Constitutional Justice – Procedure – Costs – **Waiver of court fees.**

1.4.14.2 Constitutional Justice – Procedure – Costs – **Legal aid or assistance.**

Keywords of the alphabetical index:

Legal assistance, free, right.

Headnotes:

The rule that establishes that free legal aid will be granted under a condition precedent for a lapse of five years is constitutional, since the financial situation that justified granting the benefit may change during this period.

Summary:

I. This case refers to a motion for clarification on extraordinary appeal, received as an internal appeal, against a decision handed by a Justice of the Supreme Court, which maintained the payment of court costs and attorney's fees, in the event of reciprocal loss in a lawsuit.

In the case, the applicant was granted the benefit of free legal aid when she showed evidence of her insufficient economic resources to cover the procedural costs, without compromising her own support and of her family. However, the order to pay the costs of loss in the lawsuit was affirmed, under a condition precedent, whereby the debt should only be

cancelled after a period of five years, due to the statute of limitations, if her economic condition does not change.

The applicant claimed that the condition precedent under Article 12 of Law 1060/1950 is incompatible with the fundamental right to free legal assistance, guaranteed by Article 5.LXXIV of the Federal Constitution. In this sense, the rule, which was enacted before the entry into force of the Federal Constitution in 1988, would not have been accepted by the current Constitution. Finally, the applicant requested the legal provision to be declared unconstitutional.

II. The Supreme Court, unanimously following the opinion of the Rapporteur Justice, concluded that the rule is constitutional on the grounds that the main purpose of free legal aid is to ensure access to Court for those who do not have the economic means to pay court costs. Initially, the Court asserted the tax nature of the court costs. As such, considering the principle of the ability to pay, the Court noted that Article 12 of Law 1060/1950 aims at applying fair taxation, as it does not privilege someone who has recovered his ability to pay the court costs instead of privileging society as a whole, which is responsible for paying taxes that provide judicial activity. The Court stressed that the exemption rule assigns to courts, acting in the State role, the duty to assess legal requirements and set the gratuity, considering both the non-retroactivity of the benefit and the possibility to revoke it.

The Court highlighted, furthermore, that the new Civil Procedure Code, which would come into force on 25 March 2016 maintained, under Article 98.3, the same condition precedent to require the duty of paying court costs.

III. In a separate opinion, a Justice presented complementary grounds and stressed that the free legal aid has several purposes, including promoting equal and effective access to justice. The obligation of the government to ensure access to courts is a fundamental right directed to a specific group (poor people) and is limited to the compliance with legal requirements (evidence of insufficient income). The condition precedent to collect costs aims to ensure, in the event of a change in the beneficiary's economic condition, that he is not privileged with the exemption; otherwise the objectives of the benefit would fail. In other words, rather than promoting equality, it will contribute to increasing inequality.

Supplementary information:

- Articles 5.LXXIV of the Federal Constitution;
- Article 12 of the Law 1060/50 was revoked by the new Civil Procedure Code (Law 13105/2015), which ruled the benefit of free legal aid under Articles 98 to 102.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2016-3-019

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 17.12.2015 / **e)** Preliminary injunction on a Claim of non-compliance with a Fundamental Precept 378 (ADPF 378 MC) / **f)** Impeachment proceeding / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 094, 11.11.2016 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Head of State.**

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Legislative bodies.**

1.3.4.7.4 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Impeachment.**

Keywords of the alphabetical index:

Commission, appointment / Committee, fact-finding / Impeachment, proceedings, initiative, right / Presidential impeachment.

Headnotes:

The proceedings to impeach the President under Law 1079/1950 are legitimate, if the legal text is interpreted appropriately, in the light of the current Constitution.

Summary:

I. The Communist Party of Brazil (PCdoB) filed a complaint of non-compliance with a fundamental precept (a subsidiary mechanism for filing constitutional complaints) to determine whether the impeachment proceedings under Law 1079/1950 are compatible with the current Constitution.

In the case, on 2 December, the Chamber of Deputies Speaker authorised the initiation of impeachment proceedings against the President, Dilma Rousseff. On 8 December, the Chamber elected Deputies to form the special committee responsible for analysing the request and issuing a report on the allegations. At the time, each political party leader appointed representatives to form candidacies of deputies to join the committee, after the Full Chamber vote. However, the opposition understood this procedure privileged the government. As such, it launched alternative candidacies, formed by deputies from parties of the opposition and dissidents from the governing coalition. At the end, the election of members to the special committee included the spare candidacies and it was held by secret vote.

The claimant rebelled against the procedure in this election and requested injunctive relief to determine the voting to be opened, observing the rules concerning the representatives' appointment by party leaders – hindering alternative candidacies – and parties' proportional representation. It also required the annulment of the Chamber Speaker's decision, which had received the impeachment claim, arguing the right to prior defence was not respected.

Initially, the rapporteur partially granted the relief to suspend the proceedings, until the Full Court rule on the complaint requests. The Supreme Court decided on the constitutional legitimacy of the proceedings under Law 1079/1950 for the impeachment of the President. The law was analysed in the light of the 1988's Constitution to determine which rules had remained in force after its promulgation and how these rules shall be interpreted. As a general line, the Court affirmed the rules established to 1992's impeachment.

II. The Court unanimously held that the President has no right to prior defence to the decision of the House Speaker that authorises the impeachment proceedings to initiate, since such decision consists of a mere admissibility act and the full defence is ensured by numerous opportunities to further protest. Moreover, prior defence is not a requirement of the full defence constitutional principle, but an exception that must be provided by law. However, as regards

the procedure of the special committee election, the Court ruled the vote shall be opened and candidacies must be formed by the representatives appointed by the leaders of political parties.

The Court stated that the House internal rule provides that the leaders of both parties and parliamentary groups shall appoint their representatives. Therefore, the Full Chamber cannot choose other members alternatively. Such spare candidacies weaken party autonomy and the constitutional guarantee to a proportional representation of parties or parliamentary groups in the committees. In dissenting opinions, Justices claimed this matter is *interna corporis* and the Judiciary could not hinder a choice made by the Chamber when performing its duties.

As for the opened vote, the Court held that the publicity of Legislative acts stems from the democratic principle, the republican regime and the representative system. It allows greater transparency, popular control over the representatives and the process legitimacy. Moreover, the rules on the procedure of impeachment (Federal Constitution, Law 1079/1950 and internal rules) do not provide for secret vote on this matter. Therefore, the Chamber Speaker cannot take such an individual decision, based on his own discretion. The secret vote is an exception that must be established by law specifically. Furthermore, it is incompatible with the nature and severity of the impeachment proceeding. In contrast, the dissenting Justices stated that the secret ballot ensures the freedom and independence of Congress, as the voters would not suffer pressure and undue interference.

Regarding the compliance of the impeachment law with the current Constitution, the Court held the competence of the houses of Congress had changed. In the 1946 Constitution, the Chamber of Deputies was responsible for both admitting the impeachment proceedings to initiate and holding a trial on the charges with the President. The current Constitution establishes that the Chamber of Deputies shall only authorise the start of proceedings (Article 51, I), while the Senate shall exclusively prosecute and try the President (Article 52, II). The Court held that such authorisation is a proceeding condition to start the case. The procedure is not initiated by the Chamber, nor does the Chamber hold the power to direct the Senate to do so. Thus, the phrase "prosecute and trial", which refers to the Senate's competence, encompasses the issuing of a prior decision on whether the process shall actually be established. The understanding that the Senate could not dismiss the Chamber's authorisation did not prevail.

Due to the change of roles of the houses of Congress concerning the impeachment procedure, the Court decided unanimously that a probative finding within the Chamber is not appropriate. It shall occur within the Senate, which is currently responsible for judging the merits of impeachment charges.

The Court established that all the probative findings developed in the Senate must obey the rule that the defence presents arguments after the prosecution. Thus, the procedure follows the usual procedure of criminal actions filed directly before the Supreme Court, in accordance with the principles of legal defence and contradictory, so that the accused hearing is the final act of probative finding. In a dissenting opinion, a Justice decided the need for the President's hearing before the prosecution, at the time when the procedure is received in the Senate, on the ground that it is a consequence of the due process clause.

The Court decided, by majority, that the initial procedure requires a simple majority of votes instead of two-thirds (higher quorum). As the Law 1079/1950 does not provide a specific standard for this initial act, it shall follow the solutions adopted concerning the impeachment of President Fernando Collor in 1992. At the time, the Supreme Court decided to apply, by analogy, the rules to impeach the Supreme Court Justices and Attorney General. Thus, the Court established that a supermajority vote is required exclusively for the Chamber's initial authorisation and for the Senate's trial on the merits of impeachment charges. The Court also ruled, on the same grounds, that the Senate has no competence to dismiss the impeachment procedure forwarded by the Chamber of Deputies.

Unanimously, the Court established the rules of suspicion and impediment provided for judges in the Code of Criminal Procedure cannot be applied, in a supplementary manner, to the Chamber Speaker. Law 1079/1950 provides for specific situations and there is no legal gap to be filled by supplementary application. Moreover, it is not even appropriate to equate judges, from whom full impartiality is required, to congressmen, who must perform their duties, supervising and judgment, based on their political and party convictions and the will of the ones they represent.

The Court established that senators can perform both roles, to judge and accuse, and to take all measures needed to assess the President's impeachment charges. The impeachment proceeding is a constitutional instrument of political and administrative control to oust the occupant from public office through political institutions (in this case,

the Chamber of Deputies and the Senate), in order to protect the State. The person in charge of office is not the object of impeachment, but the office – regardless of who is in charge – since it aims at maintaining or re-establishing proper functioning of the public administration and the State’s institutions as a whole. Considering that the procedure is not judicial, it is not appropriate to convey guarantees inherent to ordinary criminal cases to the political sphere of impeachment crimes.

Finally, the Court ruled the legitimacy to apply, in a supplementary manner, the internal rules of the houses of Congress to the impeachment proceeding, as long as the provisions comply with appropriate legal and constitutional provisions, and are limited to the self-organisation of the houses of Congress. There is no violation of the principle of reservation to special law, since it is not required that only laws passed by Congress can govern the matter.

Supplementary information:

- Law 1079/1950 (establishes the impeachment offenses and provides for its proceedings).

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-020

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 17.02.2016 / **e)** *Habeas Corpus* 126292 (HC126292) / **f)** Presumption of innocence and provisional execution of the criminal sentence / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 100, 17.05.2016 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Enforcement of judgment, appeal / Presumption of innocence.

Headnotes:

The provisional execution of a criminal conviction, issued or reaffirmed in courts of second degree of jurisdiction, although subject to special or extraordinary appeal, does not compromise the principle of the presumption of innocence.

Summary:

I. This case refers to a writ of *habeas corpus*, with preliminary injunction, filed against a decision of the Court of Justice of the State of São Paulo that had affirmed the conviction held by the first Court and that had ordered an arrest warrant against the claimant to start the provisional execution of the sentence.

The claimant argued that the order is a criminal coercion since it represents a sentence prior to the decision becoming *res judicata*. He argued that, according to the Court’s understanding the provisional execution of the sentence does not comply with the principle of the presumption of innocence, which states that no one shall be considered guilty before the decision becomes *res judicata* (Article 5.LVII of the Federal Constitution). Finally, he requested, through the writ of *habeas corpus*, to be freed while pending trial on the special and extraordinary appeals.

II. The Supreme Court, by majority vote and according to the Judge-Rapporteur’s opinion, denied the *habeas corpus* writ. The Supreme Court emphasised that, before the decision from the court of first instance, the presumption of innocence is absolute. Upon conviction, a non-definitive guilty plea is established, as it can be subject to appeal and reviewed by a hierarchically superior court. After the decision from the second instance court, when the double degree of jurisdiction occurs, one can no longer discuss matters relating to facts and evidence. Any subsequent appeal (special appeal or extraordinary appeal) does not have the potential to change the conviction and the defendant’s criminal responsibility. Accordingly, execution of the sentence execution while appeals of extraordinary nature are still pending does not compromise the essential core of the not-guilty presumption principle, if the defendant has been treated as innocent during the ordinary criminal proceedings. Moreover, to ensure the presumption of innocence until the final decision in the trial process,

considering all possible appeals can encourage excessive, improper, and merely dilatory appeals, compromising the State's right to punish.

The Court overruled the prevailing understanding which stressed that imprisonment due to conviction requires a final sentence that is not subject to appeal (HC 84078), aiming at establishing balance between the principle of innocence presumption and the effectiveness of the criminal judicial function.

III. In a separate opinion, a dissenting Justice highlighted that the presumption of innocence is a historical victory of citizens against government oppression and abuse of power. The presumption of innocence could not become less valuable, under the risk of denying the Democratic State of Law and the new constitutional order. It is also incompatible with the case law of the Inter-American Court of Human Rights, the jurisprudence of the European Court of Human Rights and the recommendation of the Human Rights Committee of the United Nations and other international organisations. The Justice rejected arguments based on the practices and legal experiences of countries such as the US and France, which admit provisional execution of the sentence, as it is the Brazilian constitutional wording, itself, which establishes the limits on performance of execution (Article 5.LVII of the Federal Constitution). The Justice argued that presumption of innocence, besides being a constitutional guarantee (Article 5.LVII of the Federal Constitution), is a fundament of the Penal Execution Act (Articles 105 and 147) which imposes a *res judicata* (final) decision. Finally, the extraordinary nature of appeals suspends the immediate effectiveness of the criminal condemnatory decision, favouring the defendant as regards the not-guilty presumption. Therefore, it does not comply with the provisional execution of the sentence (except in the case of provisional detention).

Supplementary information:

This case overruled case number HC 84078.

- Article 5.LVII of the Federal Constitution;
- Articles 105 and 147 of the Penal Execution Act.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-021

a) Brazil / **b)** Federal Supreme Court / **c)** First Panel / **d)** 24.02.2016 / **e)** Extraordinary Appeal 601314 (RE 601314) / **f)** Provision of financial information to the Treasury judicial authorisation / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 130, 23.06.2016 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Bank, account, tax inspection, disclosure / Bank, banking secrecy / Bank secret, guarantees / Document, access, restrictions / Document, administrative, access, right / Document, confidentiality / Review, administrative / Secrecy, information, disclosure / Tax credit / Tax, contributory capacity / Tax, duty to pay / Tax, evasion.

Headnotes:

Providing financial information to the Treasury without a court order does not violate the right to bank secrecy when there is an administrative proceeding initiated or a tax procedure in progress and the examination of such information is considered indispensable by the competent administrative authority.

Tax legislation of a mere instrumental nature is not subject to the principle of non-retroactivity of laws and it shall be immediately applied.

Summary:

I. This case refers to an extraordinary appeal questioning whether it is constitutional, in the light of the right to bank secrecy, for authorities or tax agents to have access to banking data without a court order, as provided for in Article 6 of Complementary Law 105/2001 (hereinafter, “LC 105/2001”). The Court also considered whether Law 10174/2001, which allows assessment of tax credits related to years prior to the law's enforcement, breaches the principle of non-retroactivity of laws.

In this case, The Regional Federal Appellate Court, in the challenged decision, ruled that fundamental rights and guarantees are not absolute and must be reconciled with the exercise of public authorities' constitutional powers, aiming at protecting social interests of greater scope. The Court stated that the right to secrecy, provided in Article 5.XII, of the Federal Constitution, prohibits abusive interference in the transmission of bank data, but does not give them complete inviolability. Thus, it is possible for the legislator to foresee specific hypotheses of bank secrecy breaches, enabling the Administration's power-duty to collect taxes and oversee compliance with tax obligations. The Regional Federal Appellate Court also stated that there was no offence to the principle of non-retroactivity of the tax rule, since the law did not create or increase taxes; it only provided mechanisms to combat tax evasion. Therefore, it has immediate application even to a period prior to the law's effectiveness.

The appellant claimed infringement of Articles 5. X, XII, XXXVI, LIV, LV; 145.1; and 150.III.a, of the Federal Constitution (concerning the rights to privacy, secrecy of communications, the principle of *res judicata*, protection against deprivation of assets without the due process of law, right to full defence in judicial and administrative processes, and the State's power to levy taxes, respectively). He claimed that judicial authorisation is necessary to breach bank secrecy. He also claimed a violation of the principle of non-retroactivity of laws, since the control mechanisms provided by Law 10174/2001, which are used to calculate credits related to the Provisional Contribution on Financial Transactions, could not be used to determine other taxes whose taxable events took place in a period prior to the law enforcement.

II. The Supreme Court, by majority, denied the request in the extraordinary appeal and established two legal theses with general repercussion (i.e. precedents with *erga omnes* application):

1. "Article 6 of LC 105/2001 does not offend the right to bank secrecy, as it accomplishes equality among citizens by means of the principle of contributory capacity, as well as it establishes objective requirements and the transfer of the duty of confidentiality from the banking sphere to the fiscal sphere"; and
2. "Law 10174/2001 does not attract the application of the principle of non-retroactivity of tax laws, in view of its instrumental nature, under the terms of Article 144.1 of the National Tax Code."

The constitutionality of Article 6 of LC 105/2001 examination reveals a confrontation between the right to bank secrecy and the fundamental duty to pay taxes, both referred to the same citizen. Discussing the premises of bank secrecy and the limits of the Tax Administration fiscal powers, the Rapporteur established the ability of the tax to reduce legal, political, and economic inequalities. The Court declared that the fundamental duty to pay taxes to the extent of the taxpayer's contributory capacity satisfies the principle of equality and that this principle is bound to a sovereign State committed to the satisfaction of the collective needs of its people. The Court affirmed that the obligation to pay taxes implies the duties of the Treasury to inspect effectively and to tax correctly, observing the economic capacity of the taxpayers.

The Court asserted that bank secrecy is a right of the expression of personality. The citizens' right to have their bank activities and financial data free from interference or offence from the State or from the financial institution itself fulfils that right. However, the Court pointed out that it is not an absolute right and the law may establish limits. Thus, the right to confidentiality of data cannot be opposed to the Tax Administration duties, since the citizen cannot use bank secrecy to commit crimes or to stop paying taxes.

The Rapporteur judge pointed out that the bank secrecy issue is not restricted to Brazilian territory. Brazil has adhered to several international tax treaties and programmes aimed at exchanging, automatically or on request, fiscal information between the signatory countries. These measures address global efforts to combat international tax fraud, currency evasion, money laundering, 'tax heavens', and the financing of criminal organisations by improving fiscal transparency in relation to legal entities and business arrangements. Thus, the identification of the taxpayer's assets, income and economic activities provides the principle of the contributory capacity fulfilment, which would be at risk of violation due to the restrictive hypotheses of access to taxpayers' bank transactions by the Tax Administration.

The Court stated that the Article 6 of LC 105/2001, besides establishing objective requirements for the request of information by the Tax Administration, also guarantees the duty of confidentiality transfer from the bank to the fiscal sphere. Such transfer assures the confidentiality of the taxpayer's financial transactions and the accountability of civil, administrative and criminal authorities in case of abuse.

With regard to Law 10174/2001, the Court rejected the application of the principle of non-retroactivity of tax laws because of its instrumental nature. The rule concerns tax assessment, not a new tax obligation or a tax increase. It imposes a new administrative duty on the Federal Revenue by allowing it to use the information on the financial transactions of bank account holders to investigate divergences. The procedure permits the establishment of an administrative proceeding in order to verify tax credits related to other taxes different from the Provisional Contribution on Financial Transactions, even if the taxable events occurred prior to the effectiveness of this law, allowing the taxpayer's contributory capacity to be identified. This is a practical application of the isonomy principle.

Justice Ricardo Lewandowski highlighted that confidential data of fiscal interest could only be accessed after the initiation of an administrative proceeding, by an act that gives reasons and is regulated in the three state levels – Federal Government, States and Municipalities. The taxpayer must be guaranteed immediate notification regarding initiation of the proceeding, full access to the records and the right to extract copies of any documents or decisions on the records, so that they can exercise judicial control over the administrative acts concerned.

III. In dissenting opinions, some of the Justices granted the extraordinary appeal. They argued that breaking bank secrecy requires a court order, under penalty of violating the citizens' right to privacy. The use of the control mechanisms provided by Law 10174/2001 offends the principle of non-retroactivity of laws when they aim at calculating credits related to taxes different from the Provisional Contribution on Financial Transactions and that concern taxable activity prior to its enforcement. The Justices emphasised the need to use legal means to exclude evasion, in order to avoid international cooperation from violating the Brazilian legal system.

Supplementary information:

In the judgment of MS 33340, the STF decided that the Federal Court of Accounts may request information from the National Bank for Economic and Social Development on financial transactions with private companies. Such requests do not represent a breach of bank nor business secrecy.

- Articles 5. X, XII, XXXVI, LIV, LV; 145.1 and 150.III.a, of the Federal Constitution;
- Article 6 of Complementary Law 105/2001;
- Article 144.1, of the National Tax Code;
- Law 10174/2001;

- Item 225 of the general repercussion:

“a. Provision of information on financial transactions to the Treasury without judicial authorisation, pursuant to Article 6 of Complementary Law 105/2001;
b. Retroactive application of Law 10174/2001 for the calculation of tax credits referring to years prior to its validity.”

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-022

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 10.03.2016 / **e)** Extraordinary Appeal 778889 (RE 778889) / **f)** Different periods of maternity leave to pregnant women servants and to adopters / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 159, 01.08.2016 / **h)**.

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality.**

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:

Adoption, child, best interest / Child, adoption / Child, family tie / Civil servant, motherhood and employment / Civil servant on leave / Leave, maternity / Leave, parental / Maternity, protection / Pregnancy, worker, protection / Woman, special protection.

Headnotes:

In compliance with the constitutional principle of equality and the best interests of the child, it is unconstitutional to establish a different period for maternity leave granted to pregnant women servants and to adoptive parents, including extensions of maternity leave. Moreover, it is not possible to establish different deadlines for maternity leave on grounds of the age of the adopted child.

Summary:

I. This case refers to an extraordinary appeal brought by a civil servant against decision establishing that the provision of different periods for maternity leave granted to pregnant women servants and adopters does not offend the constitutional principle of equality because they relate to different factual situations. The Court *a quo* stated that the license granted to pregnant women – Article 7.XVIII of the Federal Constitution – primarily seeks to preserve the health of mothers, who enjoy 120 days to recover from the physical and psychological changes resulting from pregnancy. In turn, given that the adoptive mother neither goes through medical intervention, nor breastfeeding of their children, the Court found that the 90-day period for maternity leave (Article 210 of Law 8112/1990) is a reasonable time for effective family life between the mother and the adopted child, although it is lower than the term given to pregnant women. If the child is older than one year old, the adoptive mother is granted 30 days of maternity leave. The term is shorter than that given to a pregnant servant because this child would need less care than a newborn.

The applicant alleged violation of Articles 7.XVIII, 39.3^o and 227.6^o of the Federal Constitution (concerning, respectively, the right to maternity leave, social rights of holders of public office, and the prohibition of discrimination between children born inside or outside wedlock). She explained that, by adopting a child over one year old, she enjoyed 30 days of maternity leave, pursuant to Law 8112/1990, which was later extended for 15 days, based on Law 11770/2008 and the Resolution 30/2008 of Federal Justice Council. Based on the right to equality of treatment between biological and adopted children, the applicant stated that she was supposed to be entitled to the same period of leave that was granted to pregnant women – 120 days of benefit (Article 7.XVIII of the Constitution) and 60 days of extension (Law 11770/2008) – regardless of the child's age. She argued the unconstitutionality of Article 210 of the Law 8112/1990, and Article 3.1 and 3.2 of the Resolution 30/2008 of the Federal Justice Council on the basis that they discriminate against adoptive mothers, since their right to maternity leave was decreased due to the age of the adopted child.

II. The Supreme Court, by a majority, granted the extraordinary appeal and declared the unconstitutionality of Article 210 of the Law 8112/1990 and Article 3.1 and 3.2 of the Resolution 30/2008 of the Federal Justice Council. The Court decided that the term of the license granted to the adoptive mother and their extensions may not be less than the period

granted to pregnant women. The Court also stated that the license term cannot vary according to the age of the adopted child. Thus, the Court recognised the applicant's right to the remaining term of parental leave, so the full enjoyment time is equivalent to 180 days of paid absence, which is usually given to pregnant women in the federal public service (120 days of benefit plus 60-day extension), regardless of the age of the adopted child.

The Court interpreted the Constitution in accordance with the principles of equality and of human dignity, the protection of maternity, the priority of the best interests of the child, the doctrine of full protection, the prohibition of discriminatory treatment between adopted and biological children, the right to dignity of women who decide to adopt and the prohibition of poor protection. This case overruled previous Court jurisprudence since the Justices held that the concept of family and the scope given to the protection of children and youth have suffered constitutional mutation (a change in the direction of the norm, in contrast to pre-existing understandings, due to the changing social reality). Although there was no modification in the text of Articles 7.XVIII and 227.6 of the Constitution, the meaning assigned to them has evolved in regard to the rights of adopted minors, the understanding of parental leave and equality of children.

The Full Court stressed that adopted children are a vulnerable and fragile group and they will require additional effort from the adoptive family to adapt, to create bonds of affection and to overcome traumas. The older the child and the higher the compulsory length in institutions, the greater will be the difficulty of adapting to the family. Thus, the granting of derisory term of maternity leave is a disincentive to late adoption and is disproportionate to the child's emotional needs. Besides, the adopted child cannot receive lower protection than biological children, who are in less serious condition. Moreover, it is in the State interest that orphaned children are adopted, which reduces the expenditure of public funds on shelters. The Court asserted that the State must ensure the dignity and autonomy of women to choose their life projects, creating conditions to reconcile motherhood and profession, especially when the realisation of motherhood occurs by way of adoption, enabling the rescue of family life in favour of children in need.

The Rapporteur judge stated that mothers who adopted prior to the date of this decision may enjoy the remaining period of maternity leave at any time. This right is extinguished only if the adopted person has reached adulthood. The Justice pointed out that the enjoyment of the adopter license, even if late,

complies with the principles governing the protection of the children. He also stressed the impossibility of conversion of the remaining period of parental leave into damages, since this restitution does not meet the best interests of the minor.

III. In a dissenting opinion, a Justice dismissed the appeal. He asserted that Article 227.6 of the Constitution prohibits discrimination between children who are born to a married couple or single individual, and children who are adoptive or biological. However, it does not concern the legal situation of the pregnant woman or the adopter. By establishing different license terms, the legislature took into account the biological aspects and the health of the pregnant woman. He declared that if the Court equalised the situation of the progenitor and the adopter, the Justices would be acting as legislators and they were not competent to do so. By understanding that there was no breach of the Constitution, the dissenting vote held that there was no right to the increase of the adopter license period.

Supplementary information:

- This case refers to number 782 of general repercussion: possibility of law establishing different periods of maternity leave to pregnant women servants and adopters;
- Articles 7.XVIII, 39.3 and 227.6º of the Federal Constitution;
- Article 210 of the Law 8112/1990;
- Law 11770/2008.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-023

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 30.03.2016 / **e)** Extraordinary Appeal 841526 (RE 841526) / **f)** Legal liability of the State for the death of a detainee / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 159, 01.08.2016 / **h)**

Keywords of the systematic thesaurus:

4.6.10.1 Institutions – Executive bodies – Liability – **Legal liability.**

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

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

Keywords of the alphabetical index:

Liability, state, condition / Prisoner, rights, violation, remedy / Prisoner, treatment, inadequate conditions.

Headnotes:

Legal liability rests on the State has for the death of a detainee in the event of failure to comply with the State's specific duty to protect prisoners' physical and mental integrity.

Summary:

I. The State of Rio Grande do Sul filed an extraordinary appeal arguing the civil liability of the State due to the death of a detainee at the State Penitentiary Jacuí, in 1988. The criminal report was not conclusive as to the cause of death, stating it might have been suicide or murder. The first instance court decided by the objective liability of the State and the second instance decision (Court of the State of Rio Grande do Sul) affirmed the ruling. The State argued that the causal link between the alleged unlawful administrative fact and the damage caused is a requirement for the imposition of state liability and it had not been proved.

II. The Supreme Court unanimously dismissed the extraordinary appeal and established the following thesis of general repercussion (i.e. a precedent with *erga omnes* effect): in the event of failure to comply with its specific duty of protection provided for in Article 5. XLIX of the Federal Constitution, the State is responsible for the death of the detainee.

The Court pointed out that the Federal Constitution of 1988, on the one hand, adopted the theory of administrative risk, according to which the government is objectively responsible for the damage caused to a third party, regardless of the intent or fault of the public official. This demands, therefore, only demonstration of the link between state conduct and the damage caused to the individual. Thus, one cannot impute to the State compensation for

damages that do not result from its activities, but which result exclusively from the activities of third parties, the victim themselves or due to unforeseeable circumstances or *force majeure*.

On the other hand, Article 37.6 of the Constitution does not clearly specify the legal solution to cases of damage arising due to State omissions. The jurisprudence of the Supreme Court has taken the approach that the omission is also grounded in that article, since the constitutional provision stipulates that the State is liable for “damage that its agents cause to third parties” and it is not for the interpreter to establish distinctions, which were not made in the constitutional text. However, in case of omission, the link is only characterised when the State has a specific legal duty to act to prevent the damaging event.

Pursuant to Article 4 of the Law of Introduction to the Brazilian Law Rules, when the law is silent, the “judge will decide the case according to the analogy, customs and general principles of law.” Therefore, it is possible to apply, by analogy, Article 13.2 of the Criminal Code, which states that the “omission is criminally relevant when one should and could act to prevent the outcome.” In addition, the contrary view would adopt the theory of integral risk according to which the state is still liable whether there is no causal link between the conduct and the damage.

Finally, the Court stated that, regarding the death of the detainee, the Constitution assigns the State the specific duty to act as it ensures the prisoners respect to physical and moral integrity. This is a fundamental right associated to the principle of human dignity, which has an axiological basis to all fundamental rights. However, it is necessary to register that death can occur by several means: homicide, suicide, accident or natural death. When it is proven that the death of the detainee could not have been avoided by the State, there is no causal link between the resulting death and the State failure. Therefore, there is no duty to claim State responsibility. In this particular case, the State did not prove the suicide nor was it able to show any cause to exclude the causal link between the death and its constitutional duty to ensure the integrity of the detainees.

Supplementary information:

- Article 5.XLIX of the Federal Constitution;
- Article 37.6 of the Federal Constitution;
- This case refers to number 592 of general repercussion: legal liability of the State for the death of detainee.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-024

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 14.04.2016 / **e)** Provisional measure in a request for a writ of mandamus 34131 (MS 34131 MC) / **f)** Suspension of the impeachment proceedings / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 93, 10.05.2016 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Head of State.**

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Legislative bodies.**

1.3.4.7.4 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Impeachment.**

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

Keywords of the alphabetical index:

Committee, fact-finding / Fact-finding, committee, report, validity / Commission, appointment / Impeachment, proceedings, initiative, right / Presidential impeachment.

Headnotes:

In the impeachment proceedings, the Chamber of Deputies has the competence to authorise or not the establishment of the proceedings against the President for crime of responsibility, through a report of a Special Committee. The Federal Senate has the exclusive competence to try and judge the accusation, when the reported facts will be assessed and the accused will have the opportunity to be heard.

The eventual reference to a norm not received by the Constitution (i.e. a norm enacted before the entry into force of the Constitution and which is incompatible with the Constitution) does not harm the validity of the

report of the Special Committee, since the assessment of the charges and of the mentioned rules, as well as the assessment about the inclusion of matters not related to the proceedings, will be a competence of the Federal Senate.

Summary:

I. Federal Deputies filed a request for a writ of mandamus with a preliminary injunction against the report of the Special Committee of the Chamber of Deputies about the accusation for crimes of responsibility attributed to the President. The plaintiffs aimed at suspending the effects of the report, avoiding its voting before the Chamber, because its content goes beyond the matter of the proceedings and it refers to an article that was not received by the Federal Constitution. On the merits, they requested to strike documents not related to the proceedings from the record and the annulment of the acts made after the filing of such documents. They also demanded that the Special Committee should not manifest about a rule not received by the Federal Constitution.

The plaintiffs argued that the Chairman of the Special Committee wrongly conducted the proceedings, because he cited the so called "budgetary step overs" (accounting trickery in order to disguise the true size of the budget deficit – acts forbidden in the Article 11 of the Law 1079/1950 – Law of Crimes of Responsibility) as one of the grounds to proceed with the proceedings to remove the President, even though these acts were not referred to in the accusation. The plaintiffs argued that this article was not received by the Federal Constitution; hence, it could not ground the accusation. They asserted that a new document was filed in the records (the plea bargain of a senator), which is not related to the matter of the proceedings nor contributes to the fact-finding process. They claimed that the hearings of clarifications about the accusation is not legitimate, as the accused could not defend herself, breaching the principle of due process, adversarial proceedings and the opportunity to be heard. They finally contended that the report is null, because it went beyond the matter of the accusation, framed by the House Speaker, when he received the request for impeachment for crime of responsibility.

II. The Supreme Court, unanimously, denied the request for preliminary injunction, following the grounds of the decision on ADPF 378. The Court asserted that, concerning the impeachment proceedings, the Chamber of Deputies has the competence to assess the procedural conditions of the charging instrument and to authorise or not the establishment of the proceedings against the President for the crime of responsibility. The Federal Senate has the exclusive competence to try and

judge the accusation, when the reported facts will be assessed and the accused will have opportunity to be heard.

The Court stated that the clarifications about the accusation are solely a procedural condition and added that in this step there is no accusation, but only investigations about the seriousness of the facts attributed to the President. Thus, the lack of the notification of the accused does not impair her defence, which will be exercised at the opportune time. In regard to the filing of documents in the records that are not related to the matter of the accusation, the Full Court deemed that the plea bargain of a senator was irrelevant to the conclusion of the report of the Special Committee. The analysis of the eventual pertinence of this document to the accusation must be held by the Federal Senate.

The Full Court declared that the Special Committee must provide a grounded definition of the offence attributed to the President. Even though Article 11 of the Law 1079/1950 was not received by the Federal Constitution, the definition of the offence described in the report was based on other norms of the Law of Crimes of Responsibility, besides norms of the Federal Constitution and of the Fiscal Responsibility Act. Thus, the Court affirmed that eventual reference to a norm that was not received does not decrease the validity of the report of the Special Committee, since the assessment of the accusation and the applicable norms will be a duty of the Federal Senate, as well as the assessment if there are matters unrelated to the proceedings.

III. In separate opinions, dissenting Justices claimed that the report of the Special Committee must be framed by the accusation as it was accepted by the House Speaker, otherwise it would be null.

Supplementary information:

- Article 11 of the Law 1079/1950 (Law of Crimes of Responsibility);
- The Supreme Court decided to cancel the conference of 14 April 2016, in order to allow Justices to analyse the suits about the procedure of the impeachment proceedings. An extraordinary conference was called, in the same day, at 5.30 pm, to try the following suits: ADI 5498, MS 34128, MS 34130 and MS 34131. The vote of the Chamber of Deputies that decided for the acceptance of the accusation of the impeachment, with 367 votes for and 137 votes against, was held on 17 April 2016. Afterwards, the proceedings were sent to the Federal Senate.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2016-3-025

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 14.04.2016 / **e)** Provisional measure in a request for a writ of mandamus 34128 (MS 34128 MC) / **f)** Order to vote on the impeachment request of former President Dilma Rousseff / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 217, 11.10.2016 / **h)**

Keywords of the systematic thesaurus:

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Head of State.**

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Legislative bodies.**

1.3.4.7.4 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Impeachment.**

Keywords of the alphabetical index:

Commission, appointment / Committee, fact-finding / Impeachment proceedings / Impeachment, proceedings, initiative, right / Parliament, voting procedure / Presidential impeachment.

Headnotes:

In case of a tie in the writ of *mandamus* trial, the contested act must be upheld due to the relative presumption of legitimacy of State acts.

The contested act refers to the decision of the Chamber of Deputies' President that determined the voting order of the House plenary session concerning authorisation of the impeachment proceedings against the President of the Republic in the Federal Senate. In this case, the voting was organised by State, starting from the North Region to the South Region, alternately.

Summary:

I. This is a writ of *mandamus* filed by a federal deputy, with a preliminary injunction, against an act of the Chamber of Deputies' President, claiming he had violated constitutional and procedural rules of the impeachment procedure by giving a new interpretation to Article 187.4 of the Internal Rules of the House, which establishes:

“The roll-call shall be made by the deputies alternately from north to south and vice versa (...).”

The vote takes place in a plenary session of the Chamber of Deputies in order to authorise (or refuse to authorise) the impeachment against the President of the Republic and its object is the Special Commission's report on the complaint for crime of responsibility (i.e. an unconstitutional act directly attributable to the president). Initially, the Chamber of Deputies' President decided that the deputies of the South Region should initiate the vote – observing the order of calling – State by State, until it reaches the North Region.

The petitioner argued that the interpretation given by the Chamber of Deputies' President violates the literal meaning of the House internal rule, does not guarantee a fair trial and violates the interpretation customarily adopted by the House. The petitioner also argued that the interpretation also breaches the constitutional principles of legality, legal certainty, due process and isonomy. He argued that the vote should take place in accordance with the Court's previous decision (ADPF 378, 17 December 2015) concerning the impeachment process. The petitioner required the observance of the nominal call of parliamentarians, starting from the deputies from the North to the South Region of the country, alternately. He argued that this is the only possible interpretation of Article 187.4^o of the Internal Rules of the House. As an alternative request, if the Court considers the orientation of the Chamber of Deputies' President to be correct, the petitioner requested that its application should begin with the deputies of the Northern States of the country, because, the last time the norm was applied, votes started with the deputies of the South States. Therefore, this order respects the rule of alternation.

After receiving this writ of *mandamus*, the Chamber of Deputies' President partially revoked the previous decision. In a new position, he stated that the roll call of parliamentarians for voting would be in groups, that is, according to the States they represent. Thus, it would be initiated by a deputy from a State of the North Region and, alternately, would be called a deputy from a State of the South Region,

successively, passing through the other Regions of the country. The President explained that the order of States would follow the tradition of the House, the provision in the voting panel and, by analogy, the geographical order of capitals. The nominal call of the deputies, within the same State, would take place in alphabetical order.

The petitioner reaffirmed that the new interpretation adopted by the Chamber of Deputies' President continued to violate Article 187.4^o of the Internal Rules of the House. He criticised the President's decision to organise the voting by States and insisted that the intercalation of votes should occur among the deputies of each State of the Federation, individually named, one from the North and one from the South, and not from State to State.

II. The Supreme Court, by unanimous decision, ruled that oral argument cannot be upheld in the appraisal of an injunction in a writ of *mandamus* due to the absence of legal provision.

Then, the Court, by a majority, heard the case, overcoming the Justices who understood that the writ entered into internal matters of the Chamber of Deputies, in dealing with the interpretation and application of regimental norms. They also understood the case did not present a subjective right, since the right to vote was fully ensured.

Regarding the analysis of the request for preliminary injunction, there was a tie in the vote. Justices Roberto Barroso (Rapporteur) and Rosa Weber partially granted the injunction, to a lesser extent, and Justices Edson Fachin, Marco Aurélio, Ricardo Lewandowski, partially granted the injunction, to a broader extent. Justices Teori Zavascki, Luiz Fux, Cármen Lúcia, Gilmar Mendes and Celso de Mello denied the request for preliminary injunction.

According to Article 146 of the Supreme Court internal rule, in the case of a writ of *mandamus*, once a tie in the vote has been registered, the writ must be denied. Consequently, the contested act remains preserved due to the incidence of the relative presumption of legitimacy that qualifies the State acts. Thus, the injunction was rejected and the President's interpretation of Article 187.4^o of the Internal Rules of the House for the voting order was upheld.

The Justices who rejected the injunction understood that the case did not raise a constitutional matter, since the interpretation given by the legislative branch to an internal norm did not breach the Federal Constitution and should, therefore, be respected.

The Rapporteur, Justice Roberto Barroso, stressed that the interpretation of the Chamber of Deputies' President regarding the alternation of Federal States in voting is compatible with the rules of procedure. The Justice applied the idea of deference: where the legislative branch has decided reasonably, it is not for the judicial branch to interfere. However, he considered that the voting should take place according to the geographical order of the States, and the calling of the deputies for a plenary voting should observe the alternation between north and south, considering, to that purpose, the latitude of the States' capitals.

Other votes, which granted the injunction to a greater extent, considered inadequate the roll call for parliamentary vote by Federal State. They understood that the deputies should be called individually and alternately, from the North Region to the South Region and vice versa.

Supplementary information:

- ADPF 378 MC: assessment of the rite of the impeachment proceedings of the President;
- Article 187 of the Internal Rules of the Chamber of Deputies: "The roll-call vote shall be made by the electronic voting system, obeying the instructions established by the Bureau for its use. [...] Paragraph 4: When the electronic system is not in working condition, and in the hypotheses dealt with in Articles 217.IV and 218.8, the roll-call vote shall be taken by calling the Members alternately from north to south and vice versa, noting that:
 - I – names shall be uttered aloud by one of the Secretaries;
 - II – Deputies, rising from their seats, will answer yes or no, as they approve or reject the matter in a vote;
 - III – Abstentions shall also be noted by the Secretary."
- The Brazilian Supreme Court decided to cancel the session of 14 April 2016, in order to allow Justices to analyse the suits about the impeachment proceedings. The Court assigned an extraordinary session, in the same day, at 5:30 pm, to try the following cases: ADI 5498, MS 34127, MS 34128, MS 34130 and MS 34131. On 17 April 2016, the Chamber of Deputies decided to accept initiation of the impeachment process by a 367-137 vote. Afterwards, the Chamber forwarded the proceedings to the Federal Senate.

Languages:

Portuguese, English (translation by the Court).

*Identification:* BRA-2016-3-026

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 14.04.2016 / **e)** Preliminary injunction in a request for a writ of mandamus 34130 (MS 34130 MC) / **f)** Object of the impeachment proceedings against ex-President Dilma Rousseff / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 185, 01.09.2016 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Head of State.**

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Legislative bodies.**

1.3.4.7.4 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Impeachment.**

Keywords of the alphabetical index:

Commission, appointment / Committee, fact-finding / Impeachment proceedings / Impeachment, proceedings, initiative, right / Presidential impeachment.

Headnotes:

The Chamber of Deputies has competence to authorise or not the impeachment of the President of the Republic due to crimes of responsibility and the Federal Senate has competence to receive, indict and try the charges presented.

The proceedings within the Chamber of Deputies, including the ones of the Special Commission, are procedural requirements to establish the impeachment by the Federal Senate. At this phase, there is no defendant or party, but simply careful scrutiny of the serious charges presented against the President of the Republic. Therefore, the guarantees of an adversarial system and full defence do not apply.

In order to authorise or not the impeachment in the Federal Senate, the Chamber of Deputies' Full Body shall deliberate strictly about the object of the complaint as the Chamber originally received it.

Summary:

I. Dilma Rousseff, President of Brazil at that time, filed a request for a writ of *mandamus* with a preliminary injunction against acts of the Chamber of Deputies' President and the Chamber Commission President, claiming they had violated constitutional and procedural rules of the impeachment procedure.

She alleged that the parliamentary debates to vote on the Commission's report – on whether the House should admit the impeachment proceedings – went beyond the object of the complaint as the Chamber of Deputies' President had previously framed it. Thus, she requested annulment of the report on grounds of the adversary system and violation of the right to a full defence. She added the complaints had provided information in Congress that charged her with new facts and that she had not been given the opportunity to be heard on those. She highlighted that, in order to fulfil the right of full defence, it is necessary that the charges are clear and objective. In addition, she stated her counsel did not present oral arguments after the reading of the Special Commission's report, which curtails her defence. Finally, she sustained that a new document was filed in the records (the plea bargain of a Senator), which was neither related to the matter of the proceedings nor contributed to the fact-finding.

In the motion for a preliminary injunction, the plaintiff sought to suspend on-going proceedings in the Chamber of Deputies until the Court decides all claims of the full defence violation. On the merits, the plaintiff requested to withdraw from the records documents that do not relate to the proceedings and to annul all acts produced after they were filed. She also required the Special Commission to utter a new report limited to the complaint the Chamber of Deputies' President originally received, to annul the claimants' hearing or, at least, the possibility to present arguments on them.

The General Counsel to the Federal Government raised an objection to present oral arguments and the Full Court, by majority, denied the motion. Afterwards, the Court denied the request for preliminary injunction, based on the lack of *fumus boni iuris* (i.e. likelihood of success on the merit of the case). Pursuant to the decision handed down in ADPF 378, the Court affirmed that the Chamber of Deputies has competence to authorise or not the impeachment establishment on the crimes of responsibility the

President was charged with. The Court asserted that such authorisation stems from the vote in the Chamber of Deputies' Special Commission, which provides a report limited to the original object of complaint. Thus, the Chamber performs mainly a political judgment on the facts described. The Chamber's duties are procedural requirements to follow the complaint.

II. The Court dismissed the claim to annul the report and, accordingly, the motion to restart all acts already produced. The Court decided the failure to notify the plaintiff of the hearing – when claimants provided explanations on the charges filed – as well as the lack of opportunity to be heard about them do not violate the guarantees of an adversarial system and full defence. As aforementioned, during this phase, there is no defendant or party, but simply careful scrutiny of the seriousness of the charges filed. The Court also asserted the lack of the Counsels' oral arguments after the reading session did not violate the full defence, because this procedural stage falls within the exclusive competence of the Commission members. Therefore, interventions before, during or after the reading are not required.

The Court concluded that the Senator's plea bargain was irrelevant to the conclusion mentioned in the Special Commission's report. The Federal Senate has the competence to assess the relevance of such document, since it is responsible to receive, indict and try the impeachment. At that time, the Senate shall analyse the facts described and the President of the Republic may fully exercise her defence.

The Court held the deliberation of the Chamber of Deputies' Full Body concerning initiation of the impeachment process must be restricted to the terms according to which the Chamber's President originally received the complaint.

Accordingly, the charges were:

- i. violation of the Budget Guidelines Law (*Lei de Diretrizes Orçamentárias*) for having issued decrees to open lines of additional credit in 2015 without congressional approval; and
- ii. the repeated practice of using funds from state-owned banks to cover budget gaps (*pedaladas fiscais*). Thus, the Full Body shall not consider the report's content.

III. In separate opinions, dissenting Justices claimed the Special Commission's report is null due to curtailment of defence. The report went beyond the charges framed when the Chamber of Deputies' President originally accepted the complaint. Moreover, the plaintiff had no opportunity to defend herself

from the claimants' new allegations that were raised at the hearing to elucidate fact-finding. The Justices suggested the withdrawal of all matters that went beyond the original complaint from the report, so that they would not mislead the congressmen.

Supplementary information:

- ADFP 378 MC: assessment of the procedure of the impeachment proceedings of the President.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-027

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 11.05.2016 / **e)** Extraordinary Appeal 641320 (RE 641320) / **f)** Criminal serving sentence in less onerous regime due to the lack of vacancies in appropriate penal institution / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 159, 01.08.2016 / **h)**.

Keywords of the systematic thesaurus:

4.6.10.1 Institutions – Executive bodies – Liability – **Legal liability.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

Keywords of the alphabetical index:

Imprisonment, length / Prison administration / Prison, alternative measure / Prison, sentence, execution / Prison, treatment, unfavourable, legality / Prisoner, rehabilitation / Sentence, serving, punishment.

Headnotes:

The lack of appropriate penal institutions to comply with custodial sentences in a semi-open or open regime does not authorise the detention of the condemned in a more onerous prison regime, under penalty of violation of the principles of individualisation

of punishment, legality and human dignity. In the case of shortage of vacancies, house arrest may be applied or, if feasible, alternative measures, such as: early departure of the defendant; electronically monitored freedom; and replacement of deprivation of liberty for study or penalties restricting rights.

Summary:

I. This case refers to an extraordinary appeal against a decision that recognised the lack of an appropriate institution to comply with a custodial sentence in a semi-open regime and which, consequently, ordered the execution of the sentence under house arrest until a vacancy arose in an appropriate prison unit.

Since it is a public safety interest, the applicant claimed that the defendant, who was convicted of theft in conspiracy, should initiate the execution of the sentence in the most onerous regime (closed system), while waiting for a vacancy to arise. The author claimed infringement of Articles 1.III, 5.II, 5.XLVI and 5.LXV of the Federal Constitution (concerning the dignity of the human person, legality, individualisation of punishment, and illegal arrest, respectively). The applicant argued that the vacancies for the semi-open regime do not allow the Judiciary, by itself, to grant the benefit of house arrest outside the cases established by law. He argued that the judgment under appeal, by not taking into account the personal circumstances of the convicted and the nature and circumstances of the crime, would have disregarded the requirement of proportionality and the relationship that should exist between the agent's conduct and the penalty imposed.

A public hearing was held, in which experts from various fields were heard, including representatives of the Parliament, civil society, and the Judiciary, among others.

II. The Supreme Court, by a majority, partially granted the extraordinary appeal. The Court settled that the absence of a vacancy in an appropriate institution for the defendant to serve his or her sentence in a semi-open or open regime does not allow detention of the defendant in a closed prison regime, under penalty of violation of the principles of human dignity, individualisation of punishment and legality (Article 1.III, 5.XLVI and 5.XXXIX of the Constitution). The Full Court asserted that it is unacceptable that the flaws in the prison system may frustrate the basic right of the convicted to receive fair and proper treatment. The Rapporteur judge pointed out that the placement of the accused in a more onerous regime would contribute to prison overcrowding and would constitute over-execution, which violates the right of the defendant to start

serving the sentence in a scheme compatible with the conviction and the right to advance to a more favourable regime after serving, with good behaviour, part of the sentence (Law 7.210/1984).

The Court stated that it is the government's responsibility to find definite solutions to improve the prison system. Thus, the Rapporteur urged Parliament to reform the legislation of criminal enforcement in order to conform the penal establishments to the social reality. The Full Court suggested the construction of more units designed for open and semi-open regimes; the promotion of work and study for the prisoners, through the allocation of public funds and involvement of entities that receive public funds; and compliance with the maximum number of prisoners to enable the management of the prison mass and the allocation of resources. If these items are not observed, public administrators will be held accountable. These measures favour the re-socialisation of prisoners, which is the main function of criminal enforcement.

As theme 423 of general repercussion (i.e. a binding precedent with *erga omnes* effect), the Court established the following theses:

- a. the lack of an appropriate penal institution does not authorise the detention of the condemned in a more onerous prison regime;
- b. criminal enforcement judges can evaluate the suitability of the premises for the semi-open and open regimes, such as agricultural and industrial colonies (semi-open regime), housed house (open system), as well as sites that do not fall as labour colony;
- c. in case of a shortage of vacancies, the judiciary should apply alternative measures, such as:
 - i. early output of the accused that is closer to the progress scheme;
 - ii. electronically monitored freedom offered to defendants in semi-open regimes;
 - iii. substitution of deprivation of liberty for penalties restricting rights (for example: provision of services to the community) or study while in the open regime.

It was emphasised that these measures do not exhaust the alternatives that may be adopted by judges responsible for criminal execution.

Although Law 7.210/1984 provides for house arrest only in humanitarian cases (convicted over 70 and suffering serious illness, pregnant, or convicted women who are responsible for a child who is physically or mentally handicapped), the Court held that, until the alternative measures proposed are structured, house arrest may be granted in cases where lack of adequate vacancy exists in the prison system.

Given the complexity of the constitutional issue in the trial, the Rapporteur proposed, in addition, measures that can be taken to alleviate the shortage of vacancy in the prison system with the intervention of the National Council of Justice (hereinafter, "CNJ"). Thus, the Supreme Court ruled that the CNJ must present:

- a. a structuring project of the National Prisoners Register, containing sufficient information to examine the possibility of progression or extinction of the penalty, accelerating the release of vacancies;
- b. report on the implementation of monitoring electronic stations and alternative penalties;
- c. measures to increase labour and study opportunities for prisoners;
- d. means for obtaining resources from the National Penitentiary Fund (FUNPEN); and
- e. increase in the number of vacancies in the semi-open and open regimes.

In another vote, a Justice considered that some of the determinations suggested by the Rapporteur, such as the implementation of monitoring stations and the increase in vacancies in the semi-open and open regimes, fall under the responsibility of the executive branch, not the judiciary. He added that the CNJ has already adopted specialised politics and focused on improving the National Penitentiary System, so some of the requests presented herein are already underway. Finally, the Justice said that it is not appropriate for the Supreme Court to interfere in the administration of the CNJ.

Notwithstanding the previous position, in another vote, a Justice stated that the determinations given by the Rapporteur represent legitimate intervention of the Judiciary since the proposals have administrative nature and they are related to the enforcement of sentences.

III. In a dissenting opinion, a Justice granted the appeal. He considered that detaining the defendant in a more onerous regime due to the absence of vacancy for serving a sentence in semi-open regime is inappropriate. The Justice said that house arrest should be applied and that any other alternative hypotheses had been mentioned for the case.

Supplementary information:

- This case refers to the number 423 of general repercussion: criminal serving sentence in less onerous regime due to the lack of vacancies in appropriate penal institution;
- Articles 1.III, 5.XLVI and 5.XXXIX of the Federal Constitution;
- Law 7.210/1984.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-3-028

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 23.06.2016 / **e)** Request for a writ of *habeas corpus* 118533 (HC 118533) / **f)** "Privileged" drug trafficking and heinous crime / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 199, 19.09.2016 / **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:

Crime, heinous, punishment, execution, special condition / Drug, trafficking / Drug, trafficking, penalty, execution / Drug offence, difference in penalisation / Sentence, consistent with the offender's personal situation / Sentence, reduction, application, condition.

Headnotes:

The application of the sentence reduction factor provided for in the law regulating drug traffic crimes – suitable to first offenders who have good records and who do not participate in criminal organisations – precludes the application of the legal regime concerning heinous offenses.

Summary:

I. This case refers to a request for a writ of *habeas corpus* which questions whether the legal regime of heinous offenses should be applied to drug traffic crimes, in the event the sentence reduction factor provided for in Article 33.4 of the Drugs Law (Law 11343/2006) is applied. This sentence reduction factor is suitable to first offenders who have good records and who do not participate in a criminal organisation.

In this case, patients were sentenced to seven years and one month in prison, in closed conditions, and seven hundred and ten days-fine, for having transported 772 kg of marijuana. The initial trial court applied Article 33.4 of the Drugs Law and dismissed the application of the Heinous Crimes Law (Law 8072/1990), which provides a greater period of time to downgrade incarceration conditions. The understanding was upheld on appeal and reversed in the Superior Court of Justice on the grounds that the application of the mentioned cause of sentence reduction does not change the offense committed, as there is not a new type of crime established other than the one described in the article.

II. The Supreme Court, by a majority, granted the order to remove application of the legal regime of heinous offences to so-called “privileged drug traffic”.

Initially, the Rapporteur, Justice Cármen Lúcia, pointed out that, given the large amount of drugs seized, this case would not be the most appropriate to set the legal thesis (i.e. to establish a binding precedent with *erga omnes* effect). However, within the writ of *habeas corpus*, the Court could not change the legal framework established by lower courts or harm the legal position of the defendants. The Justice then considered that the analysis of the legal provisions relevant to the case shows that the only act related to drug traffic that should be treated as heinous is the one defined in Article 33, caput and Paragraph 1, of the Drugs Law. These provisions are expressly enshrined in Article 44 of the Drugs Law as unbailable crimes, which are not subject to probation, grace, pardon and amnesty, and Article 33.4 is not mentioned in the provision.

Justice Barroso observed that the jurisprudence of the Supreme Court has held back from an interpretation of the legal framework which characterises all acts related to drug-related conduct as heinous. In this sense, the Justice mentioned Supreme Court decisions that considered unconstitutional the requirement of mandatory closed conditions to start sentence executions, the prohibition on applying a punishment restraining rights and the ban of parole in drug trafficking. Furthermore, if the sentence reduction factor of “privileged traffic” is applied to the fullest extent, it establishes a minimum penalty of simply one year and eight months. The Justice considered that it would be disproportionate to treat an offence subject to such a low level of sanction with the consequences applied to heinous crimes.

Justice Gilmar Mendes emphasised in his opinion that Article 5.XLIII of the Federal Constitution establishes an obligation on lawmakers to criminalise certain acts in providing that: “the practice of torture,

the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as unbailable and not subject to grace or amnesty, and their principals, agents, and those who omit themselves while being able to avoid such crimes shall be held liable”. However, as provided for in the article, the drafters of the constitution let the criminal regime and the criminal proceeding regime of such acts to be set by legislators. Furthermore, the determined provision did not establish identical liability for all acts described therein. Thus, the conclusion is that the legislature has a margin of discretion when predicting behaviour involving illicit drug transactions, but withdrawing the equivalence to heinous offences. For example, Article 33.3 of the Drugs Law provides as a crime, “offering drugs, occasionally and without purpose of profit, to a person of their relationship, to consume it together.” This is a conduct of minor offensive potential which, as well as the one from Article 33.4, is set aside from the equivalence to heinous crimes provided for in Article 44 of the Drugs Act.

Finally, Justice Fachin highlighted that there are multiple behaviours related to illicit drugs, and none of the conducts described as crimes in the Drugs Law has *nomen iuris* of “illicit trafficking in narcotics and similar drugs”, as set by the Constitution. Therefore, the actual scope of the constitutional provision must rely on the principle of proportionality and on comparative analysis of legal system rules. Applying the cause of sentence reduction implies disapproving the act in a low level. Furthermore, to equal an act as heinous is an exception of the legal system and it would require the privileged traffic to be expressly described as heinous to be considered as such.

III. In dissenting opinions, some Justices stated that the cause of sentence reduction is not an autonomous criminal offense called “privileged drug traffic.” The criminal definition refers only to drug traffic, and the application of the sentence reduction factor is limited, by criteria of reasonableness and proportionality, to downgrade the penalty of the small and occasional dealer, in contrast with the large and contumacious one, to which the Drugs Law had granted stricter punishment.

Supplementary information:

- Article 5.XLIII of the Federal Constitution: “the practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as unbailable and not subject to grace or amnesty, and their principals, agents, and those who omit themselves while being able to avoid such crimes shall be held liable.”

- Article 33 of the Drugs Law (Law 11343/2006):
“To import, export, deliver, prepare, produce, manufacture, purchase, sell, expose for sale, offer, have in storage, transport, bring, keep, prescribe, administer, deliver the consumer or provide drugs, even for free, without authorisation or in violation of legal or regulatory Penalty – imprisonment of five (5) to fifteen (15) years and payment of 500 (five hundred) to 1,500 (one thousand five hundred) daily fine.”
- Article 33.4 of the Drugs Law (Law 11343/2006):
“For the crimes defined in the heading and in paragraph 1 of this Article, the penalties may be reduced by one sixth to two-thirds, prohibited converting the penalty into restraint of rights, provided that the agent is a first offender who has a good records, and is not engaged in criminal activities or participates in a criminal organisation.”
- Law of Heinous Crimes (Law 8072/1990).

Languages:

Portuguese, English (translation by the Court).



Canada Supreme Court

Important decisions

Identification: CAN-2016-3-007

a) Canada / **b)** Supreme Court / **c)** / **d)** 14.10.2016 / **e)** 36165 / **f)** Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General) / **g)** *Canada Supreme Court Reports* (Official Digest), 2016 SCC 39, [2016] 2 S.C.R. 116 / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; 8 *Administrative Law Reports* (6th) 278; 402 *Dominion Law Reports* (4th) 201; 488 *National Reporter* 1; [2016] S.C.J. no. 39 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal 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:

Constitutional right, Charter of rights and freedoms, violation / Justices of peace, judicial reform, remuneration / Justices of peace, judicial reform, pensions / Remuneration, review, reasonable time.

Headnotes:

Sections 27, 30 and 32 of the Act to amend the Courts of Justice Act and other legislative provisions as regards the status of justices of the peace (hereinafter, “amending Act”) did not provide for retroactive committee review of the remuneration of those justices within a reasonable time. Therefore, these sections infringe the institutional financial security guarantee of judicial independence and are contrary to Section 11.d of the Canadian Charter of Rights and Freedoms and the preamble to the Constitution Act, 1867. This infringement of judicial independence is not justified under Section 1 of the Charter. As such, these sections are unconstitutional.

Summary:

I. In 2004, the Quebec government reformed its justices of the peace regime. Six sitting justices of the peace were transitioned to the new regime, with the same remuneration as before; however, justices newly appointed to that office received a lower remuneration. None of the legislative provisions affecting remuneration were put to a reviewing committee before 2007, which then made recommendations only on a forward-looking basis. The government followed up on these recommendations by making executive Order 932-2008. In 2008, the *Conférence des juges de paix magistrats du Québec* and its individual members (presiding justices of the peace (hereinafter, "PJPs")) challenged Sections 27, 30 and 32 of the amending Act and executive Order 932-2008, as infringing the financial security guarantee of judicial independence. In addition, the PJPs argued that Section 178 of the Courts of Justice Act (hereinafter, "CJA"), which mandates their participation in the public service Pension Plan of Management Personnel, also infringes the financial security guarantee. Both the Superior Court and the Court of Appeal, in turn, found no violation of judicial independence because the provisions were part of a reform resulting in the creation of a new judicial office.

II. In a unanimous decision, the Supreme Court of Canada allowed the appeal in part. The Court held that a judicial reform may raise questions of judicial independence both for judges occupying offices that are reformed or abolished, and for judges appointed to newly created positions. Any measure that affects remuneration will automatically trigger the institutional dimension of financial security. The initial remuneration for the new office must meet the constitutional minimum required to ensure judicial integrity. Without committee review of the initial remuneration, there is no guarantee that the constitutional minimum is met. A review is also required where the new judges were transferred from an old judicial office. Because sitting judges are in an existing relationship with the government, their relationship is more susceptible to the risk of manipulation. This warrants additional protection for sitting judges.

To protect judicial independence when a new judicial office is created, all remuneration must be reviewed within a reasonable time. A reasonable time refers to the time required to implement a judicial reform, to establish the appropriate review committee and to ensure proper participation by the new judges. It will generally be measured in months, and not in years.

In the context of a judicial reform, the same reasons that justify deferring committee review of the remuneration for newly appointed judges apply equally to sitting judges who are transferred to a new office. Requiring prior review for sitting judges would create delays for judicial reforms that are in the public interest, potentially prolong an unconstitutional judicial regime, undermine judicial independence and negatively impact public perception.

In determining whether a judicial office has merely been changed, or a new judicial office has been created, the judicial function and the conditions of employment are relevant considerations. In this case, the 2004 reform created a new judicial office. The PJPs have a different jurisdiction than under the previous regime and now benefit from greater judicial independence guarantees.

Because the reform created a new judicial office, the remuneration of all the judges appointed to it needed to be reviewed retroactively, within a reasonable time after their appointment. Section 32 of the amending Act prohibits any review of the remuneration before 2007, although the judicial office was established in 2004. This contravenes the constitutional requirement that the initial remuneration of judges occupying a new office be reviewed by a committee within a reasonable time after their appointment. Three years is not a reasonable time. As such, Section 32 of the amending Act infringes the financial security guarantee of judicial independence. In addition, as Sections 27 and 30 provide for a freeze in the remuneration of the sitting judges and the establishment of the remuneration of the newly appointed judges, respectively, without referencing the need to retroactively submit the remuneration to a committee, these sections also infringe judicial independence. Finally, Section 27 infringes judicial independence because it freezes the remuneration of sitting judges before a committee has reviewed this remuneration, contrary to the financial security guarantee. As for the salary gap between the sitting judges and those newly appointed, the gap, by itself, did not infringe the financial security guarantee.

As Sections 27, 30 and 32 of the amending Act did not provide for retroactive committee review within a reasonable time, these sections infringe the institutional financial security guarantee of judicial independence, and are thus contrary to Section 11.d of the Charter and the preamble to the Constitution Act, 1867. This infringement of judicial independence is not justified under Section 1 of the Charter, because there is no evidence of a dire and exceptional financial emergency. Therefore, Sections 27, 30 and 32 are unconstitutional. Because the infringement arises from the lack of committee

review between 2004 and 2007, a review for this period is required for all PJPs as a remedy.

Since the government complied with its constitutional obligation to periodically submit PJPs remuneration to a committee from 2007 onwards, public confidence in judicial independence was in no way undermined for that later period. As such, there was no violation of judicial independence after 2007 and no defect in the executive Order 932-2008.

Finally, Section 178 of the CJA is valid. While the Pension Plan of Management Personnel may not be as beneficial as that of the judges of the Court of Québec, as part of overall remuneration, it meets the minimum constitutional threshold required for the office of a judge such that the PJPs are not perceived as susceptible to political pressure through economic manipulation.

Languages:

English, French (translation by the Court).



Costa Rica

Supreme Court of Justice

Important decisions

Identification: CRC-2016-3-003

a) Costa Rica / **b)** Supreme Court of Justice / **c)** Constitutional Chamber / **d)** 20.01.2016 / **e)** 00788/16 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**

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.**

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

Keywords of the alphabetical index:

Consular assistance, right / Deportation / Immigration / Sovereignty.

Headnotes:

Immigration and alien affairs are policies shaped by the States as they are sovereign. Authorising the entry and exit of foreign nationals entails a great deal of discretionary power, only limited by the fundamental rights enshrined in the Constitution. Detention or arrest of illegal immigrants is part of that policy.

The right to have legal counsel for the immigration and deportation procedures may be expressly waived. The right to have consular assistance recognised by international law stands as a fundamental right and must be followed under the doctrine of the Inter-American Court of Human Rights. Cuban nationals can be deported to Cuba when expressly consented in writing, otherwise they shall have the right to be deported to a third country or released from detention centres.

Summary:

I. Three Cuban immigrants travelling to the United States of America were detained by immigration officers after failing to demonstrate legal entry and legal permanence in Costa Rica. After their administrative arrest a petitioner filed a writ of *habeas corpus* to obtain protection of their constitutional rights and have them released. The Law of the Constitutional Jurisdiction provides that any person can file a writ of *habeas corpus* in favour of any other person's right to freedom of movement or personal integrity. In this case, the three Cubans constituted the aggrieved/injured party of the case.

II. The General Law on Migration and Alien Affairs authorises the administrative arrest of illegal immigrants to help identify the detainees and to put the necessary cautionary measures in place in accordance to their circumstances. The three Cubans were admitted in Panama, crossed the border to Costa Rica and then travelled north to the Costa Rican-Nicaraguan border. While still in Costa Rica they asked for the same provisional humanitarian visa as other Cuban nationals had been accorded while staying for further travel arrangements. Instead they were arrested.

The petitioner considered their arrest to be illegal, arguing they were object of unequal treatment, denied the right to counsel and the right to have consular assistance.

The Constitutional Chamber noted that legislation authorises the arrest of illegal immigrants, while also providing the protections that the Constitution offers to all citizens, as well as the protections offered by human rights treaties. The established jurisprudence of the Constitutional Chamber holds that the arrest of undocumented migrants is a valid measure for those who cannot demonstrate a regular migratory status (Decisions nos. 2000-11076, 2000-2459, 1999-07366 and 2009-03648). But the measure must always be motivated, moreover when deportation is intended. The immigration officers argued that the three Cuban migrants had no ties to Costa Rica, that they had evaded all migratory controls and stayed unlawfully in the country, which constituted valid reasons to accord their arrest. The immigration officers therefore argued that they had found sufficient facts and legal reasons to order the said administrative detentions.

The Constitutional Chamber did not find a violation of the equal protection clause. Cuban migrants were extended provisional humanitarian visas as they travelled from the Costa Rican-Panama border, though the three Cubans did not enter the country through border controls. Their statements demonstrated they

did not seek the exceptional transitory visas at the Southern border, but had instead evaded all migratory controls until their detention.

On the right to have legal counsel the Constitutional Chamber followed the Court's precedent no. 2012-10650 that holds the possibility to waive the said right. In this sense, the authorities stated that the migrants were informed of their right to have legal assistance, but all three waived their rights. On the right to consular assistance, the Constitutional Chamber noted that such matter should follow the Advisory Opinion OC-16/99 of 1 October 1999 of the Inter-American Court of Human Rights. Article 36.1.b and 36.1.c of the Vienna Convention on Consular Relations provides sufficient grounds to deem its contents as a fundamental right, not only to cover those individuals subjected to criminal proceedings, but also to those under administrative detentions, all in accordance to the *pro homine* and *pro libertate* principles of interpretation. According to the facts of the case, the Cubans stated their interest to have consular assistance, which they did not receive, moreover no document was produced to reveal that they were ever received it. This accounts to a failure of the immigration officials to meet with these international standards.

Finally, the Constitutional Chamber stated that the three Cuban migrants could only be deported once their written consent was expressly stated in writing. If they opposed such measure, they were entitled to be deported to a third country within a month, or to be released from detention. In the case, two accepted to be returned to Cuba, but the third refused. In such case, he was entitled to the protections set out in the Constitutional Chamber's previous Judgment no. 2016-00697. Hence, deportation to Cuba should be prevented based on the Inter-American Commission on Human Rights 2014 annual report. That report had revealed grave restrictions to political rights, freedom of expression, restrictions on the freedom of movement and the lack of an independent judiciary. Moreover, Article 72 of the Cuban Criminal Code is an unusual standard of law by pre-criminalising conducts of persons according to their tendency to incur in crimes against the socialist moral standards. Other reports from International Amnesty, Human Rights Watch, and the lack of the basic United Nations Human Rights treaties, help reveal that if deported to Cuba such basic fundamental rights will be in peril.

III. Justice Rueda Leal dissented from the majority vote in the case on the argument of consular assistance. He followed the minority vote of Judge Oliver Jackson of the Inter-American Court of Human Rights and distinguished whether Article 36.1.b of the

Vienna Convention on Consular Relations (which provides that, upon detention, foreign nationals must be informed that their consuls may assist them) should be treated as a fundamental right. In context, the treaty should apply to criminal cases, whereas the instant case arises from an administrative procedure, in which the Cubans concerned have waived their right to legal counsel. Therefore, the right to have consular assistance is not in all cases also a substantive restriction to the right of defence; on the contrary it may be counterproductive. It is a right that cannot always be compared to a fundamental right, especially in an administrative procedure where the right to defence has not been infringed, nor regarded as unfair.

Thousands of Cuban citizens were encouraged to migrate to the United States of America under the so-called “wet-foot/dry foot” policy, that gave legal residence status by crossing US borders on foot, not by sea. In the years 2015-2016 this created a humanitarian crisis in Costa Rica as thousands were prevented from travelling north by neighbouring Central American countries to Mexico.

Such policy was terminated on 12 January 2017 by the President of the United States.

Cross-references:

Constitutional Chamber:

- nos. 2000-11076, 2000-2459, 1999-07366 and 2009-03648 declare the legality to order the administrative detention if immigrants fail to demonstrate legal migratory status;
- no. 2012-10650 establishes that the right to legal counsel can be waived;
- no. 2016-00697 limits deportation to Cuba where fundamental rights will be seriously put in peril.

Inter-American Court of Human Rights:

- Advisory Opinion OC-16/99 on consular assistance and due process of law.

Languages:

Spanish.



Croatia Constitutional Court

Important decisions

Identification: CRO-2016-3-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 27.09.2016 / **e)** U-I-2753/2012 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 94/16 / **h)** CODICES (Croatian).

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:

Constitutionality, review / Law, administrative dispute, costs / Legitimate aim, law / Proceedings, costs, reimbursement.

Headnotes:

An administrative dispute is a mechanism of review over the procedures of the State and bodies of public administration, which can, in a large number of cases, significantly restrict or abolish the constitutional rights of citizens (for example, expropriation procedures, financial and building inspections, tax inspection, etc.).

The legal regulation of the reimbursement of the costs of proceedings is a component of the right of access to a court, which is immanent to the right to a fair trial. An administrative dispute cannot be fair unless it is ensured that the unsuccessful party pays to the opposing party the costs of the proceedings that have actually been incurred because of the unlawful act or the procedure of the State or of bodies established by public law.

Summary:

I. The Constitutional Court, acting on a proposal of the Association of Corporate Lawyers (*Udruga pravnika u gospodarstvu*) and several attorneys, instituted proceedings for the review of the conformity with the Constitution of Article 79 of the Administrative Disputes Act (hereinafter, “ADA”), and declared that Article invalid as from 31 March 2017.

Administrative Disputes Act (hereinafter, "ADA"), and declared that Article invalid as from 31 March 2017.

Article 79 ADA provides that, in administrative disputes (that is to say, in administrative proceedings), each party must settle their own costs.

This Article, before it was amended provided, *inter alia*, (i) that the unsuccessful party of a dispute had to bear the costs of the dispute in full, and (ii) where parties were successful in part, the court could order each party to bear its own costs or apportion the costs on the basis of their success.

The applicants stated that the impugned Article, as amended, is not in conformity with Article 29.1 of the Constitution. They considered, among other things, that the amended provisions on the costs of administrative disputes make it significantly more difficult or even impossible to seek legal protection against administrative acts, and that only persons with the financial means to do so will be able to take part in an administrative dispute.

II. The Constitutional Court emphasised that the Administrative Disputes Act is one of the most important legal acts in a democratic society based on the rule of law and the protection of human rights. The State, through its laws on administrative adjudication, ensures an appropriate legal framework for the implementation of the constitutional guarantee set out in Article 19.2 of the Constitution, which guarantees judicial review of the lawfulness of individual acts of administrative bodies and bodies vested with public authority. The objective of the ADA, as stated in its Article 2.1, is "to ensure court protection of the rights and legal interests of natural and legal persons and other parties, breached by a decision or by an action of the body of administrative law".

The regulation of the whole administrative dispute is subject to this objective – this includes everything from the legal standing to institute proceedings, the status of the applicant and interested persons, the course of proceedings (especially of the oral hearing), the establishment of the facts and the possibility for the administrative courts themselves to decide on the rights, obligations or interests of citizens (a dispute of full jurisdiction), to the execution of court decisions. Only a few provisions of the ADA (for example, the review of the legality of general acts) have as a primary aim the protection of objective, rather than subjective, law.

The ADA (as well as special laws adapting the general regulation of administrative disputes to specific administrative areas) is thus an expression of

government policy with respect to the implementation of the constitutional guarantee set out in Article 19.2 of the Constitution. The legislator, within the framework of the Constitution, autonomously and freely selects and regulates the normative framework or the legislative model of administrative adjudication in order to protect individual rights against the excessive encroachment of bodies of public administration.

Administrative adjudication must be regulated in such a way so as to ensure the achievement of the legitimate aims of administrative court proceedings, legal security of the objective legal order, clarity, accessibility, predictability and the legal certainty of norms, as well as equality of arms in administrative court proceedings, in line with the requirements arising from the rule of law. It is the constitutional task of the Constitutional Court to ensure compliance with those requirements.

As regards the ADA's regulation of the costs of administrative disputes, the Constitutional Court reiterated that the legal regulation of the reimbursement of the costs of proceedings is a component of the right of access to a court, which is immanent to the right to a fair trial, set out in Article 29.1 of the Constitution and Article 6.1 ECHR.

The costs of an administrative dispute with an oral hearing include the costs of witnesses, experts, interpreters and other persons necessary for establishing the facts during the presentation of evidence, as well as the costs of an attorney or a state attorney representing the parties.

An administrative dispute is generally instituted by an individual against a measure or action taken by the State. In such proceedings, he or she must be allowed to use all means of providing evidence, which, in itself, requires special expenses.

Furthermore, administrative proceedings (especially those involving two or more parties with opposing, most often property, interests), as well as administrative proceedings for the review of the lawfulness of such proceedings, very often entail specific expenses for legal assistance, including legal assistance provided by attorneys.

Consequently, as regards their potential effect on the exercise and protection of rights and legal interests of citizens, administrative disputes may be compared to civil or criminal proceedings, and the costs may be a heavy burden on the applicant when exercising the right to the judicial protection of his or her subjective rights against unlawful acts of the administration.

Therefore, the Constitutional Court considered such proceedings to be unfair unless it is ensured that the unsuccessful party pays to the opposing party the procedural costs actually incurred because of the unlawful act or the procedure of the State or of bodies of public administration. Such a restriction of the right of access to a court would be acceptable under constitutional law only in cases where there are objective and rationally justified reasons for such a restriction.

The Constitutional Court examined the reasons given at time of the final amendments to the ADA, and found that they contained no legitimate aim that could justify the impugned amendment of the legal regulation of the costs of proceedings. This is all the more so since no objective and constitutionally justified reason was given for this amendment.

As a result, the amendment to Article 79 of the ADA was aimed at the protection of the financial interests of the State (since it is the State that must reimburse the costs of proceedings when it loses a dispute), and this can hardly, taking into account the purpose and nature of the administrative dispute, and especially the fact that, in Croatia, the administrative dispute is a dispute of full jurisdiction, be deemed to be a legitimate aim in the public interest.

Cross-references:

Constitutional Court:

- no. U-I-659/1994 *et al.*, 15.03.2010, *Bulletin* 2000/1 [CRO-2000-1-010];
- notification no. U-X-80/2005, 01.06.2006.

Languages:

Croatian, English.



Identification: CRO-2016-3-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 27.09.2016 / **e)** U-II-2944/2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 93/16 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.13 General Principles – **Legality.**

Keywords of the alphabetical index:

Ordinance, ministerial, contrary to a statute / Minister, exceeding of power / Minister, law-making power / Law, scope, ordinance.

Headnotes:

Where an Act provides that a minister may determine by Ordinance (implementing act) the criteria, procedure, and the manner of defining the amount, and manner of payment, of compensation, the minister exceeds the powers granted to him or her by the Act if he or she determines by Ordinance the circle of persons entitled to such compensation. That part of the Ordinance is not in conformity with Article 3 of the Constitution (rule of law) and Article 5 of the Constitution (principle of constitutionality and legality; the duty of everyone to abide by the Constitution and the law and respect the legal order).

Summary:

I. The Constitutional Court, at the request of a judge of the Municipal Court in Rijeka, reviewed the conformity with the law of Article 4.1 of the Ordinance on the criteria, procedure and manner of determining compensation to real property owners and local self-government units (hereinafter, “Ordinance”) and declared the part that reads: “or restoration or reconstruction” of the said provision to be invalid.

The judge submitting the request, acting in the capacity of sole judge, rendered a first-instance judgment on 9 May 2012 in a civil case in the Rijeka Municipal Court relating to a contract (between the plaintiff and Viškovo Municipality) on compensation for a decrease in the value of real property. The first-instance court rejected the plaintiff’s claim that the judgment was to replace the contract. As a result, pursuant to Article 37.2 of the Constitutional Act on the Constitutional Court, the Waste Act was directly applied instead of the impugned part of Article 4.1 of the Ordinance. At the time the request was submitted, the first-instance judgment was not final; it became final with the judgment of 24 June 2014 rendered by the County Court of Rijeka, rejecting the plaintiff’s appeal and upholding the first-instance judgment.

Article 4 of the Ordinance prescribes that an owner of real property is entitled to compensation for a

decrease in the market value of real property if he or she acquired title to the real property prior to the construction, restoration or reconstruction of a waste disposal facility, provided that the said real property was constructed in accordance with the law and is located at a distance no greater than 500 metres from the waste disposal facility (Article 4.1). Real property means a residential building or a residential-turned-office building (Article 4.2).

The judge submitting the request considered that the Minister responsible for environmental protection, physical planning and construction, by adopting Article 4.1 of the Ordinance, overstepped the powers granted to her pursuant to Article 24.5 of the Waste Act, because she significantly enlarged the circle of persons entitled to financial compensation for a decrease in the value of real property. Within the meaning of Article 24.1 of the Waste Act, such persons are only the owners of legally constructed residential or residential-turned-office buildings who acquired their title before the beginning of the construction of the waste disposal facility. However, within the meaning of Article 4.1 of the Ordinance, such persons also include all the owners of legally constructed residential or residential-turned-office buildings who acquired the title to real property after the beginning of the construction of the waste disposal facility, but before the beginning of the restoration or reconstruction of the waste disposal facility. The judge submitting the request considered that, in the case at instance, this constituted a violation of Article 5.1 of the Constitution (principle of constitutionality and legality) because the Waste Act did not empower the minister to determine who would be entitled to compensation, but only to prescribe the criteria, procedure and manner of defining the amount of and the manner in which the compensation should be paid in and paid out.

II. The Constitutional Court established that, in this particular case, part of Article 3 (rule of law) and Article 5 of the Constitution (principle of constitutionality and legality; the duty of everyone to abide by the Constitution and the law and respect the legal order) were relevant for the Constitutional Court's review.

Article 24.1 of the Waste Act prescribed that the owner of a legally constructed residential and residential-turned-office building, which is located at a distance of up to 500 metres from the waste disposal facility was entitled to compensation for a decrease in the value of real property, provided that he or she had acquired title to the real property before the beginning of the construction of the waste disposal facility. Article 24.3 prescribed that the City of Zagreb or another city or municipality in whose area the waste

disposal facility was located, according to the conditions prescribed by the Act, had a right to financial compensation.

The minister adopted the Ordinance on the basis of Article 24.5 of the Waste Act, which prescribed that the minister was to determine the criteria, procedure and manner of defining the amount of and the manner in which the compensation should be paid in and paid out, as referred to in Article 24.1 and 24.3.

The Constitutional Court found that neither Article 24.5 of the Waste Act, which was in force at the time of the adoption of the impugned Ordinance, nor Article 41.5 of the Sustainable Waste Management Act, which was adopted (and entered into force) after the adoption of the impugned Ordinance, empowered the competent minister to determine the circle of persons entitled to financial compensation for a decrease in the value of real property. Both Acts empowered her to determine only the criteria and manner of defining the amount of compensation and the manner in which the compensation is to be paid in and paid out. Pursuant to Article 24.5 of the Waste Act, the competent minister was also empowered to prescribe the procedure for defining the amount of compensation.

Therefore, the Constitutional Court found that the part of Article 4.1 of the Ordinance which reads "or restoration or reconstruction" was not in conformity with either Article 24.5 of the Waste Act or Article 41.5 of the Sustainable Waste Management Act. Consequently, the above-mentioned part of Article 4.1 of the Ordinance is also not in conformity with Article 3 of the Constitution and Article 5 of the Constitution.

Moreover, the Sustainable Waste Management Act, which was enacted after the adoption and the entry into force of the Ordinance, did not determine the circle of persons entitled to compensation the same way as the impugned part of Article 4.1 of the Ordinance. This Act contains a provision that is comparable to the provision of the Waste Act on the basis of which the impugned provision of the Ordinance was adopted.

Languages:

Croatian, English.



Identification: CRO-2016-3-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 06.12.2016 / **e)** U-I-2509/2016 / **f)** / **g)** *Narodne novine* (Official Gazette), 3/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 4.4 Institutions – **Head of State**.
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.

Keywords of the alphabetical index:

Head of State, former, right to continue public activities / Head of State, former, right to an office, abolish / Law, adoption, emergency procedure / Legitimate aim, law / Procedure, urgent / *Vacatio legis*, necessary length.

Headnotes:

The adoption of an Act abolishing the right of the former President to an office (and the rights connected with it), as a special right to continue his public activities at the expense of the State budget, was justified on the basis of the objective and reasonable grounds of the economic situation and as a way of making all former presidents equal in terms of their rights.

The Act does not violate “the very essence of the right to continue public activities” of the former President, because he may continue his activities in the future.

Summary:

I. The Constitutional Court did not accept the proposal of the applicant, former President Stjepan Mesić, to institute proceedings to review the conformity with the Constitution of Articles 2 and 3 of the Act on Amendments to the Act on Special Rights of Presidents of the Republic of Croatia after the Termination of their Term of Office (hereinafter, the “Act”). With the entry into force of the impugned Act on 31 May 2016, his right to an office (and the rights connected with it), as a special right related to the continuation of his public activities at the expense of the State budget, was abolished.

II. When reviewing the conformity of the impugned provisions of the Act with the Constitution, the Constitutional Court proceeded from Article 3 of the

Constitution (rule of law) and Article 90.1, 90.3, 90.4 and 90.5 (mandatory publication of the Act, *vacatio legis* and the prohibition of the retroactive effect of the Act).

The Constitutional Court reiterated its holding in Decision and ruling no. U-I-4113/2008 *et al* of 12 August 2014: the institution of the President after the termination of his or her term of office was no longer one of a constitutional category, and it was left to the legislator to determine the special rights, if any, of former presidents.

As regards the specific arguments advanced by the applicant, the Constitutional Court’s findings were as follows.

The Court found that the adoption of the impugned Act had a legitimate aim in the public interest and was objectively and reasonably justified by the reasons given by the Government in the final draft of the Act and in its observations to the Constitutional Court, that is to say, as a consequence of the economic situation in Croatia and as a way of making all former presidents equal in terms of their rights.

The Court considered unfounded the applicant’s allegations that the impugned Act violated “the very essence of the right to continue public activities” of the President after the termination of his term of office. His right to continue his public activities was not restricted in any way, except that it was no longer an institution. Therefore, he could continue those activities in the future but not at the expense of the State budget.

The Court found that the applicant’s argument regarding the retroactive effect of the impugned Act (Article 90.5 of the Constitution) was unfounded. Article 3 of the impugned Act provides for its entry into force on the first day following that of its publication in the Official Gazette and it is thus applicable only *pro futuro*, i.e. for the future.

The applicant objected to the absence of an appropriate transitional period for adjustment after the entry into force of the impugned Act. The Constitutional Court considered that argument founded. The transitional period, in this case, should have:

- i. provided for sufficient time for the completion of the pending activities of the Office (of the President after the termination of his term of office); and
- ii. regulated its employees’ future status in accordance with labour law.

As to the first question, the Constitutional Court found that the failure to provide for a transitional period for the completion of the pending activities of the Office of the President after the termination of his term of office was unacceptable from the perspective of the rule of law (Article 3 of the Constitution). However, such an action, which is in principle unacceptable, lost its constitutional relevance in this specific case. The Court noted that the former President and his Office had an appropriate period of time for the completion of their work and for the "transfer", namely, six months, from 31 May 2016 (the day on which the impugned Act entered into force) to 6 December 2016 (the day on which the Constitutional Court rendered this ruling).

As to the second question, namely the labour-law status of a civil servant employed in the Office of the President after the termination of the President's term of office, it is clear from the Government's additional observations that the general regime for civil servants had been applied in this employee's case.

Therefore, the applicant could no longer rely on those grounds.

In this ruling, the Constitutional Court once again warned about the unacceptable and bad parliamentary practice of using an urgent enactment procedure to pass laws (see Report no. U-X-99/2013, 23 January 2013). However, the Court considered unfounded the applicant's allegations that the grounds for the enactment of the Act in an urgent procedure were not exceptionally justified.

The Constitutional Court, bearing in mind the effects of the impugned Act and the fact that it concerned only one addressee, found that the grounds given by the Government when proposing enactment in an urgent procedure were sufficient. Namely, the Act provides for only one subject-matter that can be fully discussed in only one reading, without there being a need for the additional time and costs of a second reading.

Finally, the Court also considered unfounded the applicant's argument that the legislator, by determining that the impugned Act would enter into force on the first day following that of its publication in the Official Gazette, had failed to observe the provision of the Constitution on *vacatio legis*, that is to say, that an Act shall enter into force no earlier than the eighth day following that of its publication (Article 90.3 of the Constitution).

The Constitutional Court considered those arguments in the light of its position in decision nos. U-I-3845/2006 and U-I-5348/2012 of 23 January 2013 on the need for consistent compliance with the constitutional rule that an Act enters into force no earlier than the eighth day following that of its publication and that departure from this rule is allowed only "for exceptionally justified reasons".

In the light of the above, the Court found exceptionally inadequate the explanation given in the amendment of 27 April 2016 proposing that the impugned Act enter into force on the first day following that of its publication in the Official Gazette.

However, for the reasons that the Constitutional Court stated above (in particular, the impugned Act provides for only one subject-matter that can be fully discussed in only one reading), the Constitutional Court held that the entry into force of the impugned Act on the first instead of the eighth day following that of its publication in the Official Gazette was in itself not a sufficient reason for repealing the impugned Act.

III. Justice Mato Arlović and Andrej Abramović attached dissenting opinions to the majority decision.

Cross-references:

Constitutional Court:

- no. U-I-4113/2008 *et al.*, 12.08.2014;
- nos. U-I-3845/2006, U-I-5348/2012, 23.01.2013, *Bulletin* 2013/1 [CRO-2013-1-002];
- notification no. U-X-99/2013, 23.01.2013, *Bulletin* 2013/1 [CRO-2013-1-006].

Languages:

Croatian, English.



Identification: CRO-2016-3-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 13.12.2016 / **e)** U-III-2521/2015 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 123/16 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body.**

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

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

Keywords of the alphabetical index:

Consumer protection / Contract, foreign currency loan / Loan, foreign currency, clause / Loan, interest rate, variable / Fairness, principle.

Headnotes:

The extent of a court's obligation to state in writing the reasons that guided it towards a decision depends on the particular circumstances of the case.

A decision does not satisfy the general requirements arising from the constitutionally guaranteed right to a fair trial unless it contains sufficient and relevant reasons used by the court as guidance in rendering its decision and those reasons are capable of leading to the conclusion that the court actually examined the case and responded to all the significant allegations of the parties.

Summary:

I. Constitutional complaints were filed by the Croatian Union of Consumer Protection Organisations (hereinafter, "Potrošač") and seven banks, following the Supreme Court judgment and ruling of 9 April 2015, by which their requests for review of the judgment and ruling of the High Commercial Court of 13 June 2014 (hereinafter, "second-instance decision") had been rejected as unfounded.

Prior to the Constitutional Court proceedings, Potrošač, acting under the Consumer Protection Act (hereinafter, "ConsPA"), had filed a claim with the competent commercial court against eight of the largest banks, with respect to unfair contractual terms in consumer loan contracts concerning a variable interest rate and tying the principal to the Swiss franc (foreign currency clause). The first-instance court allowed Potrošač's claim.

The second-instance court:

- i. rejected the whole claim with respect to the 8th respondent bank;

- ii. rejected the part of the claim concerning the contractual term tying the principal to the Swiss franc with respect to seven banks; and
- iii. affirmed the decision of the first-instance court that the contractual terms on the variable interest rate constituted unfair contractual terms with respect to seven banks.

In its constitutional complaint, Potrošač mainly argued that there had been a violation of the right to a fair trial (i.e. a violation of the right to a reasoned decision and a failure to apply the case-law of the Court of Justice of the European Union).

The banks argued that:

- i. there had been procedural omissions; and
- ii. domestic and European substantive law had been applied in a way that led to arbitrary decision-making.

II. The Constitutional Court partly allowed Potrošač's constitutional complaint and quashed the part of the Supreme Court's decision concerning the foreign currency clause with respect to all the banks and the part concerning the variable interest rate with respect to the 8th respondent bank.

The Constitutional Court first considered the admissibility of Potrošač's constitutional complaint.

Potrošač was, under the Consumer Protection Act taken together with the relevant Decree, a person entitled to institute proceedings before the competent commercial court in order to protect the collective interests of consumers.

Since the decisions of ordinary courts rendered in these proceedings were impugned in the Constitutional Court proceedings, the Constitutional Court found that Potrošač was entitled to lodge a constitutional complaint.

The Constitutional Court then considered the arguments of the parties from the aspect of a violation of the right to a fair trial, in particular, the right to a reasoned court decision.

a. Potrošač's constitutional complaint

As regards the intelligibility of the contractual terms concerning the variable interest rate, the Constitutional Court, like the second-instance court, found that during negotiations and the conclusion of the loan contract, the bank staff had not explained to consumers all the elements affecting the calculation of the interest rate. Such an explanation was the only

way for consumers to understand the economic effects of entering into a contract with such an interest rate. Therefore, those contractual terms were unintelligible, hence unfair, and consequently null and void. The Constitutional Court also agreed with the second-instance court that the case-law of the Court of Justice of the European Union (hereinafter, "CJEU"), namely Judgment no. C-26/13 of 30 April 2014 concerning Article 4.2 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, applied to the case in hand.

The Constitutional Court noted that, in that judgment, the CJEU emphasised that the relevant provision of Directive 93/13/EEC, as regards a contractual term, must not be interpreted as requiring only grammatical intelligibility, but also as requiring that the consumer be provided with an explanation of the reasons for and the particularities of the relevant mechanism (of the variable interest rate, in the case in hand) and the relationship between that mechanism and the mechanism laid down by other terms of the contract, so that the consumer could foresee, on the basis of clear, intelligible criteria, the economic consequences for him or her which derive from it.

However, as to the intelligibility of the foreign currency clause, the Supreme Court – noting that the inclusion of a foreign currency clause in contracts was a generally accepted long-term contracting model, and that it and its legal consequences were, therefore, "very well known" to consumers – found that the clause was intelligible to consumers, and thus not subject to the fairness test of the above-mentioned Directive and case-law of the CJEU. In other words, the banks' failure to inform the consumers about the economic consequences of entering into a loan agreement was decisive for the Supreme Court's finding that the contractual terms on the variable interest rate were unfair, but not taken into account for its finding on the foreign currency clause. The Supreme Court provided no reasons for adopting a different approach in interpreting this legal standard.

The double standards and unclear and insufficiently reasoned criteria followed by the Supreme Court in applying different approaches when assessing the intelligibility (fairness) of the contractual terms concerning the variable interest rate and the contractual term of the foreign currency clause were particularly important because the loan agreements provided for two significant variable elements – a foreign currency clause and a variable interest rate.

Consequently, the Constitutional Court established that the Supreme Court had failed to state the reasons for the different interpretation of the same legal standard.

Furthermore, the Supreme Court had also failed to state reasons for considering that:

- i. CJEU judgment no. C-26/13 was relevant for reviewing the fairness of the contractual terms concerning the variable interest rate, but not that of the foreign currency clause; and
- ii. it was not obliged, in the case in hand, to make a request to the CJEU for a preliminary ruling concerning EU law, under Article 267.3 of the Treaty on the Functioning of the European Union.

As regards the 8th respondent bank, the Constitutional Court examined the reasons based on which the Supreme Court had found that that bank's contractual term on the variable interest rate (which differed in content from the terms of the other banks) was intelligible to consumers.

Based on the above findings, the Constitutional Court established that the right to a fair trial had been violated, in the aspect of the right to a reasoned court decision.

The remaining part of Potrošač's constitutional complaint was rejected.

b. The banks' constitutional complaints

The Constitutional Court found that the banks' right to a fair trial had not been violated and rejected their constitutional complaints. In this connection, the Court found that the ordinary courts had provided sufficient and relevant reasons for their findings and that the banks had been able to participate in the proceedings and to carry out legally permitted procedural actions.

Cross-references:

Court of Justice of the European Union:

- C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt*, 30.04.2014.

Languages:

Croatian, English.



Identification: CRO-2016-3-011

a) Croatia / b) Constitutional Court / c) / d) 13.12.2016 / e) U-I-392/2011 *et al.* / f) / g) *Narodne novine* (Official Gazette), 7/17 / h) CODICES (Croatian).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.

5.2 Fundamental Rights – **Equality**.

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

Keywords of the alphabetical index:

Sovereignty, monetary / Contract, foreign currency, clause / Principle of monetary nominalism / Principle of valorism.

Headnotes:

Article 22 of the Civil Obligations Act, which allows a foreign currency clause to be included in a contract, does not undermine the (monetary) sovereignty of the State, since Article 21 of the Act on the Croatian National Bank prescribes that the *kuna* is the legal tender for payment in the country and must be used for all payments in Croatia, including in cases where a foreign currency clause is included in a contract.

This Article does not place banks in a privileged position in relation to other entrepreneurs and citizens as borrowers because a foreign currency clause may be used by all persons that are subject to the law of contract and in all contracts. It is a norm whose legal nature is neutral and applies to all persons in contractual relationships as either debtors or creditors.

Summary:

I. The Constitutional Court rejected 31 proposals submitted by natural and legal persons to institute proceedings for a review of the conformity of Article 22 of the Civil Obligations Act (hereinafter, “COA”) with the Constitution.

The impugned Article 22 COA allows a foreign currency clause to be included in a contract. That Article lays down, in particular, that a contractual term is permitted according to which the value of the contractual obligation in the currency of Croatia is calculated on the basis of the value of gold or the exchange rate of the currency of Croatia against a

foreign currency. In such cases, unless the parties agree on another exchange rate, the obligation must be performed in the currency of Croatia on the basis of the selling exchange rate that is published by the foreign exchange or the Croatian National Bank as applicable at the date of maturity or at the date of the payment as required by the creditor.

The proponents argued that Article 22 COA was not in conformity with the Constitution for three reasons:

- a. it undermined the (monetary) sovereignty of the Republic of Croatia;
- b. it put banks in a privileged position in relation to other entrepreneurs in Croatia; and
- c. it put banks in a privileged position in relation to citizens, savings depositors and borrowers because “the use of a foreign currency clause, in this specific case, completely eliminates all risk for the bank and drastically decreases the certainty or determinability of future performance for the co-contractor, who is left with all the risk in terms of the fulfilment of the contract”.

II. Starting from the proponents’ argument, the Constitutional Court reviewed the conformity of Article 22 COA with the Constitution from the aspect of a possible violation of its Article 2.1 and 2.4.1 of the Constitution (inalienability, indivisibility and non-transferability of the sovereignty of the Republic of Croatia), Article 14.2 of the Constitution (equality of all before the law) and Article 49.2 of the Constitution (equal legal status of all entrepreneurs on the market).

a. Sovereignty of the Republic of Croatia

When considering whether the proponents’ argument was founded, the Constitutional Court proceeded from Article 21 of the Act on the Croatian National Bank, which lays down that the *kuna* is the only legal tender for payment in Croatia and must be used for all payments in Croatia (except when the use of another currency is permitted by law for payments in Croatia). Payments must also be made in *kunas* where a foreign currency clause is included in a contract and where a monetary obligation is linked with the exchange rate of the Croatian *kuna* against a foreign currency. This also applies in cases where the obligation of payment, contrary to law, is expressed in a foreign currency. Such unlawful conduct is considered to be a criminal offence and is sanctioned in accordance with the laws and regulations of Croatia.

Therefore, the Constitutional Court found Article 22 COA not to be contrary to Article 2.1 of the Constitution.

b. The privileged position of banks in relation to other entrepreneurs

Article 22 COA is an exception to the principle of monetary nominalism laid down in Article 21 COA. According to that principle, a debtor is bound to pay the number of monetary units stated in the obligation, regardless of whether the value of money has decreased or increased. The principle of monetary nominalism excludes the debtor's liability for loss of the value of money.

According to the opposite principle, the principle of valorism, a change in the value of money requires a change in the amount of the monetary obligation. If the value of money decreases, the number of monetary units increases; if the value of money increases, the number of monetary units decreases. Therefore, the purpose of valorism is to ensure the equal value of performance in a particular contractual relationship or in another relationship governed by the law of obligations.

Article 22 COA, that is to say, the foreign currency clause, is a way of protecting the equal value of performance, as are the index clause (Article 23 COA) and the sliding scale (Article 24 COA). The parties to the contract, both the creditor and the debtor, enter into a contract with a foreign currency clause to keep the value of the performance completely equal when measured against the foreign currency or the price of gold.

The Constitutional Court found that Article 22 COA has a legitimate aim: by allowing foreign currency clauses, the value of the performance of the parties in contractual or other relationships governed by the law of obligations is protected from possible changes in the value of money during the time between the creation of the monetary obligation and its fulfilment or maturity.

Article 22 COA neither imposes an obligation to use a foreign currency clause nor prescribes that it is reserved for only specific persons or types of contracts.

Therefore, the Constitutional Court found the impugned Article 22 COA to be in conformity with Article 14.2 of the Constitution, taken in conjunction with Article 49 of the Constitution. citizens/borrowers

The foreign currency clause, provided for in Article 22 COA, may be used by all persons that are subject to the law of contract and in all contracts, even those entered into by two natural persons who are not traders (civil-law contracts). It is possible for any contracting party to use this clause under the same

conditions. Whether or not it is included in a contract depends on the free will of both parties to the contract (the creditor and the debtor). In the legal sense, it provides for the equality of both parties to a particular legal transaction.

The Constitutional Court therefore found the proponents' argument regarding the unconstitutionality of Article 22 COA, in particular, with respect to Article 14.2 of the Constitution, to be unfounded.

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Statistical data

1 September 2016 – 31 December 2016

- Judgments of the Plenary Court: 6
- Judgments of panels: 90
- Other decisions of the Plenary Court: 3
- Other decisions of panels: 1 293
- Other procedural decisions: 52
- Total: 1 444

Important decisions

Identification: CZE-2016-3-007

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 15.09.2016 / **e)** I. ÚS 2617/15 / **f)** Restricting a judge's freedom of speech when commenting on political competition / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

4.5.10 Institutions – Legislative bodies – **Political parties.**

4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities.**

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline.**

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

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

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:

Confidence in the state, citizen's / Court, authority and impartiality / Disciplinary proceedings / Freedom of speech / Judge, electoral campaign, freedom of expression / Judge, law governing the profession / Judge, political views / Judge, status / Mayor / Media, statement by a judge / Political competition / Restraint, duty / Speech, political.

Headnotes:

In order to preserve public confidence in the judicial power, it is essential that judges, in their speech, maintain a clear distance from political competition at any level, including the local level. Judges cannot take part in the campaigns of individual politicians, political parties, political movements or election groupings. Nor can they make post-election statements with a view to influencing future coalitions.

Summary:

I. The complainant is a judge who owns a cottage in a small community where he participated in the election campaign for municipal elections by preparing and distributing his own flyers. Later, in an article in a local periodical, he publicly commented on the results of the elections and possible coalition alternatives, in particular, with respect to the post of the community's mayor. He was found guilty by a disciplinary court because, in exercising his political rights, he had put at risk the dignity of the judicial office and had misused his judicial office to promote private interests. The disciplinary court imposed no disciplinary measure.

II. The Constitutional Court commented on the alleged unconstitutionality of a single-level disciplinary proceeding in this case only briefly, referring to its key Judgment file no. Pl. ÚS 33/09, in which it had addressed this issue thoroughly. Having not found any of the alleged deficiencies in the disciplinary court's instructions, the Constitutional Court considered that the procedural guarantees for protection of fundamental rights had been observed. The Constitutional Court considered unfounded the claim of violation of the freedom of thought, which reflects the internal thought process of every person and is an absolute right which cannot be restricted. It noted that the complainant had been found guilty by the disciplinary court not because of his internal thoughts, but because of the external expressions of his opinions.

The Constitutional Court considered only the complainant's claim concerning violation of freedom of speech in more detail. Relying on the case-law of the European Court of Human Rights, it did not call into question the principle that, with respect to freedom of speech, judges also come under the protection of Article 17 of the Charter of Fundamental Rights and Freedoms of the Czech Republic and Article 10 ECHR. Because of the nature of the public office of judge, the speech of judges is, of course, subject to special restrictions. In this regard, the Constitutional Court cited the duty of loyalty and restraint deriving from the case-law of the European Court of Human Rights, which applies to all state

employees in relation to their exercise of the freedom of speech, including judges. The reason for this is that public confidence in the judicial power is essential for the proper and effective functioning of an independent and impartial judiciary.

The Constitutional Court concluded that, while the duty of loyalty binds judges only with respect to the fundamental principles and values of a democratic, law-based state, the duty of restraint is wider. The Court emphasised that the pre-1989 experience makes it necessary to insist that judges maintain a clear distance from political competition. The present constitution, based on a discontinuity of values with the communist regime, has a special interest in preventing the linking of judges with political parties and their excessive involvement in political competition. Thus, in exercising their freedom of speech, judges must act with restraint in relation to political competition at all levels. Judges freely decide to submit to these constitutional limitations on freedom of expression at the time they accept the office of judge and take the judicial oath.

According to the case-law of the European Court of Human Rights and the Constitutional Court, when assessing whether or not a judge has observed the duties of loyalty and restraint in his or her speech, it is necessary to consider whether the speech in question was in sharp conflict with the fundamental values of a democratic legal order and whether it violated public confidence in the independence and impartiality of the judicial power. These duties also apply to a judge in his or her private life. The particular circumstances in which he or she makes his or her statements must be examined. Speech must be evaluated more strictly when the individual expressly refers to his or her office or directs his or her speech to a circle of persons who know that he or she is a judge. By contrast, a high degree of protection will be enjoyed by judges' statements concerning issues related to the administration and organisation of the judiciary. Lastly, it is necessary to assess whether the nature and severity of the potential penalty are proportionate to the misconduct.

Applying the above-mentioned principles to the present case, the Constitutional Court concluded that the disciplinary court's decision pursued the legitimate aim of the protection of the independence and impartiality of the judicial power. While the Constitutional Court did not criticise the complainant for violation of the duty of loyalty, it could not reach the same conclusion regarding the duty of restraint. The complainant's judicial office was expressly used in the flyers to benefit a particular party's campaign, and the complainant also significantly entered the public debate by publishing an article in the local

magazine under circumstances where his speech could be linked to his office. In so doing, the complainant breached his duty of restraint as a judge because he, on his own initiative, actively, openly, and with excessive intensity, became involved in political competition.

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

Cross-references:

European Court of Human Rights:

- *Olujić v. Croatia*, no. 22330/05, 05.02.2009;
- *Oleksandr Volkov v. Ukraine*, no. 21722/11, 09.01.2013, *Reports of Judgments and Decisions* 2013;
- *Karsai v. Hungary*, no. 5380/07, 01.12.2009;
- *Lindon, Otchakovsky-Laurens and July v. France*, nos. 21279/02 and 36448/02, 22.10.2007, *Reports of Judgments and Decisions* 2007-IV;
- *Pedersen and Baadsgaard v. Denmark*, no. 49017/99, 17.12.2004, *Reports of Judgments and Decisions* 2004-XI;
- *Kudeshkina v. Russia*, no. 29492/05, 26.02.2009;
- *Wille v. Liechtenstein*, no. 28396/95, 28.10.1999, *Reports of Judgments and Decisions* 1999-VII;
- *Baka v. Hungary*, no. 20261/12, 23.06.2016, *Reports of Judgments and Decisions* 2016.

Languages:

Czech.



Identification: CZE-2016-3-008

a) Czech Republic / **b)** Constitutional Court / **c)** Plenum / **d)** 11.10.2016 / **e)** Pl. ÚS 5/16 / **f)** Justification of a decision not to grant citizenship on the grounds of a threat to national security / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
4.6.6 Institutions – Executive bodies – **Relations with judicial bodies**.

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

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

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

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

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

Keywords of the alphabetical index:

Body, administrative / Citizenship / Citizenship, acquisition, conditions / Evidence, undisclosed / Information, classified, protection / Judicial review / National security / National security, threat.

Headnotes:

The legal framework allowing the Ministry of the Interior not to disclose to an applicant the reasons for not granting his or her application for citizenship – where those reasons are based on reports of the police and the intelligence services containing classified information that the applicant is a threat to national security, to the sovereignty and territorial integrity of the state, or to democratic foundations, lives, health or property values – is constitutional.

Summary:

I. In related proceedings on a constitutional complaint under Article 87.1.d of the Constitution, file no. III. ÚS 2660/15, the Constitutional Court reviewed the constitutional complaint brought by the complainant, alleging violation of his fundamental rights by the Ministry of the Interior, which rejected his application for citizenship of the Czech Republic on grounds of national security. The complainant specifically pointed out that the reports on which the Ministry had based its decision were classified, and as such not part of the file; therefore, he did not have an opportunity to defend himself effectively. In his opinion, this was all the more true because decisions to reject applications for citizenship are, under Article 26 of the Act on the Citizenship of the Czech Republic (hereinafter, the “Act”), excluded from judicial review. Panel III of the Constitutional Court referred the complainant’s petition for annulment of this provision to the plenum of the Constitutional Court for a decision under Article 87.1.a of the Constitution.

II. The Constitutional Court pointed out at the outset that, although the complainant’s petition objected to the exclusion – set out in Article 26 of the Act – from judicial review of decisions issued under Article 22.3 of the Act, he sought the annulment of only Article 22.3 of the Act. In accordance with its settled case-law, the Constitutional Court considered itself bound by the wording, and not the reasoning of the petition. It therefore focused only on the review of Article 22.3 of the Act, which provides that the reports of the police and of the intelligence services of the Czech Republic concerning an application for citizenship do not become part of the file if they contain classified information.

The Constitutional Court also pointed out that, under its case-law, if a state citizenship relationship arises on the basis of a decision by a State body (and not *ex lege*), the State has an inalienable right to decide whether or not to grant citizenship, and, if it decides not to do so, it does not violate any rights. However, that does not mean that the criteria set out in the Constitutional Court’s case-law do not apply to the reasons of decisions in citizenship cases. It is therefore unacceptable to impose an absolute and unconditional ban on public authorities’ stating reasons for their decisions. Nevertheless, the need to reflect the legitimate public interest in the protection of classified information justifies a permissible restriction in the form of a statutory prohibition on stating reasons whose disclosure would endanger that interest. The interest of national security, as expressly stated in Article 1 of Constitutional Act no. 110/1998 Coll. on the Security of the Czech Republic, legitimises the restriction of an individual’s legal sphere.

In evaluating security risks or the reports in the context of an application for citizenship, an administrative body must respect the proportionality principle in individual cases and distinguish between the different levels of security risks. An exception from stating reasons may be applied only in cases where there is a relevant and not completely marginal security risk. Only then is it true that stating the security reason for which the administrative body rejects an application, could, in a particular case, realistically represent a threat to national security or third parties.

The Constitutional Court concluded that the legal framework chose rational, instead of arbitrary, means for achieving this legitimate aim, because it excludes from the reasons of a decision only the information based on which an application is rejected on grounds of a threat to national security. The Constitutional Court considered the compromise between an individual’s interest in disclosure of the reasons for a negative decision, on the one hand, and the security interests of the State, on the other hand, to be constitutional.

III. The judge rapporteur in the case was Jaroslav Fenyk. Dissenting opinions were filed by judges Vojtěch Šimíček, Kateřina Šimáčková and Ludvík David.

Judge David concurred, but did not consider the statutory framework under review to be a compromise or the result of a balancing of opposing interests. If an application is rejected by merely stating that the applicant is a threat to national security interests, the applicant learns nothing from the wording of the rejection, and has nothing to protest against. That legal framework cannot be an “optimisation of the conflicting effects of the protective mechanisms of both constitutionally protected values”. The solution chosen by a democratically elected legislature, which he respected, should be described as a desirable result in terms of the criterion of the necessary restriction of individual rights in a proceeding to grant citizenship. The conclusions of the present judgment could be significant for the potential review of Article 26 of the Act, which excludes a decision rejecting an application for citizenship from judicial review.

Judges Šimíček and Šimáčková believed that the petition should have been granted. Panel III should also have submitted a petition seeking the annulment of Article 26 of the Act because both provisions are theoretically connected. An applicant for citizenship cannot tell from the decision why the application was unsuccessful, and at the same time the applicant cannot defend himself or herself procedurally against that decision – his or her position thus becomes similar to that of Joseph K. in Kafka’s *The Trial*. Whether a given case is subject to judicial review is decided exclusively by the administrative body itself, or the police or intelligence service. This situation represents a completely disproportionate and non-reviewable concentration of power in the executive body. Judicial review is guaranteed for one group of applicants, but completely ruled out for another, and the criterion for this differentiation is the completely non-reviewable actions of the bodies of state power. Here too the applicant should have the right to a fair, proper, and reviewable process. According to the dissenting judges, this case did not concern optimisation, in the desirable sense of a balancing of constitutional values, but merely, and only, optimisation in terms of simplifying the activities of the bodies of state power. The dissenting judges referred to Judgment file no. Pl. ÚS 11/2000, in which the Constitutional Court accepted a special procedural regime of judicial review guaranteeing all the elements of the right to a fair trial for cases reviewing the activity of state security forces. At that time, the Court emphasised that such judicial review is necessary. With one exception, the special procedural framework was unfortunately not adopted,

even though there was no reason for it not to apply to cases of citizenship. If the plenum did not conclude that the impugned provision was unconstitutional, it should have rejected the petition, so as to avoid creating an obstacle of *res judicata* to the potential review of Article 26 of the Act.

Languages:

Czech.



Identification: CZE-2016-3-009

a) Czech Republic / b) Constitutional Court / c) Second Panel / d) 25.10.2016 / e) II. ÚS 443/16 / f) Conditions for registering a graduate of a foreign law school in the list of trainee lawyers; the right to free choice of profession / g) *Sbírka nálezů a usnesení* (Court’s Collection); <http://nalus.usoud.cz> / h) CODICES (Czech).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar**.
 5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status**.
 5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one’s profession**.

Keywords of the alphabetical index:

Bar, admission / Bar council, pupil advocates, enrolment / Education, law / Education, requirement / Law governing the profession / Lawyer, admission to practice, conditions / Lawyer, professional requirement.

Headnotes:

In assessing whether the education of an applicant seeking registration in the list of trainee lawyers meets the conditions set out in point 2 of Article 37.1.b of the Act on the Legal Profession, not only the knowledge of the relevant areas of law, but also the legal skills and other experience, acquired by the applicant must be considered.

Summary:

I. In proceedings before the general courts, the complainant sought to have an obligation imposed on the Czech Bar Association (hereinafter, the “CBA”) to register him in the list of trainee lawyers. The complainant is a graduate of the master’s program in law at the Jagiellonian University in Krakow. Even though the Czech Republic Ministry of Education, Youth and Sports had issued him with a certificate recognising his university education to be equivalent to education received in the Czech Republic, the CBA refused to register him in the list of trainee lawyers. The grounds for its decision were that the complainant did not meet the conditions set out in point 2 of Article 37.1.b of the Act no. 85/1996 Coll. on the Legal Profession, as worded at the time, because the education he had acquired at the Polish university did not correspond in content and scope to the general education in law at a Czech university. The general courts agreed with the CBA’s opinion, and did not grant the complainant’s application. His only option was to complete special studies at a Czech school of law which could be taken into account by the CBA.

II. The Constitutional Court first extensively reiterated the general principles arising from European Union law and compared the legal frameworks in other member states of the European Union. The Constitutional Court then reviewed the alleged interference in the complainant’s right to free choice of profession, based on the test of proportionality.

The Constitutional Court then assessed whether the failure to register the complainant on grounds of the alleged non-fulfilment of the conditions in the Act on the Legal Profession could achieve a legitimate aim, namely, the practice of law by highly qualified persons who will ensure the professional provision of legal services. In this respect, the Constitutional Court found the action in question appropriate, because it is precisely through this step that the CBA can prevent a person from becoming a trainee lawyer where there is a risk in the specific case that that person would not provide the requisite level of legal services. Therefore, in the Constitutional Court’s opinion, the first part of the test of proportionality was met.

The Constitutional Court then considered whether the interference in question was necessary, and whether there was no alternative that would be less disruptive to the complainant’s rights. In this respect, the Constitutional Court found that the CBA had erred. In evaluating the level of the complainant’s education, the CBA, and later the general courts, had focused only on the complainant’s knowledge of some selected areas of law, and had completely failed to evaluate other decisive facts, such as the high quality

of Polish legal education, the complainant’s several years of professional practice, and the high-quality of his filings in this case.

Thus, in view of the foregoing, it appeared that both the CBA and the general courts had been unjustifiably narrow in their evaluation of the complainant’s level of knowledge and skill. In the Constitutional Court’s opinion, the legitimate aim pursued could have been met even if the complainant had been registered in the list of trainee lawyers. The complainant could have then practiced law under the responsibility of his trainer, and could have continued to acquire the necessary knowledge and experience, which he could have later demonstrated at the bar exam. Thus, the impugned action by the CBA was not necessary in view of the legitimate aim pursued.

Given that the CBA’s action did not meet the second criterion of the proportionality test, it fell to the Constitutional Court to declare that the complainant’s right to free choice of profession had in fact been violated, because the general courts had not protected his rights.

Therefore, the Constitutional Court granted the constitutional complaint and annulled the impugned decisions. The Constitutional Court added that, in reviewing evidence, the general courts should also consider the availability of special studies.

III. The judge rapporteur in the case was Ludvík David. No judge filed a dissenting opinion.

Cross-references:

Court of Justice of the European Union:

- C-313/01, *Morgenbesser v. Consiglio dell’Ordine degli avvocati di Genova*, 13.11.2003;
- C-298/14, *Brouillard v. Jury du concours de recrutement de référendaires près la Cour de cassation, Belgian State*, 06.10.2015;
- C-340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, 07.05.1991.

Languages:

Czech.



France

Constitutional Council

Important decisions

Identification: FRA-2016-3-007

a) France / **b)** Constitutional Council / **c)** / **d)** 09.09.2016 / **e)** 2016-561/562 QPC / **f)** Mr Mukhtar A. [Detention pending extradition] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 15.09.2016, text no. 59 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Extradition, detention pending extradition.

Headnotes:

The provisions of Articles 696-11 and 696-19 of the Code of Criminal Procedure concerning the extradition procedure setting out the procedure applicable to detention pending extradition and the conditions under which an application for the release of a person whose extradition is sought is examined by the investigation chamber are constitutional, subject to reservations as to their interpretation.

Summary:

On 14 June 2016, the Constitutional Council received from the Court of Cassation two questions in an application for a priority preliminary ruling on the issue of constitutionality concerning the compatibility of the provisions of Articles 696-11 and 696-19 of the Code of Criminal Procedure with the rights and freedoms guaranteed by the Constitution.

These provisions concern the extradition procedure. They set out the procedure applicable to detention pending extradition and the conditions under which an application for the release of a person whose extradition is sought is examined by the investigation chamber.

The Constitutional Council held that the contested provisions are constitutional, but expressed several interpretative reservations. With regard to Article 696-11 of the Code of Criminal Procedure, the Constitutional Council expressed two interpretative reservations.

It first held that any interpretation of the contested provisions such as to exclude the ability of a judge hearing the request for incarceration as part of an extradition procedure to release the individual whose extradition is sought without any control measure where the individual concerned provides sufficient guarantees regarding his or her presence would constitute a breach of individual freedom and a disproportionate infringement of freedom of movement.

The Constitutional Council further held that, when a ruling is made on the placement in detention pending extradition of a person whose extradition is sought, the principle of respect for the rights of the defence required that person to be able to be assisted by a lawyer and, as the case may be, made aware of the submissions made by the public prosecutor.

As far as Article 696-19 of the Code of Criminal Procedure is concerned, the Constitutional Council held that the need to safeguard individual freedom required the judicial authorities to allow the request for release if the total duration of detention in relation to the extradition procedure was unreasonable.

Subject to these reservations, the Constitutional Council upheld the constitutionality of the second and third subparagraphs of Article 696-11 of the Code of Criminal Procedure along with the second and third sentences of the second subparagraph of Article 696-19 of the Code as in force following the enactment of Law no. 2011-392 of 14 April 2011 on police custody.

Languages:

French.



Identification: FRA-2016-3-008

a) France / **b)** Constitutional Council / **c)** / **d)** 23.09.2016 / **e)** 2016-567/568 QPC / **f)** Mr Georges F. and another [Administrative searches during a state of emergency II] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.09.2016, text no. 28 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

State of emergency, administrative search.

Headnotes:

In failing to subject the ordering of searches to any condition or to accompany their implementation by any guarantee, the legislature has not ensured that a reasonable balance is struck between the objective of constitutional standing of safeguarding public order and the right to respect for private life.

However, the calling into question of acts pertaining to criminal procedure carried out following a search ordered on the basis of provisions found to be unconstitutional would disregard the constitutional objective of safeguarding public order and would have manifestly excessive consequences.

Summary:

On 24 June 2016, the Constitutional Council received from the Court of Cassation two questions in an application for a priority preliminary ruling on the issue of constitutionality concerning the provisions of Section 11.1 of Law no. 55-385 of 3 April 1955 on the state of emergency as in force following the issue of Order no. 60-372 of 15 April 1960.

By decision no. 2016-536 QPC of 19 February 2016, the Constitutional Council had previously upheld as constitutional the provisions in force following the enactment of the Law of 20 November 2015, which enabled the administrative authorities to order searches in the event that a state of emergency had been declared.

On this occasion, the Constitutional Council dealt with the provisions of the law on the state of emergency which allowed administrative searches to be ordered, as in force prior to the enactment of the Law of 20 November 2015.

During the most recent period, these provisions applied between 14 November 2015, the date on which a state of emergency was declared, and the entry into force of the Law of 20 November 2015.

Having concluded that the contested provisions had legislative status, the Constitutional Council held that, in failing to subject the ordering of searches to any condition or to accompany their implementation by any guarantee, the legislature had not ensured that a reasonable balance was struck between the constitutional objective of safeguarding public order and the right to respect for private life.

The Constitutional Council accordingly ruled that the contested provisions were unconstitutional.

However, the Constitutional Council held that the calling into question of acts pertaining to criminal procedure carried out following a search ordered on the basis of provisions found to be unconstitutional would disregard the constitutional objective of safeguarding public order and would have manifestly excessive consequences. The Council therefore stated that any measures taken on the basis of the provisions ruled unconstitutional could not be contested on the basis of this unconstitutionality in the context of any criminal procedures resulting from them.

Languages:

French.

*Identification:* FRA-2016-3-009

a) France / **b)** Constitutional Council / **c)** / **d)** 05.10.2016 / **e)** 2016-580 QPC / **f)** Mr Nabil F. [Expulsion in situations of absolute emergency] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.10.2016, text no. 126 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

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

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

Keywords of the alphabetical index:

Foreigner, expulsion.

Headnotes:

Insofar as Article L. 522-1 of the Code on the Entry and Residence of Foreigners and on the Right of Asylum (CESEDA) provides that, as a matter of principle, a foreign national cannot be deported unless the administrative authorities have previously notified the individual in question and he or she has been summoned to be heard by the commission provided for under paragraph 2 of that Article, except in situations of absolute urgency (where the administrative authority is exempt from these obligations), it does not violate either the right to an effective judicial remedy or the right to respect for private life.

Summary:

On 6 July 2016 the Constitutional Council received an application for a priority preliminary ruling on the issue of constitutionality from the *Conseil d'État* concerning the compatibility of Article L. 522-1 of the Code on the Entry and Residence of Foreigners and the Right of Asylum (CESEDA) with the rights and freedoms guaranteed by the Constitution.

This Article provides that, as a matter of principle, a foreign national cannot be expelled unless the administrative authorities have previously notified the individual in question and he or she has been summoned to be heard by the commission provided for under paragraph 2 of that article. On an exceptional basis, the administrative authorities are exempt from these obligations in situations of absolute urgency.

The Constitutional Council ruled that the provisions did not violate either the right to an effective judicial remedy or the right to respect for private life.

It held firstly that the concept of absolute urgency satisfied the need to be able to remove a foreign

national from the national territory where he or she represented an immediate threat, for the purposes of the paramount importance of ensuring public order.

Secondly, the contested provisions did not deprive the interested party of the ability to appeal against the deportation order before the administrative courts, specifically before the urgent applications judge, who could suspend enforcement of the deportation or order any action necessary in order to safeguard a fundamental freedom.

Lastly, although the applicant objected to the lack of any time delay between notification of the deportation order on the foreign national on the one hand and the official enforcement of this measure on the other, this did not result from the contested provisions. Furthermore, in the event that the separate decision concerning the country to which the foreign national was to be deported is contested, in accordance with the combined provisions of Articles L. 513-2 and L. 523-2 of the Code on the Entry and Residence of Foreigners and the Right of Asylum, it falls to the administrative courts to monitor compliance with the prohibition on the deportation of a foreign national “to a [particular] country if it is established that his or her life or freedom will be threatened there or where he or she will be exposed to treatment in breach of the requirements of Article 3 of the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950”.

The Constitutional Council consequently upheld the constitutionality of the phrase “Except in situations of absolute urgency” appearing in the first subparagraph of Article L. 522-1 CESEDA.

Languages:

French.

*Identification: FRA-2016-3-010*

a) France / **b)** Constitutional Council / **c)** / **d)** 21.10.2016 / **e)** 2016-590 QPC / **f)** La Quadrature du Net and others [Surveillance and control of wireless transmissions] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 23.10.2016, text no. 37 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Wireless transmission, surveillance, control.

Headnotes:

Insofar as they authorise the public authorities to engage in surveillance and to control any wireless transmissions without excluding the possibility of the interception of communications or the collection of identifiable data, the contested provisions infringe the right to respect for private life and the secrecy of correspondence.

In providing that measures of surveillance and control may be taken “solely for the purposes of the defence of national interests”, the contested provisions give effect to the constitutional requirements pertaining to the safeguarding of the fundamental interests of the Nation. However, they do not prohibit these measures being used for broader purposes than the sole implementation of these requirements.

The contested provisions do not define the nature of the surveillance and control measures which the public authorities are authorised to take. They do not subject the use of these measures to any substantive or procedural requirement and do not accompany their implementation by any guarantee.

Consequently, Article L. 811-5 of the Internal Security Code, as in force following the enactment of the Law of 24 July 2015 on intelligence, is unconstitutional.

Summary:

On 25 July 2016 the Constitutional Council received an application from the *Conseil d'État* for a priority preliminary ruling on the issue of constitutionality concerning the compatibility of Article L. 811-5 of the Internal Security Code, as in force following the enactment of Law no. 2015-912 of 24 July 2015 on intelligence, with the rights and freedoms guaranteed by the Constitution.

These provisions were contested in particular on the basis of the right to respect for private life.

The Constitutional Council held first of all that the surveillance and control measures authorised by the contested provisions are not subject to the provisions on intelligence featuring in Book VIII of the Internal Security Code, which define the information gathering techniques that require the prior authorisation of the Prime Minister, issued after obtaining the prior opinion of the National Commission for the Control of Intelligence Techniques (CNCTR), and which indicate the forms of appeal against the implementation of these techniques. These measures are also not subject to the provisions of Sub-Section 2 of Section 3 of Chapter I of Part III of Book I of the Code of Criminal Procedure, which regulate the interception of correspondence exchanged over an electronic communications network as ordered by an investigating judge.

The Constitutional Council then went on to state the reasons why the contested provisions constitute a manifestly disproportionate infringement of the right to respect for private life and the secrecy of correspondence.

Firstly, insofar as they authorise the public authorities to engage in surveillance and to control any wireless transmissions without excluding the interception of communications or the collection of identifiable data, the contested provisions infringe the right to respect for private life and the secrecy of correspondence.

Secondly, in providing that measures of surveillance and control may be taken “solely for the purposes of the defence of the national interests”, the contested provisions give effect to the constitutional requirements pertaining to the safeguarding of the fundamental interests of the Nation. However, they do not prohibit these measures being used for broader purposes than the sole implementation of these requirements.

Lastly, the contested provisions do not define the nature of the surveillance and control measures which the public authorities are authorised to take. They do not subject the use of these measures to any substantive or procedural requirement and do not accompany their implementation by any guarantee.

The Constitutional Council accordingly ruled as unconstitutional Article L. 811-5 of the Internal Security Code, as in force following the enactment of the Law of 24 July 2015 on intelligence.

Since the immediate repeal of this Article would have had the effect of depriving the public authorities of any ability to monitor wireless transmissions, the Constitutional Council deferred until 31 December 2017 the date on which this declaration of unconstitutionality would take effect.

It nonetheless ruled that, until the entry into force of a new law, or at the latest by 30 December 2017, the provisions of Article L. 811-5 of the Internal Security Code could not:

- be interpreted as a basis for the interception of correspondence, the collection of connection data or the capturing of computer data that is subject to a requirement of authorisation under Part II or Chapter IV of Part V of Book VIII of the Internal Security Code;
- be implemented without informing the CNCTR, in accordance with the regulations, of the scope and nature of the measures taken in accordance with this Article.

Languages:

French.



Identification: FRA-2016-3-011

a) France / **b)** Constitutional Council / **c)** / **d)** 21.10.2016 / **e)** 2016-591 QPC / **f)** Ms Helen S. [Public Register of Trusts] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 23.10.2016, text no. 38 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

Keywords of the alphabetical index:

Trust / tax fraud, combating.

Headnotes:

The entry in a register accessible to the public of the names of the settlor, the beneficiaries and the trustees of a trust provides information concerning the manner in which an individual intends to dispose of his assets. This results in an infringement of the right to respect for private life.

Summary:

On 25 July 2016 the Constitutional Council received from the *Conseil d'État* an application for a priority preliminary ruling on the issue of constitutionality concerning the compatibility of Article 1649 AB of the General Tax Code, as in force following the enactment of Law no. 2013-1117 of 6 December 2013 on combating tax fraud and major economic and financial crime, with the rights and freedoms guaranteed by the Constitution.

These provisions establish a public register of trusts, which includes information concerning all trusts, the declaration of which is made mandatory by Article 1649 AB. The trusts affected are those for which the trustee, settlor or any beneficiary is tax resident in France and those including an asset or right situated in France. For each registered trust, the register states the date of its establishment and the names of its trustee, settlor and beneficiaries.

The Constitutional Council held that in promoting the transparency of trusts through the contested provisions, it was the intention of the legislature to prevent their use for the purposes of tax evasion and money laundering. It thereby pursued the constitutional objective of combating fraud and tax evasion.

However, an entry in a register accessible to the public of the names of the settlor, the beneficiaries and the trustees of a trust provides information concerning the manner in which an individual intends to dispose of his assets. This results in an infringement of the right to respect for private life. In failing to specify the status of the individual seeking consultation or the reasons justifying the consultation of the register, the legislature did not limit the category of persons who would have access to this register, which is placed under the responsibility of the tax authorities.

The Constitutional Council accordingly ruled that the contested provisions infringed the right to respect for private life in a manner that was manifestly disproportionate having regard to the objective pursued.

Consequently, it ruled as unconstitutional the second paragraph of Article 1649 AB of the General Tax Code.

Languages:

French.



Identification: FRA-2016-3-012

a) France / **b)** Constitutional Council / **c)** / **d)** 04.11.2016 / **e)** 2016-594 QPC / **f)** Ms Sylvie T. [Lack of [provision for] nullity of questioning under oath during detention in police custody] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 06.11.2016, text no. 30 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

5.3.13.23 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to remain silent.**

Keywords of the alphabetical index:

Police, custody, letters rogatory, right to remain silent.

Headnotes:

The fact that any person who is heard as a witness during the course of the implementation of letters rogatory is required to swear that he or she will “tell the truth, the whole truth and nothing but the truth” may be of such a nature as to lead the person to believe that he or she does not have the right to remain silent or to contradict the information received concerning this right. The contested provisions violate the suspect’s right to remain silent, which is protected under the Constitution.

Summary:

On 4 August 2016 the Constitutional Council received an application from the Court of Cassation for a priority preliminary ruling on the issue of constitutionality concerning the compatibility with the rights and freedoms guaranteed by the Constitution of Article 153 of the Code of Criminal Procedure (hereinafter, “CCP”).

The applicant asserted that, where the obligation to swear an oath during the course of a criminal investigation is imposed on a person who is suspected

of having committed an offence, it violates the right to remain silent and the right against self-incrimination.

The applicant also objected to the second sentence of the last subparagraph of Article 153 of the CCP, which provides that the fact that an individual held in police custody in the context of letters rogatory has been heard after having sworn the oath stipulated for witnesses does not constitute grounds for annulling the procedure.

The Constitutional Council held first that the right to remain silent is protected under the Constitution. This derives from the principle whereby no person may be required to incriminate himself or herself, which results from Article 9 of the 1789 Declaration of the Rights of Man and the Citizen.

It then went on to hold that only a person in respect of whom there are one or more plausible reasons to suspect that he or she has committed an offence may be held in police custody and furthermore that, according to the combined provisions of Articles 103 and 153 of the CCP, any person who is heard as a witness during the implementation of letters rogatory is required to swear that he or she will “tell the truth, the whole truth and nothing but the truth”.

However, the Constitutional Council considered that the requirement to swear such an oath may be of such a nature as to lead the person to believe that he or she does not have the right to remain silent or to contradict the information received concerning this right. It inferred from this that, in precluding under all circumstances the nullity of a hearing carried out under oath during detention in police custody in the context of letters rogatory, the contested provisions violate the suspect’s right to remain silent.

The Constitutional Council consequently ruled as unconstitutional the second sentence of the last subparagraph of Article 153 of the CCP, as in force following the enactment of Law no.2004-204 of 9 March 2004 on the adaptation of the justice system to developments in crime.

Languages:

French.



Identification: FRA-2016-3-013

a) France / **b)** Constitutional Council / **c)** / **d)** 10.11.2016 / **e)** 2016-738 DC / **f)** Law to enhance the freedom, independence and pluralism of the media / **g)** *Journal officiel de la République française – Lois et Décrets*, 15.11.2016, text no.2 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Journalist, source, confidentiality, protection.

Headnotes:

In amending the current system for protecting the confidentiality of journalists' sources, which enables this confidentiality to be breached only if justified by an overriding reason of public interest, the legislature did not ensure that a balance was struck between freedom of expression and communication on the one hand and various other constitutional requirements on the other, including in particular the right to respect for private life, the confidentiality of correspondence, the safeguarding of the fundamental interests of the Nation and the search for offenders.

Summary:

By Decision no. 2016-738 DC of 10 November 2016, the Constitutional Council ruled on the Law to enhance the freedom, independence and pluralism of the media.

Members of the National Assembly and Senators referred three Sections of the Law to the Constitutional Council.

Section 4 of the contested law modified the current system for protecting the confidentiality of journalists' sources, which enables this confidentiality to be infringed only if justified by an overriding reason of public interest.

The combination of several constitutional difficulties led the Constitutional Council to declare invalid Section 4, emphasising the constitutional value of freedom of expression and communication.

On the one hand, this Section prohibited any infringement of the confidentiality of sources for the purpose of punishing the commission of an offence, irrespective of its seriousness, the circumstances of its commission, the interests protected or the overriding requirement of public interest associated with such punishment.

On the other hand, the criminal immunity which it established was framed too broadly, both for protected individuals and for the offences covered.

All staff involved in the editorial process, whose work does not have a mere indirect link with the dissemination of information to the public, were protected by this immunity.

In addition, this immunity prohibited prosecutions for the receipt of information obtained in breach of professional secrecy and for violation of privacy, offences which are however punished by a term of five years' imprisonment and which seek to combat conduct that violates the right to respect for private life and the confidentiality of correspondence. It also prohibited prosecutions for the receipt of information obtained in breach of investigative secrecy, an offence punished by the same penalty, which protects the presumption of innocence and the search for offenders.

The Constitutional Council held that the legislature had not ensured that a balance was struck between freedom of expression and communication on the one hand and various other constitutional requirements on the other, including in particular the right to respect for private life, the confidentiality of correspondence, the safeguarding of the fundamental interests of the Nation and the search for offenders.

The Constitutional Council accordingly declared as unconstitutional Section 4 of the Law.

Languages:

French.



Identification: FRA-2016-3-014

a) France / **b)** Constitutional Council / **c)** / **d)** 17.11.2016 / **e)** 2016-739 DC / **f)** Law on the modernisation of justice in the 21st Century / **g)** *Journal officiel de la République française – Lois et Décrets*, 19.11.2016, text no. 4 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.

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

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

Keywords of the alphabetical index:

Divorce.

Headnotes:

Under the new divorce procedure by mutual consent, the difference in treatment between minors, who benefit under all circumstances from the protection resulting from the requirements of parental authority, is directly related to the objective of the Law and consequently does not infringe the principle of equality.

Summary:

By Decision no. 2016-739 DC of 17 November 2016, following an application by more than 60 members of the National Assembly and more than 60 Senators, the Constitutional Council ruled on the Law on the modernisation of justice in the 21st Century.

With regard to the new divorce procedure by mutual consent provided for under Section 50 of the Law, the Constitutional Council rejected the applicants' argumentation, in particular the argument based on the infringement of the principle of equality between children.

In relation to this point, the Constitutional Council stated that Article 371-1 of the Civil Code, which defines parental authority as a set of rights and duties that have as their purpose the interest of the child, requires the parents to involve the child in decisions that concern him or her in accordance with his or her age and degree of maturity. It also held that, pursuant to Article 388-1 of the Civil Code, any child who is capable of discernment may be heard by a court in any procedure that affects him or her.

The contested law provides that the choice by a child who is capable of discernment to ask to be heard by the court precludes the operation of the amicable procedure of divorce by the mutual consent of his or her parents, resulting rather in the judicial procedure of divorce by mutual consent. Within this context, it therefore falls to the court, acting in accordance with Article 232 of the Civil Code, to refuse to approve the divorce agreement and not to issue a decree of divorce "if it appears that the agreement takes insufficient account of the interests of the children or of one of the spouses".

The Constitutional Council inferred that the law grants specific protection to a child who has asked to be heard by the court.

Insofar as the law grants to children who are capable of discernment the right to request to be heard by the court, it establishes a difference in treatment between such children and other children in terms of the judicial protection to which they are entitled.

However, this difference in treatment is based on a difference in circumstances between children capable of discernment, who are able to express their views regarding their situation as a result of the divorce of their parents, and other children.

The Constitutional Council held that this difference in treatment between children, who benefit under all circumstances from the protection resulting from the requirements of parental authority, is directly related to the objective of the Law and accordingly does not infringe the principle of equality.

Languages:

French.

*Identification: FRA-2016-3-015*

a) France / **b)** Constitutional Council / **c)** / **d)** 02.12.2016 / **e)** 2016-600 QPC / **f)** Mr Raïme A. [Administrative searches during a state of emergency III] / **g)** *Journal officiel de la République française – Lois et Décrets*, 04.12.2016, text no. 29 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

State of emergency, administrative search.

Headnotes:

Where data copied during the course of an administrative search constitute a threat but do not establish that an offence has been committed, the legislature has not stipulated any time-limit after the end of the state of emergency upon expiry of which these data must be destroyed.

The legislature has not put in place any legal guarantees in relation to the retention of these data that are capable of ensuring that a balance is struck between the right to respect for private life and the constitutional objective of safeguarding public order.

In allowing the seizure of electronic media without the prior authorisation of a court during an administrative search carried out under a state of emergency, the legislature struck a balance that was not manifestly unreasonable between the right of ownership and the constitutional objective of safeguarding public order.

Summary:

On 16 September 2016 the Constitutional Council received an application from the *Conseil d'État* for a priority preliminary ruling on the issue of constitutionality concerning the compatibility with the rights and freedoms guaranteed by the Constitution of certain provisions of paragraph I of Section 11 of Law no. 55-385 of 3 April 1955 on the state of emergency, as in force following the enactment of Law no. 2016-987 of 21 July 2016 extending the application of Law no. 55-385 and laying down measures to reinforce the combating of terrorism.

The contested provisions were adopted by the legislature in the wake of Decision no. 2016-536 QPC of 19 February 2016 of the Constitutional Council, which had declared unconstitutional the previous provisions of the Law on the state of emergency, which enabled the copying of data stored in an IT system to which access was gained as a result of an administrative search. At that time, the Council had

concluded that the provision was not accompanied by sufficient legal guarantees.

During such searches, the contested provisions authorise the seizure of data contained in any IT system or terminal equipment situated on the premises or contained in any other IT system or terminal equipment, where such data are accessible from the initial system or available to this system.

Such seizure is implemented by copying these data or by seizing the medium on which they are contained. The contested provisions lay down the conditions governing the use and retention of such data by the administrative authorities, under the control of the administrative courts.

As the case involved the seizure and use of electronic data, the Constitutional Council held first that the contested provisions establish the reasons that can justify such seizure: the search must have revealed the existence of data relating to the threat.

Secondly, these provisions set out the conditions governing its implementation: the seizure must be carried out in the presence of a police officer; it may not be carried out unless a report is drawn up stating the reasons and unless a copy is provided to the public prosecutor and to the occupant of the premises, to his or her representative or to two witnesses.

Lastly, the contested provisions require the prior authorisation by a judge of any use of the data collected, which must not relate to data that are unrelated to the threat. Pending a decision by the court, the data are placed under the responsibility of the head of the service that carried out the search, and may not be accessed by any person.

The Constitutional Council held that, in stipulating these different legal guarantees, as regards the seizure and use of electronic data, the legislature had struck a balance that was not manifestly unreasonable between the right to respect for private life and the constitutional objective of safeguarding public order. It also held that the legislature had not violated the right to an effective judicial remedy.

With regard to the retention of electronic data, the Constitutional Council held that the legislature had set out conditions to govern the retention of data other than those relating to the threat that justified the seizure by providing for a time-limit upon expiry of which they must be destroyed. In the same way, where the use of data leads to a finding that an offence has been committed, the law provides that they must be retained in accordance with the applicable rules of criminal procedure.

The Constitutional Council however ruled that, where the data copied constitute a threat but do not establish that an offence has been committed, the legislature had not stipulated any time-limit after the end of the state of emergency upon expiry of which these data must be destroyed. The Council consequently held that the legislature had not put in place any legal guarantees in relation to the retention of these data that are capable of ensuring that a balance is struck between the right to respect for private life and the constitutional objective of safeguarding public order.

The Council accordingly ruled as unconstitutional the wording: “With the exception of those pertaining to the threat represented for public security and order by the conduct of the individual concerned” featuring in the last sentence of the eighth subparagraph of paragraph I of Section 11 of the Law of 3 April 1955. However, it deferred the effects of this declaration of unconstitutionality until 1 March 2017.

As regards the violation of the right of ownership, the Constitutional Council held that the seizure of IT systems and equipment is not only accompanied by the legal guarantees mentioned above but also that it is only possible if the copying of the data contained on them cannot be carried out or completed during the search. This impossibility must be substantiated by the administrative authority when seeking authorisation from the court to use the data contained on these media. In addition, the seizure report must draw up an inventory of the materials seized.

Lastly, the systems and equipment seized must be returned to their owner upon expiry of a maximum period of fifteen days after the date of their seizure or the date on which the urgent applications judge authorised the use of the data. This time limit may be extended for the same period of time by the urgent applications judge only where there is difficulty in accessing the data contained on the media seized.

The Constitutional Council also held that, in allowing the seizure of electronic media without the prior authorisation of a court during an administrative search carried out under a state of emergency, the legislature had struck a balance that was not manifestly unreasonable between the right of ownership and the constitutional objective of safeguarding public order.

Other than the wording cited above, the Council upheld as constitutional the provisions of subparagraphs five to ten of paragraph I of Section 11 of Law no. 55-385 of 3 April 1955 on the state of emergency in the version contested.

Languages:

French.



Identification: FRA-2016-3-016

a) France / **b)** Constitutional Council / **c)** / **d)** 29.12.2016 / **e)** 2016-744 DC / **f)** Finance Act for 2017 / **g)** *Journal officiel de la République française – Lois et Décrets*, 30.12.2016, text no. 5 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Google tax.

Headnotes:

The Section establishing a “Google tax” contained within the draft 2017 Finance Act, which sought to increase the taxation of profits diverted by multinationals on their operations in France, is unconstitutional on the grounds that the tax authorities cannot have “the power to choose the taxpayers that must or need not fall within the scope of corporation tax”.

Summary:

The Constitutional Council received an application from more than 60 Senators and more than 60 members of the National Assembly concerning the 2017 Finance Act.

The initial draft bill contained 65 sections. The text that was passed and submitted to the Constitutional Council contained 160 sections.

The applicants objected to nine sections. The Constitutional Council in addition considered a further seven sections of its own motion.

The objection related in particular to Section 78 of the 2017 Finance Act, the purpose of which was to extend, under certain conditions, the scope of corporation tax to the profits earned in France by legal persons established outside France.

The Constitutional Council held that the legislature had made the application of these new provisions subject to a decision by the tax authorities to initiate an audit procedure.

Whilst the legislature has the right to alter the scope of corporation tax for the purpose of taxing the profits earned in France by undertakings established outside the national territory, any decision to leave to the tax authorities the power to choose the taxpayers that do or do not fall within the scope of corporation tax would be beyond its powers. For this reason, the Constitutional Council accordingly declared Section 78 invalid.

Languages:

French.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2016-3-017

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 26.07.2016 / **e)** 1 BvL 8/15 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Betreuungsrechtliche Praxis* 2016, 182-186; *Gesundheitsrecht* 2016, 659-668; *Zeitschrift für das gesamte Familienrecht* 2016, 1735-1738; *Der Deutsche Rechtspfleger* 2016, 638-648; *Europäische Grundrechte-Zeitschrift* 2016, 558-570; *Recht und Psychiatrie* 2016, 245-258; *Familie und Recht* 2016, 712-714; *Zeitschrift für das gesamte Medizin- und Gesundheitsrecht* 2016, 396-40; *Neue Juristische Wochenschrift* 2017, 53-60; CODICES (German).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

Keywords of the alphabetical index:

Care and custody / Hospital, detention, compulsory / Hospital, psychiatric, confinement / Mental disorder, treatment, consent, forced hospitalisation / Patient, psychiatric hospital, rights / Patient, right to refuse treatment / Patient, right to self-determination / State, duty to protect fundamental rights and freedoms / State, duty to protect life / Treatment, medical, compulsory.

Headnotes:

1. In the face of the threat of substantial damage to the health of persons under custodianship who cannot recognise the necessity of a medical measure, it follows from Article 2.2.1 of the Basic Law (*Grundgesetz – GG*) that the state's duty to protect those persons requires, under certain narrow conditions and as an *ultima ratio*, that medical treatment is provided even if that treatment conflicts with the person's natural will.

2.a. Within the procedure under Article 100.1 of the Basic Law, the subject matter of the specific judicial review can also be a provision regarding which the referring court has found that it lacks a design which, according to the court's plausibly reasoned firm conviction, is necessary on the grounds of a specific constitutional duty of protection.

b. If a sufficiently weighty, objective need for clarification of a matter of constitutional law raised by a referral persists, the referral may remain admissible even if the death of one of the main parties of the initial proceedings has resolved that proceeding.

Summary:

It violates the duty of protection under Article 2.2.1 of the Basic Law that under the current legal situation, persons in need of aid who receive in-patient treatment in a non-closed facility but who are no longer able to move around without assistance cannot be given medical treatment, if need be even against their natural will. This was the ruling of the First Panel of the Federal Constitutional.

The legislator must promptly fill the gap in protection that the Court established. Considering that under the current legal situation, the possibility of treatment is denied entirely even in cases of life-threatening damage to health, the Panel ordered that, for the time being until a new provision enters into force, § 1906.3 of the German Civil Code applies accordingly to persons under guardianship who are being treated as inpatients and are unable to remove themselves spatially from coercive medical treatment.

Languages:

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



Identification: GER-2016-3-018

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 27.07.2016 / **e)** 1 BvR 371/11 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Zeitschrift für das gesamte Familienrecht* 2016, 1839-1847;

Rechtsprechungsdienst – Beilage zum Nachrichtendienst des Deutschen Vereins für öffentliche und private Fürsorge 2016, 123-130; *Neue Juristische Wochenschrift* 2016, 3774-3781; CODICES (German).

Keywords of the systematic thesaurus:

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Dignified minimum existence, guarantee / Family, financial situation / Family, support / Income, guaranteed minimum, beneficiary, difference in treatment / Income, minimum, coverage, benefits, claim, ascertainment / Income, minimum, in line with human dignity, fundamental right to guarantee / Minimum condition of existence, right / Minimum subsistence / Social assistance, reduction.

Headnotes:

In determining the need for benefits in order to ensure a dignified minimum existence (Article 1.1 in conjunction with Article 20.1 of the Basic Law), the income and assets of persons from whose familial community it is reasonable to expect that they actually support each other and pool their resources can generally be taken in account regardless of a right to maintenance.

Summary:

I. The applicant challenged that the calculation of the amount of his benefits to secure his minimum needs took into account his father's invalidity pension, thus in part reducing his benefits, even though he had no enforceable maintenance claim against his father. He primarily claims a violation of his right to a guarantee of a dignified minimum existence. The applicant lived in a household with his father and they pooled their resources.

II. The Federal Constitutional Court decided that the complaint is unfounded.

The decision is based on the following considerations:

The constitutionally guaranteed right to a dignified minimum existence covers the means that are absolutely necessary for securing both one's physical existence and a minimum of participation in social, cultural, and political life. The legislator has a margin

of appreciation in assessing what the necessary needs are in order to ensure a dignified minimum existence. Consequently, in assessing need, the income and assets of persons from whom mutual support can be expected due to a reciprocal sense of duty can, as a rule, be taken into account. Such a reduction in the necessary needs is not precluded even where there is either no maintenance claim under private law, or where its amount would only be minor. The deciding factor is not the possible existence of a maintenance claim, but the *de facto* economic situation of the person in need, i.e., that they are in fact pooling their resources.

The challenged decision of the Federal Social Court (*Bundessozialgericht*) and the rules on basic income support benefits as they apply to a two-person community of need consisting of a grown child and a parent meet these constitutional requirements.

The total amount of benefits granted to secure the applicant's subsistence does not fall below the constitutionally required amount needed to guarantee a dignified minimum existence. While the benefits granted to the applicant were indeed reduced, this was due to a partial crediting of his father's invalidity pension against the benefits, as stipulated in the challenged provisions in which the legislator assumes that the applicant's needs are covered by corresponding contributions from his father. In this case, his father did indeed have adequate means to contribute towards securing his son's subsistence.

The total amount of the benefits granted to ensure the applicant's minimum needs of existence can be justified under constitutional law. The factors taken into account for its determination are plausible and differentiate according to the relevant facts. It is not objectionable under constitutional law that the social benefits, calculated according to the need of the person concerned and granted to guarantee a dignified existence, be reduced by a fixed rate, in line with the savings that are typical of living together in a family household. In particular, it is sufficiently plausible that family members living together in one household would in any case completely pool their resources. The assumption that when an adult joins a community of need this leads to savings of 20%, which is relevant to determining standard needs, has sufficient empirical basis, at least with regard to a two-person community of need. This assumption thus stays within the legislator's margin of appreciation. In this case, the Court is not called upon to decide whether and as of what number of persons a minimum dignified existence is no longer guaranteed if each additional person in a house-hold results in standard benefits being reduced by 20%.

It is also not objectionable under constitutional law if, in a community of need comprising one parent and one adult child, benefits are distributed unequally between the two. It appears sufficiently plausible for the legislator to assume that parents in a household, even with a grown child, will regularly assume the main share of the costs and will forgo an exact accounting.

If parental income is credited against the regular amount of standard benefits, this does not extinguish the applicant's constitutionally guaranteed statutory entitlement to be paid benefits to secure his existence. Rather, it only limits the amount of the individual entitlement to benefits from the agency providing basic income support, based on the facts of the specific case. The legislator proceeds, with plausible reasons, from the assumption that securing one's existence through basic income support benefits is necessary only to the extent that subsistence is not provided by members within a common family household.

In the case at hand, the legislator may be guided by the plausible assumption that a relationship within the nuclear family – i.e., between parents and children – is generally such a close bond that mutual support can be expected, and that the household will regularly pool their resources. However, if parents refuse in earnest to financially support their children who not entitled to maintenance, there is no common household within the meaning of the legal provisions, and thus no "community of need" may be assumed. In that case, income and assets are not to be taken into account; also, it must then be possible to move out of the parental home without adverse consequences for the entitlement to basic income support.

The differences in the design of the benefits systems applying to children (both under and over the age of 25) who live in a community of need with one or both parents, and to children who are of age and live in the parental household are compatible with the requirements of the general principle of equality under Article 3.1 of the Basic Law.

The legislator includes adult children up to the age of 25 in a community of need because it thereby pursues the legitimate aim of aligning entitlements to social benefits with the specific neediness of the entitled beneficiaries, while at the same time sparing the so-called "community of solidarity" between the insured persons. To use joint habitation and age as guiding factors is suitable for this purpose, because it is plausible to assume that parents and children over the age of 18 who live together will pool their resources. The unequal treatment of children below

and above the age of 25 in a parental household is also reasonable. If parents refuse in earnest to financially support their children, the latter are no longer part of the community of need even before they have reached the age of 25. Then, they are entitled to the full amount of standard benefits, and no crediting of their parents' income against those benefits takes place. In such cases, they may also move out without losing their entitlement.

The differences between the benefits systems are also sufficient to provide plausible reasons for different rules for crediting. The one covers persons in need who either temporarily or permanently have a reduction in earning capacity, the other concerns persons in need who in general might be capable of securing their subsistence themselves.

Languages:

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



Identification: GER-2016-3-019

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 06.09.2016 / **e)** 2 BvR 890/16 / **f)** / **g)** / **h)** *Europäische Grundrechte-Zeitschrift* 2016, 570-576; *Juristenzeitung* 2016, 1113-1116; *Zeitschrift für Internationales Wirtschaftsrecht* 2016, 279; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Arrest Warrant, European / Extradition / Extradition, criminal conduct, respect for human rights / Extradition, obstacle, conformity of criminal proceedings with rule of law / Extradition, request, from EU Member State.

Headnotes:

The fact that the accused's silence can be used to his or her detriment in criminal proceedings does not hinder extradition to the United Kingdom.

Summary:

Extraditions on the basis of a European arrest warrant are not impermissible on the mere grounds that the right not to incriminate oneself is not guaranteed to the same extent in the requesting state's procedural law as is the case under German criminal procedural law and guaranteed by the German Constitution. The possibility under British criminal procedural law to use the accused's silence to his or her detriment under certain circumstances is in contradiction to the right not to incriminate oneself as applicable under German criminal law and enshrined in the Basic Law. However, it does not violate the constitutional principles that are beyond the reach of European integration (*integrationsfest*).

Only where the core content of the right not to incriminate oneself, which is inherent to human dignity, is affected, Article 1 of the Basic Law (*Grundgesetz – GG*) is violated. Such was the decision of the Second Chamber of the Second Panel of the Federal Constitutional Court. It thereby did not admit for decision a constitutional complaint by which the applicant had challenged his extradition to the United Kingdom of Great Britain and Northern Ireland for the purpose of criminal prosecution.

Languages:

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



Identification: GER-2016-3-020

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 13.10.2016 / **e)** 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16 / **f)** CETA preliminary injunction / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Europäische Zeitschrift für Wirtschaftsrecht* 2016, 916; *Juristische Schulung* 2016, 1141; *Die Leitsatzkartei des deutschen Rechts* 2016, 52943; *Neue Juristische Wochenschrift* 2016, 3583; *Neue Zeitschrift für Verwaltungsrecht* 2016, 1799; CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 4.8.8.5.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – International relations – **Participation in international organisations or their organs.**
 4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**

Keywords of the alphabetical index:

Competence, transfer to the European Union / Consequences, weighing / Constitutional identity / Legitimacy, democratic / Preliminary injunction / *Ultra vires*.

Headnotes:

1. Insofar as the proceedings for a preliminary injunction challenge the signing of the Comprehensive Economic and Trade Agreement (hereinafter, “CETA”), these must be rejected as the signing does not have any direct legal effect for the applicants.
2. The required weighing of the consequences with regard to the provisional application of CETA arrives at the result that a rejection of the preliminary injunction does not lead to severe disadvantages for the rights of the applicants or for the German Parliament (*Bundestag*), if the German Federal Government (hereinafter, the “Government”) ensures that:
 - a decision by the Council of the European Union (hereinafter, the “Council”) on provisional application will only apply to those parts of CETA that lie indisputably within the scope of the competences of the European Union;
 - until the Federal Constitutional Court renders a decision in the principal proceedings,

sufficient democratic legitimacy with regard to the decisions of the CETA Joint Committee is ensured; and

- the interpretation of Article 30.7.3.c CETA allows Germany to unilaterally terminate the provisional application.

Summary:

I. In joined proceedings, applicants nos. I-IV essentially claim that a decision by the Council authorising the signing of CETA, its provisional application, and the conclusion of CETA, violates their rights under Article 38.1 in conjunction with Articles 79.3, 20.1 and 20.2 of the Basic Law. In the proceedings disputed between constitutional organs (*Organstreit*), the parliamentary group of the German Parliament asserts, in a representative action on behalf of Parliament, the latter’s right to legislative discretion under the second sentence of Article 23.1 in conjunction with Article 59.2 of the Basic Law.

In April 2009, the Council authorised the European Commission to open negotiations with Canada on an economic and trade agreement. CETA was to further strengthen the common purpose of the mutual successive liberalisation of practically all areas of trade in goods and services, and of establishment, as well as to ensure and facilitate the compliance with international environmental and social agreements. Upon conclusion of the negotiations, the Commission submitted a Proposal to the Council in July 2016 to authorise the signing of CETA, to declare it provisionally applicable until the procedures required for its conclusion are completed, and to conclude CETA.

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

The Court can provisionally decide a matter by way of a preliminary injunction if this is urgently required to avert severe disadvantage, prevent imminent violence or for other important reasons in the interest of the common good (§ 32.1 of the Federal Constitutional Court Act, hereinafter, the “Act”). In assessing whether the requirements of § 32.1 of the Act are fulfilled, the Court must generally apply a strict standard. This standard is even stricter when the measures involved have implications for international law or for foreign policy. The prospects of success in the principal proceedings are not to be taken into account, unless the declaration sought, or the application made, in the principal proceedings is inadmissible from the outset or clearly unfounded. In case the outcome of the principal proceedings cannot be foreseen, the Court must weigh the consequences.

Irrespective of the outstanding questions whether the constitutional complaints and the proceedings disputed between constitutional organs are admissible and well-founded, the applications for a preliminary injunction are without success on the basis of the required weighing of the consequences.

If the preliminary injunction were issued but the Government's participation in passing the decision of the Council on the provisional application of CETA is later found to have been constitutionally permissible, the probability is high that the general public would suffer severe disadvantages.

In fact, the substantial consequences of even a preliminary, but certainly of an ultimate, failure of CETA would be more political than economic. A preliminary injunction preventing the Government's approval of the provisional application of CETA would significantly interfere with the – generally broad – legislative discretion of the Government in the fields of European and foreign economic policy. Similarly, in regard to the European Union (hereinafter, the “EU”), the failure of CETA – even if only preliminary – would not only impair the external trade relations between the EU and Canada, but also have far-reaching negative effects on the negotiation and conclusion of future external trade agreements. The probability is high that the disadvantages stemming from the issuance of a preliminary injunction followed by a lack of success in the principal proceedings would be irreversible. The anticipated loss in reliability on the part of the Federal Republic of Germany (hereinafter, “Germany”) – as the initiating force behind such a development – and on the part of the EU overall could have lasting negative effects for the scope of action and decision-making of all European players in the shaping of global trade relations.

Compared with this, the disadvantages arising from the non-issuance of a preliminary injunction followed by a subsequent finding that the Government's participation in the passing of the decision by the Council was impermissible are less severe. CETA does indeed contain provisions that could qualify the decision of the Council on the provisional application as an *ultra-vires* act in the principal proceedings. An encroachment on the constitutional identity protected under Article 79.3 of the Basic Law can also not be ruled out.

However, the Government has stated that by means of the final version of the Council decision in dispute and by means of its own corresponding declarations (Article 30.7.3.b CETA), exceptions to the provisional application can be made that at least result in ensuring that the upcoming Council decision on the provisional application of CETA should not qualify as an *ultra-vires* act. To the extent that these

reservations suffice, any concerns regarding how the provision in question affects constitutional identity should be dispelled. Moreover, the Government has made it clear that it will only lend approval in the Council to those parts of CETA that lie beyond doubt within the competences attributed to the EU under primary law. According to its submission, it will not approve the provisional application for areas that remain subject to the competence of Germany.

Any encroachment on the constitutional identity (Article 79.3 of the Basic Law) brought about by the system of committees' competences and procedures can – in the context of the provisional application at any rate – be countered in various ways. An inter-institutional agreement, for example, might ensure that decisions taken by the CETA Joint Committee pursuant to Article 30.2.2 CETA may only be passed on the basis of a common position (Article 218.9 Treaty on the Functioning of the EU) unanimously adopted by the Council.

If, contrary to the assumption of the Court, the Government should not be able to, or foreseeably will not be able to, undertake the courses of action it had proposed in order to avoid a potential *ultra-vires* act or a violation of the constitutional identity of the Basic Law (Article 79.3 of the Basic Law), it has, as a final resort, the possibility of terminating the provisional application of CETA in Germany by means of written notification (Article 30.7.3.c CETA). This interpretation of the norm, however, does not appear to be authoritative. However, the Government has stated that it is correct. It must therefore declare, in a manner that has bearing in international law, that this is its understanding and notify the other parties to CETA accordingly.

Cross-references:

Federal Constitutional Court:

- 2 BvR 2735/14, 15.12.2015, Second Panel, *Bulletin* 2016/1 [GER-2016-1-003];
- 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, 21.06.2016, Second Panel, *Bulletin* 2016/2 [GER-2016-2-014].

Languages:

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



Identification: GER-2016-3-021

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 13.10.2016 / **e)** 2 BvE 2/15 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Europäische Grundrechte Zeitschrift* 2016, 668-686; CODICES (German).

Keywords of the systematic thesaurus:

4.5.2.2 Institutions – Legislative bodies – Powers – **Powers of enquiry.**

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

Keywords of the alphabetical index:

Confidential information, protection / Data collection, secret / Data transfer, third country / Data, access, public interest / Data, right of oversight / Intelligence service / Intelligence, gathering / Parliament and foreign politics / Parliament, committee, enquiry / Parliament, controlling function / Parliament, enquiry, guarantees / Parliament, enquiry, procedure / Parliament, group, rights / Security, external and internal / Security, national.

Headnotes:

1. § 18.3 of the Law Governing the Right of Committee of Inquiries of the German Parliament (*Bundestag*) does not provide each and every minority in a committee of inquiry the power to file an application within a dispute between constitutional organs. Instead, this power is granted only to a minority committee that is supported by the specific or potential minority of the members of the German *Bundestag* that can establish a committee of inquiry.

2. The right of a parliamentary committee of inquiry to take evidence is subject to limitations which, however, must be rooted in constitutional law, even insofar as they are regulated by ordinary statutory law (cf. *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 124, 78 <118>). Accordingly, obligations arising under public international law cannot provide a limit to the parliamentary right to take evidence, given that they have not as such acquired constitutional rank.

3. The right to receive the United States National Security Agency (hereinafter, “NSA”) Selector Lists that generally follows from the parliamentary committee of inquiry’s right to take evidence has neither been met by the appointment of an expert person of trust nor by that person’s expert opinion.

4. The committee of inquiry’s right to take evidence conflicts with the government’s interest in a functional and duty-oriented performance of duties. These duties also include the cooperation between the intelligence services to ensure the effective protection of the state and the Constitution.

5. In this case:

The government’s interest in non-disclosure outweighs the parliamentary interest in information given that the NSA Selector Lists that are covered by the order to take evidence are not subject to the Federal Government’s exclusive power of disposal due to agreements under public international law, and given that the Federal Government’s assessment according to which handing over the lists without the necessary consent would significantly undermine the functioning of the German intelligence services as well as their ability to cooperate is plausible, and because the Federal Government, in consultation with the Committee of Inquiry into NSA Activities, took account through other procedural measures of the request for submission as specifically as it could have done without disclosing secrets.

Summary:

The Second Panel of the Federal Constitutional Court decided that the Federal Government does not have to submit the NSA Selector Lists to the parliamentary Committee of Inquiry into NSA Activities. In principle, the Committee of Inquiry’s right to collect evidence also comprises the NSA Selector Lists. However, at the same time the Selector Lists also concern secrecy interests of the United States of America and are thus not subject to the Federal Government’s exclusive power of disposal.

Constitutionally, there are no objections to the Federal Government’s assessment according to which handing over the lists in disregard of assured confidentiality and without the approval of the United States of America would significantly undermine the functioning of the German intelligence services as well as their ability to cooperate and thus also impair the government’s capacity to act in matters of a foreign and security policy nature.

In that regard, the government’s interest in non-disclosure outweighs the parliamentary interest in information – particularly as the Federal Government, in consultation with the Committee of Inquiry into NSA Activities, took account of the request for submission as specifically as it could have done without disclosing secrets. Notably, the government provided information as to the focal points of the cooperation between the German Federal Intelligence Service

(hereinafter, the “BND”) and the NSA, concerning the content and compilation of selectors, on the filtering of selectors through the BND, and on the number of rejected selectors. Insofar there is no risk of creating an area that is not subject to control and thus no risk that relevant information is largely withheld from Parliament.

Languages:

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



Identification: GER-2016-3-022

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 30.11.2016 / **e)** 1 BvR 458/10 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

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

Keywords of the alphabetical index:

Church and state, coexistence, peaceful / Church, State, separation / Holiday, national, discrimination / Holiday, public / Holiday, religious.

Headnotes:

1. The recognition of Good Friday as a public holiday as well as its further specification as a day subject to the special protection of silence, and the resulting limiting effects on basic rights can generally be justified on the basis of the constitutional rules governing Sundays and public holidays in Article 140 of the Basic Law in conjunction with Article 139 of the

Weimar Constitution as they do not prescribe anyone’s personal attitude, but rather create an external, silent atmosphere.

2. In constellations in which an event that conflicts with the statutory protection of silence is covered by the scope of protection of the freedom of religion and belief (Article 4.1 and 4.2 of the Basic Law) or the freedom of assembly (Article 8.1 of the Basic Law), the legislator must provide for statutory exceptions according to which it is possible to grant an exemption from duties of omission that have been set out to protect silence.

Summary:

The provisions of the Bavarian Act on the Protection of Sundays and Public Holidays (hereinafter, the “Act”) that recognise Good Friday as a public holiday and provide it with a qualified atmosphere of peace and quiet are generally compatible with the Constitution. However, the absolute exclusion of exemptions (*Befreiungsfestigkeit*) that applies to this day and according to which exemptions – even exemptions for important reasons – from the prohibition of activities are barred from the outset (sub-sentence 2 of Article 5 of the Act) proves to be disproportionate. This is what the First Panel of the Federal Constitutional Court held. Thus, the Court granted the relief sought by the constitutional complaint of an ideological community against the partial prohibition of a public event that had been planned to take place on Good Friday.

Languages:

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



Identification: GER-2016-3-023

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 06.12.2016 / **e)** 1 BvR 2821/11, 1 BvR 321/12, 1 BvR 1456/12 / **f)** Nuclear Phase-Out / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Expropriation, elements / Legitimate expectation, protection, principle / Property, content and limits, determination / Property, guarantee, scope / Property, seizure, adequate compensation.

Headnotes:

1. The Thirteenth Act Amending the Atomic Energy Act (hereinafter, the “13th Amendment Act”) which aims to accelerate the nuclear phase-out is for the most part compatible with the Basic Law.
2. A legal person governed by private law and operating domestically for profit that is entirely owned by a Member State of the European Union, can, by reason of the Basic Law’s openness toward European law, exceptionally invoke the freedom of property and lodge a constitutional complaint.
3.
 - a. The electricity volumes allocated by law to the nuclear power plants in 2002 and 2010 are not subject to an independent protection of property, but as considerable elements of the plants, they benefit from the protection of the property that these constitute.
 - b. An authorisation under public law does not generally constitute property.
4. An expropriation under Article 14.3 of the Basic Law always requires both the deprivation of property by means of a change in attribution of its ownership as well as the acquisition of property. The provisions on the acceleration of the nuclear phase-out in the 13th Amendment Act of 31 July 2011 thus do not constitute an expropriation.
5. Where limitations to the rights of use and disposal of property – as determinations of the contents and limits of property within the meaning of the second sentence of Article 14.1 of the Basic Law lead to a deprivation of specific property interests, without constituting an acquisition of property, these are subject to more stringent proportionality requirements.
6. The striking, without compensation, of the prolongation of the operational lifetimes of the nuclear power plants by an average of twelve years that had been set down statutorily at the end of 2010, brought about by the challenged 13th Amendment Act is constitutional, given the repeated limiting of expectations with regard to preserving the additional electricity output allowances. The legislator was entitled to use the reactor accident in Fukushima, even without any new findings as to dangers, as an opportunity to accelerate the nuclear phase out for the protection of the health of the people and the environment.
7. Due to the shut-down dates fixed by law and the specifically established expectations in this case, the 13th Amendment Act contains a determination of the contents and limits of property that cannot reasonably be imposed insofar as it hinders two of the applicants from using up substantial parts of the residual electricity volumes of 2002 within their corporations.
8. Under certain conditions, Article 14.1 of the Basic Law protects legitimate expectation in the stability of a legal situation as a basis for investments in property and its use.

Summary:

I. The constitutional complaints challenge the acceleration of the phase-out of nuclear energy enacted in 2011. The fundamental decision in favour of a phase-out was already taken in 2002 whereby individual nuclear power plants were allocated a residual electricity volume, transferable to other nuclear power plants. Once these were used up, the power plants were to be shut down. The 2002 Act on the phase-out did not contain a fixed end date. Following the 2009 parliamentary election, the 11th Act Amending the Atomic Energy Act of 8 December 2010 granted nuclear power plants additional residual electricity volumes, prolonging the operational lifetimes of German nuclear power plants by an average of 12 years. As a result of the Fukushima nuclear accident in 2011, however, the legislator set down fixed end dates for the operation of nuclear power plants in the 13th Amendment Act, and at the same time struck the prolongation of the operational lifetimes of the nuclear power plants. The applicants, producers of nuclear energy, principally challenge a violation of the freedom of property (Article 14.1 of the Basic Law), as they will foreseeably not be able to use up their residual electricity volumes prior to the end date.

II. The Federal Constitutional Court held that the provisions of the 13th Amendment Act of 31 July 2011 in part constitute a determination of the content and limits of property that may not reasonably be imposed. The constitutional guarantee of the right to property protects the specific assets held by the individual owners against measures by public authority. The scope of the protection only results once the content and limits of property are determined, which is a matter for the legislator. Its power to determine the content and limits is all the more broad, the stronger the social dimension of the property involved. This provides the legislator with particularly broad leeway to design the law relating to atomic energy, even in respect of existing property interests, without, however, completely depriving them of protection.

The Court found that the 13th Amendment Act interferes with the applicants' constitutionally guaranteed right to property (Article 14 of the Basic Law). The residual electricity volumes allocated in 2002 are not subject to independent protection, but benefit from the constitutional protection of property that Article 14 of the Basic Law affords for the use of the property rights in an authorised nuclear plant. The introduction of fixed dates by which nuclear power plants in Germany must be shut down renders the possibilities to use the power plants protected by the guarantee of property untenable, and limits them in a way that violates equality.

The Court clarified that the challenged provisions do not result in the expropriation of the applicants' property rights, since the introduction of fixed shut-down dates does not deprive the applicants of any stand-alone property rights and it lacks the element of an acquisition of goods that is indispensable for an expropriation. The Court established that to constitute an expropriation within the meaning of Article 14.3 of the Basic Law there must be both a complete or partial revocation of specific subjective property interests for the purpose of fulfilling certain public tasks and at the same time this must constitute an acquisition of goods for the benefit of the public authorities or another beneficiary. By limiting expropriation to cases where goods are acquired, burdens on property cannot be categorised as expropriations requiring compensation if they only consist of a deprivation by the state of specific property interests and thereby give particular weight to the interference. In such cases, the legislator must examine particularly carefully whether such a deprivation is compatible with Article 14.1 of the Basic Law only if the owner is provided with an appropriate settlement.

The Court held that in determining the content and limits of property, the legislator must find a fair balance between the owner's interests worthy of protection and the public good. If the legislator determines the content and limits of property by changing the legal situation, it must adhere to the principles of proportionality, legitimate expectation and equality. It held that the legislator is pursuing a legitimate regulatory objective by suitable means by accelerating the nuclear phase-out with the intent of minimising the residual risk associated with nuclear energy, thereby protecting the life and health of the people and the natural foundations of life. The striking of the residual electricity volume allocated in 2010 is proportional: the interference with Article 14 of the Basic Law is very extensive, yet the public interests pursued by the 13th Amendment Act are of high value and, in the specific implementation of the 2010 striking of the prolongation of the operational lifetimes, they carry great weight. However, deficits in the production of electricity could have been avoided by means of a different staggering of the end dates for the nuclear power plants.

Furthermore, the 13th Amendment Act violates Article 14.1 of the Basic Law insofar as it does not provide for any transitional periods, compensation clauses or other settlement provisions for cases in which investments in nuclear power plants were devalued through the striking of the additional electricity output allowances allocated in 2010.

The Atomic Energy Act continues to be applicable; the legislator has until 30 June 2018 to draw up new provisions.

Languages:

German, English (translation by the Court available on its website).



Hungary

Constitutional Court

Important decisions

Identification: HUN-2016-3-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 20.10.2016 / **e)** 17/2016 / **f)** On revealing faces of police officers engaged in official business / **g)** *Magyar Közlöny* (Official Gazette), 2016/159 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Identity, disclosure / Identity, revealed / Police officer, photograph, use without consent / Police, power, exercise.

Headnotes:

The faces of police officers while on active duty need not be covered in the newspapers, news sites, and in the media in general, as their role as agents of public power outweighs their right to privacy.

Summary:

I. The matter was brought before the Constitutional Court by the Hungarian news site, Index.hu. The original case dates back to 2011, when Index.hu published a report of a demonstration organised by police unions. The online publication faced a civil lawsuit and the Metropolitan court ruled that Index.hu had to pay compensation for showing the faces of police officers in photos taken at that protest.

In Decision no. 28/2014 the Constitutional Court ruled that Index.hu was well within its right to document these events and to share the identities of police officers. The Constitutional Court held that news organisations could publish unaltered photographs showing the faces of police officers without gaining prior consent. Previously, Hungarian

journalists regularly masked the faces of the police, or manipulated the image so that the officers could not be identified. In Decision no. 28/2014 the Court ruled, however, that if the photograph was taken in a public place, showed the subject in an unbiased manner, and there was clear public interest involved in distributing the picture, then it could be published without the consent of the officer. The reason for that was that keeping people with public power accountable takes priority over any privacy considerations.

Despite the fact that the Constitutional Court ruled against the Hungarian courts' decisions and annulled the judgments against the media, the Supreme Court of Hungary (*Kúria*) issued an unfavourable decision against the media in 2015. The Supreme Court considered the personal privacy of police officers to hold greater importance than their being published in the public interest argued that nothing trumps personal privacy rights. According to the Supreme Court's judgment, therefore, Hungarian media must not only cover the faces of bystanders or residents in public places, when they appear in photographs, but also those of police officers engaged in official business. This is also why Hungarian publications are not able to show the faces or reveal the identities of those who have been charged with a crime, but not yet convicted.

II. The media outlets (including index.hu) turned to the Constitutional Court, arguing that the ordinary courts' decisions were a violation of constitutional rights, specifically the violation of the freedom of the press.

In its decision concerning the application, the Constitutional Court adhered to the standards defined in Decision no. 28/2014: photos and videos including police officers' face while on duty can be published without their consent if the disclosure is based on public interest. The Constitutional Court defined as an exception the violation of human dignity, for instance, the publishing of a police officer's suffering. Based on this standard the Constitutional Court found that the Hungarian courts had violated the freedom of the press.

Cross-references:

- no. 28/2014, 29.09.2014, *Bulletin* 2014/3 [HUN-2014-3-008].

Languages:

Hungarian.



Identification: HUN-2016-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.12.2016 / **e)** 22/2016 / **f)** On the interpretation of the EU clause / **g)** *Magyar Közlöny* (Official Gazette), 2016/191 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between the EU and member states.**

1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Law of the European Union/EU Law – **Secondary legislation.**

2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national Sources – Law of the European Union/EU Law and domestic law – **EU secondary law and constitutions.**

Keywords of the alphabetical index:

Constitution, identity / Constitutional review / European Union act, *ultra vires* / Sovereignty.

Headnotes:

The Constitutional Court can examine whether the joint exercise of competences with the European Union infringes human dignity, other fundamental rights, the sovereignty of Hungary, or Hungary's self-identity based on its historical constitution. This decision develops the Court's fundamental rights-reservation review and *ultra vires* review (composed of a sovereignty review and review based on constitutional identity).

Summary:

I. On 22 September 2015 European Union (EU) Council Decision no. 2015/1601 was adopted, which introduced a quota system for the distribution and settlement of asylum seekers and migrants among the Member States.

In December 2015 the ombudsman requested the Constitutional Court to interpret two articles of the Fundamental Law over the issue of the European Union migrant resettlement system. One of the constitutional provisions in question prohibits

collective expulsion and says that foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision (Article XIV.1 of the Fundamental Law). The other provision is the so-called EU clause, which allows Hungary, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties of the EU, to exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the EU (Article E.2 of the Fundamental Law).

The ombudsman asked the following four questions:

1. Whether the prohibition of expulsion from Hungary in Article XIV.1 forbids only this kind of action by the Hungarian authorities, or if it also covers actions by Hungarian authorities which they use to promote the prohibited expulsion implemented by other states?
2. Whether under Article E.2, state institutions are obliged to implement EU legislation that conflicts with fundamental rights stipulated by the Fundamental Law? If they are not, which state institution can establish that fact?
3. Whether Article E.2 may restrict the implementation of the *ultra vires* act? If state institutions are not obliged to implement *ultra vires* EU legislation, which state institution can establish that fact?
4. Whether Article XIV.1 and Article E can be interpreted in a way that they restrict Hungarian state institutions, within the legal framework of the EU, in facilitating the relocation of a large group of foreigners legally staying in one of the Member States without their expressed or implied consent and without personalised and objective criteria applied during their selection?

II. The Constitutional Court in the current decision did not answer question 1, but answered questions 2-4 as follows. The fundamental rights-reservation review is based on Articles E.2 and I.1 of the Fundamental Law. Under Article I.1 the inviolable and inalienable fundamental rights of man shall be respected. It shall be the primary obligation of the State to protect these rights. Having these rules in mind, and the need for cooperation in the EU and the primacy of EU law, the Court stated that it could not renounce the *ultima ratio* defence of human dignity and other fundamental rights. It argued that as the State is bound by fundamental rights, this binding force of the rights are applicable also to cases when public power is exercised together with the EU institutions or other Member States.

The Court emphasised that there are two main limits for conferred or jointly exercised competencies: they cannot infringe the sovereignty of Hungary (sovereignty review) and the constitutional identity of Hungary (identity review). According to the Court, these follow from the interpretation of the National Avowal of the Fundamental Law and Article E which refers to an “international treaty”, such as, for instance Article 4.2 of the Treaty of the European Union.

First, the Court referred to the concept of “state sovereignty” (supreme power, territory and population) which follows from Articles B.1, B.3 and B.4 of the Fundamental Law. The Court held that Article E.2 should not empty Article B of the Fundamental Law and stressed that the exercise of powers (within the EU) may not result in the loss of the ultimate oversight possibility of the people over the public power that is recognised by the Fundamental Law.

Second, the Court based the identity review on Article 4.2 of the Treaty on European Union). It acknowledged that the protection of constitutional identity rests with the Court of Justice of the European Union and is based on continuous cooperation, mutual respect, and equality. In the understanding of the Court, constitutional identity equals the constitutional (self-)identity of Hungary. Its content is to be determined on a case-by-case basis based on the Fundamental Law as a whole and its provision in accordance with Article R.3 of the Fundamental Law, which requires that the interpretation of the Fundamental Law shall be in harmony with their purposes, the National Avowal contained therein and the achievements of the historical constitution. Even though the Court held that the constitutional (self-)identity of Hungary does not mean a list of exhaustive enumeration of values, it still mentioned some of them. For example: freedoms, the division of power, the republican form of state, respect of public law autonomies, freedom of religion, legality, parliamentarism, equality before the law, recognition of judicial power, protection of nationalities that are living with us. According to the decision these equal with modern and universal constitutional values and the achievement of the historical constitution on which the Hungarian legal system rests.

In addition, the Court held that the protection of constitutional (self-)identity may also emerge in connection with areas which shape the citizens’ living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, and in areas in which the linguistic, historical and cultural involvement of Hungary can be detectable.

The Court further stated that the constitutional (self-)identity of Hungary is a fundamental value that has not been created but only recognised by the Fundamental Law and, therefore, it cannot be renounced by an international treaty. The defence of the constitutional (self-)identity of Hungary is the task of the Constitutional Court as long as Hungary has sovereignty. In its view, it follows from the above mentioned that sovereignty and constitutional identity intersect in many points; therefore the two reviews need to be employed considering one another.

III. Five justices attached concurring opinions, one justice attached a separate opinion to the decision.

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-2016-3-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 28.07.2016 / **e)** SC 24/15 / **f)** The Child and Family Agency v. CJ and another / **g)** [2016] IESC 51 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Law of the European Union/EU Law.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

4.7.13 Institutions – Judicial bodies – **Other courts.**

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

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

Keywords of the alphabetical index:

Child, order, return / Child, taken into care, protection / Child, protection, removal, other Member State.

Headnotes:

The High Court had no jurisdiction to grant an order for the return of a child to the care of the Social Services in Scotland under Council Regulation (E.C.) no. 2201/2003 (jurisdiction, recognition and enforcement of judgments in matrimonial and parental responsibility matters) where neither the Scottish Courts nor the Social Services had requested the return of the child.

Summary:

I. The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland) and in certain instances directly from the High Court. The decision of the Supreme Court summarised here is an appeal brought by the Child and Family Agency (the State agency responsible for child welfare and protection – hereinafter, the “CFA”) from a decision of the Court of Appeal. The Court of Appeal had found that the High

Court did not have jurisdiction to make an order that a child who had been placed on a child protection order in Scotland, and subsequently taken to Ireland by his mother, be returned to Scotland.

K. was born in Scotland and lived there with his mother (hereinafter, “CJ”) for most of his life. There was a history of involvement of Social Services in Scotland due to concerns for the welfare of K. Following an incident at K’s school in 2013, after which CJ pleaded guilty to assault on a child, CJ moved K to another school, and to an alternative school again within a few months. In December 2013, K was allocated a social worker and CK was served notice of a Children’s Hearing. Shortly afterwards, CJ and K were listed as missing persons in Scotland. It transpired that CJ travelled to Ireland with K. In the meantime, an interim Compulsory Supervision order was made in respect of K at the Children’s Hearing in Scotland. K was removed from the care of CJ in Dublin by An Garda Síochána (police in Ireland) under Section 12 of the Child Care Act 1991, and placed in the care of the Child and Family Agency. The CFA applied for, and was granted an emergency care order in the District Court of Ireland. K was placed in the care of the CFA until November 2014, and placed in foster care, with access to CJ. On 26 November 2014, the CFA applied for, and was granted an Interim Care Order in the District Court, following a contested hearing. In the course of the District Court hearing, the Judge of the District Court raised an issue as to the extent of jurisdiction, having regard to Council Regulation (E.C.) no. 2201/2003 of the 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (“Regulation 2201/2003”). The CFA brought proceedings in the High Court seeking various orders, including an order pursuant to the inherent jurisdiction of the High Court and/or Article 20 of Regulation 2201/2003 permitting the CFA to remove K from his current placement in Ireland and to place him in the care of child services in Scotland.

Article 20 of Regulation 2201/2003 provides:

“1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.”

The High Court concluded that it had jurisdiction to consider the claim, and made a declaration under Article 17 of Regulation 2201/2003 that the Courts of Ireland had no jurisdiction under the Regulation in respect of matters concerning parental responsibility for the child, and directed that the child should be returned to Scotland. CJ appealed to the Court of Appeal. The Court of Appeal held that that the High Court had erred in finding that it had jurisdiction to order K's return to Scotland, as there was no order under Regulation 2201/2003 from the Courts of Scotland directing the return of K.

II. The Supreme Court upheld the decision of the Court of Appeal. The Supreme Court noted at paragraph 13 that “the resolution of this matter will have significant implications for all proceedings involving children where the Regulation is a live issue.” The Supreme Court agreed with the High Court and Court of Appeal that the habitual residence of the child was, at the relevant time, Scotland, and therefore the Scottish Courts had jurisdiction in matters of parental responsibility (Article 8 of Regulation 2201/2003). The Court noted that in this case the CFA sought and obtained an order for the return of K to Scotland, although the return was neither ordered by the Scottish Courts nor sought by social services. It noted that the proceedings “were in effect being treated akin to an application under the Hague Convention with the significant qualification that it had not been determined that there had been an unlawful removal, and the person or body having custody did not seek return.” The Court noted that the essence of Regulation 2201/2003 is the allocation of jurisdiction between Member States and providing for the recognition and enforcement of judgments in such matters. The Supreme Court agreed with the Court of Appeal, that Article 20 of Regulation 2201/2003, which, providing for the making by a Court of provisional, including protective measures, in urgent cases, did not permit the order made in this case returning the child to the care of social services in Scotland at the very least without any order from a Scottish Court directing such return and in respect of which any order of the Irish court would be ancillary provisional, and therefore protective. The Court dismissed the appeal of the CFA and affirmed the order of the Court of Appeal.

Languages:

English.



Identification: IRL-2016-3-004

a) Ireland / **b)** Supreme Court / **c)** / **d)** 12.07.2016 / **e)** [SC 427/14 429/2014 430/2014] / **f)** O'Farrell and others v. Governor of Portlaoise Prison / **g)** [2016] IESC 37 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.12 Constitutional Justice – Jurisdiction – Types of litigation – **Conflict of laws.**

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

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

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

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

Keywords of the alphabetical index:

Case, criminal, procedure / Sentence, enforcement / Sentenced Person, transfer to another country / Sentence, remission, loss, remainder / Warrant, judicial / Liberty, deprivation, legality / Detention.

Headnotes:

The Supreme Court did not have the power under Section 9 of the Transfer of Sentenced Persons Act 1995, or an inherent jurisdiction, to vary sentences specified on defective warrants for the detention of three prisoners transferred from England to Ireland to serve the remainder of their sentences.

Summary:

I. The Supreme Court considered an appeal by the Governor of Portlaoise Prison from a decision of the High Court following an inquiry pursuant to Article 40.4.2 of the Constitution (concerning the right

to liberty) into the legality of the detention of the respondents in Portlaoise. The High Court found that the detention of the respondents was not in accordance with law, and ordered that the respondents should be released.

II. In 2002, the three respondents pleaded guilty before the English courts to terrorist offences, and were each sentenced to terms of imprisonment of 30 years, reduced to 28 years on appeal. They served a portion of their sentences of imprisonment in England. In 2006, the respondents availed of the procedure under the Transfer of Sentenced Persons Acts, 1995 to 1997, which had been enacted by Parliament (*Oireachtas*) to allow Irish prisoners in other jurisdictions to be transferred to serve the remainder of their sentences in prison in Ireland. The Acts permitted the Irish Government to incorporate the Convention on the Transfer of Prisoners, promulgated by the Council of Europe in 1983.

Article 9 of the Convention provides for two procedures for giving effect to the sentences of transferred persons:

1. continued enforcement; or
2. conversion of the sentence.

Although Article 10.1 of the Convention provides that the “administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State”, Article 10.2 makes provision for adaption of the sanction to the punishment or measure prescribed by its own law for a similar offence where necessary. This is given statutory force in Section 7 of the Transfer of Sentenced Persons Act 1995, as amended (hereinafter, the “1995 Act”). Section 9 of the 1995 Act provides for the making of an application to the High Court by the Minister for Justice and Equality to revoke or vary a warrant issued under Section 7.

The High Court, in its judgment of 28 August 2014, held that the specification of a sentence of 28 years in the warrants resulted in the warrants being defective. The commencement date of the sentence was also specified incorrectly as 7 May 2002. The conclusion of the High Court was based on a previous decision of the Supreme Court in *Sweeney v. The Governor of Loughan House Open Centre* [2014] IESC 42, which held that for the purposes of the Transfer of Sentenced Persons Acts 1995, a sentence imposed by a United Kingdom court of 16 years (eight years imprisonment followed by automatic release and eight years within the community on licence) is a custodial sentence of eight years. The case arose out of disparities between the sentencing systems in Ireland and England. It was held that the continued detention

beyond 8 years of a prisoner in Ireland, who had been sentenced to 16 years imprisonment in England was unlawful, as he would have been entitled to release having served one-half of his sentence in England.

In *O’Farrell* The High Court was of the view that, that having regard to *Sweeney*, the sentences should have had a true duration of approximately 18 years and 8 months, which should have been specified on the warrant. The High Court found that, due to the differences which had arisen between the Irish and English sentencing systems, the 28 year sentence of the English Courts should have been “adapted” in 2006 pursuant to Section 7.5 of the Transfer of Sentenced Persons Act 1995 prior to the transfer of the respondents to Ireland. A second issue arose as to whether the Minister for Justice and Equality might apply to the High Court, pursuant to Section 9 of the 1995 Act to “vary” the warrant issued by the High Court under Section 7.5 so that the sentence imposed by the English courts could be modified on the warrant. Counsel for the State had made an application to vary the sentences, either under Section 9 of the 1995 Act, or pursuant to the inherent jurisdiction of the Court. The High Court held that the power to “vary” a warrant under Section 9 of the 1995 Act did not extend to a fundamental modification of the sentences actually imposed, such as would have been required to render them compatible with Irish law. Thus, the High Court held that the detention of the respondents could not be shown to be lawful.

II. The seven Judges of the Supreme Court who heard the appeal agreed that, as a result of the decision of the Supreme Court in *Sweeney*, the warrants issued under Section 7 of the 1995 Act were defective. Thus, the issue for determination by the Supreme Court was whether the warrants could be varied under Section 9 of the 1995 Act as amended, to specify a sentence of just over 18 years, to commence from the date of the arrest of the respondents. A majority of the Supreme Court dismissed the State’s appeal. Laffoy J, with McKechnie J, MacMenamin J and O’Malley J concurring, held that Section 9 of the 1995 Act as amended conferred on the High Court jurisdiction to vary one or more of the provisions of the warrants, and not to vary the nature and duration of the sentence. The Court held that what the Minister sought to vary went to the nature and duration of the sentence, which should have been done via the adaption process prior to the transfer of the respondents.

III. However, a minority of the Court (Denham CJ, O’Donnell J and Clarke J) would have allowed the appeal, and expressed the view that the purpose of

the Convention was humanitarian, namely, to provide for the transfer of prisoners to their home countries to be near their families. They considered that a valid order from the English courts for the detention of the prisoners existed. Moreover, they were of the view that Section 9 of the 1995 Act permits variation which gives effect to the Convention, and stated that they would have permitted the warrant to be varied. As a result, the custodial aspect of the English sentence would have been given force, allowing the non-custodial aspect to fall away.

Cross-references:

Supreme Court:

- *Sweeney v. The Governor of Loughan House Open Centre*, [2014] IESC 42.

Languages:

English.



Italy

Constitutional Court

Important decisions

Identification: ITA-2016-3-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 05.10.2016 / **e)** 225/2016 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 43, 26.10.2016 / **h)**.

Keywords of the systematic thesaurus:

5.3.33 Fundamental Rights – Civil and political rights
– **Right to family life.**
5.3.44 Fundamental Rights – Civil and political rights
– **Rights of the child.**

Keywords of the alphabetical index:

Homosexual union, child, best interests.

Headnotes:

The question of the constitutionality of Article 337ter of the Civil Code, which was challenged because it does not allow the courts to intervene to protect the relationship that has been created within a homosexual couple between minors and the partner of their biological mother when the relationship between the two women comes to an end, was declared to be unfounded.

Summary:

I. Ms P.G. had asked the judge, in the course of non-contentious proceedings for an immediate ruling on the frequency and arrangements for spending time with two children, the sons of G. D., the woman with whom she had been romantically involved for eight years, “in the best interests of the minors, S. and M.”. The relationship had ended but during the eight years G. D. – with P. G.’s moral and financial support – had undergone a medically assisted reproduction procedure, which had led to the birth of twin boys, S. and M., who had been raised by both women.

The Court had issued a decision accepting P.G.’s appeal; the decision was the subject of an appeal brought before the Court of Appeal, raising the question of the constitutionality of Article 337ter of

the Civil Code in the part where, in violation of Articles 2, 3, 30 and 31 of the Constitution and the first paragraph of Article 117 of the Constitution, whereas it stipulated that “minors have the right to maintain a balanced and steady relationship with each of the parents and to maintain relations with relatives in the ascending line and close family (*parenti*) of each of the two parents (*genitori*)” and, in the second paragraph, it gives the judge the authority to take the necessary measures in respect of minors, and exclusively in their interests but does not stipulate that the courts may evaluate in practice whether it is in the interests of minors to maintain relations with the former partner of their biological parent once the relationship between the two has ended.

The judge *a quo* did not ask that the former partner of the biological parent be placed on the same level as the (natural or adoptive) parent, from whom minors “had the right to receive care, education, moral instruction and assistance” (Article 337*ter* of the Civil Code). Instead, he asked that, if there was an emotional bond with the children, the former partner should be placed on the same level as close family (*parenti*), who had the legal right to maintain links with the children.

The fact that the text of the said article of the Civil Code does not allow for this is incompatible:

- with Article 2 of the Constitution, which, by protecting “social groups” where the personality of the individual develops, also protects “*de facto*” families, even if they are homosexual, and minors who are part of such families, whereas, in the instant case, the latter lack such protection;
- with Articles 2, 30 and 31 of the Constitution, as the difference of treatment between children born to heterosexual parents and those born within a homosexual family is incompatible with the principle of equality;
- with the first paragraph of Article 117 of the Constitution (“Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European union law and international obligations”), with Article 8 ECHR, and with the international treaties to which Italy is party (the Convention on the Rights of the Child, adopted in New York in 1989; the European Convention on the Exercise of Children’s Rights, adopted by the Council of Europe in Strasbourg on 25 January 1996) and the Charter of Fundamental Rights of the European Union of 7 December 2000, which recognise the rights of parents and children, and the rights of other persons united by *de facto*

links, to maintain lasting relationships, in the event of the breakdown of the relationship between the couple, including homosexual relationships, in the interests of any minors concerned.

II. The Court declared the constitutionality question “unfounded”.

The *a quo* judge interpreted Article 337*ter* of the Civil Code correctly when he held that, in stipulating that the courts may intervene to ensure minors’ right to maintain a relationship with persons other than their parents, the article was referring only to persons who were related to the minors. He therefore concluded that guardianship law said nothing (*vuoto di tutela*) about the minors’ interest in maintaining the equally important relationship that they had established with persons other than their immediate family (*parenti*) and, that there was consequently a violation of the Constitution. He therefore asked the Court, with regard to the instant case, for a “supplementary” decision which would include the woman who was the former partner of the biological mother, as one of the persons whose ties with any children involved are protected by Article 337*ter* of the Civil Code.

However, the Court of Appeal omitted to consider the fact that if one of the parents of the minors (or both), without good reason and without taking account of the interests of the children, put an end to the relationship they have with third parties, outside of any family relationship, which is of particular importance for the children, it comes down to the conduct of the parent “which is in any event likely to be harmful to the children” and, in this case, Article 333 of the Civil Code allows the courts “to take the most appropriate measures” in the case concerned.

There is therefore no vacuum in guardianship law as suggested by the judge and so the question raised in relation to Article 337*ter* of the Code must be declared unfounded.

Languages:

Italian.



Kazakhstan

Constitutional Council

Important decisions

Identification: KAZ-2016-3-003

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 14.12.2016 / **e)** 1 / **f)** / **g)** *Kazakhstanskaya pravda* (Official Gazette), 28.12.2016 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

5.3.7 Fundamental Rights – Civil and political rights – **Right to emigrate.**

Keywords of the alphabetical index:

Persons leaving the country, rights, obligations.

Headnotes:

The right to leave the country may be limited, but only by laws and only to the extent necessary for protection of the constitutional system, public order, human rights and freedoms and the health and morality of the population. Any such restriction must pursue a legitimate aim; a reasonable level of proportionality is also needed between the means employed and the aim sought to be realised.

Summary:

I. On the basis of Article 78 of the Constitution, the Temirtau city court of Karaganda region asked the Constitutional Council on 16 November 2016 to assess the constitutionality of subparagraph 3 of paragraph 7 “Rules on obtaining documents for leaving the territory of the Republic of Kazakhstan” when permanent residence has been taken up elsewhere, approved by Resolution of the Government of 28 March 2012, no. 361 (hereinafter, the “Rules”). Under this provision, citizens are required, when leaving the country to take up permanent residence elsewhere, to submit to the migration police various documentation including an application certified by a notary regarding persons

living in Kazakhstan who have the right under the law to demand alimony from the person leaving (these could include parents, children and former spouses).

II. In the Constitutional Council’s view, this stipulation was out of line with Articles 21.2 and 39.1 of the Constitution for the following reasons.

The Republic of Kazakhstan proclaims itself a democratic, secular, legal and social state the highest values of which are an individual, his life, rights and freedoms. Human rights and freedoms are to be recognised and guaranteed in accordance with the Constitution and shall belong to everyone by virtue of birth. They are to be recognised as absolute and inalienable, and will define the contents and implementation of laws and other regulatory legal acts (Articles 1.1, 12.1 and 12.2 of the Constitution).

Under Article 21.2 of the Constitution everyone is entitled to leave the territory of the Republic. However, this constitutional right is not included in the list of rights and freedoms which must not be restricted in any event (Article 39.3 of the Constitution). It is possible for the right to leave the country to be limited. Any such restriction must be by law and to the extent necessary to safeguard the constitutional system, public order, human rights and freedoms and the health and morality of the population.

Under the Universal Declaration of Human Rights, there is a universal right to leave any country, including one’s own, and to return to it. People are subject, in the exercise of their rights and freedoms, only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the common good within a democratic society (Articles 13.2 and 29.2).

The International Covenant on Civil and Political Rights also stipulates that everyone is free to leave any country, including their own. Again, this right is only subject to restrictions which are provided for by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and consistent with the other rights recognised in the Covenant (Article 12.2 and 12.3).

The Constitution affords protection both to the rights of citizens leaving the Republic of Kazakhstan and to those remaining there. All citizens have rights and obligations stemming from their citizenship. The exercise of them must not violate the rights and freedoms of other persons or impinge upon the constitutional system and public morals. Everyone must observe the Constitution and legislation and

respect the rights, freedoms, honour and dignity of others. The care of children and their upbringing is a natural right and responsibility of parents. Able-bodied children who are of age must take care of their disabled parents (Articles 12.3, 12.5, 34.1, 27.2 and 27.3 of the Constitution).

The state can require those leaving the country to fulfil their obligations properly; this can take the form of creating temporary restrictions on departure. However, the Constitutional Council observed that the Rules containing the regulations in question allowed for ambiguous interpretation and could potentially generate legal uncertainty.

The Constitutional Council also assessed the role and value of the requirements on the submission of “an application submitted by a notary.” This stipulation imposes an extra burden on those leaving the country, to make an independent search for potential recipients of the alimony, even when relations were not maintained with the persons specified or where the person leaving does not even know the persons concerned. The Constitutional Council observed that it would be inadmissible for the constitutional right outlined above to become the hostage of someone's subjective relation or opinion.

The Constitutional Council noted that any decision taken by the migration police is to be taken after a thorough examination. A preventive judicial control has to be implemented in this process; any resolution by the migration police must be in line with the requirements of a fair trial and the principle of proportionality.

The Constitutional Council recommended that the Government should put measures in place to ensure the Rules complied with the legal positions of the Constitutional Council. The Government should also consider the initiation of amendments to the legislative acts governing relations in the sphere of migration for the purpose of fuller safeguards for human rights and freedoms.

Languages:

Kazakh, Russian.



Korea Constitutional Court

Important decisions

Identification: KOR-2016-3-005

a) Korea / **b)** Constitutional Court / **c)** / **d)** 26.02.2015 / **e)** 2009Hun-Ba17-205, 2010Hun-Ba194, 2011Hun-Ba4, 2012Hun-Ba57-255-411, 2013Hun-a139 161 267 276-342-365, 2014Hun-Ba53-464, 2011Hun-Ka4 (consolidated) / **f)** Adultery / **g)** 26-1(1) *Korean Constitutional Court Report* (Official Digest), 20 / **h).**

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

Keywords of the alphabetical index:

Self-determination, sexual, right / Proportionality, responsibility, punishment / Privacy / Public recognition, marriage, sex / Adultery, punishment.

Headnotes:

Although the legislative purpose of the anti-adultery provision of the Criminal Code is reasonable for maintaining marital fidelity and good sexual morality of society, the public consensus no longer supports the criminalisation of adultery in the light of the change of public attitudes on marriage and sex, as well as the spread of the idea of the importance of sexual self-determination. Since sexuality belongs to the realm of autonomy that is not subject to punishment, punishing adultery can no longer be expected to have a deterrent effect. In this regard, by excessively restricting the rights to sexual self-determination and to privacy, the prohibition of adultery fails to satisfy the requirement of the appropriateness of the means and that of the least restrictive means, and fails to achieve a balance between legal interests. Therefore, the provision violates the Constitution for infringing the right to sexual self-determination and secrecy, and the right to privacy.

Summary:

I. The petitioners, who were prosecuted for adultery (that is to say, sexual relations between a married person and someone who is not that person's spouse) filed motions requesting the constitutional review of Article 241 of the Criminal Code. After the motions had been denied, the petitioners filed the constitutional complaints. While hearing cases concerning charges of adultery, Uijeongbu District Court and Suwon District requested the constitutional review of the aforementioned provision, following motions made by the defendants or *sua sponte*.

II.1. Opinion of five Justices

The Constitutional Court held that Article 241 of the Criminal Code, which provides for imprisonment as the criminal punishment for adultery, violates the Constitution. The provision at issue, which aims at promoting the system of marriage based on good sexual morality and monogamy and at maintaining marital fidelity, restricts the rights to sexual self-determination and to privacy, which are protected under the Constitution. A public consensus no longer exists regarding the criminalisation of adultery, in the light of the change of public attitudes on social structure, marriage, and sex as well as the spread of the idea of the importance of sexual self-determination. In addition, the tendency in modern criminal law is for the State not to exercise its authority in cases where an act, in essence, belongs to the sphere of personal privacy and is not socially harmful or in clear violation of legal interests, even if the act is contrary to morality. The global trend is to abolish crimes of adultery. It should be left to the free will and love of people to decide whether to remain in a marriage, and the matter should not be forced by criminal punishment.

In the light of the current rate of punishment of adultery and the degree of social disapproval of adultery, criminal policy cannot be expected to have a general and special deterrent effect on adultery. The protection of the obligation of spouses to remain faithful to each other and the protection of female spouses can be effectively achieved by a claim for divorce against a spouse who committed adultery (Article 840.1 of the Civil Code), a claim for damages (Articles 843 and 806 of the Civil Code), disadvantages in decisions regarding custody and the restriction or exclusion of visitation rights (Article 837 and 837-2 of the Civil Code), or a claim for division of property (Article 839-2 of the Civil Code). Adultery laws have often been misused in divorce suits by spouses with greater liability or by persons outside the marriage to blackmail married women who have temporarily cheated on their husbands.

In the light of the comprehensive considerations mentioned above, the provision at issue fails to satisfy the requirement of the appropriateness of the means and that of the least restrictive means. In addition to the difficulty in supposing that the provision at issue can still serve the public policy objectives of protecting marriages and the obligation of spouses to remain faithful, the aforementioned provision excessively restricts basic rights, including the right to sexual self-determination, and thereby fails to achieve a balance between interests. Therefore, the provision at issue violates the Constitution for infringing the right to sexual self-determination and secrecy, and the right to privacy.

2. Opinion of one Justice

The instant provision provides for all types of adultery to be uniformly punished without any consideration of particular or specific circumstances, including the type of a person who committed adultery and the specific manner of acting. It violates the Constitution for excessive exercise of the State's authority to punish criminal acts in that it excessively restricts the right to sexual self-determination, thereby overstepping its limited role in achieving the purpose and function of criminal punishment.

3. Opinion of one Justice

Where the injured spouse condones or pardons the adultery, charges cannot be brought. The meaning of condone or pardon, which constitutes the requirement for prosecution, is not clearly defined, thereby suggesting that the people subject to the law cannot predict the scope and limits of governmental power. The provision at issue, therefore, infringes the principle of clarity.

In addition, the provision at issue provides for all types of adultery to be uniformly punished by imprisonment without any alternative, despite the fact that the gravity of the crime varies depending on the manner in which it was committed. The provision excludes or restricts the possibility of considering the particular or specific circumstances of individual cases, violating the principle of proportionality between responsibility and punishment.

III. Dissenting Opinion and Concurring Opinion

1. Dissenting Opinion of two Justices

The current systems and practices of the Civil Code do not offer sufficient protection for the socially and economically underprivileged in cases of divorce. If the crime of adultery is abolished without providing for a social safety-net for custody and broken families

upon divorce, families could be dissolved and the human rights and welfare of the underprivileged and young children could be infringed, as a result of placing one's right to sexual self-determination and privacy before the responsibility of marriage and the value of the family.

2. Concurring Opinion of one Justice with the Majority

Since the manner of committing adultery varies, it may be assumed that the provision at issue, by providing for imprisonment as the only punishment, is not proportionate with respect to responsibility and punishment. Nonetheless, it would be difficult to presume that a fine, which is pecuniary punishment, or punishment concerning qualifications (disqualification), which is only a sanction of shame or public humiliation, constitutes appropriate and effective deterrence for adultery, which casts aside the spousal obligation of faithfulness and brings disorder to the system of marriage. However, the resolution to the misbehaviour of a spouse during his or her marriage under the civil and family law should not be found in criminal punishment. At the time of abolishing the crime of adultery – which does not have an adequate deterrent effect – practices regarding compensation, division of property, custody, visitation rights, and other matters arising out of the dissolution of families due to adultery, should be improved and a new system should be considered for spouses and children.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-3-006

a) Korea / **b)** Constitutional Court / **c)** / **d)** 30.04.2015 / **e)** 2013Hun-Ma623 / **f)** Constitutionality of Article 844.2 of the Civil Code / **g)** 27-1(2), *Korean Constitutional Court Report (Official Digest)*, 107 / **h)**.

Keywords of the systematic thesaurus:

3.19 General Principles – **Margin of appreciation**.
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
 5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.

Keywords of the alphabetical index:

Family / Family life / Divorce / Ex-husband / DNA test / Paternity / Denial / Child / Birth, registration / Presumption, legal, rebuttable.

Headnotes:

The provision “the child born within 300 days of the termination of marriage” in Article 844.2 of the Civil Code, which creates a presumption that a child born within 300 days of the termination of a marriage is a child of the mother's ex-husband, violates the mother's right to personality in family and social life, and the fundamental right related to marriage and family life by going beyond the limits of the legislator's power.

Summary:

I. The complainant and her now ex-husband reached a mutual agreement to divorce on 19 December 2011. They obtained confirmation of their divorce from the family court and filed a certified copy of the confirmation with their local office. The complainant then lived with her present husband and gave birth to a daughter on 22 October 2012. The complainant tried to register the birth of her daughter with her name at the local office, but she was told that, pursuant to Article 844 of the Civil Code, which creates a presumption that a child born within 300 days of the termination of a marriage is a child of the mother's ex-husband, her daughter would have to be registered as the legitimate child of her ex-husband in the Family Register. In order to correct this, she needed to initiate a suit challenging paternity. The complainant decided to put off the registration of the birth. A DNA test performed by a forensic lab confirmed that her daughter was the biological child of the complainant's present husband. The complainant filed this constitutional complaint, arguing that Article 844 of the Civil Code violated her fundamental rights.

II. The Constitutional Court held that the provision “the child born within 300 days of the termination of marriage” in Article 844.2 of the Civil Code violates the Constitution, on the ground that it infringes the complainant's fundamental rights.

1. The presumption of paternity under the instant provision has a stronger effect than that of an ordinary presumption, thereby having greater influence on the legal status of the parties affected by it. Therefore, even though the enactment of a law related to the presumption of paternity falls within the realm of legislative discretion, where such law

prescribes an excessively unreasonable standard for a statutory presumption of paternity or excessively limited ways of rebutting the presumption of paternity, and thereby establishes filiation that does not correspond to actual blood ties, that law, by going beyond the limits of legislative discretion, is in violation of the Constitution.

The criterion of 'within 300 days of the termination of marriage', in itself, as the standard for the presumption of paternity under the instant provision does not appear to go beyond the limits of legislative discretion. Despite the reasonableness of the standard itself, the failure to provide legal exceptions for the '300 days' standard without taking into consideration the social changes since the enactment of the instant provision should be considered as exceeding the limits of legislative discretion, as it places excessive emphasis on achieving legal certainty by the rapid conclusion of a parent-child relationship, while ignoring the reality of the true biological relationship.

The instant provision has been in force without amendment since the enactment of the Civil Code in 1958. When that provision was enacted, divorce and remarriage were not common in our society, and a woman was statutorily prohibited from remarrying for 6 months after her divorce. Given those circumstances, it was reasonable at that time to presume that a child born within 300 days of termination of a marriage was a child of the mother's ex-husband without exception and to allow exceptional cases to be resolved only through a suit challenging paternity.

Nowadays, however, divorce and remarriage are no longer rare and the six-month ban on women remarrying after divorce was removed in the revision of the Civil Code in 2005. Moreover, the introduction of a cooling-off period before divorce, as well as mandatory arbitration, prolongs the whole process from the breakdown of marriage to final divorce. As a result, the possibility of a woman giving birth to a child whose biological father is not her ex-husband within 300 days from the termination of a marriage has increased. In addition, the development in DNA paternity testing techniques makes it possible to medically clarify whether two individuals are biologically parent and child.

Nevertheless, because of the instant provision, even where it is clear that a child born within 300 days after the termination of a marriage is not a biological child of the ex-husband or the ex-husband does not wish to establish his paternity and the child's biological father wishes to be legally acknowledged as father, the child must be registered as the legitimate child of the ex-husband in the Family Register, and this situation can

be changed only through a suit challenging paternity. As a result, the instant provision unduly places a burden on the divorced mother and her ex-husband with respect to founding new families and becomes a stumbling block to the recognition of the real blood relationship between a biological father and his child.

By failing to reflect the social, legal and technical changes since the enactment of the Civil Code, the instant provision – which forces a paternity suit to be filed by presuming the child to be a biological child of the ex-husband without exception even where a child is born after the termination of marriage and the biological father wishes to be legally acknowledged as father – imposes an unreasonably excessive restriction. Therefore, the instant provision infringes on the mother's right to personality in family and social life, and the fundamental right related to marriage and family life by going beyond the limits of the legislator's power.

2. Declaring the instant provision unconstitutional would cause a lacuna in the legal status of a child born within 300 days after the termination of a marriage as the presumption of paternity would cease to be in force immediately after the decision. Moreover, it falls generally within the realm of legislative discretion to make decisions on the standard and elements to remedy the unconstitutionality of the instant provision. Therefore, we declare the instant provision to be incompatible with the Constitution and order that the instant provision remain in effect until the legislature amends it.

III. Dissenting Opinion of three Justices

The instant provision creates a presumption of the paternity of a child born after the termination of marriage. Any presumption naturally entails some possibility of its being different from reality; therefore, if an exception is provided for rebutting such presumption, the law, not going beyond the limit of legislative discretion, should be regarded as being properly enacted.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-3-007

a) Korea / b) Constitutional Court / c) / d) 25.06.2015 / e) 2013Hun-Ka17-24, 2013Hun-Ba85 (Consolidated) / f) Production, Distribution, etc. of Virtual Child Pornography / g) 27-1(2), *Korean Constitutional Court Report* (Official Digest), 402 / h).

Keywords of the systematic thesaurus:

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

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

3.16 General Principles – **Proportionality.**

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

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

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

Keywords of the alphabetical index:

Pornography, child, juveniles / Animation.

Headnotes:

The part of the former Act on the Protection of Children and Minors against Sexual Abuse, which provides for criminal punishment of acts that produce, distribute, etc. child pornography and involve the “depiction of persons or representations that can obviously be perceived as children or minors, engaging in any other sexual act”, is not contrary to the vagueness doctrine under the *nulla poena sine lege* principle and the rule against excessive restriction.

Summary:

I. The petitioner in case 2013Hun-Ka17 had been indicted on charges of exhibiting or displaying pornography containing sexual acts by women dressed up in school uniforms. The petitioner in case 2013Hun-Ka24 had been accused of distributing, by uploading on online file-sharing websites, a pornographic animated film displaying sexual intercourse between female and male students in school uniforms. The petitioner in case 2013Hun-Ba85 had been indicted on charges of uploading and publicly exhibiting, on an online file storage service for users to view or download, a pornographic video entitled: “A uniform beautiful girl club”, which depicts persons or representations that may be perceived as children or minors.

The petitioners filed motions for the constitutional review of Articles 2.5, 8.2 and 8.4 of the former Act on the Protection of Children and Minors against Sexual Abuse (hereinafter, the “Act”), which prescribe punishment for acts such as distribution of videos or films which depict persons or representations that can be perceived as children or minors, or virtual images of children or minors.

II.1. After consideration is given to factors such as the legislative purpose, the regulatory history of virtual child pornography, and the severity of the relevant statutory punishment associated with the Act, it can be acknowledged that the phrase “persons that can be obviously perceived as children or minors” implies a depiction of persons who are highly likely to be misperceived as children or minors, fully capable of arousing abnormal sexual desire and thus likely to cause sexual crimes targeting children or minors. The phrase can also be clarified by the more detailed criteria set out in reasons for judgment by the judges that have interpreted it. This hardly indicates lack of clarity.

In light of its legislative purpose, the words “any other sexual act” of the instant provision can be perceived as obscenity that is highly likely to be sexually humiliating and repulsive to an ordinary person. It is difficult to categorically define in a law what constitutes an obscene act involving children or minors. Therefore, it is inevitable that a comprehensive form of regulation, namely one with the words “any other sexual act”, was adopted.

Thus, the instant provision is not in violation of the vagueness doctrine under the *nulla poena sine lege* principle.

2. At issue is whether the instant provision violates the rule against excessive restriction by overly limiting the freedom of expression and failing to comply with the principle of proportionality between crime and punishment. Even for virtual or pseudo child pornography, continuous distribution and exposure to expression materials using the image of children and minors as sexual objects may cause the development of a distorted perception and an abnormal attitude towards sex involving children and minors. Moreover, a comprehensive review of the results of research and studies involving sexual criminals targeting children and minors suggests that it is necessary to impose heavy penalties on distribution and dissemination of virtual child pornography in order to protect children and minors from potential sexual crimes and to send a warning signal to society.

In addition, because virtual child pornography is fully capable of leading to the development of abnormal sexual desires towards children or minors and is just as capable of doing so as real child pornography, such restriction is essential for protecting children or minors from sexual crimes. Because the gravity of crime and reprehensibility of such virtual pornography differs from that of regular pornography, the instant provision, which imposes heavier statutory punishment than the provisions of the Criminal Code prohibiting the distribution of obscene pictures, does not violate the principle of proportionality of criminal punishment. It also achieves a balance of interests when taking into account the significance of public interest involved in the protection of children and minors.

Consequently, the instant provision does not breach the rule against excessive restriction.

3. The instant provision prescribes the same statutory punishment for the distribution of both virtual and real child pornography. However, the two types of pornography hardly differ in terms of their gravity of crime and reprehensibility in that they can both cause abnormal sexual desire towards children or minors and give rise to sexual crimes involving children or minors. Moreover, only the maximum sentence is set out in the provision, and judges have discretion. Therefore, the instant provision is not considered to be in breach of the principle of equality by failing to maintain proportionality.

III. Dissenting Opinion of four Justices

1. We agree with the majority opinion regarding the view that the phrase stating “persons that can be obviously perceived as children or minors” is clearly defined. However, as to the phrase “expression materials that can be perceived as children or minors,” it is hard to judge whether it refers only to the expression materials that are highly likely to be misperceived as real children or minors, or whether it also includes pictures or cartoons insofar as they depict the images of children or minors as sexual objects.

As Article 2.4 is an open and comprehensive provision as it states “contacting or exposing all or part of the body, which causes sexual humiliation or repugnance of ordinary people,” it is difficult for persons with decent judgement to predict what “any other sexual act” subject to punishment refers to. Therefore, this phrase is also unclear. Consequently, the instant provision is void for vagueness.

2. Applying the same serious statutory punishment to virtual pornography as to real pornography which victimises real children or minors, despite the lack of substantiated causal relationship between the exposure to pseudo pornography and the occurrence of sexual crimes involving children or minors, is an excessive restriction, and not appropriate in terms of the proportionality of crime and punishment.

Yet, the parts of the instant provision stating “expression materials that can be perceived as children or minors” and “any other sexual act” are, as stated above, ambiguously defined and thus may result in an overly extensive scope of punishment. This extensiveness, in turn, may even lead to punishing or discouraging the expressions that require protection. Thus, the instant provision is likely to result in an excessive restriction on the freedom of expression and excessive criminal punishment.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-3-008

a) Korea / b) Constitutional Court / c) / d) 30.07.2015 / e) 2014Hun-Ma340 / f) Registration of personal information of sex offender / g) 26-2(1), *Korean Constitutional Court Report* (Official Digest), 370 / h).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice - Effects - **Determination of effects by the court.**
 3.12 General Principles - **Clarity and precision of legal provisions.**
 3.16 General Principles - **Proportionality.**
 3.17 General Principles - **Weighing of interests.**
 5.3.32.1 Fundamental Rights - Civil and political rights - Right to private life - **Protection of personal data.**

Keywords of the alphabetical index:

Taking photograph, without consent / Informational self-determination, right / Self-determination, personal information.

Headnotes:

Article 42.1 of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes, stipulating that any person declared, by final decision, guilty of taking photographs by using cameras, etc. under the Act shall be subject to the registration of personal information, does not infringe on the complainant's right to informational self-determination, even if it does not place different weight on different types or levels of illegality.

Article 45.1 of the Act stipulating a 20-year period for storage and management of the registered personal information of criminals violates the Constitution, as it infringes on the complainant's right to self-determination of personal information in that the risk related to the repetition of a crime may vary depending on the types of sexual offences and there is no review procedure that could exempt criminals from having to register their personal information or shorten the registration period.

Summary:

I. The complainants were convicted of crimes (taking photographs by using cameras, etc. and attempted taking of photographs by using cameras, etc.) under the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes (hereinafter, the "Act") and their personal information was registered pursuant to Articles 42.1 and 45.1 of the Act. The complainants filed this constitutional complaint arguing that their fundamental rights, including that of human dignity and worth, were violated by the aforementioned provisions.

II.1. Whether the registration provision infringes on the right to informational self-determination

The maintenance of a registry for certain types of sex offenders' personal information and its management in order to prevent repeat sexual crimes and enhance the effectiveness of criminal investigations are proper means of achieving legitimate legislative purposes. Expanding the scope of punishment or imposing heavier sentences would not be enough to curb the crime of taking photographs by using cameras etc.; therefore, the State's management of the personal information of any person punished for such crimes can be an effective and pragmatic way of preventing such crimes from being repeated. Despite the possible differences in the types of crime of taking photographs by using cameras, etc. and in the levels of illegality or culpability, the nature of the crime, which violates the victims' sexual freedom and right not to be photographed, is basically identical.

Therefore, the legislature's decision not to place a different weight on the individual types or levels of illegality of the crime cannot be considered to be an excessive restriction. Moreover, requiring a person to register his or her personal information does not necessarily mean that the person's rehabilitation becomes difficult or that the person will be stigmatised as a criminal. In this regard, while the private interests are not seriously infringed by the registration provision, the public interests to be achieved by that provision are very important. Therefore, the registration provision does not infringe upon the complainants' right to informational self-determination.

2. Whether the management provision infringes on the complainants' right to informational self-determination

The storage and management of sex offenders' personal information, aimed at preventing the repetition of sexual offences and enhancing the effectiveness of investigations for a period of 20 years during which there can always be a possibility of the repetition of a crime, are effective means of achieving legitimate legislative purposes. But the levels of risk related to the repetition of crime may be different depending on the types of sexual offences subject to registration and the characteristics of offenders, and it is reasonable for the legislators to minimise the restriction on the right to informational self-determination by providing for different periods of registration. However, the management provision in this case sets a uniform period of 20 years for the storage and management of personal information. Moreover, once personal information is stored pursuant to the management provision, there is no way for the order to be reviewed with respect to an exemption from the duty to register or a shortening of the registration period. This amounts to an extremely severe restriction. Even though the public interests to be achieved by the management provision are important, setting a uniform 20-year registration period without exception and imposing various duties during that period can result in a serious imbalance between the public interests to be achieved and the private interests of the sex offenders whose culpability is relatively low and who are less likely to commit similar crimes again. Therefore, the management provision infringes on the right to informational self-determination.

It falls within legislative discretion to provide for different periods of registration in order to remedy the unconstitutionality of the management provision and provide for measures for the exemption from the duty to register personal information or the shortening of the registration period where there is any change in

the circumstances, such as disappearance of the risk of recidivism. Therefore, we declare the management provision to be incompatible with the Constitution and declare that the management provision is to remain temporarily in force until the legislature amends it by 31 December 2016.

III. Dissenting Opinion

1. Dissenting Opinion by two Justices on the registration provision

The registration provision does not consider 'the risk of recidivism' as one of the requirements for selecting criminals who are subject to the registration of personal information. The registration provision thus imposes an unnecessary restriction on the sexual offenders subject to the provision who are not likely to be at risk of recidivism. The registration provision also violates the requirement of the least restrictive means because it fails to provide less restrictive alternatives for offenders who are less culpable or responsible. In addition, the registration provision fails to strike a balance between the public interests to be achieved and the private interests of the sex offenders whose culpability is relatively low and who are not at risk of recidivism. Therefore, the registration provision violates the right to informational self-determination.

2. Dissenting Opinion by two Justices on the registration provision

The types of crime of taking photographs by using cameras etc. vary depending on the criminal intent and motive, target of the crime, numbers and mode of action, affecting the need for the registration of personal information and the risk of recidivism. The registration provision, however, uniformly imposes the duty to register personal information on all kinds of offenders who commit the crime of taking photographs by using cameras etc. without variation or exception.

In addition, the elements of crime under Article 14.1 of the Act are unclear, thereby failing to give fair notice to the people who are subject to the provision about the standard of culpability and scope of crime, and the registration provision makes anyone with a final conviction for the crime of taking photographs by using cameras etc. mandatorily subject to the registration of personal information without the benefit of a separate procedure such as a judicial decision.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-3-009

a) Korea / **b)** Constitutional Court / **c)** / **d)** 21.10.2015 / **e)** 2013Hun-Ka20 / **f)** Profanity against the Nation / **g)** 27-2(1) *Korean Constitutional Court Report* (Official Digest), 700 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Insult, defamation, distortion / Dissemination, false fact.

Headnotes:

Article 104.2 of the former Criminal Code, which prescribes criminal penalties for expressions or actions that undermine or may undermine the safety, interest or dignity of the nation through means such as insult, defamation, distortion or dissemination of false facts relating to state institutions established by the Korean government or its Constitution, infringes on the freedom of expression and thereby violates the Constitution.

Summary:

I. The petitioner, who sought constitutional review in this case, had been indicted on charges of profaning the nation and violating the Presidential Emergency Decree on the Protection of National Safety and Public Order by drafting and keeping "expression materials" that distorted information relating to state institutions, etc., as well as circulating those materials to Japanese and American persons, leading to the publication of translations of the materials in a Japanese magazine, thereby undermining the safety, interest, and dignity of the State through foreigners.

The Court of first instance sentenced the petitioner to three years of imprisonment and three years of suspension of qualifications (disqualification) for the above crimes. This sentence was affirmed following the dismissal of the petitioner's appeals to the High Court and the Supreme Court. The petitioner filed for retrial of the case with the Court of first instance,

namely the Seoul Central District Court, which decided to commence the retrial on 19 April 2013.

While the above-mentioned retrial was pending, the petitioner filed a motion for constitutional review of Article 104.2 of the former Criminal Code, which prohibits profanity against the nation, with the Seoul Central District Court. That court granted the motion and filed a request for constitutional review with the Constitutional Court on 13 June 2013.

II.1. The instant provision limits the contents of expression. Since the limitation of such rights is, in principle, allowed only under strict conditions that are limited to inevitable circumstances where major public interests are at stake, it is at issue whether the provision violates the rule against excessive restriction and thus infringes on the freedom of expression.

2. In light of the circumstances at the time the press was regulated and the aforementioned provision was removed, it is doubtful whether the true legislative purpose of the provision can be construed as the protection of national safety, interest, and dignity. It is also hardly conceivable that a blanket limitation of acts of expression by way of criminal punishment contributes to the purpose. Therefore, the means of achieving the legislative purpose is not considered appropriate.

3. The term "other means" as a form of behaviour prohibited by the instant provision is not clearly defined, and the scope of its application is too far-reaching. The "interest" or "dignity" of the nation is also abstract and unclear in its meaning. Imposing punishment not just for the acts that undermined national interest or dignity but also for those that could do so, discourages free criticism and debate regarding the State and State agencies and extensively limits the freedom of expression.

The Criminal Code has a number of provisions safeguarding the safety and independence of the nation, and the National Security Act or the Military Secret Protection Act also has detailed provisions to that end. Therefore, the instant provision is not needed for the purpose of securing the "safety" of the nation. Furthermore, the preservation of the true "interest" of the nation is ensured through extensive discussions and forums, and its enforcement by criminal punishment is excessive. Imposing criminal penalties on the general public for their criticism or negative judgements on grounds that they undermine the "dignity" of the nation is contrary to the spirit of democracy, which guarantees free criticism and participation with respect to the State. The State or State agencies are not only capable of finding facts

and engaging in public relations on their own with diverse and vast sources of information, but also well-equipped to fully achieve the legislative purpose of the instant provision by actively responding to dissemination of false facts or malicious distortion. Thus, the instant provision fails to meet the requirement of the least restrictive means.

4. It is doubtful to what extent the blanket restriction of people's expression through criminal punishment can truly contribute to protecting the safety, interest, or dignity of the State, and the degree of limitation of fundamental rights is highly important in light of the value of the freedom of expression in a democratic society. For this reason, the instant provision also fails to strike a balance between competing interests.

In the light of the above, the instant provision breaches the rule against excessive restriction and infringes on the freedom of expression, ultimately violating the Constitution.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-3-010

a) Korea / **b)** Constitutional Court / **c)** / **d)** 26.11.2015 / **e)** 2012Hun-Ma940 / **f)** Unclaimed Corpses Offered to Medical School as Cadavers / **g)** 27-2(2), *Korean Constitutional Court Report* (Official Digest), 335 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.

Keywords of the alphabetical index:

Corpse, dissection, cadaver / Unclaimed body, use, dissection / Unclaimed body, deceased's wishes.

Headnotes:

Unclaimed dead bodies should not be offered to medical schools as cadavers for dissection, if the deceased has objected to this prior to death. The main text of Article 12.1 of the Act on Dissection and Preservation of Corpses violates the Constitution, as it infringes on the complainant's right to self-determination regarding the disposal of her dead body, in violation of the principle against excessive restriction.

Summary:

I. The complainant, who suffers from lupus, a chronic autoimmune disease, is an unmarried woman born in 1962. Her parents died long ago and she has been out of contact with her siblings for more than 30 years. Having cut ties with all members of her family, she has practically no family members or relatives to claim her dead body when she dies.

She became aware of the instant provision from a media report. The provision states that where a corpse is not claimed, it can be offered to medical schools for academic and research purposes even against the deceased's wishes. Upon learning of this, the complainant filed a constitutional complaint for a declaration that the instant provision is unconstitutional.

II. The subject-matter of this case is whether the main text of Article 12.1 of the Act violates the Constitution for infringing on the complainant's fundamental right.

1. The legislative purposes of the instant provision are to facilitate the supply of cadavers for investigation of cause of death and pathological and anatomical research by providing a legal basis for the supply of unclaimed dead bodies as cadavers and thereby improving public health and contributing to medical education and research. The legislative purposes are legitimate and the means of achieving the legislative purposes are appropriate.

2. The statistics seem to prove that the effectiveness of the instant provision is doubtful: only once in the past five years has an unclaimed corpse been offered to a medical school as a cadaver. Moreover, most cadavers used for dissection in medical schools are provided to them by whole body bequests; therefore, even without the instant provision, a sufficient number of cadavers can be made available by other means.

The current law stipulates that, as regards organs or human tissues, which are different from the whole body, where there is an explicit expression of

objection, it is impossible to transplant or retrieve them against the wishes of the deceased. Nevertheless, the instant provision fails to provide for an adequate procedure for explicitly showing a person's objection to his or her unclaimed dead body being offered as a cadaver to medical schools. The provision also makes it possible for an unclaimed dead body to be offered to a medical school for teaching anatomy regardless of the deceased's wishes. Therefore, the instant provision does not fulfil the requirement of the least restrictive means.

3. Although the public interest pursued by the instant provision of improving public health and contributing to medical education and research by facilitating the supply of cadavers is legitimate, the private interest of the right to self-determination infringed on by the instant provision by allowing a person's dead body to be offered to a medical school as a cadaver cannot be considered to be less serious. Therefore, the instant provision also fails to strike a balance between legal interests.

For the foregoing reasons, the instant provision violates the Constitution, as it infringes on the complainant's right to self-determination regarding the disposal of her dead body, in violation of the principle against excessive restriction.

Languages:

Korean, English (translation by the Court).

*Identification:* KOR-2016-3-011

a) Korea / **b)** Constitutional Court / **c)** / **d)** 23.11.2015 / **e)** 22013Hun-Ka9 / **f)** Chemical Castration Case / **g)** 27-2(2), *Korean Constitutional Court Report* (Official Digest), 391 / **h)**.

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
 3.16 General Principles – **Proportionality.**
 3.17 General Principles – **Weighing of interests.**
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

Keywords of the alphabetical index:

Sexual impulse / Self-determination / Privacy / Personality right / Recidivism, prevention / Recidivism, sexual crime, prevention.

Headnotes:

Article 4.1 of the Act on Pharmacological Treatment of Sex Offenders' Sexual Impulses, under which a public prosecutor may request a court to issue an order for pharmacological treatment of a person aged 19 or over who is recognised to be at risk of sexual recidivism, is not in violation of the rule against excessive restriction and does not infringe on the right to physical freedom. However, Article 8.1 of the Act which allows a court to issue a treatment order is incompatible with the Constitution on the grounds that the provision violates the rule against excessive restriction and thus infringes on the right to physical freedom in cases where there is a considerable amount of time between the issuing and the execution of the order.

Summary:

I. The defendant in the underlying case was indicted on a charge of forcibly molesting the victims, who were five and six years old respectively. The prosecutor requested that the court issue an order for pharmacological treatment of sexual impulses against the defendant.

The court made a *sua sponte* request to the Constitutional Court for a constitutional review of Articles 4.1 and 8.1 of the Act on Pharmacological Treatment of Sex Offenders' Sexual Impulses (hereinafter, the "Act"), on the grounds that these provisions are in violation of the rule against excessive restriction and thus infringe on the right to physical freedom of sexual offenders subject to the treatment.

II.1. An order for pharmacological treatment of sexual impulses (hereinafter, "treatment order") pursuant to the provisions at issue does not require consent of the person subject to the treatment. The injection of the drugs suppresses the sexual impulses and desire of the person, and may cause limited sexual functioning, which may lead to the deterrence of sexual crimes. Therefore, the instant provisions, which regulate control of mental desire and physical function, restrict the right to physical freedom, as well as other fundamental rights, such as the rights to privacy, self-determination, and personality.

2. The legislative purpose of the instant provisions is legitimate. The pharmacological treatment of sexual impulses that aims to suppress the secretion and effects of testosterone, a hormone that plays a role in sexual impulses and activity, is accepted as an appropriate means of achieving the legislative purpose.

Moreover, the instant provisions in principle satisfy the minimum restriction principle and the balance of interest test in light of the following facts specified in the Act:

- i. the treatment is sought against sexually deviant patients after evaluation by a medical specialist;
- ii. the temporary interruption of the treatment can be sought when the treatment is not necessary; and,
- iii. the secretion and function of testosterone can be restored upon discontinuing the treatment.

However, the Act stipulates that the treatment order is to be issued at the time of sentencing. Where a court sentences a person to a long prison term, the amount of time between the issuing and execution of the treatment order may be significant. Yet, an application for temporary interruption of the treatment may only be filed six months after the execution of the treatment order begins. In addition, even though the procedure to prevent unnecessary treatment is not yet in place, the order provision, that is to say, Article 8.1, allows a court to issue the treatment order at the time of sentencing. The issuing of the treatment order where there is no procedure to prevent unnecessary treatment excessively restricts fundamental rights of the person subject to the treatment, and this goes beyond the necessary scope to fulfil the legislative purpose.

For those reasons, the order provision, in that the procedure for preventing unnecessary treatment at the time of execution of the treatment order has not yet been prepared, is in violation of the rule against excessive restriction and infringes the right to physical freedom of the person subject to the treatment.

3. It is the legislature's task to develop the specific means and the procedure for preventing the risk of unnecessary treatment where there is a significant amount of time between the issuing and actual execution of the treatment order against a person serving a long prison term. The unconstitutionality only becomes a concrete problem when the treatment order is being executed, and the unconstitutional aspect of the order provision can be remedied by amending the provision before the execution takes place. For these reasons and in order to prevent confusion in enforcing the law, the Constitutional Court, even though it has

decided that the order provision is not in conformity with the Constitution, orders that the provision remain in force until the legislature enacts the amendment.

III. Dissenting Opinion of three Justices

The legitimacy of the legislative purpose of the instant provisions is not questionable. However, whether pharmacological treatment is a proper means of fulfilling the legislative purpose is debatable, considering that sexual incapacitation can hardly be regarded as effectively deterring sexual offences and the drugs used in the treatment do not cure the fundamental pathological problems of sexual deviance. Furthermore, the excessive restriction stipulated by the instant provisions goes beyond the scope required to fulfil the legislative purpose and is against the minimum restriction principle when the following facts are comprehensively considered:

- i. the consent of the person subject to the treatment is not required;
- ii. the treatment of sexual deviance causing sexual offences and the prevention of sexual recidivism can be tackled with a set of measures such as the medical treatment and custody system, and the protective custody system under current law, and the wearing of an electronic ankle bracelet; and
- iii. the unconstitutional aspect of the instant provisions pointed out by the majority opinion.

In addition, while the deterrent effect of the measures under the instant provisions on the risk of recidivism is restricted or temporary, and even uncertain, the harm suffered by the person subject to the treatment is tremendous. Thus, the balance of interests test is not met. Most of all, we cannot help but question whether such an attempt to induce reformation of a man through controlling physical performance and intentionally impairing a man's physical function against his will are tantamount to threatening the integrity of a human being, as distinct from an animal or an object. Therefore, the instant provisions all violate the rule against excessive restriction and infringe on fundamental rights, such as the right to physical freedom. We conclude that the provisions at issue are not constitutional.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-3-012

a) Korea / b) Constitutional Court / c) / d) 23.12.2015 / e) 2013Hun-Ba168 / f) Case Concerning Constitutional Complaint against Article 45.1 of the Political Funds Act / g) 27-2(2), *Korean Constitutional Court Report* (Official Digest), 511 / h).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice - Effects - **Determination of effects by the court.**
 3.16 General Principles - **Proportionality.**
 3.17 General Principles - **Weighing of interests.**
 4.5.10.2 Institutions - Legislative bodies - Political parties - **Financing.**
 5.3.21 Fundamental Rights - Civil and political rights - **Freedom of expression.**

Keywords of the alphabetical index:

Political party, funding / Political party, freedom.

Headnotes:

A provision in the Political Funds Act that prohibits and imposes criminal punishment for financial support of political parties through supporters' associations violates the freedom of political party activities and political expression and is therefore incompatible with the Constitution.

Summary:

I. Petitioners A were accounting managers of the New Progressive Party. Petitioners B include a head of the labour union group of SK Broadband Co. Ltd., which is one of the individual units under the Korean Federation of Clerical & Financial Labour Unions.

As Political parties could no longer directly receive contributions from individuals through associations of supporters of political parties because such associations were banned under the Political Funds Act (hereinafter, the "Act"), Petitioners B decided to make political contributions in an unlawful manner by exploiting the "member support" system, to which a member of the political party has neither rights nor obligations. Petitioners A accepted illegal political contributions from Petitioners B in the amount of 180 million Korean won from 8 December 2009 to 31 December 2009, and were indicted on 15 October 2012 for receiving political contributions in a manner not prescribed by the Act.

Petitioners A, while criminal proceedings were pending against them, filed a motion for constitutional review of Articles 6 and 45.1 of the Act. As the motion was rejected on 10 May 2013, a constitutional complaint in this case was filed on 10 June 2013.

II.1. The provisions at issue that prohibit the organisation of such supporters' associations intend to enhance transparency and morality in the operation of political parties by preventing the collusion of business and politics caused by the acceptance of illegal political contributions, and by ensuring transparency in procuring political funds. Such purpose of the provisions at issue is legitimate.

2. Despite the need to restrict political contributions to political parties as a means of tackling the harmful ramifications of the collusion between business and politics caused by illegal political contributions, that collusion is a problem of only certain conglomerates and corrupt political factions, and most ordinary voters are not directly involved in it. There is thus no need to fundamentally bar political contributions by an ordinary citizen to a political party.

It may be necessary to restrict the system of supporters' associations to a certain extent in order to prevent the harmful ramifications of giving and accepting illegal political contributions. However, instead of a complete ban on the system, these ramifications may be effectively prevented by ensuring transparency in political funds through measures such as limiting the amount of donations or fundraising, or disclosure of donation records.

A membership fee may only be paid by a person who becomes a member of a political party. In modern society, there is a practical limitation on a political party's recruitment of new members in order to raise funds for party activities. Thus, it is difficult to obtain political funds only by membership fees paid by party members.

Under the current law, a citizen may give financial support to a political party without joining any party by entrusting donations to the National Election Commission. However, under the current donation system of the Commission, a donor cannot specifically designate the political party that will receive the donation. The current system, under which the Commission distributes and pays the donation to each political party according to the distribution ratio of government subsidies, is more like a development fund for politics and political parties at large, and it is completely different from the system under which a donor may give financial support to a certain political party according to his or her own political preference. Therefore, the membership fee

and the donation system through the National Election Commission are inadequate substitutes for the supporters' associations.

Accordingly, the provisions at issue do not meet the appropriateness of means and the minimum restriction requirements.

3. The public interest which the provisions at issue intend to protect is to enhance the transparency and morality in the operation of political parties by countering the collusion between business and politics caused by illegal political contributions, and by ensuring transparency in procuring political funds. Nonetheless, the provisions at issue, which completely prohibit financial support for political parties, also result in a restriction of freedom of political party activities with respect to political parties' financing themselves and freedom of political expression. The harm caused by the provisions at issue is greater, and therefore the test of a balance of interests is also not satisfied.

On those grounds, the provisions at issue infringe on the freedom of political activities and freedom of political expression.

4. While Article 6 of the former Act was amended by Act no. 9975 on 25 January 2010, this amendment was not relevant to the situation of supporters' associations. Even under the amended version of the Act, a political party still cannot designate its own supporters' association. Thus, if we leave Article 6 as it stands now, this will result in leaving and neglecting the unconstitutional provision. In order to ensure the effectiveness of this decision of unconstitutionality and promote consistency in law and order and judicial economy, we must extend the scope of our decision to Article 6 as well, and declare Article 6 unconstitutional.

5. As the provisions at issue are not compatible with the Constitution, they, in principle, must be declared unconstitutional. However, if we find the provisions at issue unconstitutional and immediately deprive them of their validity, it will eliminate the legal basis for the designation of supporters' associations. The provisions at issue will therefore continue to apply until their unconstitutional aspects are remedied, and the legislature shall prepare new legislation as promptly as possible, by 30 June 2017 at the latest.

III. Dissenting Opinion of one Justice

The provisions at issue simply prohibit donations to a political party through the supporters' association of the party. An ordinary citizen can still indirectly express his or her own political support for a certain political party by donating to a supporters' association

of an individual politician of the political party. Furthermore, there are other ways of giving financial support to the political party: one can join the party and pay the membership fee or entrust donations to the National Election Commission. It is hasty to conclude that the provisions at issue excessively restrict the freedom of political expression.

The provisions at issue that prohibit a political party from having a supporters' association should not be held unconstitutional as they do not infringe on the freedom of political party activities and freedom of political expression to the extent of exceeding the legislature's freedom of legislative formation.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-3-013

a) Korea / **b)** Constitutional Court / **c)** / **d)** 23.12.2015 / **e)** 2014Hun-Ba3 / **f)** Advance Notice of Dismissal Case / **g)** 27-2(2), *Korean Constitutional Court Report* (Official Digest), 553 / **h)**.

Keywords of the systematic thesaurus:

3.19 General Principles – **Margin of appreciation**.
5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law**.
5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

Keywords of the alphabetical index:

Legislature, discretion / Employment, dismissal, advance notice, exception / Employment, short term, dismissal, advance notice.

Headnotes:

A provision setting out that a worker “who has been employed for less than six months as a monthly-paid worker” is excepted from the group of persons to whom the employer is required to give advance notice of dismissal, is not constitutional as the provision infringes on the worker’s labour rights and the principle of equality.

Summary:

I. The petitioner was dismissed on 6 July 2009 without advance notice from his job as an English teacher at a private academy.

As the petitioner’s request for a constitutional review of Article 35.3 of the Labour Standards Act (hereinafter, the “Act”), which provides that a worker who has been employed for less than six months as a monthly-paid worker, that is to say, a monthly worker who receives monthly wages, is an exception to the requirement of advance notice of dismissal, was rejected, the petitioner filed a constitutional complaint in this case on 2 January 2014.

II.1. Whether the instant provision infringes on labour rights

The requirement of advance notice of dismissal provided for by the Labour Standards Act is not only related to the dismissal of a worker, which is a very essential aspect of the working or labour conditions, but also intends to avoid jeopardising a worker’s livelihood with the sudden loss of his or her job. For this reason, it constitutes a reasonable labour condition which is required to guarantee a worker’s human dignity. Therefore, requiring an employer to provide advance notice of dismissal is one of the minimum labour conditions for guaranteeing human dignity of an individual worker, and the right to advance notice of dismissal is included in the labour rights.

In light of the purpose of the requirement of advance notice of dismissal and the exceptions to the requirement set out in Article 26 (i.e., where a natural disaster, calamity or other unavoidable circumstances prevent the continuance of the business or where the worker has caused a considerable hindrance to the business or has intentionally inflicted any damage to property), exceptions to the requirement of advance notice must be limited to circumstances where a worker has a low expectation of the continuation of the employment relationship considering the nature of the employment contract.

However, the instant provision clearly allows an employer to dismiss a monthly-paid worker who has been employed for less than six months without advance notice and without payment of the wages specified in Article 26, regardless of the nature of the employment contract. We find no reasonable basis for excluding a monthly-paid worker who has been employed for less than six months from the advance notice requirement. Monthly-paid employees who have been employed for less than six months are mostly workers who have signed an employment contract with no definite term of duration and thus

generally have a high expectation that the employment relationship will continue. Dismissal of these workers constitutes an unexpected dismissal.

While determination of the scope of employees subject to the requirement of advance notice of dismissal is a matter of legislative policymaking and therefore one falling within legislative discretion, the legislature whose duty it is to protect labour rights must maintain harmony and balance in determining the system of advance notice by considering the interests of both employees and employers. Imposing an advance notice requirement on an employer regulates dismissal from a procedural perspective, and the requirement does not prohibit an act of dismissal itself. Moreover, the notice period is merely thirty days, and an employer who fails to give notice can still comply with the law by paying not less than thirty days of wages. In light of these facts, the requirement of advance notice can hardly be perceived as an excessive restriction. On the other hand, a monthly-paid worker who has been employed for less than six months, if excluded from the requirement of advance notice, can lose a job without prior notice only because he or she has been employed less than six months, despite the fact that those workers are typically regarded as regular employees.

With respect to the instant provision, which excludes “a worker who has been employed for less than six months as a monthly-paid worker” from the workers to whom advance notice of dismissal must be given, the legislature failed to set out the minimum procedural regulation required by the legislature’s duty to protect workers, and thus the legislature exceeded the scope of discretion tolerable under the Constitution in exercising its legislative discretion.

Accordingly, the instant provision is unconstitutional as it infringes labour rights.

2. Whether the instant provision violates the Principle of Equality

Dismissal of a regular employee who does not have a fixed-term contract constitutes an unexpected and sudden dismissal regardless of whether or not the employee has been employed for less than six months. In that respect, an employee who has been employed for less than six months and other employees who have been employed for more than six months are not fundamentally different in terms of their expectation of the continuation of the employment contract. Furthermore, a worker who has been employed for less than six months also needs enough time to seek another job and needs to be protected from the financial difficulties caused

by a sudden loss of his or her job. Consequently, the instant provision, by treating a worker who has been employed for less than six months differently from a worker who has been employed for more than six months regarding the requirement of advance notice even though they are both monthly-paid workers, constitutes discrimination without reasonable grounds.

Under the Act, a worker is a person who provides labour to receive wages in a subordinate relationship and under supervision and order of an employer. The Act pursues the aim of protecting labour conditions or lives of workers falling under such definition. A monthly-paid worker, as well as a worker who receives other types of wages such as hourly, daily or weekly wages, also provides labour for the purpose of earning wages and is subordinate to an employer. The worker should not be subject to discrimination with respect to workers who receive other kinds of wages only because the worker is paid wages on a monthly basis. The Act gives equal protection to workers who receive monthly wages and those paid on an hourly, daily, or weekly basis. We find no reasonable grounds on which a monthly-paid worker should receive different treatment from workers paid hourly, daily, or weekly wages, in particular, with respect to the application of the advance notice requirement.

The instant provision is in violation of the principle of equality under Article 11 of the Constitution as it discriminates against a monthly-paid worker who has been employed for less than six months when compared to other monthly-paid workers who have been employed for more than six months and other workers who receive wages other than monthly wages without reasonable grounds.

Languages:

Korean, English (translation by the Court).



Kosovo

Constitutional Court

Important decisions

Identification: KOS-2016-3-002

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 08.12.2016 / **e)** KO 73/16 / **f)** The Ombudsperson – Constitutional review of Administrative Circular no. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January 2016 / **g)** *Gazeta Zyrtare* (Official Gazette), 09.12.2016 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

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

3.21 General Principles – **Equality.**

4.12.2.4 Institutions – Ombudsman – Guarantees of independence – **Financial independence.**

4.12.7 Institutions – Ombudsman – **Relations with the executive.**

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

4.13 Institutions – **Independent administrative authorities.**

Keywords of the alphabetical index:

Civil Service, independence.

Headnotes:

The Ombudsperson and the Constitutional Court are situated outside the three classical branches of government. They are not and cannot be involved in the inter-play of the division of power and checks and balances that characterises the three branches of government. These institutions have a specific constitutional status that must be respected by the governing authorities. The same principles apply to other independent institutions enumerated in the Constitution.

The Ombudsperson and the Constitutional Court are there to assist the three branches of government in ensuring the rule of law, the protection of fundamental human rights and supremacy of the Constitution. They are specialised and uniquely independent

institutions. Consequently, the Government cannot impose identical criteria to them without paying close attention to their specificities guaranteed by the Constitution. Ordering these institutions to place their staff members in positions, grades and job classifications as approved by the Government, without due account being taken of their specificities and uniqueness, is out of line with the constitutional guarantees.

Summary:

I. In 2010, Parliament adopted a new Law on Salaries of Civil Servants. In 2015, the Government enacted a Regulation on Classification of Jobs in the Civil Service based on the above law. In addition, the Government adopted a catalogue of jobs in Civil Service with the aim of creating a system of uniform grades, positions and salaries in all public institutions financed by the Kosovo budget. In 2016, as a further implementing measure, the Government enacted an Administrative Circular requesting the Ombudsperson to classify and place its civil servants in positions and grades as approved by the Government. The same Administrative Circular, with the same requests, was sent to the Constitutional Court as well as all other independent institutions enumerated under Chapter XII of the Constitution, namely the Auditor General, Central Election Commission, Central Bank, Independent Media Commission. In the Administrative Circular, the Government asked the institutions mentioned above to submit proposals for their internal job classification and placement to the Government for review and approval. The purpose was to determine their classification within the catalogue of jobs in the Civil Service and place the civil servants within these respective institutions in the positions and grades approved by the Government.

The Administrative Circular was subsequently challenged before the Constitutional Court on the basis that it was unconstitutional and did not respect the principle of independence granted to these institutions. The Ombudsperson, the applicant in this case, claimed that the Government had violated the constitutional guarantee of independence of the Ombudsperson, the Constitutional Court and other independent institutions enumerated in Chapter XII of the Constitution, by interfering in the internal matters of organisation, budget and staff management.

II. The Court admitted the case for review and considered that it raised serious questions of fact and law which required examination on the merits. The main question for the Constitutional Court to consider was whether the Government, by enacting the Administrative Circular, had taken into account the

specific constitutional place and status of independent institutions and the constitutional guarantees for their functional, organisational and financial independence; and whether the legal principle “equal pay for equal work” was constitutionally applicable in view of their constitutional standing.

The Constitutional Court noted that the Administrative Circular touched upon the constitutional status of the independent institutions and had a substantive impact on their organisational, functional and financial status. The Court did not contest the authority of the Government to unify classification of job positions and grades as part of its public administration obligations. However, it emphasised that when the Government is undertaking this process, it must take into account the special status of the Ombudsperson, the Constitutional Court and other independent institutions in accordance with their constitutional guarantee of independence; the preparation, content and applicability of any norms related to their functioning and internal job descriptions and remuneration must be adequately and appropriately developed and determined.

The Court concurred that the Government has a constitutional prerogative and duty to act as the policymaker of the state, including in the area of classification and categorisation of job positions. Nonetheless, it could not be expected that staff of the constitutionally independent institutions should conform in an identical manner to the system of recruitment, job classification, categorisation and remuneration provided by a legal act of general nature of the Government, or any act of the executive branch, without account first having been taken of the specificities and uniqueness of the institutions in question.

In the concluding part of the Judgment, the Court noted that the Administrative Circular did not take into account the unique position of the Ombudsperson and of the Constitutional Court as constitutionally independent institutions, in the context of the Circular having been prepared without the participation of the institutions concerned or without the opinions expressed being taken into consideration.

The Court accordingly declared that the Administrative Circular issued by the Government violated in its entirety the provisions of the Constitution as stipulated in Chapters VII (Constitutional Court) and XII (Independent Institutions).

Languages:

Albanian, Serbian, English (translation by the Court).



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2016-3-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.10.2016 / **e)** KT26-N13/2016 / **f)** On paying the salary of a member of the *Seimas* to members of the *Seimas* who continuously fail to attend work at the *Seimas* / **g)** TAR (Register of Legal Acts), 24590, 05.10.2016, 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.**

5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration.**

Keywords of the alphabetical index:

Member, parliament, remuneration / Parliament, sittings, attendance.

Headnotes:

A statutory provision to the effect that remuneration for the given month may not be reduced by more than one third for a member of parliament who has failed during that month without a compelling reason, to attend parliamentary sessions or sittings of committees or other structural units of parliament is unconstitutional.

Summary:

I. The Constitutional Court declared unconstitutional Article 15¹.1 of the Statute of the *Seimas*, insofar as it provided that remuneration for the given month could not be reduced by more than one third for a member of parliament who, during that month, had continuously failed, without important justifying reason, to attend sittings of parliament or sittings of committees or other structural units of parliament to which he or she has been appointed and where voting had been scheduled in advance, in accordance, with the procedure prescribed in the Statute of the *Seimas*.

II. Under the provision mentioned above, if a member of parliament failed to attend, without important justifying reason, more than half of the parliamentary sessions in which voting on the adoption of legal acts had been scheduled in advance and which took place at the scheduled time, his or her remuneration for that month would be reduced by one third. The Constitutional Court held that this was not permissible; it noted that these provisions would apply even if there was no significant reason for the absence.

The constitutional status of a member of parliament, as a representative of the Nation, entails a constitutional duty to attend parliamentary sessions; this forms a major part of the work of parliament. Non-attendance without important justifying reason should be viewed as non-performance of duty.

Under the Constitution, a member of parliament is entitled to receive the remuneration of a member of parliament. Remuneration for the work of members of the parliament, and remuneration for expenses relating to their parliamentary activities, is an important element of the constitutional status of a member of parliament, and should be considered as a safeguard of the parliamentary activity of a member of parliament. The Constitution implies that the remuneration of a member of parliament must be at a sufficient level and paid on a regular basis. The rationale behind these constitutional regulations is to ensure that members of parliament carry out their duties properly.

Parliament is obliged to regulate, through legislation, the payment of remuneration for the work of a member of parliament. In doing so, parliament must pay heed to the norms and principles of the Constitution. It must also pay heed to the concept of the work of a member of parliament and the imperative, arising from the Constitution, to ensure the preconditions are in place to allow them to carry out their duties properly. Having assessed the circumstances related to the fulfilment of the duties of members of the parliament, the legislature may lay down a differentiated legal regulation on their remuneration, having regard to whether the member in question performs his or her duties properly.

Payment of remuneration from the funds of the state budget to a member of parliament who does not fulfil their constitutional duty to attend parliamentary sessions should be considered a constitutionally unjustified privilege. The Constitution does not protect and does not defend any such rights, which are in fact privileges in terms of their content.

The Constitutional Court also noted that, while regulating the payment of remuneration for members of parliament in cases where a member has continuously and without important justifying reason, failed to attend the sittings, the legislature must take account of the fact that the recognition of the parliamentary opposition is a necessary element of pluralist democracy. Demonstrative non-participation of members of parliament at sessions of parliament or sessions of any of its structural units to which they are appointed, which is based on the opinion and political goals of the parliamentary opposition, i.e. obstruction as a type of political protest and a method of parliamentary activity in seeking to prevent the adoption of a resolution undesirable by the minority, may, under the Constitution and in certain situations, be assessed as an important reason not to attend sittings if such non-participation is not regular.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2016-3-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.12.2016 / **e)** KT31-N17/2016 / **f)** On the resolution of the *Seimas* on approving the conclusion of the ad hoc Investigation Commission of the *Seimas* for the Restoration of the Civil and Political Rights of President Rolandas Paksas / **g)** TAR (Register of Legal Acts), 29337, 23.12.2016, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.4.6.1.2 Institutions – Head of State – Status – Liability – **Political responsibility.**
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**
 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

President, impeachment / Investigation commission.

Headnotes:

Parliament may not approve a conclusion by a parliamentary commission which might contain proposals that could be incompatible with the Constitution. Before deciding whether to approve such a conclusion, Parliament must assess the constitutional compliance of the suggestions put forward in the conclusion.

Summary:

I. The Constitutional Court recognised that Article 1 of the parliamentary resolution whereby parliament approved the conclusion of the Commission for the restoration of the civil and political rights of President Rolandas Paksas, who was removed from office following impeachment proceedings for a gross violation of the Constitution or a breach of the oath, was in conflict with the Constitution, *inter alia* with the constitutional principles of responsible governance, a state under the rule of law, and the separation of powers.

II. Having assessed a conclusion of an *ad hoc* investigation commission of parliament and having adopted a relevant resolution expressing the opinion of parliament and its attitude to the conclusion of the commission, parliament, as the institution of legislative power, is thereby expressing its own position concerning the proposals to take appropriate action as set out in the conclusion of the investigation commission. Consequently, the decision of parliament, expressed by means of a resolution, to approve the proposals formulated in the conclusion of the Commission implies that the *Seimas* will follow them when adopting relevant legal acts.

The Constitutional Court assessed the constitutionality of Article 1 of the impugned parliament resolution, insofar as it approved the proposals of the conclusion of the Commission to supplement the provisions of the Statute of the *Seimas* governing impeachment proceedings so that parliament would have the power, in specified circumstances, to review and annul an impeachment against a person without applying to the Constitutional Court concerning this issue. The Commission suggested in its conclusion that the Statute of the *Seimas* should provide for parliament to have the power, in the light of new essential circumstances, to decide independently that the legal grounds on which the impeachment proceedings were instituted (gross violation of the Constitution or a breach of the oath) and which were established in the relevant conclusion of the Constitutional Court no longer existed and that a person who had been removed from office following

impeachment proceedings or whose mandate as a member of parliament had been revoked had not, through his actions, violated the Constitution or broken his oath.

The Constitutional Court held that the Commission's suggestions undermined the constitutional concept of the institute of impeachment, under which two independent institutions of state power (parliament and the Constitutional Court) have powers in impeachment proceedings. The Constitution assigns each institution, in the case of impeachment proceedings, specific powers corresponding to their respective functions. Implementation of the Commission's proposals would interfere with the competence granted to the Constitutional Court in impeachment proceedings and parliament would take over the powers of the Constitutional Court.

The Constitutional Court also assessed whether Article 1 of the parliament resolution was in conflict with the Constitution, insofar as it approved the proposals set out in the conclusion of the Commission which would allow parliament to adopt a resolution restoring the right of Rolandas Paksas to stand for election as a member of parliament by a 3/5 majority vote of the members of the parliament. The Constitutional Court held that parliament had no constitutional ground for adopting such a resolution; the Commission's proposals were incompatible with the overall constitutional legal regulation on constitutional liability for a breach of the oath and gross violation of the Constitution and with the interpretation of this legal regulation formulated in the official constitutional doctrine, as well as the essence and purpose of an oath, as a constitutional value, and the irreversibility of the constitutional sanction applied. The proposals, which include the regulation of the legal consequences of constitutional liability by means of a parliamentary resolution, would give rise to a different interpretation of the Constitution from that provided by the Constitutional Court, undermining this court's powers to officially interpret the Constitution and impinging on the constitutional competence of this court (as an institution of judicial power) to administer constitutional justice.

The Constitutional Court emphasised that respect for international law, i.e. the observance of voluntarily undertaken international obligations and respect for the universally recognised principles of international law (and the principle of *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania. It also stated that the only one way to remove the incompatibility between the Constitution and the provisions of Article 3 Protocol 1 ECHR (insofar as they imply the international obligation of the Republic of Lithuania to

guarantee the right to stand for election as a member of parliament of somebody who was removed from office following impeachment proceedings for a gross violation of the Constitution or a breach of the oath) and to implement the related judgment of the European Court of Human Rights is to amend the relevant provisions of the Constitution. Any other approach, such as the adoption or amendment of laws and other legal acts, is impossible under the Constitution.

Cross-references:

European Court of Human Rights:

- *Paksas v. Lithuania*, no. 34932/04, 06.01.2011, *Reports of Judgments and Decisions* 2011 (extracts);
- *Scozzari and Giunta v. Italy*, no. 39221/98, 13.07.2000 *Reports of Judgments and Decisions* 2000-VIII.

Languages:

Lithuanian, English (translation by the Court).



Luxembourg Constitutional Court

Important decisions

Identification: LUX-2016-3-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 09.12.2016 / **e)** 00126 / **f)** / **g)** *Mémorial* (Official Gazette), A, no. 254, 15.12.2016 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.

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

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

Keywords of the alphabetical index:

Heir, equal treatment / Civil partners, unequal treatment / Civil partnership, preferential tax treatment / Inheritance, tax, rate / Succession, registered partners.

Headnotes:

A statutory provision concerning the legal effects of certain civil partnerships (PACS), requiring that a partnership must have existed for at least three years at the time of the death of the partner of whom the surviving partner is a legatee in order to benefit from the 5% basic rate of inheritance tax rather than the rate of 15%, where there is no common descendant at the time of death, does not violate the principle of equality before the law (Article 10bis of the Constitution) or equality in relation to taxation (Article 101 of the Constitution). This is the case even though the provisions governing inheritance tax provide for a basic rate of 5% for the surviving spouse, also in situations in which there is no common descendant, irrespective of the duration of the marriage at the time of the death of the predeceased spouse.

Summary:

The case had its origin in proceedings concerning the amount of inheritance tax due by an individual in relation to the estate of his predeceased partner, of whom he was a legatee and of whom he had been the registered partner for less than three years at the time of the death. The individual challenged the distinction between, on one hand, the statutory provisions on the legal effects of certain partnerships, which stipulate that a partnership must have existed for at least 3 years at the time of the death of the partner in order to benefit from the basic rate of 5% of inheritance tax instead of the rate of 15%, in the event that there is no common descendant at the time of such death, and, on the other hand, the provisions which stipulate for the surviving spouse, also in the event that there is no common descendant, a basic rate of 5% irrespective of the duration of the marriage at the time of the death of the predeceased spouse. The Luxembourg *tribunal d'arrondissement* (district court) referred the following interlocutory question to the Constitutional Court:

“Is Article 28, nos. 2 and 3 of the Law of 9 July 2004 on the legal effects of certain partnerships, amending Article 10 of the Law of 13 June 1984 modifying certain legislative provisions governing the collection of registration fees, inheritance tax and stamp duty, as amended, insofar as it subjects partners, within the meaning of the amended Law of 9 July 2004 on the legal effects of certain partnerships, with no common children or descendants, to the requirement that they must have been united for at least three years by a partnership declaration registered in accordance with the provisions of the Law of 9 July 2004 on the legal effects of certain partnerships, as amended, in order to be able to benefit:

- from the 5% rate of inheritance tax and the transfer duty upon death; and
- from the deduction of 38,000.00 euros on the net share received or acquired by the surviving partner in the predeceased partner's estate where they do not have at least one common child or descendant;

compatible with Articles 10bis and 101 of the Constitution, whereas such a requirement of duration is not imposed on married couples?”.

The Constitutional Court held that, fundamentally, the intention of the legislature was not to establish a partnership as an institution of the same nature as marriage.

On the basis of this finding alone, the circumstances of a spouse, who is united by marriage, and those of a partner, were basically not comparable.

While it is true that, through various reforms, including that concerning the basic rate of inheritance tax due by the surviving partner, the legislature brought the respective regimes applicable to married couples and to partners more closely into line, these respective regimes were not, however, sufficiently similar in order to be comparable, taking account of the fundamental difference intended by the legislature, which manifests itself in particular through the fact that the surviving spouse is an heir by operation of law, while the surviving partner may inherit from his or her predeceased partner only if a will made by the latter has designated him or her as a legatee.

This major difference in the law means that there is not sufficient comparability on the level of the civil rights of inheritance, from which the rights in matters of inheritance tax at issue in the main action ensue.

Accordingly, at the time of the partner's death, the respective circumstances of a spouse and of a surviving partner were not sufficiently comparable in order to enable the principle of equality before the law to be validly applied.

Due to the lack of comparability between the circumstances of the surviving partner and those of the surviving spouse in the specific context of inheritance tax, the question raised had no relevance with regard to the notions of preferential treatment or exemption under Article 101 of the Constitution.

Languages:

French.



Moldova Constitutional Court

Important decisions

Identification: MDA-2016-3-006

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 16.05.2016 / **e)** 14 / **f)** On the exception of unconstitutionality of Article 1.2.c of Law no. 121 of 25 May 2012 on equality / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 22.07.2016, 217-229 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Secularity, principle / Religion, public practice.

Headnotes:

Exercise of the freedom to manifest religious beliefs or faith must respect the rules of public security and order, the protection of health and public morality and the rights and freedoms of others.

As the principle of secularism is part of the constitutional identity of the state, the state must adopt a neutral attitude regarding the functioning of religious denominations and thus guarantee the observance of the fundamental rights of all.

Summary:

I. The case originated from a complaint which had challenged the constitutional compliance of Article 1.2.c of Law no. 121 of 25 May 2012 on equality, raised before Buiucani District Court, Chisinau mun., which had been examining the application against the Council for Preventing and Eliminating Discrimination and Ensuring Equality, which had decided, by a ruling dated 19 May 2014,

that the actions of a priest of the Orthodox Church who performed a religious ritual in relation to a LGBT person during a TV show represented incitement to discrimination on the grounds of sexual orientation and belief.

Under these regulations, the provisions of the law do not extend to and may not be interpreted as affecting religious denominations and their groups in respect of religious beliefs. The applicants argued that this exclusion of religious denominations violated the constitutional principle of equality and the international treaties on human rights. They also took issue about the fact that the regulations confer an absolute character on the freedom of religion and the freedom to manifest religious beliefs, contrary to the provisions of the Constitution and of the international treaties to which the Republic of Moldova is a party.

II. The Court noted that the universal right to have or to adopt a religion or belief of one's choice also encompasses the right to change one's belief or religion or not to have one at all. The Court emphasised that those changing their religion or belief or abandoning them altogether should be afforded equal protection and not be subject to discriminatory treatment.

It also noted that freedom of conscience is a fundamental right guaranteed by international treaties on fundamental human rights and involves moral responsibility and consciousness for the thoughts expressed. Responsibility, including legal responsibility, only comes into play when the thoughts or opinions are expressed, when they can harm the dignity, honour or freedom of thought of another or the social order or the rule of law. Therefore freedom of conscience is closely related to freedom of expression, the latter being simply the recognised possibility of a person to share thoughts.

In a democratic society, where several religions co-exist within one population, restrictions may need to be imposed on the freedom to manifest one's religion or belief in order to reconcile the interests of different groups and ensure that the beliefs of every person are respected.

Exercise of the freedom to manifest religious beliefs or faith must comply with the rules of public security and order, the protection of health and public morality and the rights and freedoms of others. The right to have a belief protects the inner forum of the person, not the outward manifestation of his beliefs.

The Court emphasised that the contested regulations should be applied to the extent that they relate to the doctrine, canons and traditions of religious denominations, whose provisions are applicable to their own believers, and sacerdotal functions in spaces designed for this purpose, so as not to contradict the current legislation or impinge upon the human rights and fundamental freedoms of others.

The Court also noted that the main characteristic of the secular state is refraining from interference with religious denominations whilst also ensuring the equal rights and duties of citizens within the state regardless of their religious beliefs. Thus, secularism is the cornerstone of the state organisation, designating the separation of the political and administrative power of the state and religion, applying the basic principle of democracy, the separation of powers.

Secularism does not imply indifference on the part of the state towards religion, but rather the state guarantees the protection of religious freedom in a regime of religious and cultural pluralism. This neutral character should be a prerequisite for determining all actions by the state, especially in regard to religion.

The principle of secularism is not a tool to combat the presence of religion in the public domain or to encourage secularisation of the state and civil society. Secularism implies the existence of pluralism in the system of values, equal protection of religious and non-religious people. A neutral attitude is required by the state towards both categories.

Supplementary information:

Legal norms referred to:

- Article 31.4 of the Constitution;
- Article 1.2.c of Law no. 121 of 25 May 2012 on equality.

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2016-3-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 17.11.2016 / **e)** 33 / **f)** Assessment of constitutionality of certain provisions of the Civil Code and Civil Procedure Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

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

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

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

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:

Guardianship, mental disorder / Legal capacity, limited / Documents, nullity, absolute.

Headnotes:

Guardianship can be established when the restrictions involved are proportionate to the level of incapacity of the person with mental disability and only for a period of time; further evaluation will then be needed as to whether the measure should be extended by the competent authority which established it.

A person with a mental disorder should not be impeded from effective participation in the process of examination of the declaration on legal incapacity, at least not before this incapacity has been ascertained by the Court.

Summary:

I. The Constitutional Court was asked to assess the constitutionality of certain provisions of the Civil Code and of the Civil Procedure Code regulating the legal capacity of persons with mental disability. The question raised with the Court addressed two distinct aspects of the problem, namely establishing the guardianship over persons declared to be incapacitated and the defence in court of rights and legitimate interests by those declared incapacitated. The Court examined both issues separately.

In terms of establishing guardianship over persons declared incapacitated, the Court noted that under the challenged provisions of the Civil Code, persons who, following a psychiatric disorder (mental illness or mental disability) cannot discern or direct their actions, may be declared incapacitated by the Court, and guardianship will be established. The applicants contended that guardianship, regulated by Article 24 of the Civil Code, entails a complete deprivation of legal capacity of those with mental disorders, even though in most cases, less restrictive measures are needed.

The applicants also pointed out that the degree or severity of the impairment of discernment is not examined at the time when a person is declared incapacitated and guardianship is being established. They were of the opinion that in the case of people with severe mental disorders, who do not have the capacity to make decisions, an individualised approach is needed for each case to facilitate decision making, taking into account the wishes and preference of the person concerned.

The Court emphasised that although people may be declared incapacitated by a judicial act, the deprivation of legal capacity may not hinder human dignity, which is the subject of absolute protection by the state under Article 1.3 of the Constitution. In terms of safeguarding the dignity of all, the possibility of carrying out independent activities in society by offering opportunities to develop and protect their rights and freedoms is implicitly granted to all incapacitated persons.

The Court noted that legal incapacity should not be declared automatically by reason of mental disorder; this could impinge on the rights and interests of persons who are able to acknowledge or conduct their actions at certain times and in certain situations, or who may be able to develop other skills with qualified support. Guardianship should only be applied to persons who cannot fully discern or conduct their actions. This should be a flexible measure, providing a solution that will be appropriate to each situation or degree of incapacity. Guardianship should be established as a last resort, following the exhaustion of other less restrictive measures, and only in cases where the establishment of such measure is necessary for the protection of the person in question.

The Court stressed that guardianship in itself is not unconstitutional, but in order to be compatible with the Constitution it should be interpreted as meaning that a declaration of legal incapacity only targets people fully lacking discernment and in respect of whom the application of other less restrictive protection measures proves ineffective.

The Court then turned to the defence in court of the rights and legitimate interests of adult persons declared incapacitated. Under the challenged provisions, adults declared incapacitated are unable independently to defend their rights, freedoms and legitimate interests in court; applications submitted by them are not examined, returned or withdrawn by the Court and procedural steps taken by them are void. Similarly, applications for declaration of legal incapacity can be examined without the participation of the person concerned.

The applicants argued that all interested persons, including somebody with mental disabilities, is entitled to address the Court in the way established by law to defend their rights, freedoms and legitimate interests. The principle of free access to justice should apply regardless of somebody's health condition and it is materialised by the possibility of drafting an application to the Court; it is for the courts alone to consider the legitimacy of complaints.

The Court noted that decisions taken by legal representatives on behalf of incapacitated persons do not always reflect their will and preferences. A person who has been declared incapacitated becomes totally dependent on their guardian in all spheres of life. Such measures are often applied for an indefinite time span; it is usually impossible to challenge actions that affect the rights of an incapacitated person other than via their guardian.

The Court also stated that procedural documents drawn up by incapacitated persons cannot be declared void from the outset. Courts may in certain circumstances need to review requests for summonses without the compulsory involvement or consent of the guardian of the incapacitated person, if the problem submitted for consideration may only be examined with the direct participation of the person who submitted it.

The Court found that annulment of procedural documents drawn up by adults with limited legal capacity constitutes an even more disproportionate restriction; for instance, adults who are addicted to certain substances can discern and conduct their actions in specific situations and at certain periods of time. The nullity of procedural documents drawn up by persons deprived of capacity is not to be confused with the prohibition of deprivation or limitation of the capacity to act of an individual.

The Court noted that the ability to have civil procedural rights and obligations is recognised equally for all individuals and organisations that enjoy by law the right to address a court in order to protect their rights, freedoms and legitimate interests.

If a person cannot attend the hearing for objective reasons, courts must provide for the matter to be heard at their place of stay, noting, as appropriate, the impossibility of communicating with this person. The condition of somebody with a mental disorder should not impede their effective participation in the process of examination of the declaration of legal incapacity, at least not before the impossibility of their doing so has been ascertained by the Court following the undertaking of all necessary measures.

Supplementary information:

Legal norms referred to:

- Article 1.3 of the Constitution;
- Article 24 of the Civil Code.

Cross-references:

Constitutional Court:

- no. 27, 13.11.2014, *Bulletin* 2014/3 [MDA-2014-3-009].

Languages:

Romanian, Russian (translation by the Court).



Montenegro

Constitutional Court

Important decisions

Identification: MNE-2016-3-003

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 29.12.2016 / **e)** U-III 351/16 / **f)** / **g)** / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**
 3.10 General Principles – **Certainty of the law.**
 5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings.**
 5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration.**

Keywords of the alphabetical index:

Coefficient, salary, wage grade / Case-law, uneven.

Headnotes:

A High Court decision that an employee who had not been in receipt of the correct coefficient for his job grading should have taken steps to rectify this straightaway and was accordingly not entitled to pecuniary compensation from his employer, who had not followed the requirements in the amendments to the law in this field, represented an arbitrary and discretionary interpretation of the law, which was to the detriment of the employee. His right to a fair trial was also breached.

Summary:

I. The applicant in this matter submitted a constitutional complaint against a judgment of the High Court in Podgorica, Gž. no. 1805/15 of 6 November 2015, alleging a violation of the rights referred to in Articles 8, 17.2, 19, 32 and 118 of the Constitution, Articles 6.1 and 14 ECHR and Article 1 Protocol 12 ECHR.

The applicant explained that although legislation amending the Law on Wages of Civil Servants and State Employees had introduced an increase in coefficient levels for those wage grades, the defendant had never put the decision into effect for the payment of wages; he did not pay the wages at the coefficient level referred to in the above provision, which he should have done with effect from 8 January 2008. He never showed the decision on coefficient levels to his employees, either under the original or the currently applicable Law on Wages of Civil Servants and State Employees. The Court did not deal with the facts in the case or give any reasons for this.

The applicant considered that the Court had discriminated against him for not affording him the exercise of rights stipulated by the law. He had also been discriminated against in relation to other Montenegrin citizens to whom the Court had granted the compensation he was seeking on the same factual and legal grounds. Uneven case-law existed in a high number of judgments and his right to an impartial hearing had been breached.

The Court of First Instance, from which the applicant had sought redress, noted that Article 1 of the Law Amending the Law on Wages of Civil Servants and State Employees (*Službeni list Crne Gore* (OGM) (Official Journal) no. 17/07) stipulates the coefficient 3,77. In the period between 23 August 2008 and 1 February 2014, the Defendant should have paid him a salary calculated according to coefficient 3,77. In view of the above statutory provisions, Article 148 of the Law on Obligations and the established facts, the Court found the Defendant liable for the damage incurred as he had not acted in accordance with the provision of Article 1 of the Law Amending the Law on Wages of Civil servants and Employees, which constituted an illegal action; it was irrelevant that the applicant had not conducted administrative proceedings against the decision on allocation dated 17 March 2005 in the part determining the level of salary.

The Second Instance Court overruled the judgment of the First Instance Court, dismissing the applicant's claim as unfounded, on the basis that the lower court had not given a proper decision on the claim. The Supreme Court at the general sitting held on 19 March 2015 took a general legal position (SU I no. 23-2/15) according to which an employee whose salary coefficient was determined by the decision on appointment is not entitled to the difference in the amount of salary to which he or she would be entitled for the employment position in question under the coefficient stipulated by the Law on Wages of Civil Servants and State Employees, if

he or she had not previously contested the decision of appointment before the competent authority in the part determining the coefficient. The applicant, whose position fell within the 29th wage grade, had been allotted coefficient 2,76 by the defendant's decision of appointment dated 17 March 2005, which was increased by 20,5% on the grounds of years of service. Following the entry into force of the Law Amending the Law on Wages of Civil Servants and State Employees on 8 January 2008 (which stipulated a higher coefficient for the 29th wage grade, i.e. coefficient 3,77) the applicant did not avail himself of legally stipulated legal protection by contesting what he was being paid, which meant that the decision of allocation in the part determining the coefficient for establishing a fixed part of the salary became final and effective, leaving no legal grounds to adjudicate compensation, since the salary was paid under the defined coefficient.

The High Court reversed the first instance judgment, because the applicant had not made use of the statutory legal protection which meant that the order that had determined the coefficient for setting up the fixed part of the wage had become final. On this basis, his complaint was dismissed as unfounded.

II. The Constitutional Court was of the view that the High Court had interpreted and enforced the substantive law in an arbitrary and discretionary fashion, to the detriment of the applicant.

Having considered the content, the task of the Constitutional Court in this matter was to establish whether the method used by the Second Instance Court to interpret and enforce the substantive law in a particular case could be held arbitrary and whether the applicant's right to a fair trial guaranteed by Article 32 of the Constitution was violated as a result of this arbitrary interpretation and enforcement.

Where a higher coefficient has been lawfully set for the wage grade to which a state or local government employee had been allocated, and the competent authority did not pass the order on a new coefficient in accordance with the law, the employee is entitled to payment of a fixed part of the wage according to the coefficient regulated by the law. The Act on internal organisation and systematisation of management authorities constitutes the basis for allocating titles and wage grades to local servants and employees and it has to be harmonised with Government decrees. The defendant did not adapt the Act on internal organisation and systematisation for the period covered by the particulars of claim to the Government decrees; the applicant was not allocated an appropriate wage grade and effectively the defendant did not adopt any single order on

allocation under such an adapted act. The conclusion must clearly be drawn that the court rejected the applicant's case through an incorrect enforcement of substantive law. This was to the applicant's detriment as he received a lesser sum in wages. The defendant should have acted in accordance with the amendments to the Law on Wages of Civil Servants and State Employees in terms of the coefficient that had been established and was under a legal duty to adopt a new order establishing a new coefficient for the applicant.

The Constitutional Court also took the view that the manner in which the High Court construed and enforced the applicable substantive right was arbitrary, which resulted in violation of the applicant's right to a fair trial as guaranteed by Article 32 of the Constitution and Article 6.1 ECHR.

It also noted that the Supreme Court had taken two legal positions on the specific legal issue. The Constitutional Court is neither competent to compare and value the legal positions nor bound by legal comprehension of the Supreme Court; it may only consider the legal positions of the Supreme Court in the light of the right to legal certainty, in terms of the existence of mechanisms for adjusting case-law. Its main remit is to ensure that the effects of such interpretation (enforcement of the law) comply with the Constitution and whether, in a specific case, they have resulted in the violation of the constitutional rights of an applicant in a constitutional appeal.

The Constitutional Court established the violation of rights referred to in Article 32 of the Constitution and Article 6.1 ECHR. It did not consider possible violations of other constitutional and convention rights indicated in the appeal. It upheld the applicant's constitutional appeal, overturned the Judgment of the High Court in Podgorica, Gž. no. 1805/15 of 6 November 2015 and sent the case back to the High Court in Podgorica for a retrial and ruling.

Languages:

Montenegrin, English.



Norway

Supreme Court

Important decisions

Identification: NOR-2016-3-002

a) Norway / b) Supreme Court / c) Plenary / d) 16.12.2016 / e) HR 2016-2554-P / f) / g) / h) CODICES (English, Norwegian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
 2.1.1.3 Sources – Categories – Written rules – **Law of the European Union/EU Law**.
 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
 3.17 General Principles – **Weighing of interests**.
 3.26 General Principles – **Fundamental principles of the Internal Market**.
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
 5.3.10 Fundamental Rights – Civil and political rights – **Rights of domicile and establishment**.
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
 5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions**.

Keywords of the alphabetical index:

Freedom of establishment / Freedom of Assembly / Freedom of association.

Headnotes:

A union's notice of a boycott of a Danish company constituted an unlawful restriction on the freedom of establishment under Article 31 of the Agreement on the European Economic Area (hereinafter, the "EEA"). It was deemed unnecessary to determine whether the boycott fell within the scope of Article 11.1 ECHR. It was recognised that the freedom of assembly and association is, in any event, not absolute.

Summary:

I. The case concerned the legality of a notification of a boycott by Norway's Transport Workers' Federation (hereinafter, "NTF") against the Danish company Holship Norge AS (hereinafter, "Holship"). The aim of the boycott was to secure Holship's acceptance of a collective agreement granting dockworkers the priority right to perform loading and unloading services at the port of Drammen in eastern Norway. Holship wanted to perform the stevedoring operations themselves, using their own employees, and had declined to sign the agreement.

Section 2 of the Norwegian Boycott Act lays down several conditions for a boycott to be lawful. The relevant condition in this case was Section 2.a, according to which a boycott is unlawful when its purpose is unlawful or when it cannot achieve its goal without causing a breach of law.

Holship argued that the boycott was "unlawful", within the meaning of Section 2.a, given that it constituted a restriction on the freedom of establishment under Article 31 of the EEA Agreement.

NTL claimed that EEA competition law did not apply to the collective agreement, and that the boycott in any event was justifiable. They argued that the priority clause aimed to secure the workers' rights, and that this was an overriding reason of general interest that justified the restriction on the freedom of establishment. NTL also emphasised that any restrictions on the boycott would violate both Article 11 ECHR and the equivalent principle in Article 101.1 of the Constitution.

II. The Supreme Court (by a majority of 10-7) found that the collective agreement did not fall outside the scope of EEA competition law, and that the boycott constituted an unjustifiable restriction on the freedom of establishment. The boycott had accordingly an "unlawful" purpose within the meaning of Section 2.a of the Boycott Act.

The Court appreciated that social policy objectives, including the protection of workers, could justify restrictions on the freedom of establishment. In this case, however, the priority clause went beyond the objective of improving conditions of work and employment. The primary aim was in the majority's opinion to prevent Holship from performing unloading and loading services in Drammen port. In its considerations, the majority put great weight on an advisory opinion the Supreme Court had obtained from the Court of Justice of the European Free Trade Association States (EFTA) as part of the case preparation.

The majority did not find it necessary to determine whether the boycott fell within the scope of Article 11.1 ECHR and/or Article 101.1 of the Constitution. The limitation set forth in Article 11.2 ECHR was under any circumstances applicable, and an equivalent restriction could be interpreted into the constitutional right.

III. Seven justices disagreed with the majority. In their opinion, EEA competition law did not apply to the collective agreement as it related to the conditions of work and employment. The minority further found that the restriction on the freedom of establishment in any case was justifiable, as the main aim of the boycott had been to secure the workers' rights. Since the minority reached the conclusion that the boycott was legal, they did not have to consider whether the arrangement was protected by Article 11 ECHR and/or Article 101.1 of the Constitution.

Languages:

Norwegian.



Poland Constitutional Tribunal

Important decisions

Identification: POL-2016-3-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.10.2016 / **e)** K 24/15 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2016, item 2197 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
5.3.14 Fundamental Rights – Civil and political rights – ***Ne bis in idem.***

Keywords of the alphabetical index:

Driving licence / Driving licence, suspension as a reprimand / Driving license, suspension, double jeopardy.

Headnotes:

The imposition of two different sanctions (a temporary suspension of a driving licence and a fine) for the same offence (i.e. speeding more than 50 kilometres per hour over the speed limit in an urban area), within the scope of two different types of proceedings (criminal and administrative proceedings), does not infringe the principle that the same case may not be determined twice.

The challenged provisions are unconstitutional, insofar as they do not provide for situations that justify driving a vehicle more than 50 kilometres per hour over the speed limit in an urban area in an emergency.

Summary:

I. On 11 October 2016, the Constitutional Tribunal considered joined applications filed by the Ombudsman and the Public Prosecutor-General with regard to rules for suspending a driving licence.

The applicants argued that the challenged provisions infringe the principle of *ne bis in idem*, which prohibits administering a penalty twice in the same case. The challenged provisions provide for the imposition of two different sanctions (a temporary suspension of a driving licence and a fine), within the scope of two different types of proceedings (criminal and administrative proceedings), for the same prohibited act (speeding more than 50 kilometres per hour (kph) in an urban area).

II. The Constitutional Tribunal held that the principle of *ne bis in idem* had not been infringed, as the suspension of a driving licence in that respect is not a criminal sanction, but an administrative one. The said suspension is mentioned in the provisions of administrative law as a sanction for an infringement of an administrative prohibition setting the maximum speed limit for driving a motorised vehicle in an urban area. Above all, the suspension of a driving licence is meant as a preventive measure. It is a deterrent for vehicle drivers, meant to discourage them from excessive speeding. This is a characteristic of an administrative sanction, which does not constitute an adequate reaction to a committed prohibited act, but is a measure intended to ensure the implementation of executive and managerial tasks of administrative authorities. The punitive character of that sanction is determined neither by the degree to which it is burdensome, which is a relative category contingent on the situation of a given person, nor by its similarity to a punitive measure such as a temporary prohibition against driving motorised vehicles. Indeed, the same sanction may be administered within the scope of various systems of liability.

The other allegation raised by the applicants concerned the lack of proper procedural guarantees in the event of the suspension of a driving licence by a decision issued by the governor of a poviát (a unit of the administrative division of the territory of Poland) for speeding more than 50 kph over the speed limit. It was argued that there were no legal possibilities of taking account of subjective elements within the scope of a procedure devised in such a way, e.g. the degree of fault, a detriment to society, and the circumstances of a case.

In the view of the Tribunal, such circumstances do not justify excessive speeding over the maximum speed limit for motorised vehicles in an urban area. The applicants also noted the possibility of errors in speed measurement and hence the risk of suspending a driving licence in a situation where there was actually no violation of the speed limit.

However, the Constitutional Tribunal stated that such circumstances should be mentioned and considered

within the scope of administrative proceedings. Both the stage of issuing a decision by the governor of a poviát, as well as the stage of a review conducted by the Local Self-Government Appellate Committee, and subsequently at the stage of proceedings in an administrative court, there is a possibility of raising, verifying and potentially taking account of an allegation about an error in speed measurement. The proof of an error in speed measurement may also be conducted in proceedings before a criminal court, which may result in acquitting a person accused of the alleged misdemeanour of speeding. This in turn makes it possible to reopen administrative proceedings concluded by a final decision on the suspension of a driving licence, since the finding that there was an error in speed measurement constitutes a new actual circumstance that may be of significance for that case.

The non-conformity to the Constitution was adjudicated in the present case only insofar as the challenged provisions do not provide for situations that justify driving a vehicle more than 50 kph over the speed limit in an urban area in an emergency. The Constitutional Tribunal ruled that, within that scope, the said provisions are inconsistent with Articles 2 and 45.1 of the Constitution, which guarantee, respectively, that Poland shall be a democratic state ruled by law and the right to a fair trial.

Indeed, the Act lacks an explicit indication that a driving licence will not be suspended if a person driving a motorised vehicle over the speed limit in an urban area does so to prevent or minimise a direct threat to a legally protected interest, where the threat may not be avoided in any other way, and road safety sacrificed in such a situation does not represent a manifestly greater value than the threatened interest. In administrative law – similarly to criminal law and law concerning misdemeanours – account should be taken of the conflicts of interests and values which justify the individual's failure to adhere to requirements and prohibitions set out in legal provisions, the breach of which is penalised by law. However, an emergency referred to herein may neither be construed broadly nor be regarded as tantamount to "particularly justified cases".

The suspension of a driving licence for speeding more than 50 kph over the speed limit in an urban area is a measure aimed at improving road safety, and, as a consequence, enhancing the protection of lives and health of participants in the traffic. This means that an emergency that justifies a departure from the suspension of a driving licence, in the case of a person driving excessively over the speed limit, should be restricted by the legislature only to a

situation where the said speeding is justified by the need to save life and protect health. A threat to the life and health of a driver, a passenger or any other person must be direct and immediate, i.e. it must actually exist while the driver is speeding. An authority that applies the administrative sanction in the form of the suspension of a driving licence, as well as the authority that reviews the validity of such a decision, should have a legal possibility of considering all circumstances that characterise an emergency; where the authorities find that the circumstances have occurred, they should have a possibility of departing from the imposition of the sanction, providing reasons for such a decision.

III. The Tribunal issued this judgment in a bench composed of five judges, with one dissenting opinion.

Cross-references:

Constitutional Tribunal:

- K 17/97, 29.04.1998;
- P 2/98, 12.01.1999, *Bulletin* 1999/1 [POL-1999-1-002];
- K 23/99, 18.04.2000;
- K 36/00, 08.10.2002;
- K 18/03, 03.11.2004;
- SK 52/04, 24.01.2006;
- P 19/06, 15.01.2007;
- P 43/06, 04.09.2007;
- P 26/06, 15.04.2008;
- P 46/07, 22.09.2009;
- Kp 4/09, 14.10.2009;
- P 29/09, 18.11.2010;
- P 90/08, 12.04.2011;
- K 23/10, 12.02.2014;
- SK 6/12, 01.07.2014, *Bulletin* 2014/2 [POL-2014-2-004];
- P 32/12, 21.10.2015.

European Court of Human Rights:

- *Engel and others v. the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 23.11.1976, Series A, no. 22;
- *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28.06.1984, Series A, no. 80;
- *Lutz v. Germany*, no. 9912/82, 25.08.1987, Series A, no. 123;
- *Weber v. Switzerland*, no. 11034/84, 22.05.1990, Series A, no. 177;
- *Kadubec v. Slovakia*, no. 27061/95, 02.09.1998, *Reports* 1998-VI;
- *Jussila v. Finland*, no. 73053/01, 23.11.2006, *Reports* 2006-XIV;

- *Zolotukhin v. Russia*, no. 14939/03, 10.02.2009, *Reports of Judgments and Decisions* 2009;
- *Maresti v. Croatia*, no. 55759/07, 25.06.2009;
- *Boman v. Finland*, no. 41604/11, 17.02.2015;
- *Rivard v. Switzerland*, no. 21563/12, 04.10.2016.

Languages:

Polish.



Identification: POL-2016-3-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.10.2016 / **e)** SK 28/15 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2016, item 2200 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Evidence, forensic / Evidence, obligation to produce / Proportionality / Samples, forensic, evidence.

Headnotes:

The necessity of taking a cheek swab occurs when such evidence is a prerequisite for determining or identifying a perpetrator and for holding him or her criminally liable or for protecting an innocent person from being wrongly held criminally liable.

Summary:

I. On 11 October 2016 the Constitutional Tribunal considered a constitutional complaint with regard to the terms of taking samples of biological material from an accused person for the purpose of genetic examination.

The Court was requested to provide an answer to the question of whether the requirement to subject an accused person to taking a cheek swab by a police

officer, imposed on the accused by Article 74.2.3 of the Criminal Procedure Code (hereinafter, the "CPC") – if this is necessary and there is no risk that this might endanger the health of the accused person or other persons – constitutes a proportionate restriction of the constitutional rights to personal inviolability, protection of private life, and to informational self-determination.

II. The Constitutional Tribunal adjudicated that Article 74.2.3 of the CPC is consistent with the right to personal inviolability (Article 41.1 of the Constitution); the right to the protection of private life (Article 47 of the Constitution); and the right to informational self-determination (Article 51.2 of the Constitution) in conjunction with Article 31.3 of the Constitution, which sets down rules for limitations on the exercise of fundamental rights (i.e. such limitations "may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.")

The Constitutional Tribunal first held that the action of taking a cheek swab constitutes an interference with personal inviolability, which is intrinsically related, *inter alia*, to the inviolability of the physical integrity of the individual.

Due to the amount and nature of information included in a sample of biological material, *inter alia*, in the form of the genetic code of a person, which contains vital data e.g. about the person's state of health, the obtaining of biological material also constitutes an interference with the privacy of the individual. Moreover, the Tribunal stated that the obligation to provide the samples of biological material, which include vital and very personal information, including the genetic code of the person, constitutes a violation of the right to informational self-determination. This is because the scope of the right to informational self-determination, protected on the basis of Article 51.2 of the Constitution, comprises, *inter alia*, the right to autonomously decide what information to disclose about oneself to others and one's discretion to determine the accessibility of information about oneself to others

The Tribunal stated that not only personal inviolability but also the right to the protection of private life and informational self-determination are not absolute and may be subject to restrictions, in compliance with the rules set out in Article 31.3 of the Constitution, as well as Articles 41.1.2 and 51.2 of the Constitution concerning the rights to personal inviolability and informational self-determination.

In the opinion of the Constitutional Tribunal, Article 74.2.3 of the CPC indicates both the manner of restricting the rights and freedoms of the individual (subjecting him or her to the taking of a cheek swab) as well as the prerequisites for the restriction (the positive prerequisite i.e. the necessity to undertake such action, as well as the negative prerequisite i.e. concern that the said action would endanger the health of the accused person or other persons). The linguistic, systemic and functional interpretations of Article 74.2.3 of the CPC lead to the conclusion that the necessity of taking a cheek swab occurs when such evidence is a prerequisite for determining or identifying a perpetrator and for holding him or her criminally liable or for protecting an innocent person from being wrongly held criminally liable. This is the proper way of interpreting Article 74.2.3 of the CPC.

In the view of the Constitutional Tribunal, the role of Article 74.2.3 of the CPC is to fulfil one of the basic objectives of criminal proceedings, namely determining the perpetrator of an offence and holding him or her criminally liable, as well as excluding the said liability with regard to an innocent person, and thus the protection of security or public order, within the meaning of Article 31.3 of the Constitution.

Also, the said provision indirectly serves the protection of the rights and freedoms of other persons, in particular the aggrieved parties.

In the view of the Tribunal, the regulation expressed in Article 74.2.3 of the CPC meets the criterion of usefulness derived from Article 31.3 of the Constitution. The taking of biological material followed by an analysis of DNA is a globally recognised method of providing evidence in criminal proceedings which has very strong evidentiary value, for the outcome of an analysis of DNA makes it possible to determine, with great probability, whether a sample of given biological material does not come from a particular person or whether two samples have the same source.

In the view of the Tribunal, the regulation expressed in Article 74.2.3 of the CPC also meets the requirement of necessity. Due to the evidentiary effect of an analysis of DNA, in particular as an identification method, the taking of a cheek swab, in certain circumstances, may prove to be the only way of linking a given perpetrator with the scene of an offence, and thus holding the perpetrator criminally liable and achieving the objectives of criminal proceedings, arising from Article 2 of the Criminal Procedure Code.

In the view of the Tribunal, the effects of Article 74.2.3 of the CPC remain adequately proportionate to burdens imposed by that provision on a citizen. The manner of obtaining a sample of biological material, which consists of taking a cheek swab, interferes, to a minimum extent, with the personal inviolability of an accused person. Such action is taken by a police officer trained within that scope and, in particularly justified instances, by a competent employee of a healthcare centre or a research or specialised institution conducting genetic examination.

At the same time, Article 74.2.3 of the CPC formulates the negative prerequisite for the above action, which is, *inter alia*, concern that the said action would endanger the health of an accused person, which constitutes an adequate safeguard against a disproportionate interference with the personal integrity of the individual.

A data set containing information obtained from an analysis of DNA, including samples in the form of cheek swabs, collected for the analysis, is subject to protection arising from provisions on the protection of personal data, whereas information concerning the genetic code of a person, obtained, collected, verified and processed by the police may comprise only information about the non-coding part of DNA.

III. The Tribunal issued this judgment as a bench composed of five judges, without dissenting opinions.

Cross-references:

Constitutional Tribunal:

- P 11/98, 12.01.2000;
- K 15/98, 11.04.2000, *Bulletin* 2000/2 [POL-2000-2-011];
- K 41/02, 20.11.2002, *Bulletin* 2003/1 [POL-2003-1-006];
- SK 39/02, 17.02.2004;
- K 4/04, 20.06.2005;
- K 17/05, 20.03.2006, *Bulletin* 2006/3 [POL-2006-3-011];
- SK 57/04, 11.04.2006, *Bulletin* 2006/3 [POL-2006-3-012];
- K 41/05, 02.07.2007;
- K 8/04, 17.06.2008, *Bulletin* 2008/3 [POL-2008-3-008];
- K 1/07, 02.07.2009;
- U 5/07, 10.03.2011;
- K 33/08, 13.12.2011;
- SK 55/13, 04.11.2014;
- K 39/12, 20.01.2015, *Bulletin* 2015/1 [POL-2015-1-001].

European Court of Human Rights:

- *Velden v. the Netherlands*, no. 29514/05, 07.12.2006;
- *W. v. the Netherlands*, no. 20689/08, 20.01.2009;
- *Peruzzo and Martens v. Germany*, nos. 7841/08 and 57900/12, 04.06.2013;
- *Jalloh v. Germany*, no. 54810/00, 11.07.2006, *Reports of Judgments and Decisions* 2006-IX;
- *Saunders v. the United Kingdom*, no. 19187/91, 17.12.1996, *Reports* 1996-VI;
- *S. and Marper v. the United Kingdom*, nos. 30562/04 and 30566/04, 04.12.2008, *Reports of Judgments and Decisions* 2008.

Languages:

Polish.



Identification: POL-2016-3-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.11.2016 / **e)** K 6/14 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2016, item 2205 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Dangerousness, prognosis / Isolation / Mentally ill / Preventive measure.

Headnotes:

Post-sentence isolation, provided for by Article 14.3 of the Act on procedures for dealing with persons with mental disorders who pose a threat to the lives, health or sexual freedom of other persons, is not a punitive measure. It is merely indirectly linked to the past of the person posing a threat. The purpose of the said isolation is to subject the person to therapy in a

special facility or to preventive monitoring. On no account may such isolation constitute an additional sentence for an offence committed in the past.

Summary:

I. On 15 November 2016, the Constitutional Tribunal considered joined applications and questions of law lodged with the Tribunal by the President of the Republic of Poland, the Polish Ombudsman, the Circuit Court in Lublin, and the Court of Appeal in Wrocław, with relation to the Act on procedures for dealing with persons with mental disorders who pose a threat to the lives, health or sexual freedom of other persons. In that Act, the legislature regulated the need to protect the health and lives of all persons against the criminal acts of persons who are particularly dangerous to society and who may, after serving the sentence of the deprivation of liberty, still pose a threat, according to the opinions of experts and a competent court. In total, 12 out of 59 provisions of the Act were challenged to a varied degree. The question of the constitutionality of the challenged Act required reference to two competing constitutional values: the personal liberty of every individual as well as the protection of life and health of every person. The task of the Tribunal was to determine to what extent the legislature had managed to achieve a certain balance between those values. In the judgment of 23 November 2016, the Constitutional Tribunal adjudicated that only one provision of the Act is inconsistent with the Constitution.

II. The Tribunal deemed that the circumstance that a convicted person was serving a sentence of the deprivation of liberty in a therapeutic facility would be an insufficient prerequisite for admitting an application of the head of a prison filed for the institution of court proceedings.

Justification for an application does not free the court from the obligation to provide its own evidence to determine whether the convicted fulfils the statutorily specified requirements for the application of the preventive monitoring or placement in the National Centre for Prevention. In accordance with Article 11 of the Act on procedures for dealing with persons with mental disorders, the court is required within the scope of such proceedings to designate two expert psychiatrists in the case of persons with sexual disorders, as well as an expert sexologist or a certified psychologist within the field of sexology.

Moreover, the Constitutional Tribunal deemed that, taking into account the varied nature of the personality disorders of those who may be placed in the National Centre for Prevention (*inter alia* persons with disorders related to sexual preference and/or with dissocial

personality), neither from the legislature nor an authority issuing an executive regulation might be required to provide detailed rules for carrying out therapy in the National Centre for Prevention. The said therapy must in principle, be individualised in character, and must be addressed to every patient separately. The placement in the National Centre for Prevention constitutes a form of deprivation of personal liberty, which combines elements of mandatory psychiatric detention as well as a few precautionary measures provided for in the Penal Code.

Taking into account all the prerequisites for the placement in the National Centre for Prevention, the Tribunal held that the post-sentence isolation provided for in Article 14.3 of the Act is not a punitive measure. It is merely indirectly linked to the past of the person posing a threat. The purpose is to conduct a therapy in the National Centre for Prevention or preventive monitoring. On no account does this constitute reconviction for an offence committed in the past.

Moreover, contrary to isolation and medical precautionary measures regulated by the provisions of the Penal Code, the placement in the National Centre for Prevention is not used “instead of a penalty”, e.g. because a person is not of sound mind or his or her capacity in this respect is considerably impaired. The said differences result in a situation where the constitutional standards arising from Articles 2 and 42.1 of the Constitution, concerning the democratic nature of the State, social justice, and the prohibition against retroactivity as well as the principle of *ne bis in idem*, do not adequately cover an individual's placement in the National Centre for Prevention on the basis of Article 14.3 of the Act.

Specified by law, the mode of implementing a court order makes the said isolation much more similar to the institution of the coercive placement of a patient in a psychiatric facility than to the penalty of the deprivation of liberty.

In the view of the Tribunal, isolation in the National Centre for Prevention used with regard to a person who poses a threat constitutes an exceptional measure. The court should determine this only when preventive monitoring proves insufficient. Isolation for an indefinite period is thus to be regarded, according to the intention of the legislature, as the last resort and should be used only in cases where a person with disorders poses a particularly serious and real threat to the security, health and lives of other persons, and where the likelihood that the person will commit an offence again is, on the basis of Article 14.3 of the Act, ‘extremely high’.

The Constitutional Tribunal did not agree with the allegation raised by the Ombudsman as regards the lack of a specific time-limit for preparing a psychiatric and psychological opinion in executive proceedings. According to the Tribunal, what arises from the wording of Article 9 of the challenged Act is that a psychiatric and psychological opinion on the state of health of a person in question is to be prepared in the course of executive proceedings. The Act does not outline a specific time-frame for the preparation of such an opinion. What follows from the logic of that legal institution is that such an opinion will be prepared towards the end of the period of a sentence. Therefore, the Tribunal does not see any necessity for the legislature to provide a more specific time-frame for preparing such an opinion. Indeed, the very nature of personality disorders which constitute the basis for filing an application for the use of one of the two preventive-therapeutic measures provided for in the Act (preventive monitoring or isolation in the National Centre for Prevention) indicates that the said measures are not determined by a particular time-limit.

In the view of the Tribunal, the lack of the indication of a specific time-limit for preparing the psychiatric and psychological opinion referred to in Article 9 of the Act does not constitute an infringement of the principle of appropriate legislation, reconstructed from Article 2 of the Constitution.

In the view of the Constitutional Tribunal, the provision of Article 46.1 of the challenged Act – pursuant to which adjudication “on the further deprivation of a given person of liberty”, which is related to the further stay in the National Centre for Prevention, is based exclusively on a psychiatric opinion, and the results of therapeutic activities – does not safeguard against the arbitrary or routine extension of the person’s stay in the National Centre for Prevention.

According to the Tribunal, the 2013 Act, which authorises a competent court to issue a decision on the necessity, or the lack thereof, to extend stay in the National Centre for Prevention on the basis of an opinion of one psychiatrist as well as the results of therapeutic activities, is insufficient from the perspective of procedural guarantees which should be granted to a person placed in the National Centre for Prevention.

III. The Tribunal issued this judgment in a bench composed of five judges, with one dissenting opinion.

Cross-references:

Constitutional Tribunal:

- K 27/00, 14.06.2000;
- P 6/02, 10.12.2002, *Bulletin* 2003/1 [POL-2003-1-009];
- K 18/03, 03.11.2004;
- P 27/05, 18.10.2006;
- K 47/04, 27.11.2006;
- SK 40/07, 01.07.2008;
- K 33/06, 10.07.2008;
- U 5/07, 10.03.2010;
- P 21/09, 01.03.2011;
- SK 18/09, 08.12.2013.

European Court of Human Rights:

- *Winterwerp v. the Netherlands*, no. 6301/73, 27.11.1981, Series A, no. 47;
- *Luberti v. Italy*, no. 9019/80, 23.02.1984, Series A, no. 75;
- *Johnson v. the United Kingdom*, no. 22520/93, 24.10.1997, *Reports* 1997-VII;
- *Witold Litwa v. Poland*, no. 26629/95, 04.04.2000, *Reports of Judgments and Decisions* 2000-III;
- *Varbanov v. Bulgaria*, no. 31365/96, 05.10.2000, *Reports of Judgments and Decisions* 2000-X;
- *Hilda Hafsteinsdottir v. Iceland*, no. 40905/98, 08.06.2004;
- *Hutchison Reid v. the United Kingdom*, no. 50272/99, 20.02.2003, *Reports of Judgments and Decisions* 2003-IV;
- *Rakevich v. Russia*, no. 58973/00, 28.10.2003;
- *M. v. Germany*, no. 19359/04, 17.12.2009, *Reports of Judgments and Decisions* 2009.

United Nations Human Rights Committee:

- *Fardon v. Australia*, no. 1629/2007, 10.05.2010.

Languages:

Polish.



Portugal

Constitutional Court

Statistical data

1 January 2016 – 31 December 2016

Total: 1 520 judgments, of which:

- Abstract reviews
 - Prior: -
 - Ex post facto*: 5
 - Omission: -
- Referenda
 - National: -
 - Local: -
- Concrete reviews
 - Summary Decisions¹: 813
 - Appeals: 567
 - Challenges: 119
- President of the Republic²: -
- Mandates of Members of the Assembly of the Republic³: -
- Electoral Matters⁴: 4
- Political Parties⁵: 5
- Declarations of Assets and Income: -
- Incompatibilities⁶: -
- Funding of Political Parties and Election Campaigns⁷:

¹ Summary decisions are those that can be issued by the rapporteur if he or she believes that the Court cannot hear the object of the appeal, or that the question which is to be decided is a simple one – particularly because it has already been the object of a decision by the Court, or it is manifestly without grounds. A summary decision can consist simply of a referral to earlier Constitutional Court jurisprudence. It can be challenged before a Conference of the Court (made up of three Justices from the same Chamber). The Conference's decision is then definitive if it is unanimous; otherwise it can itself be challenged before the Chamber's Plenary.

² Questions regarding the President's mandate, not his/her election.

³ Questions involving disputes over the loss of a seat.

⁴ Cases involving electoral coalitions, electoral disputes and disputes about electoral administrative matters.

⁵ Includes records of the abolition or disbanding of political parties, and challenges against decisions taken by party organs.

⁶ Only with regard to declarations of incompatibility and disqualifications of political officeholders.

Important decisions

Identification: POR-2016-3-012

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 03.11.2016 / **e)** 583/16 / **f)** / **g)** *Diário da República* (Official Gazette), 235 (Series II), 09.12.2016, 36179 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

Keywords of the alphabetical index:

Property, sale, purchase / Preferential rights.

Headnotes:

A provision of the Civil Code which attributes a preferential purchase right to tenants who have been party to an urban rental contract for more than three years, when interpreted to mean that the right will not extend to the whole of the property if the rental only encompasses part of the building and the latter is not subject to a multiple-unit / common property regime was in line with the Constitution. The interpretation outlined above does not render the norm in breach of the principles of equality, the right to property and ownership and the right to housing and the principle of the protection of legitimate expectations.

Summary:

I. Long-term tenants of a legally non-autonomous part of the building claimed a preferential right to buy the whole property when the owners were seeking to dispose of the property.

⁷ Annual accounts of political parties, election campaign accounts, and appeals against decisions by the Political Accounts and Funding Entity (ECFP). The ECFP is an independent organ that operates under the aegis of the Constitutional Court and whose mission is to provide the latter with technical support when it considers and scrutinises political parties' annual accounts and the accounts of campaigns for elections to all the elected entities with political power (President of the Republic; Assembly of the Republic; European Parliament – Portuguese Members; Legislative Assemblies of the autonomous regions; elected local authority organs).

In 2000, the Constitutional Court had already pronounced on a tenant's preferential right (right of first option to buy or right of first refusal) within the scope of a housing-rental relationship. That decision was handed down in relation to the Urban Rental Regime. In it, the Court took a position on the constitutional conformity of the same basic situation as the one at issue here, but from the inverse perspective. The issue in the present case was the conformity of an interpretation of a Civil Code norm that was introduced as part of the New Urban Rental Regime, according to which the tenant of a non-autonomous part of a property cannot exercise a preference in relation to the whole of the latter. In its earlier Ruling, the Court did not reject the opposite interpretation – i.e. that the tenant of part of an urban property which was not subject to a 'horizontal' ownership regime was entitled to first option to buy the whole of the building, even though the landlord had argued that the attribution of such a right to the tenant violated her own right to property and ownership.

II. The Court took the view in this case that although the way in which the preferential right was addressed in the two interpretations was different, the right itself was substantially the same. In its 2000 case-law, it had limited itself to stating that the Constitution takes a neutral stance on whether the spatial extent of a tenant's preferential right is greater or smaller. In this domain, the legislator's freedom to choose solutions tends not to be conditioned by the projection of constitutional values. In the absence of an express legislative choice, this idea of the issue's neutrality on the constitutional plane also applied to the question before the Court in this case, where the current interpretation does not recognise a broader preferential right. It is debatable which of the two interpretations more closely represents the applicable *legis artis*. The various constitutional norms and principles do not provide decisive arguments either way.

Over the years, the legislator has opted to give tenants a preferential right to buy when the place they are renting is available for sale. It has achieved this through various legislative solutions, the first of which (in relation to urban rentals) was only available in the case of commercial rentals.

When it passed the New Urban Rental Regime in 2006, the legislator gave urban-regime tenants a right of first option to buy in the event of the sale or surrender in lieu of payment of the place they had been renting for more than three years.

The current norms on this preferential right express the principle that it refers to the object of the pre-

existing right which justifies it. In the present case, the preferential right is limited to the 'rented place'. If what is to be sold is an overall thing – e.g. a building – within which that rented place does not possess legal autonomy, the preferential right cannot be exercised.

The situation of a tenant of part of a building where that part is legally autonomous, and that of a tenant of part of a building which has not been divided into legally autonomous units are not the same. In the first case, the nature of the rented thing makes it possible for the physical reality that is the object of the transaction in which possession and use of that reality passes from one party to another to match the physical reality of the object of the rental. In the second case such matching is impossible.

It is not necessary under the Constitution for legislative choices made at a given moment in time to be adhered to indefinitely. If a conflict of interest arises between landlord and tenant, the protection the Constitution affords to the right to housing means that the degree of protection available to the tenant must be greater when what is at stake is the effective elimination of that right. In relation to other aspects of the conflict, the legislator must be allowed to legislate more freely.

The Court went on to note that one of the constitutionally guaranteed aspects of the right to property is the freedom of transmission, whether *inter vivos* or *mortis causa*; there can be no such thing as property the disposal of which is prohibited. This right does not preclude legal limitations on the freedom to transmit provided they do not affect the essential content of the right to property – a preferential right is an example of such a limitation – and which exist solely in response to the need to protect other types of interest. A preferential right obliges owners, if they decide to sell, to give the holder of the right (the tenant in the present matter) first option to buy under the same terms as another offeror.

Jurisprudence is divided on rented accommodation that only forms part of a property which is not subject to a 'horizontal' regime. Some courts have held that such tenants are entitled to a first option on the whole of the property ("the expansive theory"). Others have limited the right to the specific rented place, with no preference existing if that place cannot be transacted autonomously ('location theory').

Constitutionally, the ordinary legislator is as entitled to extend this preferential right in accordance with the expansive theory as it is to restrict it under the location theory. In practice, successive legal texts have been interpreted as supportive of both theories.

The distinct regimes that result from the decision to opt for the location theory and thus differentiate between situations are neither arbitrary nor lacking in rational grounds. The position of someone confronted with a preferential right of a tenant wishing to exercise that right solely in relation to his or her 'rented place' is not the same as that of someone faced with a tenant wishing to exercise it with regard to a broader space from which the rented space cannot be legally detached. This situational diversity can lead the legislator to impose a differentiated legal treatment without the principle of equality being breached.

There is a clear line of jurisprudence showing that the Constitution only prohibits differentiated treatment of situations where no material grounds exist for that differentiation; the Constitution also prohibits negative forms of discrimination which harm the equal dignity of human persons, and differences of treatment for which there is no justifiable reason.

The Court had already said that the functions of the principle of equality do not include guarantees that the legislator's choices are rational and coherent or represent the best solution. Constitutional Justices are only required to prevent legal norms from establishing rules which differentiate between persons or situations that warrant equal treatment or which equalise persons or situations that merit differentiated treatment.

Nor does the norm violate the constitutional right to property and ownership. An imperative requirement cannot be deduced from that right for legislation which allows someone who already has rented housing to use a preferential right to acquire the right to ownership of the whole of the property. Furthermore, what was at stake in the normative interpretation before the Court was not the actual provision of housing (tenants already have this) but whether housing should be made more stable via the right to property and at the cost of a level of sacrifice of the autonomy to negotiate in relation to a part of a property that is not actually rented out, a very different situation.

The Court also observed that a breach of the right to housing of one's own did not come into play here; the Constitution does not require that right to be fulfilled by means of transforming, via a preferential right, rented housing into owned housing. The Constitution does however seek to guarantee access to a dignified place in which to live – access that can be ensured as much by renting as by the right to ownership of property.

The Court also rejected an allegation of a breach of the principle of the protection of legitimate expectations. The legislator must be recognised to possess the lawful ability and perhaps even the duty to try to suit legal solutions to existing realities. There must be a fair balancing of the sub-principle of the protection of citizens' expectations derived from the principle of a democratic state based on the rule of law on the one hand, and the legislator's freedom to create and shape legislation on the other. It is only in cases in which, by changing existing regulations, new legislation makes intolerable and excessively burdensome changes to pre-existing legal relations and situations which citizens and the community could not have been expected to foresee, that that sub-principle imposes itself so as to prevent the new law from failing to respect the minimum degrees of certainty and security which every social entity must take into account.

The Court accordingly rejected all allegations to the effect that the normative interpretation was unconstitutional and denied the appeal.

Supplementary information:

One Justice dissented from a section of the Ruling in which the Court decided not to hear a part of the appeal lodged before it because that part did not meet the requisite for admission of an appeal on the grounds of the alleged unconstitutionality of a norm. He did, however, concur with the majority in relation to the part of the appeal that was heard and denied.

Cross-references:

Constitutional Court:

- nos. 346/93, 12.05.1993; 156/95, 15.03.1995; 225/00, 05.04.2000; 465/01, 24.10.2001 and 187/13, 05.04.2013.

Languages:

Portuguese.



Identification: POR-2016-3-013

a) Portugal / b) Constitutional Court / c) First Chamber / d) 03.11.2016 / e) 584/16 / f) / g) / h) CODICES (Portuguese).

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.**

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

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

Keywords of the alphabetical index:

Procedural swiftness / Evidence, submission, new trial.

Headnotes:

An interpretation of the Criminal Procedural Code to the effect that following a decision by a higher court that an accused person should be given a new trial, he or she should not be granted a new time limit in which to submit his or her prior written defence and a list of witnesses is not unconstitutional.

The dynamic with which the law imbues criminal procedure fulfils an express constitutional purpose of speediness, which is justified by the need to ensure both quick and effective protection of the legal assets and values protected by the criminal law, and the principle that accused persons are presumed to be innocent, which is incompatible with delays in or indefinite extensions of proceedings designed to determine their criminal culpability.

The legal status of accused persons does not exempt them from the duty to act within the time limits and in the way set out in the law. It does not rule out the possibility of negative consequences if they fail to do so.

Contesting the accusations brought against him or her by submitting a prior written defence is one of the fundamental tools available to an accused person but it is subject to peremptory procedural deadlines which, if exceeded, eliminate the right to engage in the act. If the accused has been notified of the need to submit a defence and a list of witnesses and they fail to do so within the allotted time, they lose the procedural right to do so at all. Nor can an accused

who has submitted a defence subsequently present a new one; the procedural right is exhausted when it is effectively exercised.

The right of the applicant in this matter to contest the facts of which he was accused and to submit evidence of his innocence had been effectively recognised, albeit not exercised, in the run-up to his first trial. The deadline for doing so had elapsed. The Constitutional Court took the view that his claim that he should be granted a new time limit within which to submit a written defence and a list of witnesses before his new trial was constitutionally unfounded.

Summary:

I. The applicant in this concrete review case argued that a decision by a higher court (in this case, the Court of Appeal) to refer his case to the lower courts for a new trial ought to have given him a fresh opportunity to submit a prior written defence and list of witnesses. In his view, the fact that there was going to be a “new trial” because the first one had been cancelled should result in the rights of the defence being assured and maintained “anew”, otherwise the new trial risked simply becoming a “simulacrum” of the process of justice in a democratic state based on the rule of law.

The Court noted that the article in the Criminal Procedure Code, or CPP, containing the disputed norms was included in the Title devoted to pre-trial acts. It only granted accused persons the procedural ability to submit a prior written defence and a list of witnesses, regulating the details of how they should do so. From a systematic perspective, sending cases back for a new trial belongs within a Chapter devoted to the details of the ordinary appeal process.

The question of constitutionality here was not about the norm which allows accused persons to contest the charges against them and present evidence in their favour, but rather the legislative solution which specifically precludes them from doing so when an appeal court strikes down an original conviction on procedural grounds and sends the case back for a new trial. The essential normative elements of the legal source of the interpretative solution adopted by the court *quo* include not only the article governing how written defences and the accompanying list of witnesses should be submitted, but also the norm that sets out the preconditions for ordering a new trial and delimits the scope of application of such orders. The applicant targeted the set of normative CPP provisions which permits the interpretation that when higher courts order a new trial, the defence is not entitled to a new time limit within which to contest the accusations and submit a list of witnesses.

The Constitution expressly states that accused persons must be tried in the shortest period of time compatible with the guarantees available to the defence. The sense of urgency in penal proceedings, which is justified by the need to protect the legal assets and values that are harmed by crime, is limited by those guarantees. Criminal proceedings must be structured in such a way as to make those two key elements of the value judgements entailed therein, which tend to pull in opposite directions, compatible with one another.

The Court noted that the concept of preclusion, under which failure to exercise a subjective procedural right and take advantage of an opportunity by the applicable deadline results in a loss, must also operate in criminal proceedings. Every procedural subject, including the accused, is required to act in proceedings within the time limits and in the manner laid down by law, otherwise they will not be able to act at all. This is how the law makes the public interest in defending the legal assets and values that are protected by the criminal law on the one hand compatible with the need to protect the defence guarantees which the Constitution expressly affords to the accused on the other.

Under the constitutional principle of the presumption of innocence, the rule in criminal cases is that if an accused does not contest the charges against him or her, this does not have the damaging impact generated by an absence of counter-arguments in a civil case. As a result, the procedural idea of preclusion does not have the same substantive impact in the legal sphere of the accused in criminal proceedings as it does in that of the defendant in civil cases. The law also gives judges the power to ask questions and conduct enquiries on their own initiative with a view to discovering the truth and thus helping them reach a good decision. This is an important limit on the procedural effects of failure on the part of the accused to fulfil their legal obligation, *inter alia* in terms of submitting a list of witnesses and other evidence.

The Court therefore rejected the applicant's argument that the normative interpretation in question was unconstitutional.

Cross-references:

Constitutional Court:

- nos. 658/11, 21.12.2011; 266/15, 19.05.2015 and 193/16, 04.04.2016.

Languages:

Portuguese.



Identification: POR-2016-3-014

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 09.11.2016 / **e)** 591/16 / **f)** / **g)** *Diário da República* (Official Gazette), 237 (Series II), 13.12.2016, 36478 / **h)** CODICES (Portuguese).

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.**

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

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

Keywords of the alphabetical index:

For-profit legal person, litigation.

Headnotes:

The interpretation by a court *a quo* of a norm in such a way as to immediately exclude the possibility of granting legal aid to for-profit legal persons, and the ensuing refusal of legal protection to such entities without taking their economic situation into consideration, were unconstitutional. They violated the constitutional right of access to the law and to effective jurisdictional protection, under which justice cannot be denied because of a lack of economic resources. This right is an indispensable guarantee of the protection of fundamental rights and is inherent in the idea of a state based on the rule of law.

The Constitution does not require a form of treatment that simply ignores all the differences between the various types of legal subject, or the significance that granting legal protection has for each one. However, it is necessary that the ways in which those differences are projected onto the criteria for granting

that protection do not absolutely or disproportionately preclude it. The criteria must be appropriate and cannot make it impossible in practical terms to concretely assess and consider situations in which any given subject alleges a lack of sufficient means. The norm before the Court limited itself to prohibiting the grant of legal protection to a whole category of subjects, regardless of their situation. This was unconstitutional.

Summary:

I. The applicant in this matter was a for-profit legal person (a commercial company), which had applied for legal aid to allow it to judicially oppose an injunction taken out by the District Centre of the Social Security Institute. This application was rejected. The company then contested that rejection before the court *a quo*, which denied its suit on the basis of a normative interpretation whereby legal aid cannot be granted to for-profit legal persons because the legal system requires such persons to always have sufficient economic resources so that they are never in a situation in which a lack of funds justifies the need for protection in the form of legal aid.

II. The Constitutional Court noted that the constitutional right of access to the courts could not be emptied of its content by a lack of economic resources. Accordingly, no person, be they natural or legal, Portuguese or foreign, can be deprived of the ability to submit their cause to the judgment of the courts. The Constitution guarantees legal persons the enjoyment of the rights that are compatible with their nature. Given that the ability to go and the possibility of being taken to court do not require a human support, one can only conclude that the fundamental right of access to the law and the courts is compatible with the nature of legal persons.

The fundamental right of citizens to form associations and companies would also be deprived of its efficacy if the Constitution did not protect the fundamental rights of those legal entities.

Justice-related services do not necessarily have to be free of charge, but their cost cannot be so burdensome that it makes access to the courts substantially difficult. The costs involved in that access must take into account the potential inability of entities in economic difficulties to go to court, and must respect the principles of proportionality and appropriateness.

In a society characterised by the prohibition of self-defence and the guarantee of access to the courts, both legal and natural persons will sometimes need to take other entities to court in order to effectively

implement their rights (e.g. credit rights), and to defend themselves in lawsuits brought against them by third parties (e.g. actions for contractual or extra-contractual civil liability, including injunction proceedings).

The interpretation of the norm in the legislation on Access to Courts (hereinafter "LADT") by the lower courts in these proceedings presupposed that it was not admissible for for-profit legal persons not to have enough money to be able to go to court, insofar as their own legal nature means that the law requires them to be provided with an organisational and financial structure with capacity to fund the foreseeable costs of their activities, including those resulting from litigation. This precluded any case-by-case assessment of merit and excluded the legal protection needed for a subject in this legal category to gain access to court. The only factor that counted in order for the norm to be applied was the subject's legal nature. Its lack of economic capacity, gauged with reference to criteria that are both appropriate and comparable to those applied to other legal and natural persons, was deemed irrelevant.

The Court acknowledged that the circumstances of granting legal aid to natural persons is not the same as those entailed in providing aid to for-profit legal persons. The law requires the latter to incorporate the costs of any judicial litigation in which they engage into their overall business. A decision to afford unlimited legal aid to for-profit legal persons would have the effect of protecting litigation by commercial companies that were not in a position to continue trading. From this perspective, awarding legal aid to for-profit legal persons would be dysfunctional and could potentially create inequalities between companies competing in the same market.

In addition, legal persons are allowed to deduct the costs of litigation from their taxable income, so that although the entity has to bear them to begin with, they end up being written off when their taxable profits are calculated.

However, in its case-law the Court had already noted that neither the norms contained in the European Convention on Human Rights, nor the case-law on the European Court of Human Rights in relation to those norms, had led to any normative solution regarding the legal protection of legal persons that requires the exclusion of the possibility of granting legal aid to for-profit legal persons without first concretely evaluating their situation.

In a 2010 Ruling, the Court of Justice of the European Union also emphasised that the principle of effective judicial protection set out in the Charter of

Fundamental Rights of the European Union must be interpreted to mean that one cannot exclude the possibility that legal persons can invoke the principle, and that the aid granted in consequence can in particular encompass dispensation from prior payment of court costs or for the assistance of legal counsel (without prejudice to the fact that the response to a concrete request for legal aid must always take factors such as the object of the dispute and the applicant's financial capacity, into account).

This understanding of the principle of effective judicial protection enshrined in the Charter of Fundamental Rights of the European Union precludes the idea of a necessary incompatibility between the provision of legal aid to for-profit legal persons and the proper functioning of competitive markets.

The Constitutional Court said that that understanding should be upheld in domestic law and within the overall framework of a systemic vision of the subject. One has only to imagine the hypothesis of a commercial company from Portugal or another EU Member State that finds itself in economic difficulties due to a violation of EU legal norms by the Portuguese State and wants to hold the latter civilly liable: the company's inability to discuss its own lack of funds with the competent Portuguese authorities in order to obtain the legal aid needed to ensure effective judicial protection would be contrary to the Charter of Fundamental Rights of the European Union norm and would place the company in an unequal situation in relation to its counterparts in parallel situations in other Member States.

The Court accordingly found the normative interpretation before it unconstitutional.

Cross-references:

Constitutional Court:

- nos. 279/09, 27.05.2009 and 216/10, 01.06.2010.

Languages:

Portuguese.



Identification: POR-2016-3-015

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.11.2016 / **e)** 611/16 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Disciplinary sanction, pension, loss / Income, subsistence level.

Headnotes:

A norm which substituted the penalty of loss of the right to a pension for three years in the case of retired officers for that of compulsory retirement was unconstitutional; it breached the principle of proportionality and the rights to dignity and a decent standard of living.

Summary:

I. This concrete review case concerned a norm of the Public Security Police Disciplinary Regulations which substituted the penalty of loss of the right to a pension for three years in the case of retired officers for that of compulsory retirement (the latter would have applied had they still been on active duty.)

The Public Prosecutor is legally obliged to appeal to the Constitutional Court when another court has refused to apply a norm on the basis of unconstitutionality. Such was the case here.

II. The Constitutional Court noted that the measure entailed the pension being eliminated altogether for a significant period of time. It went beyond the strictly pecuniary nature of a disciplinary penalty and affected the conditions a former police officer would need in order to subsist, depriving him or her for a lengthy period of the payment that should have replaced his or her work income following retirement. That elimination did not occur within the framework of the officer's former working relationship, but within the scope of his or her new legal social-security retirement relationship, which is based on a contributory principle underlain by the assumption

that there is a direct correlation between the right to pension payments and the obligation to contribute.

Such a measure, which takes no account of how much of the pension of the person concerned is to be lost and the potential impact on his or her basic living conditions undermines the principle of proportionality. By contrast, a legislative solution which preserves a minimum level of income so as to ensure a decent standard of living, even if the duration of the penalty had to be lengthened in order to diminish the accused's assets by the same total amount, would achieve the goals of retributive punishment and general prevention with the same degree of efficacy without endangering the right to subsistence.

The Court rejected the argument that the measure posed no danger to the right to a decent standard of living because the former officer would be able to apply for material social-security benefits. In the Court's view, the removal of a benefit the purpose of which is to replace the income previously earned by work, which is covered by a compulsory, contributory welfare system and funded by transfers from the State Budget, with no attempt at weighing up the possible negative impact on the lives of those concerned, was illogical and senseless.

The existence of welfare mechanisms within the overall framework of a social security system was not sufficient in itself to avert the unnecessary and excessive nature of a legislative measure with the potential to create situations of hardship and material insecurity that would have to be remedied by other forms of material assistance.

In earlier case law, the Constitutional Court had addressed the question of the unconstitutionality of norms under which retired public servants can lose the right to their pension, rather than being subject to disciplinary penalties applicable to those who are still working or on active duty. Notwithstanding dissenting opinions in one of those rulings, until 2014 none of them had ever entailed a finding of unconstitutionality. In that year, the Court took the opposite position in relation to part of an Public Security Police Disciplinary Regulations norm under which retired public servants and officers could completely lose their right to a pension for four years, instead of being subjected to the penalty of dismissal from the service which would have been applicable had they still been on active duty. The Court found that provision unconstitutional.

In the earlier cases, the Court had focused on a different issue in order to reach the conclusion that it was not unconstitutional to deprive retired public servants of their pension because they had

committed a disciplinary infraction. It found no unconstitutionality in the part of the regime governing the attachment of social security benefits whereby the amount needed to guarantee a subsistence level for a pensioner cannot be attached, whereas once that minimum is assured, attachment over and above it is constitutionally permissible. In the case of disciplinary penalties, the retirement pension is not affected by an act of attachment designed to coercively fulfil a credit right which the debtor has not satisfied voluntarily. Instead, it is removed by means of a disciplinary penalty with retributive and general preventative aims which could be definitively prejudiced if one were to exempt retired officers from any penalty for their infractions.

From the constitutional-law perspective of the present case (the need to defend the principles of the dignity of the human person and proportionality as limits on the state's disciplinary power), the Court observed the lack of legally relevant difference between a norm that took away a person's pension for four years as a substitute for disciplinarily punishing them with dismissal, which the Court found unconstitutional in 2014, and one with the same material outcome, albeit for three years instead of four, used to replace the disciplinary penalty of compulsory retirement, which was the object of the present appeal. Neither fulfilled the constitutional requirement to weigh up the effect the total suppression of such a means of subsistence could have on the basic living conditions of a retired accused person; moreover, the precise nature of the disciplinary penalties that were being replaced was irrelevant, and the difference in the length of the replacement disciplinary penalties was insignificant.

In its earlier case law, the Court had taken the position that even in the event that application of the norm would lead to deprivation of the indispensable minimum needed to guarantee dignified subsistence, the interested party could always resort to the welfare mechanisms which the legal system provides as a response to economic hardship situations. However, it also considered that albeit one must recognise that loss of the right to a pension as a consequence of the commission of a disciplinary infraction and the attachment of wages or social benefits in order to coercively satisfy a credit right are the products of legislative policy reasons with differing degrees of importance, the fundamental right to a decent standard of living arising from the principle of the dignity of the human person is subject to a single valuation criterion.

In Portuguese constitutional jurisprudence, the dignity of the person is perceived as a primary regulatory principle for the entire legal system. The

essential core of the guarantee of a decent standard of living inherent in respect for the dignity of the person has been concretely evaluated in terms of the amount of the national minimum wage. This was the framework on which the Court based its view that the Constitution precludes the attachment of both social benefits whose amount does not exceed that minimum wage, and work-related income in an amount that would reduce the worker's income to below the minimum wage (assuming the debtor did not possess other attachable property or income.)

The Court accordingly found the norm before it violated the principle of proportionality and was unconstitutional.

Cross-references:

Constitutional Court:

- nos. 349/91, 03.07.1991; 411/93, 29.06.1993; 62/02, 06.02.2002; 177/02, 23.04.2002; 306/05, 08.06.2005; 442/06, 12.07.2006; 518/06, 26.09.2006; 28/07, 17.01.2007; 188/09, 22.04.2009 and 858/2014, 10.12.2014.

Languages:

Portuguese.



Identification: POR-2016-3-016

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 21.11.2016 / **e)** 641/16 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**
- 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**
- 5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment.**
- 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

Keywords of the alphabetical index:

Criminal policy / Sexual freedom.

Headnotes:

A norm in the Criminal Code which deems incitement to or procurement for prostitution to be a crime is not unconstitutional; the criminal policy rationale which justifies making incitement to or procurement for prostitution a crime and legitimises penal intervention in this area is based on the assumption of a high and unacceptable risk of vulnerable persons being exploited by third parties. Such situations endanger the autonomy and freedom of the agents who prostitute themselves.

Summary:

I. The applicant in this concrete review case argued that the norm under which incitement to or procurement for prostitution is a crime was unconstitutional because it illicitly and disproportionately compresses the constitutional rights to free personal development, including sexual freedom and the right to work. Her position was that there should be no unlawfulness in fostering or favouring sexual relations which are engaged in freely (without coercion, violence or serious threat, constraint, deception or fraudulent manipulation, abuse of authority or taking advantage of a victim's psychological incapacity or special vulnerability) by adults in a place that is not public and where the parties' privacy is preserved, even when the procurer acts on a professional basis and money changes hands in the process. She accepted that the facts involved in such a practice "might be the object of minimal criticism, not fit into the normal way in which a society does things, and not represent the behaviour that might be desired of both parties", but she disputed the view that they were significantly negative to justify the intervention by the Criminal Law.

II. The Court referred to its own jurisprudence, particularly a leading case dating from 2004 in which it had not found the criminalisation of, incitement to or procurement for prostitution to be unconstitutional – a Ruling which the applicant had cited, in support of her view that it no longer matched current reality in 2016.

The Court reiterated its own argument in the 2004 Ruling – that intervention by the criminal law in this field does not represent legal protection of a moral perspective, but rather the protection of the freedom and autonomy required to ensure the dignity of

persons who prostitute themselves. Referring again to its earlier Ruling, the Court said that freedom of conscience was not at stake here; that freedom does not include a dimension which consists of taking advantage of other people's unmet needs or making a profit from someone else's sexuality. The Court considered the fact that prostitution itself is not prohibited to be irrelevant. Even if one were to take the view that prostitution could be an expression of the free availability of individual sexuality, for third parties to take economic advantage of it is already the expression of an interference which entails intolerable risks, to the extent that it corresponds to the use of a specifically intimate dimension of the other, not for his or her own ends, but for those of third parties. The Court also noted other cases in Criminal Law in which a person's autonomy or consent to certain acts do not themselves justify the behaviour of those who assist, instigate or facilitate that person's behaviour. Examples of such crimes include helping another person commit suicide, and disseminating child pornography.

Duties of respect and solidarity exist in one's relations with others which stem from the principle of the dignity of the human person and go beyond a mere non-interference with a person's autonomy. There is no constitutional imperative to criminalise a certain 'professional activity' whose object includes the specific negation of this type of value, but nor is that criminalisation contrary to the Constitution. The freedom to engage in an occupation or economic activity is subject to limits and to a framework composed of values and rights that are directly associated with the protection of the autonomy and dignity of other human persons. Activities that can affect lives, health and moral integrity are thus particularly subject to conditions when they are undertaken in the form of work or enterprise.

The criminalisation of incitement to or procurement for prostitution is a criminal policy option that is justified primarily by the normal association between the forms of conduct incorporated into that concept and the exploitation of the economic and social needs of those who devote themselves to prostitution and use it as a means of subsistence. The fact that the legal provision before the Court does not expressly require there to be a concrete exploitative relationship in order to typify this crime does not mean that preventing such relationships is not a fundamental reason for criminalisation.

III The Ruling was the object of two dissenting opinions. Although in the past, one Constitutional Justice (the same in both cases) had dissented from Rulings 396/07 of 10 July 2007 and 522/07 of 18 October 2007, and another from Ruling 654/11 of

21 December 2011, and albeit all three dissenting opinions were formulated in terms similar to those employed by the minority Justices in the present case, their positions could not be said to constitute a sustained line of thought in opposition to that taken by the majority in the present Ruling, firstly, because the Constitutional Court has not once ruled in accordance with that opposing view, and secondly because so few Justices have ever dissented from the prevailing one.

One of the dissenting arguments put forward against this particular Ruling was that a 1998 reform which removed an existing element from the criminal type 'incitement to or procurement for prostitution' – the "exploitation of situations of abandonment or economic need" – rendered the legal value which this criminalisation was designed to protect indefinite, thereby contradicting the constitutional requirement that any restrictions on fundamental rights must be necessary. It could only be contended that the legal classification of this crime protects the legal value 'sexual freedom' if the norm in question were interpreted restrictively, limiting its applicability to cases in which the victim is in a situation of economic and social need. However, since the change in the law, that interpretation is no longer possible.

The other dissenting opinion was put forward by the President of the Constitutional Court, who argued the same thesis and that there is no legal value in this situation that requires protection. He said that since 1998, these have been 'victimless crimes' in the criminological sense of the term. By giving up the component "exploitation of situations of abandonment or economic need", which linked the criminal infraction to an offence against sexual freedom, the only element the legislator left in play was the prevention or repression of sin, which is an exercise in atavistic moralism with which the criminal law of a state based on the rule of law in a secularised, democratic society has nothing to do. He considered that it was the criminalisation itself which could be seen as a perverse assault on the dignity or autonomy of people who, as enlightened and free adults, should be able to legitimately choose to lead their lives as much in the "shade of virtue" as in the "shadow of sin".

Cross-references:

Constitutional Court:

- nos. 144/04, 10.03.2004; 196/04, 23.03.2004; 303/04, 05.05.2004; 170/06, 06.03.2006; 396/07, 10.07.2007; 522/07, 18.10.2007; 141/10, 14.04.2010; 559/11, 16.11.2011; 605/11, 05.12.2011; 654/11, 21.12.2011; 203/12, 24.04.2012 and 149/14, 13.02.2014.

Languages:

Portuguese.

*Identification:* POR-2016-3-017

a) Portugal / b) Constitutional Court / c) First Chamber / d) 13.12.2016 / e) 676/16 / f) / g) / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
5.3.39 Fundamental Rights – Civil and political rights
– **Right to property.**

Keywords of the alphabetical index:

Rights, creditors / Bankruptcy, insolvency, assets / Compensation, workplace accidents.

Headnotes:

An article in the Law regulating the regime governing reparation for work-related accidents and occupational illnesses under which credits derived from the right to reparation are inalienable, unattachable, non-renounceable and enjoy the guarantees enshrined in the Labour Code is not unconstitutional.

The constitutional right to private property does not simply protect “real rights”; it also covers the satisfaction of credit rights at the expense of the debtor’s assets. It is in order for creditors’ rights to be affected by the impossibility of including compensation for a work-related accident in a bankrupt debtor’s seizable assets, provided that the extent to which they are affected is limited to that necessary and sufficient to ensure the debtor (an accident victim who is also a debtor) a minimally decent standard of living.

The right to compensation for injuries is an imposition derived from the principle of a democratic state based on the rule of law, and also substantiates a specific aspect of the protection afforded to individual rights. The right to compensation and the obligation to compensate should not be viewed separately from their implications for the protection of rights.

The compensation awarded to an accident victim under the Law regulating the regime governing reparation for work-related accidents and occupational illnesses is a reflection of a means of protecting rights affected by a work-related accident, albeit this may not always be the whole or only form taken by that protection.

The rule that compensation for a work-related accident cannot be included in a bankrupt debtor’s seizable assets cannot be viewed as disproportionate unless the right protected by this compensatory regime is also taken into account, to the extent that taking away or reducing the amount in question affects the protection of an absolute right that can be protected by the Constitution.

In weighing up the sacrifice of the creditors in this situation against that of the holder of the right to compensation for a work-related accident, one must consider the latter’s special nature, which cannot be dissociated from the victim’s effective functional and physical loss, be it temporary or permanent, partial or absolute.

When creditors’ rights conflict with their debtor’s right to effective reparation for his or her injuries in this way, the outcome may be a proportionate restriction of the former, because it is impossible to say that they should prevail over the latter whatever the circumstances.

Summary:

I. The legal norm at issue in these proceedings stated that all credits derived from the right to reparation provided for in the Law regulating the regime governing reparation for work-related accidents and occupational illnesses work-related accidents, including occupational rehabilitation and reintegration, are inalienable, unattachable and non-renounceable.

The court *a quo* in this matter considered that, when interpreted to mean that pensions receivable as a result of work-related accidents cannot be attached under any circumstances, this norm was in breach of the right to private property as guaranteed in the Constitution, and negated the ability to transmit that property in life or upon death. Effectively, the lower court considered the norm unconstitutional when interpreted in this way and consequently refused to apply it. The Public Prosecutors’ Office is legally bound to appeal to the Constitutional Court against every decision in which another court refuses to apply a legal norm because it deems it unconstitutional. This was the origin of the present concrete review case.

II. There are two aspects to compensation awarded for work-related accidents: one concerns the victim's physical and psychological recovery; the other involves payment of a sum of money calculated according to whether the victim died or was incapacitated, and to what extent.

In previous cases linked to the possibility of attaching part of a person's income from work, pensions or other periodic revenues of a similar nature, when that attachment can affect the executed party's receipt of a minimum amount capable of ensuring him or her a minimally decent standard of living, the Constitutional Court had upheld the view that affecting creditors' rights does not violate the Constitution, provided the effect is limited to that necessary and sufficient to ensure the debtor's minimally decent subsistence.

In its decision in the present case, the lower court had not weighed up the debtor's asset-related situation. The Constitutional Court observed therefore that it was not possible to discern that the amount exempted from attachment (and thus from inclusion in the bankrupt debtor's seizable assets) exceeded that needed to ensure him and his family a minimally decent standard of living.

A right to compensation must be viewed against the background of the right whose reparation is sought by compensatory means. The Court had already recognised that the right to compensation for injuries is an imposition derived from the principle of a democratic state based on the rule of law and substantiates a specific aspect of the protection afforded to individual rights.

From this perspective, the rights that are protected by the Constitution may be intolerably affected if compensation for the damages caused by their injury is denied. In addition to the cases in which the Constitution specifically attributes a right to compensation for injuries, the Court has recognised the existence of a general right to reparation for injuries rooted in the need to respect and guarantee the effective implementation of the fundamental rights included in the principle of a democratic state based on the rule of law.

While civil liability is a consequence of breaches of rights, the reparation for the consequences of the violation of a right is inseparable from the protection of that right. This is recognised in Article 41 ECHR.

From a constitutional perspective the right to compensation and the obligation to compensate must be viewed as expressions of the protection afforded to or removed from a right, although the chief purpose of the law on work-related accidents is to

restore a victim's capacity for work. The compensation awarded to victims is another way of protecting those of their rights (e.g. the right to physical integrity) that were affected by the accident.

The Court noted that the rule whereby compensation for a work-related accident cannot be attached or seized in order to pay a bankrupt person's debts must be viewed in the context of the right that is protected by this compensatory format. To remove the compensation from the victim's legal sphere would be to eliminate the protection of a certain absolute right which enjoys the support of the Constitution.

The special nature of compensations for work-related accidents cannot be dissociated from the *effective loss* they seek to repair; a creditor's sacrifice cannot be weighed up in isolation.

The disproportion noted by the lower court in this case cannot be recognised *abstractly*, without carefully weighing up the accident victim's position, both in terms of the monetary amount that should be exempted from attachment or seizure in order to pay his or her debts in bankruptcy, and with regard to the right for which the compensation is intended to provide reparation.

There is a collision between the creditor's right that exists as part of the affirmation of the guarantee provided by the debtor's assets on the one hand, and the debtor's right to see certain amounts which form part of his or her assets deemed immune to that asset-based guarantee because of their origin and function on the other.

The Court said that when a creditor's right to satisfaction from the debtor's assets clashes with the debtor's right to effective reparation for his or her injuries on the basis of the special rules governing labour-related misfortunes, each situation must be weighed up, which may result in a proportionate restriction on the former, because it is not possible to abstractly say that it must prevail over the latter in every case, whatever the circumstances.

As such, the Constitutional Court disagreed with the court *a quo* that the normative interpretation in question was unconstitutional, and upheld the mandatory appeal against that court's decision.

III One Justice dissented from the majority view. In his view, the norm was unconstitutional; it disproportionately compressed the rights of the bankrupt person's creditors. This breached the constitutional right to property, when taken in conjunction with the constitutional norm which

requires restrictions on constitutional rights, freedoms and guarantees to respect the principle of proportionality.

Cross-references:

Constitutional Court:

- nos. 349/91, 03.07.1991; 385/05, 13.07.2005; 657/06, 28.11.2006; 444/08, 23.09.2008; 363/15, 09.07.2015 and 55/16, 02.02.2016.

Languages:

Portuguese.



Romania Constitutional Court

Important decisions

Identification: ROM-2016-3-005

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.07.2016 / **e)** 580/2016 / **f)** Decision on the citizens' legislative initiative entitled "Law for revision of the Constitution" / **g)** *Monitorul Oficial al României* (Official Gazette), 857, 20.10.2017 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Constitution, amendment / Legislative initiative, popular / Marriage, couple, same-sex.

Headnotes:

The proposed amendment of the right to marriage and family relations in the Constitution, i.e. replacement of the words "of the spouses" with the words "between a man and a woman", constitutes a mere indication as regards the exercise of the fundamental right to marriage, namely the specific determination of the fact that marriage is concluded between partners of different biological sex. The amendment proposed is not likely cause the disappearance, removal, deletion or cancellation of the concept of marriage. Furthermore, the safeguards of the right to marriage, as enshrined in the constitutional text of reference in its original form, remain unchanged. Therefore, the initiative for revision of the Constitution is constitutional, as it does not remove the right to marriage or the safeguards thereof and it does not bring into question any other limit on matters of revision. The right to marriage and family is distinct from the right to family life/respect for and protection of family life, a concept with a much broader legal content, which is also embodied and protected by the Constitution.

Summary:

I. The Secretary General of the Senate sent to the Constitutional Court the citizens' legislative proposal for the revision of Article 48.1 of the Constitution, registered at the Senate, together with the original supporters' lists. In accordance with the accompanying explanatory memorandum, the citizens' legislative proposal was initiated in order to remove any doubt that the use of the term "spouse" in Article 48.1 of the Constitution might create in the shaping of the concept of "family", the ratio between "family" and the fundamental right of men and women to marry and to found a family. It was pointed out that the replacement of the term "spouses" with the words "man and woman" shall ensure the precise and literal implementation of certain expressions enshrined as entrenched safeguards for protection of the family as the "natural and fundamental group unit of society" under Article 16 of the Universal Declaration of Human Rights. In the same vein, also in Romania, only "man and woman", together, enjoy the universal recognition and protection of the right to marry and to found a family, based on some important considerations of historical, cultural and moral nature characterising the Romanian society.

II. Proceeding to the examination of the citizens' initiative for the revision of the Constitution, the Court found, first, that the legislative proposal which is the subject of this initiative, as well as its accompanying explanatory memorandum, signed by the committee of initiative consisting of 16 members, have been published in the Official Gazette of Romania, within the 30-day term limit as of the issuance of the Legislative Council's Opinion.

Verifying, next, whether the lists of supporters have been attested by the mayors of the administrative-territorial divisions or by their representatives, the Court held that the attestation of the lists of supporters has not been carried out, in some cases, in strict compliance with the applicable legal provisions, and found that there have been various infringements of the legal framework. Having subtracted from the total number of supporters of the legislative initiative (2,760,516) the number of those whose signatures have not been duly attested (62,039), this left a total of 2,698,477 supporters whose signatures have been duly attested. Therefore, the errors found, which are deemed reasonable in view of the very large number of supporters, cannot lead to the unconstitutionality of the initiative for the revision of the Constitution, and it is therefore met the requirement laid down in Article 150.1 of the Constitution, i.e. at least a number of 500,000 citizens with the right to vote, necessary to initiate revision of the Constitution.

On the basis of the examination of files containing data on the legislative initiative's supporters, also in terms of the legality of the attestation, it was found that 39 counties, as well as the city of Bucharest, fulfil, each, the requirement to have at least 20,000 signatures duly attested in support of the legislative initiative. That being so, the Court found that also the territorial dispersion requirement had been complied with, as provided for by Article 150.2 of the Constitution.

Having ascertained the compliance with the requirement relating to the initiators of the revision, the Court turned to assessing the constitutionality of the legislative proposal constituting the subject of the citizens' initiative, i.e. its examination under the provisions of Article 152 of the Constitution, which sets out the limits on matters of revision of the Constitution. The constitutional rule of reference governs the requirements of intrinsic constitutionality of the initiative for revision (Article 152.1 and 152.2) and of extrinsic constitutionality thereof (Article 152.3).

With regard to the extrinsic constitutionality as to the normality of circumstances for revision of the Constitution, the provisions of Article 152.3 of the Basic Law, which prohibit any revision of the Constitution during the state of siege or the state of war, must be read in conjunction with those of Article 63.4 of the Constitution, according to which no revision of the Constitution is permitted throughout the period in which the Chambers' term of office will extend until the new Parliament has lawfully convened. The Court found that, in the present case, none of the situations referred to by the said constitutional texts apply, and, thus, the requirements of extrinsic constitutionality of the initiative for revision are complied with.

Adjudication as to the intrinsic constitutionality of the revision requires analysis by reference to the provisions of Article 152.1 and 152.2 of the Constitution, in order to determine whether the subject of the revision is the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, or territorial integrity, independence of the judiciary, political pluralism, or official language, and whether the proposed amendments lead to the suppression of any of the fundamental rights and freedoms in the Constitution, or their safeguards. Proceeding to this verification, the Court noted that the initiative for revision concerns a text included in Title II of the Constitution – Fundamental rights, freedoms and duties, i.e. Article 48 – Family, which now reads as follows:

1. "The Family is founded on the freely consented marriage of the spouses, their full equality and on the parents' right and duty to ensure the

upbringing, education and instruction of their children.

2. The terms for entering into marriage, dissolution and annulment of marriage are established by law. Religious wedding may be celebrated only after civil marriage.
3. Children born outside marriage are equal before the law with those born in wedlock."

It proposes that Article 48.1 of the Constitution be redrafted as follows:

"The Family is founded on the freely consented marriage between a man and a woman, their full equality and on the parents' right and duty to ensure the upbringing, education and instruction of their children."

The difference compared to the existing wording of that paragraph is the replacement of the words "of the spouses" with the words "between a man and a woman". The Court found that the amendment does not affect the values specifically and exhaustively listed in Article 152.1 of the Constitution.

Having examined, next, the compliance of the proposed amendment with the provisions of Article 152.2 of the Basic Law as to the prohibition to suppress any of the fundamental rights and freedoms, or their safeguards, the Court found, first of all, that the text subject to the amendment proposal is included under the title "Family", and, within its content, it sets out a series of principles and safeguards in terms of marriage. Having regard to the content of the regulation, the Court has held that Article 48 of the Constitution enshrines and guarantees the right to marriage and the family relationships resulting from marriage, apart from the right to family life/respect for and protection of family life, a concept with a much broader legal content, which is also embodied and protected by Article 26 of the Constitution, according to which

- "1. The public authorities shall respect and protect personal, family and private life.
2. Any natural person has the right to freely dispose of himself unless he thereby encroaches upon the rights and freedoms of others, on public order, or morals."

The concept of family life is complex, including also *de facto* family relationships, apart from family relationships resulting from marriage, the importance of which has entitled the constituent legislator to highlight distinctly, in Article 48, the protection of family relationships resulting from marriage and the relationship between parents and children. Whereas the proposal for a revision of the Constitution only

covers marriage and family relationships resulting from marriage, and not family life within the meaning of Article 26 of the Constitution, the Court has only examined whether the amendment proposed by the initiators of the revision of the Constitution suppresses the right to marriage, or one of its safeguards.

Having examined the new wording of Article 48.1 of the Constitution, proposed by the initiators of the review, the Court found that it is not likely to lead to the disappearance, removal, deletion or cancellation of the concept of marriage. In addition, all safeguards related to the right to marriage, as enshrined in the text of the Constitution, shall remain unchanged. The amendment consisting in the replacement of the words "of the spouses" with the words "between a man and a woman" constitutes a mere indication as regards the exercise of the fundamental right to marriage, namely the specific determination of the fact that marriage is concluded between partners of different biological sex, which is, moreover, in line with the original meaning of the text. In 1991, when the Constitution was adopted, the marriage was seen in Romania according to the traditional conception, i.e. union between a man and a woman. This view is supported by the subsequent development of family law in Romania, as well as by the systematic interpretation of the constitutional norms of reference. Thus, Article 48 of the Constitution defines the concept of marriage in conjunction with the protection of children, both children "born out of wedlock" and children born "born in wedlock". It is evident, therefore, the biological component underlying the legislator's view as to marriage, which was regarded without doubt as a union between a man and a woman, as long as only from such a union, whether in or outside wedlock, children may be born.

That being so, the Court found that the initiative for revision of the Constitution is constitutional in respect of Article 152.2 of the Constitution, as it does not lead to the suppression of the right to marry or its safeguards. The proposed amendment of Article 48.1 of the Constitution relates exclusively to the right to marriage and family relations resulting from marriage. The other fundamental rights, referred to in the *amicus curiae* submissions in the file, are not called into question by the initiative for revision and may not, therefore, be the subject of the constitutional review thereof.

For the reasons set out above, the Court, by unanimous vote, found that the citizens' legislative initiative entitled "Law for revision of the Constitution" meets the requirements laid down by Articles 150 and 152 of the Constitution.

Languages:

Romanian.

*Identification:* ROM-2016-3-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 11.10.2016 / **e)** 619/2016 / **f)** Decision on the objection of unconstitutionality of the provisions of Law for the interpretation of Article 38.11 of Law no. 96/2006 on the status of deputies and senators / **g)** *Monitorul Oficial al României* (Official Gazette), 6, 04.01.2017 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

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

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**

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

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

Keywords of the alphabetical index:

Conflict of interest / Law, ambiguous / Law, foreseeability / Parliament, member, criminal prosecution.

Headnotes:

The ambiguity of the wording of the law enshrining the official interpretation of a legal text leads to a lack of predictability about the effects which it may produce, in that it would not be strictly limited to the scope of the social relations governed by the status of deputies and senators, but it would also cover provisions of criminal law. It is therefore possible to qualify it as both a decriminalisation law within the meaning of Article 4 of the Criminal Code and a legislative measure producing effects similar to amnesty before or after conviction. Such provisions, in principle, may not be covered, from a regulatory viewpoint, by the law on the status of deputies and senators, but must pursue the specific constitutional procedures for debate and adoption. Criminal policy

measures must be promoted in keeping with the values, needs and principles established by the Constitution, expressly and unequivocally assumed by the Parliament, and the rules of criminal substantive law that give expression to those measures must be clear, transparent, unambiguous, adopted in compliance with the reference rules stipulated by the Constitution.

Summary:

I. The applicants, 99 deputies of the lower house of Parliament, made a reference to the Constitutional Court, on the grounds of the first sentence of Article 146.a of the Constitution, seeking settlement of the objection of unconstitutionality of the provisions for the interpretation of Article 38.11 of Law no. 96/2006 on the status of deputies and senators.

The applicants argued that the criticised law, being one of interpretation, could lead to a legal conflict of a constitutional nature between the Parliament and the High Court of Justice and Cassation and thereby it would be contrary to Article 1.4 of the Constitution. They added that the interpretative law has retroactive effects, since, by its effect, there is a contradiction between the provisions of general law (Law no. 161/2003) and the special law (Law no. 96/2006), in that, as to the conflict of interests concerning deputies and senators, it retroactively reduces the scope of the general law. It is also argued that the criticised law ensures a retroactive clause of impunity, being a retroactive decriminalisation and a genuine amnesty for the MEPs who hired relatives before the date of entry into force of this ban under Article 38.11 of Law no. 96/2006. As a result, by the effect of the law of interpretation, no liability resulting from the committed offence of conflict of interests under Article 301 of the Criminal Code shall lie with them.

II. Examining the objection of unconstitutionality, the Court found that the law of interpretation, although it must concern only the legal regime of deputies and senators, in reality, by its wording, gives rise to great uncertainty as regards its material scope. It can concern acts of deputies and senators qualified as disciplinary or criminal offences or could cover, due to the matter of the Law no. 96/2006 on the status of deputies and senators, only the acts qualified as misconduct, with respect for the principle of non-retroactivity.

However, the non-transparent wording of the law of interpretation would lead to the conclusion that such a legislative solution could also refer to the criminal law, which is inadmissible since, as regards criminal liability, the constituent legislator established in Article 73.3.h of the Constitution that such offences

must be regulated by organic law, which shall be adopted in accordance with Articles 65.1 and 75 of the Constitution in separate meetings of the two Chambers of the Parliament. In the absence of derogating constitutional provisions, which expressly enshrine the possibility to establish the criminal offences committed by deputies or senators by law adopted in the joint meeting of the two Chambers, as part of their status, the law on the status of deputies and senators may not contain rules on criminal matters, in other words, rules of criminal substantive law.

The Court therefore held that the criticised legislative solution, although it appears to interpret a legal text that covers the legal status of deputies and senators, has, in reality, effects that may be also felt in criminal matters, leading to the conclusion that the analysed law is not clear, the purpose of the legislation adopted being unequivocal. The Court also found that the promoted legal solution is not foreseeable in terms of the effects that it could generate in judicial practice, since, although adopted only in civil matters, it also has implications and in criminal matters, which may be qualified as both a decriminalisation law within the meaning of Article 4 of the Criminal Code and a legislative measure which has effects similar to amnesty before and after conviction. Therefore, in terms of its legal nature, it could be characterised as a law of decriminalisation within the meaning of Article 4 of the Criminal Code and as a cause removing criminal liability for the purposes of Article 152 of the Criminal Code. Therefore, the regulatory act subject to its review represents a civil law with sui generis effects applicable in criminal matters, which is not admitted, because any legislative act must be comprehensible, clear and transparent as regards its regulatory content, so as to entitle the citizens to have confidence in the parliamentary work, a key aspect of the rule of law and of the democratic nature of the Romanian State.

The Court also pointed out that it falls within the exclusive competence of the legislator to set and structure the criminal policy of the State, but when adopting regulations of criminal law, the legislator is bound by the formal requirements set out in Articles 65.1, 73.3.h, 75 and 76.1 of the Constitution. In other words, the adoption and discussion of legislation in criminal matters should be carried out in separate meetings of the two Chambers of the Parliament, according to Article 65.1 of the Constitution. This means that the rules of referral of the Chambers laid down by Article 75 of the Constitution must be also observed, so that Article 65.2 of the Constitution cannot be applied in this case. Whereas the criteria for sharing the competencies of the two Chambers, as well as the way of dealing with some possible conflicts of

competence are specifically provided for in the Basic Law, each Chamber of the Parliament is obliged to accurately apply Article 75 of the Constitution. Consequently, any measure of criminal policy adopted by the legislator requires its debate and adoption by the Senate, as the first seised Chamber, and by the Chamber of Deputies, as the decision-making Chamber. Making this legislative journey gives substance to the principle of bicameralism enshrined in Article 61.2 of the Constitution. Any deviation from the separate debate and adoption by each Chamber of the criminal law disregards the will of the initial constituent concerning the institutional and functional architecture of the Parliament.

As regards the material requirements to which the legislator is subject in criminal matters, the Court found that the legislator has the power to criminalise facts which pose a threat to social values protected by the text of the Constitution, an expression of the rule of law and democratic character, or to decriminalise crimes where there is no longer justified the need to use criminal means, although it is clear that its margin of discretion is not absolute. Criminal policy measures must be promoted in keeping with the values, principles and requirements enshrined in the Constitution and expressly and unequivocally assumed by the Parliament. Moreover, any measure subject to the criminal policy must be carried out through a substantially clear, transparent, unequivocal criminal provision and assumed by the Parliament. In relation to the present case, the Court held that the ambiguity of the wording of the law subject to the constitutional review leads to serious doubts about the effects which it may cause in the sense that it is not strictly limited to the scope of the social relations governed by the status of deputies and senators, but would also cover provisions of criminal law, which, in principle, may not be covered, from a regulatory viewpoint, in the law on the status of deputies and senators and which cannot be allocated to one or other of the institutions of criminal law enshrined in the Criminal Code.

Accordingly, the Court held that the criticised law infringes the requirements of Article 1.5 in its component relating to the quality of the law in relation to Articles 61.2, 65.1, 65.2.j, 73.3.c, 73.3.h and 75 of the Constitution, which enshrines the principle of bicameralism, as well as rules for the debate and adoption of the law.

For the above reasons, and with a majority of votes, the Court upheld the exception of constitutionality and found that the provisions of Law for the interpretation of Article 38.11 of Law no. 96/2006 on the status of deputies and senators are unconstitutional.

III. The President of the Constitutional Court and two of the judges filed a dissenting opinion.

Languages:

Romanian.



Russia Constitutional Court

Important decisions

Identification: RUS-2016-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 15.11.2016 / **e)** 24 / **f)** / **g)** *Rossiyskaya Gazeta* (Official gazette), no. 266, 24.11.2016 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Life sentence, life imprisonment / Long-term, visit.

Headnotes:

Persons sentenced to life imprisonment should be entitled to one long-term visit per year.

Summary:

The provisions governing the right to a long-term visit of long duration for persons sentenced to life imprisonment, who are serving their sentence in strict conditions, are incompatible with the Constitution of the Russian Federation as they rule out the possibility of granting long-term visits to persons sentenced to life imprisonment during the first ten years of their sentence.

Henceforth and until appropriate amendments have been made to the legislation, persons sentenced to life imprisonment must be entitled to have one long-term visit per year from the persons referred to in the second paragraph of Article 89 of the Code on the Execution of Prison Sentences of the Russian Federation.

Languages:

Russian.



Identification: RUS-2016-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17.11.2016 / **e)** 25 / **f)** / **g)** *Rossiyskaya Gazeta* (Official gazette), no. 277, 07.12.2016 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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.**

Keywords of the alphabetical index:

Detention of a person / Influence of alcohol / Detention, duration / Detention, calculation of time limits.

Headnotes:

The administrative duration of the detention of a person under the influence of alcohol must be calculated from the beginning of his or her administrative arrest by the police.

Summary:

In Judgment no. 25-Π of 17 November 2016, the Constitutional Court assessed the constitutionality of paragraph 4 of Article 27.5 of the Code of Administrative Offences.

The impugned provision was submitted for examination because it serves as a basis for resolving the question of the duration of administrative detention of persons against whom administrative infringement procedures are brought, and who have been arrested as an administrative penalty for the offence, provided that at the time of the administrative arrest, the person concerned was under the influence of alcohol.

The impugned provision, which states that the duration of the administrative detention of persons under the influence of alcohol, is calculated from the time of their detoxification, was found to be

incompatible with the Constitution of the Russian Federation, insofar as it allowed for a restriction of liberty for a period of over 48 hours before a decision by a court.

Languages:

Russian.



Identification: RUS-2016-3-008

a) Russia / **b)** Constitutional Court / **c)** / **d)** 29.11.2016 / **e)** 26 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 277, 07.12.2016 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Civil service / Expenditure, conformity, monitoring / Confiscation.

Headnotes:

The legal provisions enabling the monitoring of the conformity of public officials' and other persons' expenditure against their income, and the confiscation of assets, are compatible with the Constitution under certain conditions.

Summary:

In Judgment no. 26-Π of 29 November 2016, the Constitutional Court assessed the constitutionality of paragraph 8 of Article 235.2 of the Civil Code of the Federation of Russia and of Article 17 of the federal law of 3 December 2012, no. 230-FZ "On the monitoring of the conformity of the expenditure of public officials and other persons against their income".

The impugned provisions were subjected to examination because they serve as a basis for the confiscation, for the benefit of the Russian Federation, of plots of land, other immovable

property, vehicles, securities and shares which belonged to public officials (working for municipal departments), their spouse and under-age children, if such persons have failed to submit information establishing their acquisition through their legitimate income.

The impugned provisions were considered to be compatible with the Constitution of the Russian Federation insofar as they:

- suggest that it is necessary to take account, in determining the application of this law-enforcement measure, of the total amount of income received by the said persons which could be used to acquire the relevant property, including legitimate income which does not appear in their tax declarations, and the need to allow these persons to submit proof of the lawfulness of their income;
- do not prevent the courts from examining all the evidence submitted by the (municipal) public official and his or her spouse and under-age children to confirm the legitimacy of the source of the funds with which he or she has purchased the property. The evidence must be examined by the court in the light of the case-law established in this judgment;
- do not prevent the court, in the event of a slight discrepancy between the amount of income whose lawfulness has been confirmed and the cost of purchase of the property, from taking account of the circumstances of the case and determining the amount whose lawfulness has not been proved and must be confiscated to the benefit of the Russian Federation, and to determine the order of execution of its decision in the light of the nature of that property.

Languages:

Russian.



Serbia Constitutional Court

Important decisions

Identification: SRB-2016-3-003

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 29.09.2016 / **e)** UŽ-4154/2013 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 102/2016 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Child, care and custody / Child, custody, biological parent / Parental rights.

Headnotes:

Parents, who have the right to raise and provide upbringing and education for their children, could be deprived of this right or limited in it, only by a court decision, if this is in the best interest of the child, and in accordance with law.

Temporary placement of a child with alternative carers is to cease as soon as this is allowed by the circumstances, and the measure by which temporary custody is enforced needs to be consistent with the final goal of the reunion of biological parents with their children. The obligation to take measures to reunite the family must be in balance with the obligation to observe the best interest of the child.

Summary:

I. The applicant filed a constitutional appeal against decisions of the Social Care Centre (hereinafter, the “Centre”), alleging, among others, violations of the rights and duties of parents (Article 65 of the Constitution).

In the constitutional appeal, the applicant describes: that she was deprived of her parental right without a

court decision; that her daughter was four years old; that she submitted a complaint with the Administrative Court, but that this court, until the constitutional appeal was filed, had not made its decision; and that from the moment the child was taken away, the applicant contacted the child in the social care centre nine times in total, for one hour each time.

II. The Constitutional Court established that: until the submission of the constitutional appeal, the applicant had been deprived of her parental rights in the duration of one year and five months, based on the Centre's ruling on temporary custody; two years and two months subsequent to this ruling, the Centre instituted the proceedings for termination of the parental rights of the applicant; the stated procedure was ended by a final decision of the competent court rejecting the complaint as groundless and the period the applicant was separated from her child, a minor, lasted almost four years.

The Constitutional Court noted that from the standpoint of the parental rights guaranteed under Article 65 of the Constitution, it follows that it is the parents, before any other persons, who have the right to raise and provide upbringing and education for their children, and that they could be deprived of this right or limited in it only by a court decision, if this is in the best interest of the child, and in accordance with law.

The Constitutional Court referred to European Court of Human Rights' Judgments *Felbab v. Serbia* (no. 14011/07, 14 April 2009) and *Monory v. Russia, Romania and Hungary* (no. 71099/01, 5 April 2005), pointing out that it has been established under Article 8.1 ECHR that everyone has the right to respect for his private and family life, and that the mutual enjoyment of a parent and child relationship represents an essential element of "a family life" within the meaning of this article.

Referring to the European Court of Human Rights' Judgment *K.A. v. Finland* (no. 27751/95, 14 January 2003), the Constitutional Court indicated that, when examining whether there was a violation of the right to family life, the European Court of Human Rights has stated that every instance of deprivation of children must be understood as a temporary measure, which is to stop the moment the circumstances allow it, and that every decision has to be made in accordance with the goal of re-establishing a life together of the natural parents and the child. The Constitutional Court also cited Judgments *Kutzner v. Germany* (no. 46544/99, 26 February 2002) and *E.P. v. Italy* (no. 31127/96, 16 November 1999).

The Constitutional Court further pointed out that when parents, for whatever reason, do not achieve satisfactory results in looking after, raising and bringing up their children, family law measures may be applied against them, which have as their goal the protection of a minor and by which parental powers are restricted. The guardianship authority conducts a correctional supervision over the exercise of parental rights, by adopting decisions by which the parents are corrected in the exercise of this right, and where they do not cooperate or reject to comply with the decision of the guardianship authority, the supervision measures may be replaced by a more serious measure, such as institution of court proceedings for the protection of the right of the child.

The Constitutional Court emphasised that its task is to consider what were the reasons stated in justification and deemed relevant and sufficient for the restriction of parental rights; this is also the standpoint of European Court of Human Rights in Judgment *K. and T. v. Finland* (no. 25702/94, 12 July 2001). The Constitutional Court found that the Centre had given very detailed reasons based on which it made the assessment that applicant's child was threatened and unsafe, that there was a high level of neglect of the child's needs and lag in its development, and that it was in the best interest of the child that the mother's right to direct caregiving and raising of the child be restricted.

However, the Constitutional Court pointed out that temporary custody is to cease as soon as this is allowed by the circumstances, and that all the measures by which temporary custody is enforced need to be consistent with the final goal of the reunion of biological parents with their children.

The Constitutional Court found that, in the period when the child was separated from the applicant, the Centre was under an obligation to take all the measures which would facilitate family reunion as soon as possible, bearing in mind at the same time the best interest of the child. Instead, the Centre limited its activities to the implementation of the Services Plan, the general goal of which was "a stable accommodation of the child in a foster family", and within this plan the applicant was solely advised how to behave when meeting her daughter, which was taking place once a month, for an hour.

The Constitutional Court concluded that in the administrative proceedings conducted before the Centre a fair balance had not been struck between the need to achieve the best interest of the child and the rights of the parent. The Court therefore adopted the constitutional appeal filed due to a violation of parental rights under Article 65 of the Constitution.

The Court also decided that just satisfaction shall be awarded to the applicant in compensation of non-pecuniary damage equalling 1,000.00 euro.

Cross-references:

European Court of Human Rights:

- *Felbab v. Serbia*, no. 14011/07, 14.04.2009;
- *Monory v. Russia, Romania and Hungary*, no. 71099/01, 05.04.2005;
- *Kutzner v. Germany*, no. 46544/99, 26.02.2002;
- *E.P. v. Italy*, no. 31127/96, 16.11.1999;
- *K.A. v. Finland*, no. 27751/95, 14.01.2003.

Languages:

English, Serbian.



Slovakia Constitutional Court

Important decisions

Identification: SVK-2016-3-003

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 18.11.2015 / **e)** PL. ÚS 5/2015 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 18.11.2015, 49/2015 / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

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

4.7.14 Institutions – Judicial bodies – **Arbitration.**

Keywords of the alphabetical index:

Arbitration, court, decision, constitutional review.

Headnotes:

Courts of arbitration in the Slovak Republic, whose power to settle legal disputes is based solely on private agreements by parties to arbitration proceedings, do not possess the status of public authority notwithstanding the fact that their decisions are binding and enforceable. The Constitutional Court, before which only decisions or procedural measures taken by public authorities may be reviewed, therefore does not have jurisdiction over complaints against decisions or procedural measures taken by such courts.

Summary:

I. The proceedings commenced with a motion submitted to the Plenum of the Constitutional Court (hereinafter, the “Court”) by one of its senates, which intended in its case to deviate from the Court’s previous case-law regarding constitutional complaints against decisions or procedural measures taken by courts of arbitration. According to that case-law, the Court had the power to adjudicate on such constitutional complaints provided that no other legal remedy was available.

II. In its motion the said senate argued that in the legal framework of the Slovak Republic the courts of arbitration exercised their powers upon agreements by parties to arbitration proceedings, so their juridical powers were conferred on them exclusively by private entities, not by the state. For that reason the courts of arbitration did not have the status of public authorities, which generally exercise their powers without the consent of parties within their jurisdiction, and are permanent bodies established by law to discharge state powers.

The senate considered that the fact that decisions of the courts of arbitration were binding and enforceable did not run counter to the above-mentioned conclusion, since the legal quality of a decision itself did not necessarily define the nature of the body issuing this decision. Thus the legal system of the Slovak Republic recognises decisions of courts of arbitration as binding and enforceable, while it did not accord these courts public authority status. The same applies to private settlements signed before notaries, which are enforceable under certain circumstances, whereas parties to such settlements may not be deemed public bodies.

The senate went on to say that the relevant legislation gave ordinary courts the possibility of reviewing decisions or procedural measures taken by the courts of arbitration in specific, exhaustively listed cases. In particular, ordinary courts might quash decisions of the courts of arbitration, if these decisions were in breach of public policy. As regards this judicial review, the senate emphasised that ordinary courts did not act as appellate courts, and consequently the courts of arbitration must not be considered as part of the judicial system. The role of the ordinary courts was strictly confined to overseeing whether certain aspects of the relation between parties to proceedings and a court of arbitration, which was of a contractual nature, were duly observed in the course of proceedings. In doing so, ordinary courts protected the minimum level set by law of procedural rights of parties to proceedings before the courts of arbitration. These statutory regulations also indicate that the responsibility for safeguarding justice in arbitration proceedings lies with ordinary courts rather than with the Constitutional Court.

Having established that the courts of arbitration were private entities, the senate reasoned that Article 127 of the Constitution, which stipulates the conditions for submitting constitutional complaints, was unequivocally interpreted as granting the Court the power to examine decisions, measures, or actions of public bodies only. It followed that the Court might not entertain complaints against the courts of arbitration.

For these reasons the senate asked the Plenum to issue a ruling which would determine that complaints against the courts of arbitration fell outside the scope of Article 127 of the Constitution.

The Plenum of the Court fully agreed with the arguments presented by the senate and held that the Court did not have jurisdiction over complaints against decisions or procedural steps of the courts of arbitration.

Supplementary information:

This decision of the Plenum is the outcome of specifically designed proceedings which may be commenced only by the senates of the Court, and are aimed at setting standards for the Court's ensuing case-law. The case itself remained to be dealt with by the respective senate, which subsequently rejected the constitutional complaint at a preliminary hearing.

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 September 2016 – 31 December 2016

In this period, the Constitutional Court held 21 sessions – 11 plenary and 10 in panels: 4 in the civil, 3 in the administrative and 3 in the criminal panel. It received 74 new requests and petitions for the review of constitutionality/legality (U-I cases) and 369 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 65 cases in the field of the protection of constitutionality and legality, as well as 340 cases in the field of the protection of human rights and fundamental freedoms.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovene full text versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts of decisions issued in the field of the protection of constitutionality and legality, with full-text version of the dissenting/concurring opinions);
- On the website of the Constitutional Court (full text in Slovene, English abstracts and a selection of full texts): www.us-rs.si;
- In the IUS-INFO legal information system on the Internet, full text in Slovene, available through www.ius-software.si;
- In the CODICES database of the Venice Commission (a selection of cases in Slovene and English).

Important decisions

Identification: SLO-2016-3-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 21.03.2014 / **e)** U-I-70/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 24/14 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); *Odločbe in sklepi Ustavnega sodišča*, XX, 23; CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

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

Keywords of the alphabetical index:

Personal data, collection / Personal data, interference / Personal data, medical / Personal data, public archives / Personal data, storage.

Headnotes:

The retention of sensitive personal data contained in medical records (and its archiving and transfer into a public archive) interferes with the constitutional rights of patients to the protection of personal data and the protection of privacy, and jeopardises the inviolability of personal dignity.

Summary:

I. The Human Rights Ombudsman challenged the statutory provision of the Protection of Documents and Archives and Archival Institutions Act which imposed on providers of medical services, who provided such as a public service, the duty to hand over to the public archive selected medical records that contained personal data.

II. The decisive question for the review of the Constitutional Court was that of the definition of the term “archives”, which also included medical records. The Court proceeded from respect for human dignity. It clarified that the state has the duty to enable individuals to maintain their dignity during medical treatment, while living with a certain diagnosis, as well as after death. Data collected in medical records reveals information from patients' private lives; its disclosure may jeopardise the personal dignity of

patients and those close to them. Medical records entail a particular collection of sensitive personal data requiring especially strong protection.

The mere retention of sensitive personal data contained in medical records by medical service providers, as well as its archiving and transfer into a public archive for the purpose of enabling public access to these archives, entails an interference with the right of patients to the protection of personal data (Article 38 of the Constitution) and the right to the protection of one's privacy (Article 35 of the Constitution). It also jeopardises the inviolability of personal dignity (Article 34 of the Constitution). The legislature must take particular account of the fact that such significant rights may only be limited due to constitutionally admissible aims, which must be very clearly and concretely defined.

The statutory regulation was aimed at maintaining the completeness of the relevant materials and their public accessibility and usability for the purposes of science and culture, and legal certainty. In the Court's assessment, such a general definition raised the question of whether the legislature proceeded with sufficient diligence and care when regulating the handling of medical data. The Court highlighted a number of deficiencies in the challenged regulation. Firstly, the legislature failed to take into account the importance of the protection of sensitive personal data contained in medical records, disclosure of which may also entail an interference with the personal dignity of the affected persons. Secondly, it disregarded medical secrecy as a necessary prerequisite for the confidentiality of the relationship between patient and doctor. Thirdly, it failed to observe the constitutional guarantees that patients are ensured in order to exercise their right to the protection of personal data, with special emphasis on the prohibition of using personal data contrary to the purpose of their collection.

The Court found that the general aim of the legislature noted above did not represent a constitutionally admissible aim, which any statutory regulation that interferes with constitutionally protected human rights and fundamental freedoms must possess. It therefore found that the challenged statutory regulation was inconsistent with the right to the protection of personal data (Article 38 of the Constitution) and indirectly also with the right to the inviolability of personal dignity (Article 34 of the Constitution). It requested the legislature to remedy the established unconstitutionality within one year following the publication of the decision in the Official Gazette of the Republic of Slovenia. The Court further established that, pending the entry into force of a different statutory regulation, the regulation determined by the challenged Act would not apply to

documents of providers of medical services that contain personal data regarding the treatment of patients.

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2016-3-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 04.12.2016 / **e)** U-I-269/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 2/15 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); *Odločbe in sklepi Ustavnega sodišča*, XX, 29; CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Education, compulsory / Education, State, duty / Education, free / Education, financing / Education, primary / School, private, financing.

Headnotes:

School age children are entitled under the Constitution to attend compulsory state-approved primary education programmes free of charge, regardless of whether these are carried out by public or private schools.

Summary:

I. The applicants were parents of minor school-age children who attended a private school. They challenged the provision of the Organisation and Financing of Education Act according to which private schools that carry out state-approved primary education programmes received 85 % of the funding received by public primary schools for the provision of such programmes. This meant that the applicants had to pay a tuition fee to compensate for the disparity in financing.

II. The Constitutional Court reviewed the alleged unconstitutionality in the light of Article 57.2 of the Constitution which states that primary education is compulsory and is to be financed from public funds. The Court clarified that this provision determines the right as well as the obligation of school-age children to attend primary school. It is not only pupils who benefit from compulsory primary education; an individual's primary education also benefits the wider public. This is why the Constitution envisaged its financing from public funds. The Court clarified that the right, determined by Article 57.2 of the Constitution, guarantees pupils the right to attend compulsory state-approved primary education programmes free of charge regardless of whether these are carried out by public or private schools. As the challenged regulation allocated less funding to state-approved private primary schools than to public schools, it interfered with the right to free primary education of pupils attending private schools, who had to pay tuition. The Court found that the legislature failed to demonstrate a constitutionally admissible aim for the interference with the right to free primary education of pupils in private state-approved primary schools. It accordingly held that the challenged statutory provision was inconsistent with the Constitution in the part that refers to compulsory state-approved primary education programmes. It required the legislature to remedy the established unconstitutionality within one year following the publication of the decision in the Official Gazette of the Republic of Slovenia.

III. The decision was adopted by five votes against four. Judges Jadek Pensa, Korpič – Horvat, Pogačar, and Sovdat voted against. Judge Zobec submitted a concurring opinion. Judges Korpič – Horvat and Jadek Pensa submitted dissenting opinions.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2016-3-015

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 17.05.2016 / **e)** CCT 225/15 / **f)** Robert McBride v. Minister of Police and Another / **g)** www.saflii.org/za/cases/ZACC/2016/30.pdf / **h)** [2016] ZACC 30; CODICES (English).

Keywords of the systematic thesaurus:

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

4.12.2 Institutions – Ombudsman – **Guarantees of independence.**

4.13 Institutions – **Independent administrative authorities.**

Keywords of the alphabetical index:

Investigation, effective / Investigation, authorised persons / Parliamentary, inquiry / Police, anti-corruption entity, independence / Ombudsman, powers / Rule of law, public interest, protection / Principle, accountability.

Headnotes:

Constitutionally established independent bodies that act as ombuds should be insulated from undue political interference.

Insulation from political interference does not mean that independent bodies cannot be held politically accountable.

It is important to ensure that independent bodies are not only independent, but are also perceived to be independent.

Summary:

I. Mr Robert McBride (Mr McBride), the Executive Director of the Independent Police Investigative Directorate (hereinafter, "IPID"), was suspended pending disciplinary action by the Minister of Police (hereinafter, the "Minister") pursuant to the provisions

of, among others, the Independent Police Investigative Directorate Act 1 of 2011 (IPID Act). Mr McBride became responsible for a publicly controversial IPID investigation into the alleged involvement of Lieutenant General Dramat, then the head of the Directorate for Priority Crimes Investigation (hereinafter, the "DPCI") and Major General Sibiyi, the provincial head of the DPCI, in the alleged unlawful rendition of four Zimbabwean nationals during 2010 and 2011. An initial report recommended that Mr Dramat and Mr Sibiyi should be criminally charged with kidnapping and defeating the ends of justice. However a later report, endorsed by Mr McBride, recommended that no charges be brought. Mr McBride was accused of unlawfully tampering with the report. The inconsistencies between the two reports prompted the Minister to suspend Mr McBride and initiate disciplinary proceedings. The Labour stayed these, pending the outcome of this case.

The High Court emphasised that the independence of IPID is expressly guaranteed by Section 206.6 of the Constitution. It held that this independence was not adequately protected by Section 6.3.a and 6.6 of the IPID Act, Sections 16A.1, 16B, 17.1 and 17.2 of the Public Service Act 103 of 1994 and the Regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GN R98 of Government Gazette 35018, 10 February 2012). The provisions were declared invalid to the extent of their inconsistency with the Constitution. As an interim measure, provisions from the South African Police Service Act (hereinafter, the "SAPS Act") – providing for Parliamentary oversight of the removal of the head of the DPCI – were read-in to the IPID Act. The decisions of the Minister to suspend Mr McBride and institute disciplinary action against him were set aside. The latter order was itself suspended for 30 days, allowing Parliament a short period to institute action against Mr McBride under the provisions now read-in from the SAPS Act, if it so decided. All of these orders were referred to the Constitutional Court for confirmation.

The Minister submitted a draft order to the Constitutional Court supporting the confirmation of invalidity of the provisions – but he resisted the setting aside of his decision to suspend Mr McBride and to institute disciplinary proceedings. Mr McBride argued that preserving the Minister's actions, which had been proved to be unconstitutional, would constitute an infringement of the rule of law.

II. In a unanimous judgment written by Bosielo AJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring), the Constitutional Court confirmed the High Court's declaration of invalidity

and found that the disputed provisions undermined IPID's constitutionally guaranteed independence. The Court emphasised the need to protect IPID from undue influence or political pressure by ensuring that appropriate mechanisms for accountability and oversight are in place. This includes security of tenure through parliamentary oversight. Public confidence in IPID's ability to fulfil its duties is important. In addition to having actual independence, the Constitution also requires IPID to be perceived as independent.

On remedy, the Minister's contention that his decisions ought to be preserved, despite being taken in terms of constitutionally invalid provisions, was rejected. The Minister's decisions to suspend Mr McBride and take disciplinary steps pursuant to his suspension were set aside. However, since both parties were amenable, the order setting aside the Minister's decisions was itself suspended for 30 days so that the process could be restarted with the necessary parliamentary oversight.

Supplementary information:

Legal norms referred to:

- Section 206.6 of the Constitution of South Africa, 1996;
- Section 6.3.a and 6.6 of the Independent Police Investigative Directorate Act 1 of 2011;
- Sections 16A.1, 16B, 17.1 and 17.2 of the Public Service Act, Proclamation 103 of 1994;
- Regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GN R98 of Government Gazette 35018, 10 February 2012);
- United Nations Convention against Corruption;
- The Council of Europe's Commissioner for Human Rights' Opinion on the Independent and Effective Determination of Complaints Against the Police (2009);
- AU Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa (2006).

Cross-references:

- *McBride v. Minister of Police and Another* [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP);
- *Glenister v. President of the Republic of South Africa and Others*, *Bulletin* 2011/1 [RSA-2011-1-004];
- *Matatiele Municipality and Others v. President of the RSA and Others* [2006] ZACC 2;
- *CUSA v. Tao Ting Metal Industries and Others* [2008] ZACC 15;

- *Helen Suzman Foundation v. President of the Republic of South Africa and Others*, Bulletin 2014/3 [RSA-2014-3-015];
- *Van Rooyen and Others v. the State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8;
- *Democratic Alliance v. President of the Republic of South Africa and Others*, Bulletin 2012/3 [RSA-2012-3-016];
- *Kruger v. President of Republic of South Africa and Others* [2008] ZACC 1;
- *Cross-Border Road Transport Agency v. Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12.

Languages:

English.



Identification: RSA-2016-3-016

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 24.10.2016 / **e)** CCT 106/15 / **f)** Merafong City Local Municipality v. AngloGold Ashanti Limited / **g)** www.saflii.org/za/cases/ZACC/2016/35.pdf / **h)** [2016] ZACC 35; CODICES (English).

Keywords of the systematic thesaurus:

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

3.13 General Principles – **Legality.**

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

Keywords of the alphabetical index:

Administrative act, challenge, collateral / Administrative act, challenge, reactive / Local authority, freedom of administration.

Headnotes:

An organ of state is entitled, if justice so dictates, to invoke a collateral or reactive challenge against an administrative act that is sought to be enforced against it, outside proceedings brought to review it.

The permissibility of collateral or reactive challenges by organs of state will all depend on a variety of factors, invoked with a “pragmatic blend of logic and experience”.

Summary:

I. Merafong City Local Municipality (Merafong) decided to levy a surcharge on water for industrial use by AngloGold Ashanti Limited (AngloGold). AngloGold appealed this decision to the Minister of Water Affairs and Forestry (Minister) in terms of the legislative framework. The Minister overturned Merafong’s surcharge.

Merafong obtained legal advice that the Minister’s ruling was “void in law”, but never approached a court to have the ruling set aside. Instead, Merafong threatened to discontinue AngloGold’s supply of water unless AngloGold paid the disputed surcharge. AngloGold complied for some time, under protest, but eventually launched proceedings in the High Court to compel Merafong to comply with the Minister’s ruling. In response, Merafong raised a defence that it could not be compelled to comply with the Minister’s ruling because it was unconstitutional and invalid as it intruded on an exclusive constitutional competence the Constitution confers on it, and counter-applied for a declarator to this effect (collateral or defensive challenge). The High Court found that the Minister’s decision, even if impugnable, was in any event binding on the Merafong until set aside. Accordingly, the Court ordered that Merafong comply with the ruling and dismissed its counter-application. On appeal, the Supreme Court of Appeal endorsed this outcome. It held that Merafong was obliged to approach a court to set aside the Minister’s ruling, and that it breached the principle of legality by simply disregarding it. The Court further held that a collateral challenge to the validity of an administrative action is a remedy available only to an individual threatened by a public authority with coercive action.

The main issue before the Constitutional Court was whether it was open to Merafong, an organ of state, to raise a collateral challenge as it did. Merafong argued that there was a fundamental distinction between decisions within the scope of powers with which a public official was clothed, but which were merely wrongly taken, and those that were “on their face, beyond the powers of the decision-maker”. In the latter case, the person subject to the decision was entitled to ignore it until the decision was sought to be enforced against it. Then, the person was entitled to raise the nullity of the decision as a defence. Merafong submitted the facts of the case fell into the second category.

II. A majority judgment, penned by Cameron J, and concurred in by Moseneke DCJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J, found that the mere fact that Merafong was an organ of state did not categorically exclude it from raising a collateral or defensive or reactive challenge. A defensive challenge should be available where justice requires, regardless whether the challenger is a private citizen or an organ of state. It is not inconceivable that an organ of state may, through legal proceedings, seek unjustly to subject another organ of state to a form of coercion. Where appropriate, that other organ of state should be able to raise a reactive challenge. While reactive challenges protect private citizens from state power, good practical sense indicate that they can usefully be employed much more widely.

On whether it was competent for Merafong to counter-apply for a declarator of invalidity of the Minister's ruling in the enforcement proceedings initiated by AngloGold, despite its failure to institute separate proceedings, the Court found that the permissibility of the reactive challenge by Merafong depends on a variety of factors, applied with a "pragmatic blend of logic and experience". It would be imprudent to pronounce an inflexible rule. A number of factors count, including that:

- i. Merafong had already applied to have the Minister's ruling set aside, albeit in response to enforcement proceedings; and
- ii. dismissing Merafong's appeal was likely to result in protracted and costly litigation as it would force Merafong to reinstitute proceedings.

In the result, the Court found that for considerations largely, but not solely, of convenience, Merafong's reactive challenge must be decided in this litigation. For this purpose, the Court remitted the matter to the High Court to decide Merafong's reactive challenge after considering:

- i. whether Merafong's delay in challenging the Minister's ruling was reasonable;
- ii. the record relating to the Minister's ruling; and
- iii. the appropriate remedy.

III. A minority judgment, penned by Jafta J, and concurred in by Bosielo AJ and Zondo J, held that the proposition that an invalid administrative act that exists in fact is binding and enforceable until set aside by a competent court collided head-on with the principle of legality which was an integral part of the rule of law. The judgment disagreed on this with the majority. The minority would have granted leave to appeal, upheld the appeal and declared Section 8 of the Water Services Act inconsistent with the Constitution.

Supplementary information:

This case presented the Court with an opportunity to define the reach of the principles in both *Oudekraal* and *Kirland* in the context of the Constitution and the principle of constitutional supremacy.

Cross-references:

- *National Industrial Council v. Photocircuit* 1993 (2) SA 245 (C);
- *Metal and Allied Workers Union of SA v. National Panasonic* 1991 (2) SA 527 (C);
- *MEC for Health, Eastern Cape v. Kirland Investments (Pty) Ltd*, *Bulletin* 2014/1 [RSA-2014-1-004];
- *Affordable Medicines Trust v. Minister of Health*, *Bulletin* 2005/1 [RSA-2005-1-002];
- *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*, *Bulletin* 2000/1 [RSA-2000-1-003];
- *Oudekraal Estates (Pty) Ltd v. City of Cape Town* [2004] ZASCA 48.

Languages:

English.



Identification: RSA-2016-3-018

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.11.2016 / **e)** CCT 5/16 / **f)** Department of Transport and Others v. Tasima (Pty) Limited / **g)** www.constitutionalcourt.org.za/Archimages/25429.pdf / **h)** [2016] ZACC 39; CODICES (English).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**
- 4.7.3 Institutions – Judicial bodies – **Decisions.**
- 4.10.1 Institutions – Public finances – **Principles.**
- 5.3.25 Fundamental Rights – Civil and political rights – **Right to administrative transparency.**

Keywords of the alphabetical index:

Administration, public finances / Administrative act, challenge, reactive.

Headnotes:

An allegedly unlawful exercise of public power has binding effect until set aside by a court of law.

An organ of state may challenge an administrative decision reactively, provided its reasons for doing so are sound, with no unreasonable delay.

Summary:

I. In 2001, Tasima (Proprietary) Limited (hereinafter, "Tasima"), contracted with the Department of Transport (hereinafter, "Department") to provide traffic management services through the electronic National Traffic Information System. In 2010, the Director-General of the Department extended the contract for an additional five years. Later, believing that the extension had been granted unlawfully, the Department sought to transfer the electronic National Traffic Information System and associated services to the statutory Road Traffic Management Corporation (Corporation). In December 2012, Tasima obtained an order from the High Court enforcing the extension pending the outcome of a dispute resolution mechanism. Numerous orders enforcing obligations arising out of the 2012 order followed.

When the Department again tried to begin the transfer process in 2015, Tasima sought a further order from the High Court. Tasima also sought to uphold the orders previously made enforcing the contract, as well as declarations of contempt of court, and committal of certain officials to jail. The Department launched a counter-application, seeking to reactively review and set aside the original departmental extension of the contract. The High Court upheld the Department's counter-application, set the extension of the contract aside, and declared the extension void from the outset. The High Court therefore found that the various enforcement orders should not have been granted.

The Supreme Court of Appeal overturned the High Court's decision. This was because reactive challenges are not open to organs of state, and in any event the counter-application was brought too late to be considered. It found that even if the contract extension was set aside, this would not insulate the Department and Corporation from complying with the court orders enforcing the contract. The Department sought to appeal to the Constitutional Court.

In the Constitutional Court, the Department persisted with its reactive challenge, arguing that the extension should be treated as invalid from the outset. Tasima disputed this, and argued that, in any event, the court orders stood to be enforced.

II. The majority judgment by Khampepe J (Froneman J, Madlanga J, Mhlantla J and Nkabinde J concurring) held that an organ of state may bring a reactive challenge, provided that the delay in doing so was not unreasonable. The delay here was excusable. The majority further concluded that the extension to the contract stood to be set aside. However, for the period between the extension being granted and the reactive challenge succeeding, the extension was legally enforceable, since it had not been set aside by a court. Applying *Oudekraal Estates (Pty) Ltd v. The City of Cape Town* and *MEC for Health, Eastern Cape v. Kirland Investments (Pty) Ltd (Kirland)* and *Merafong City Local Municipality v. AngloGold Ashanti Limited* [2016] ZACC 35, the majority held the various High Court orders continued to be enforceable until the final High Court order was made. The Department was not entitled to ignore the court orders, even if the extension was unlawfully granted. An order of committal was nevertheless held to be unnecessary in the circumstances.

III. The first dissenting judgment by Jafta J (Mogoeng CJ, Bosielo AJ and Zondo J concurring) found that the extension to the contract was granted in contravention of the Constitution, the Public Finance Management Act, and Treasury Regulations. The judgment held that the reliance placed by the Supreme Court of Appeal on *Oudekraal* and *Kirland* in was mistaken. Because the extension was invalid, it could be ignored, and Tasima was not entitled to rely on the extension to enforce the contract after the initial contractual period expired on 30 April 2012. Further, because the orders were effective only for the duration of the contract, once it expired on 30 April 2015, the orders fell away. It was therefore unnecessary to consider the effect of the orders. The first minority judgment would consequently have set aside the extension.

In the second minority judgment, in which Mogoeng CJ, Bosielo AJ and Jafta J concurred, Zondo J disagreed with the majority that the Court's judgment in *Economic Freedom Fighters v. Speaker of the National Assembly (EFF)* meant that "until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence". *EFF* could not be taken to have endorsed this since all parties there had accepted that the remedial action was valid and lawful.

A second majority judgment, written by Froneman J (Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring), noted that the Court's own preceding decisions in *Kirland* and *Khumalo v. Member of the Executive Council for Education: KwaZulu Natal* still hold good. There was no reason to deviate from them. They establish an important bulwark for the rule of law. Further, *EFF* was correctly portrayed in the majority judgment.

Supplementary information:

Legal norms referred to:

- Sections 2, 33, 165, 172, 217 and 237 of the Constitution of the Republic of South Africa, 1996;
- Section 38 of the Public Finance Management Act 29 of 1999.

Cross-references:

Constitutional Court:

- *Economic Freedom Fighters v. Speaker of the National Assembly*, *Bulletin* 2016/1 [RSA-2016-1-008];
- *Khumalo v. Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49;
- *MEC for Health, Eastern Cape v. Kirland Investments (Pty) Ltd t/a Eye & Laser Institute*, *Bulletin* 2014/1 [RSA-2014-1-004];
- *Merafong City Local Municipality v. AngloGold Ashanti Limited* [2016] ZACC 35;
- *Minister of Transport NO v. Prodiba (Pty) Ltd* [2015] ZASCA 38;
- *Oudekraal Estates (Pty) Ltd v. The City of Cape Town* [2004] ZASCA 48.

Languages:

English.



Identification: RSA-2016-3-017

a) South Africa / b) Constitutional Court / c) / d) 08.11.2016 / e) CCT 19/16 / f) South African Revenue Service v. Commission for Conciliation, Mediation and Arbitration and Others / g) www.constitutionalcourt.org.za/Archimages/25419.pdf / h) [2016] ZACC 38; CODICES (English).

Keywords of the systematic thesaurus:

3.20 General Principles – Reasonableness.
5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – Race.

Keywords of the alphabetical index:

Employment, disciplinary proceedings / Hate speech / Racist statement in labour relations / Sanction, disciplinary / Employment, sanction, occupational / Employment, dismissal, unfair / Employment, dismissal, compensation, criterion.

Headnotes:

Following the use of vitriolic racial slur by an employee against his superior reinstatement of the employee is not available where continued employment would be intolerable, since failure to do so is unreasonable.

Whether use of a historically vitriolic racial slur has made a continued employment relationship intolerable is a question of fact.

Summary:

I. The term 'kaffir' is a disparaging racial slur historically used to refer to native Africans. In South Africa, it is deemed to constitute hate speech.

On 27 July and 2 August 2007, Mr Jacobus Johannes Kruger, an employee of the South African Revenue Services (hereinafter, "SARS"), after an argument referred to his superior as a kaffir. He later repeated this. In response, SARS held an internal disciplinary enquiry in accordance with a collective agreement. Mr Kruger pleaded guilty. He was sanctioned with a six-month warning and a ten-day suspension without pay, plus counselling. The SARS Commissioner later unilaterally changed the sanction to dismissal.

Mr Kruger challenged substitution of the sanction before the Commission for Conciliation, Mediation and Arbitration (CCMA) as an unfair dismissal. The arbitrator agreed, concluding that it was legally impermissible for the Commissioner to replace the sanction imposed by the disciplinary enquiry because doing so conflicted with the terms of the collective agreement between SARS and its employees. The arbitrator restored the original sanction. The award did not consider whether the continued employment relationship would be tolerable.

SARS challenged the arbitrator's award in the Labour Court on the grounds that the arbitrator's decision was unreasonable. The Labour Court agreed with the

arbitrator that the collective agreement prohibited the change in sanction. SARS unsuccessfully challenged the Labour Court judgment before the Labour Appeal Court, which also found in favour of Mr Kruger.

In the Constitutional Court, SARS sought to appeal the Labour Appeal Court's judgment. SARS did not contest the unfairness of Mr Kruger's dismissal. It contended that, even if the Commissioner's substitution of the sanction was not allowed under the collective agreement, the employment relationship had broken down and the continuation of Mr Kruger's employment was intolerable. Thus, reinstatement was not the appropriate remedy under Section 193.2.b of the Labour Relations Act, and the arbitrator's award was unreasonable.

II. The unanimous judgment by Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring) found that the arbitrator did not take into account Section 193.2 of the Labour Relations Act. She also failed to consider the seriousness of Mr Kruger's conduct and its impact on the workplace.

Examining the historical context of the word kaffir and its meaning, the Court noted that "the word kaffir is the worst of all racial vitriols a white person can ever direct at an African in [South Africa]." It found that, based on the evidence before the arbitrator, Mr Kruger's continued employment with SARS was intolerable. As a result, the Court held that the arbitrator's award reinstating Mr Kruger was unreasonable.

Having set aside the arbitrator's award of reinstatement, the Court considered whether Mr Kruger should, notwithstanding his conduct, receive compensation for being unfairly dismissed. It noted that "[g]enerally speaking, an unfair dismissal ought to earn an employee compensation where reinstatement is not feasible by reason of the intolerability of the working relationship." Applying a number of factors, including the severity of the misconduct, SARS' willingness and offer to pay compensation and SARS' haphazard conduct during the legal proceedings, the Court ordered that Mr Kruger be paid compensation equivalent to his salary for six months at the time of dismissal.

Supplementary information:

Legal norms referred to:

- Section 33.1 of the Constitution of the Republic of South Africa, 1996;
- Sections 193.1, 193.2 and 194.1 of the Labour Relations Act 66 of 1995.

Cross-references:

- *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v. Kapp* (2002) 23 *Industrial Law Journal* 863 (LAC); (2002) 6 *Butterworths Labour Law Reports* 493 (LAC);
- *County Fair Foods (Pty) Ltd v. CCMA* (2003) 24 *Industrial Law Journal* 355 (LAC); *Hendricks v. Overstrand Municipality* [2014] ZALAC 49; (2015) 36 *Industrial Law Journal* 163 (LAC);
- *Dabner v. South African Railways and Harbours* (1920) *South African Law Reports* (AD) 583;
- *Minister of Defence and Others v. South African National Defence Force Union* [2012] ZASCA 110;
- *Government of the Republic of South Africa v. Van Abo* [2011] ZASCA 65;
- *Sidumo and Another v. Rustenburg Platinum Mines Ltd* [2007] ZACC 22;
- *Toyota SA Motors (Pty) Ltd v. Commission for Conciliation, Mediation and Arbitration* [2015] ZACC 40;
- *Kemp t/a Centralmed v. Rawlins* [2009] ZALAC 8; (2009) 30 *Industrial Law Journal* 2677 (LAC).

Languages:

English.



Identification: RSA-2016-3-019

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.2016 / **e)** CCT 155/15 / **f)** AB and Another v. Minister of Social Development / **g)** www.saflii.org/za/cases/ZACC/2016/43.pdf / **h)** [2016] ZACC 43; CODICES (English).

Keywords of the systematic thesaurus:

- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Surrogacy, child, non-biological parent, registration / Gamete, non-biological parent, surrogacy / Genetic heritage / Child, best interest / Child, right to know origin / Reproduction, assisted, techniques.

Headnotes:

The Genetic-link requirement that the gametes of at least one commissioning parent be used in the conception of the child is rational and constitutionally valid.

Summary:

I. AB is medically unable to bear children using her own gametes or with donated gametes. She underwent many *in vitro* fertilisation (hereinafter, “IVF”) cycles without success. AB was advised to consider surrogacy, but was informed that as a single woman incapable of donating a gamete, she could not legally enter into a surrogacy agreement because of Section 294 of the Children’s Act 38 of 2005. Section 294 requires that the gametes of at least one commissioning parent be used in the conception of the child in a surrogacy agreement.

With the assistance of the second applicant, the Surrogacy Advisory Group (Surrogacy Group), AB challenged the constitutional validity of Section 294. The High Court declared the impugned provision constitutionally invalid because it unjustifiably limited AB’s rights to equality, dignity, autonomy, privacy and reproductive health care.

The declaration of invalidity was referred to this Court for confirmation in terms of Section 172.2 of the Constitution. The applicants argued that Section 294 infringes the rights of members of the AB’s “class” to equal protection before the law, human dignity, “reproductive autonomy” and privacy.

The Minister appealed against the orders of the High Court, submitting that none of the rights enumerated are limited by Section 294, but if they are, the limitation is justifiable. The Minister maintained that Section 294 exists for the protection of the best interests of children and to prevent commercial surrogacy. The Centre for Child Law was admitted as a friend of the Court (*amicus curiae*). The Centre supported the Minister, asserting that the risk to children’s self-identity and self-respect – their dignity and best interests – was too high where no genetic link existed.

II. The majority judgment written by Nkabinde J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Jafta J, Mhlantla J and Zondo J concurring), focused on the power of the state to regulate the assistive reproductive opportunities available to those who are conception and pregnancy infertile.

The majority judgment held that the differentiation between the genetic link requirement in Section 294 of the Children’s Act and the IVF regulations is rational. The judgment therefore declined to confirm the declaration of invalidity, in terms Section 9 of the Constitution.

On the right to bodily and psychological integrity, the majority found that the focus of the right to reproductive autonomy is on the individual woman’s own body and not the body of another woman. Therefore, the applicants’ interpretation is unduly strained. It further held that the genetic link requirement does not prevent AB and members of the subclass from enjoying the right to have access to reproductive health care in terms of Section 27.1 of the Constitution. Finally, the majority held that the provision does not limit AB’s right to privacy. The provision regulates the conclusion of a valid surrogate motherhood agreement and it is open to commissioning parents who are conception and pregnancy infertile to bring themselves within the ambit of the law by entering into a partnership relationship with someone whose gamete may be used for the conception of the child.

The majority thus upheld the Minister’s appeal and declined to confirm the declaration of constitutional invalidity.

III. The minority judgment by Khampepe J (Cameron J, Froneman J and Madlanga J concurring) held that Section 294 violates the right to make decisions concerning reproduction and the right to equality. The minority found that by preventing those who are both conception and pregnancy infertile from ameliorating the negative effects of their infertility through surrogacy, the provision harms their psychological integrity. Hence the provision unfairly discriminates on the basis of both pregnancy and conception infertility and the differentiation is harmful to the dignity of the affected person.

In addition, the minority held that it is Section 41 of the Children’s Act that prevents children born of surrogacy from knowing their “genetic origin”, rather than Section 294. It also concluded that it can never be in the best interests of the child for a child to never be born, than to be born without a “genetic link” to one of its parents.

Supplementary information:

- Sections 1.a, 9, 10, 12.2.a, 14, 27.1 and 27.2, 36.1, 167.5, 172.1 of the Constitution of the Republic of South Africa, 1996;
- Sections 7, 41, 294 and chapter 9 of the Children's Act 38 of 2005;
- Section 68 National Health Act 61 of 2003;
- Choice on Termination of Pregnancy Act 92 of 1996;
- Regulations Relating to Artificial Fertilisation of Persons, GN R1165 GG 40312, 30 September 2016.

Cross-references:

- *S v. Makwanyane*, *Bulletin* 1995/3 [RSA-1995-3-002];
- *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)*, *Bulletin* 2004/1 [RSA-2004-1-001];
- *NM v. Smith*, *Bulletin* 2007/1 [RSA-2007-1-004];
- *Barkhuizen v. Napier*, *Bulletin* 2007/1 [RSA-2007-1-005];
- *MEC for Education: Kwazulu-Natal v. Pillay*, *Bulletin* 2007/3 [RSA-2007-3-014];
- *Department of Land Affairs v. Goedgelegen Tropical Fruits (Pty) Ltd*, *Bulletin* 2007/2 [RSA-2007-2-008];
- *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, *Bulletin* 1998/3 [RSA-1998-3-009];
- *Ferreira v. Levin NO; Vryenhoek v. Powell NO*, *Bulletin* 1995/3 [RSA-1995-3-010];
- *H v. Fetal Assessment Centre*, *Bulletin* 2014/3 [RSA-2014-3-016];
- *Minister of Home Affairs v. Fourie*, *Bulletin* 2005/3 [RSA-2005-3-014];
- *Harksen v. Lane NO*, *Bulletin* 1997/3 [RSA-1997-3-011];
- *Prinsloo v. Van der Linde*, *Bulletin* 1997/1 [RSA-1997-1-003];
- *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, *Bulletin* 1998/3 [RSA-1998-3-009];
- *Teddy Bear Clinic for Abused Children v. Minister of Justice and Constitutional Development*, *Bulletin* 2013/3 [RSA-2013-3-023];
- *SATAWU v. Garvas*, *Bulletin* 2012/2 [RSA-2012-2-006];
- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism*, *Bulletin* 2004/1 [RSA-2004-1-004];
- *Centre for Child Law v. Minister for Justice and Constitutional Development*, *Bulletin* 2009/2 [RSA-2009-2-009];

- *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*, *Bulletin* 2000/1 [RSA-2000-1-003];
- *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v. Smit NO*, *Bulletin* 2000/2 [RSA-2000-2-011];
- *President of the Republic of South Africa v. Hugo*, *Bulletin* 1997/1 [RSA-1997-1-004];
- *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, *Bulletin* 1996/3 [RSA-1996-3-016];
- *Paulsen v. Slip Knot Investments 777 (Pty) Limited*, *Bulletin* 2015/1 [RSA-2015-1-002].

Languages:

English.

*Identification: RSA-2016-3-020*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 08.12.2016 / **e)** CCT 1/16 / **f)** National Society for the Prevention of Cruelty to Animals v. Minister of Justice and Constitutional Development and Another / **g)** www.saflii.org/za/cases/ZACC/2016/46.html / **h)** [2016] ZACC 46; CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Animal, welfare, criminal prosecution / Environment, conservation / Prosecution, private, legal person / Prosecutor, undertaking not to prosecute, refusal.

Headnotes:

Bodies other than the state may be empowered by legislation to bring private prosecutions. Whether a body is so empowered is determined by interpretation of the legislation.

There is a link between animal welfare and constitutional environmental conservation. Animals are worthy of protection not only because of human values, but because animals are sentient beings capable of suffering and of experiencing pain.

On this approach, the constitutional validity of legislation differentiating between private and juristic persons, where private persons may in certain circumstances bring private prosecutions and juristic persons may not, did not arise for determination.

Summary:

I. In November 2010, National Council of Societies for the Prevention of Cruelty to Animals (hereinafter, "NSPCA") formed the opinion that the treatment of animals being ritually slaughtered constituted offences of animal cruelty under the Animals Protection Act 71 of 1962 (hereinafter, "APA"). It referred the matter to the National Prosecuting Authority of South Africa (hereinafter, "NPA") for prosecution. When the NPA refused to prosecute, the NSPCA sought to privately prosecute. Under South African law, the power of prosecution resides in the State but may be conferred by statute and on certain private persons when the State issues a certificate *nolle prosequi*.

The NPA refused to issue the certificate the NSPCA required to pursue a private prosecution in terms of Section 7.1.a of the Criminal Procedure Act 51 of 1977 (hereinafter, "CPA"). This because, in the NPA's opinion, the NSPCA was a juristic person and not a "private person" envisaged by the provision. In May 2013, the NSPCA instituted proceedings in the High Court to challenge the constitutionality of their exclusion from the term "private person" on the basis that Section 7.1.a irrationally differentiates between juristic persons and natural persons. They argued that juristic persons do not enjoy equal benefit and protection of the law in terms of Section 9.1 of the Constitution of the Republic of South Africa (Constitution).

The High Court refused the relief sought. It concluded that while there is discrimination between juristic persons and natural persons under Section 7.1.a, the discrimination is not unfair and the provision valid.

On appeal, the Supreme Court of Appeal found that the differentiation between juristic and natural persons did not invalidate Section 7.1.a as the differentiation was rationally connected to a legitimate government purpose, namely regulating private prosecutions.

In the High Court proceedings, the Minister of Justice and Constitutional Development submitted that the NSPCA should instead look to an entirely different provision, namely Section 8 of the CPA, for power to prosecute.

Section 8.1 provides that any public body or person upon which or whom the right to prosecute is "expressly conferred by law", may institute and conduct a prosecution. Section 6.2.e of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 (hereinafter, "SPCA Act") provides that the NSPCA may "institute legal proceedings connected with its functions".

The NSPCA contended, as an alternative argument, that this provision expressly conferred power on it to bring private prosecutions as Section 8 of the CPA envisages.

II. The Court concluded on ordinary principles of statutory interpretation that Section 8 of the CPA, read with Section 6.2.e of the SPCA Act, empowered the NSPCA to bring private prosecutions. The Court noted the special and central role of the NSPCA in protecting animal welfare and examined the ambit of the NSPCA's functions in fulfilling this role.

In a unanimous judgment by Khampepe J (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring), the Court unanimously agreed that the power of the NSPCA to "institute legal proceedings" encompasses the prosecution of animal cruelty offences. The Court found that the language, context and history of the SPCA Act established a sufficiently express and clear conferral of the power. It noted that the NSPCA's power to institute legal proceedings cannot be divorced from its functions, which are intrinsically connected to protecting animal welfare and preventing associated offences.

The Court found that this interpretation is reinforced by the historical development of the protection of animal welfare, the role of the NSPCA in upholding this mandate, and the increasingly robust protection of animal welfare by the courts. The Court observed that the rationale for protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals. The Court also endorsed the link between animal welfare and the constitutional right to conservation of the environment.

Given the Court's finding that the NSPCA has power to bring private prosecutions under Section 8 of the CPA, it was no longer necessary to consider the constitutional validity of Section 7.1.a.

Supplementary information:

Legal norms referred to:

- Sections 2, 9.1 and 24 of the Constitution of the Republic of South Africa, 1996.

Cross-references:

Constitutional Court:

- *Prinsloo v. Van der Linde*, *Bulletin* 1997/1 [RSA-1997-1-003];
- *S v. Lemthongthai* [2014] ZASCA 131;
- *Department of Land Affairs v. Goedgelegen Tropical Fruits (Pty) Ltd*, *Bulletin* 2007/2 [RSA-2007-2-008];
- *Mansingh v. General Council of the Bar* [2013] ZACC 40;
- *Ex Parte: The Minister of Justice: In re Rex v. Masow* 1940 AD 75;
- *R v. Smit* 1929 TPD 397;
- *R v. Moato* 1947 (1) SA 490 (O);
- *S v. Edmunds* 1968 (2) PH H398 (N);
- *National Council of Societies for the Prevention of Cruelty to Animals v. Openshaw* [2008] ZASCA 78;
- *South African Predator Breeders Association v. Minister of Environmental Affairs and Tourism* [2010] ZASCA 151.

Languages:

English.



Spain

Constitutional Court

Important decisions

Identification: ESP-2016-3-010

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 03.10.2016 / **e)** 162/2016 / **f)** Civil servants, pregnancy leave and remuneration / **g)** *Boletín Oficial del Estado* (Official Gazette), 276, 15.11.2016; www.boe.es/boe/dias/2016/11/15/pdfs/BOE-A-2016-10660.pdf / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/25096>; CODICES (Spanish).

Keywords of the systematic thesaurus:

4.7.4.1 Institutions – Judicial bodies – Organisation – **Members.**

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

Keywords of the alphabetical index:

Civil servant, motherhood and employment / Civil servant, salary / Gender, discrimination.

Headnotes:

The State must guarantee civil servants the economic and professional rights acquired during pregnancy leave.

Summary:

I. The appellant in the *amparo* proceedings (a remedy for the protection of constitutional rights) was a judge who was granted two professional assignments while on pregnancy leave. The assignments involved a wage increase. In the first payroll, the Public Administration included the wage supplement, but it was subsequently deducted because the judge had not taken up office during her pregnancy leave. After exhausting all available legal remedies, the *amparo* appeal was filed, pleading that the contested decisions had violated the applicant's rights to equality, to access on equal terms to civil service, in accordance with the requirements determined by law, and judicial protection (Articles 14.1, 23.2 and 24.1 of the Constitution).

II. The Constitutional Court granted the *amparo*. In accordance with the Court's case law, the Court held that the prohibition of sex base discrimination places a positive obligation on the State to provide compensation for socio-economic and professional disadvantages. In consequence, the State must guarantee civil servants the economic and professional rights acquired during pregnancy leave from the day they could have taken office.

III. The special constitutional significance of the case is based on the opportunity to clarify and confirm constitutional case law about the economic and professional rights during pregnancy leave. This recognition is not confined to judges but extends to all civil servants.

Cross-references:

- Articles 14.1, 23.2 and 24.1 of the Constitution;
- Organic Law no. 3/2007, 22.03.2007, on effective equality between men and women;
- Directive 2002/73/EC of the European Parliament and of the Council, 23.09.2002, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

Constitutional Court:

- no. 182/2005, 04.07.2005;
- no. 233/2007, 05.11.2007;
- no. 66/2014, 05.05.2014;
- no. 104/2014, 23.06.2014.

Court of Justice of the European Union:

- C-294/04, *Sarkatzis Herrero v. Instituto Madrileño de la Salud (Imsalud)*, 16.02.2006.

Languages:

Spanish.



Identification: ESP-2016-3-011

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 04.10.2016 / **e)** 168/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 276, 15.11.2016; https://www.boe.es/diario_boe/txt.php?id=BOE-A-2016-10670 / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/25124>; CODICES (Spanish).

Keywords of the systematic thesaurus:

1.4.10.7 Constitutional Justice - Procedure - Interlocutory proceedings - **Request for a preliminary ruling by the Court of Justice of the EU.**

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

2.1.1.3 Sources - Categories - Written rules - **Law of the European Union/EU Law.**

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

Keywords of the alphabetical index:

Constitutional Court / Court of Justice of the European Union, preliminary ruling / European Union, law, primacy / Procedural formality / Unconstitutionality.

Headnotes:

The referral of a request for a preliminary ruling to the Court of Justice of the European Union takes priority over the referral of a question of unconstitutionality to the Constitutional Court.

Summary:

I. A judge from Barcelona raised a question of unconstitutionality before the Constitutional Court regarding the differences of treatment between consumers from different Autonomous Communities (i.e. the different administrative divisions of Spain, which guarantee limited autonomy of the nationalities and regions that comprise Spain). The question dealt with a number of legal provisions of the Autonomous Communities of Navarra and Catalonia. The judge had doubts about the validity of the legal provisions, which may be a violation of the right to equal treatment under the law and consumer protection.

Simultaneously, this same judge raised a preliminary ruling before the Court of Justice of the European Union with reference to the same issue, to verify any contradictions between the legal provisions concerned and the Law of the European Union.

II. The question of unconstitutionality was declared inadmissible. The Constitutional Court held that judges cannot raise simultaneously questions of unconstitutionality before the Constitutional Court of Spain and preliminary rulings before the Court of Justice of the European Union. Preliminary rulings enjoy primacy according to the case law of the Court of Justice. Therefore questions of unconstitutionality can only be admitted when the compatibility of the legal provisions in question with the law of the European Union has been settled by the Court of Justice.

Cross-references:

- Articles 14, 51.1 and 51.3 of the Constitution.

Court of Justice of the European Union:

- C-188/10 and C-189/10, *Melki and Abdeli*, 22.06.2010;
- C-112/13, *A v. B and Others*, 11.09.2014;
- C-5/14, *Kernkraftwerke Lippe-Ems GmbH v. Hauptzollamt Osnabrück*, 04.06.2015.

Languages:

Spanish.



Identification: ESP-2016-3-012

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 06.10.2016 / **e)** 170/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 276, 15.11.2016; <http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2016-10671.pdf> / **h)** <http://tcdshj:8080/es/Resolucion/Show/25125>; CODICES (Spanish).

Keywords of the systematic thesaurus:

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Legislative bodies.**

1.6.6 Constitutional Justice – Effects – **Execution.**

3.1 General Principles – **Sovereignty.**

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

3.8.1 General Principles – Territorial principles – **Indivisibility of the territory.**

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 / Execution of judgment / Parliament, committee, competences / Submission to Constitutional Court, obligation.

Headnotes:

A Parliament of an Autonomous Community cannot conduct an initiative previously annulled by the Constitutional Court.

Summary:

I. The Spanish Government challenged the Resolution of the Parliament of Catalonia 263/XI, 27 July 2016, which contains the ratification of the report and the conclusions of the Study Commission about the Constituent Process. This resolution was another step in the process towards the independence of Catalonia.

The Constitutional Court had already issued two rulings in similar cases: Judgment 259/2015, 2 December (STC 259/2015), where the Court nullified a parliamentary resolution opening the process towards independence and Order 141/2016, 19 July (ATC 141/2016), that nullified another resolution adopted by the Parliament of Catalonia establishing, among others, a parliamentary commission to analyse the social, political and institutional reforms necessary to perform the process.

The Spanish Government contested the Resolution passed by the Parliament of Catalonia the 27 July 2016, sustaining that it breached the aforementioned Judgment 259/2015 and Order 141/2016. The Parliament of Catalonia defended the lawfulness of the Resolution, contending that it was not in contradiction with the Constitutional Court resolutions and it was based on the rightful exercise of parliamentary functions.

II. As a preliminary point, the Constitutional Court examined the possibility of guaranteeing its institutional position and the effectiveness of its

judgments and resolutions. To resolve the issue, the Court referred mainly to two articles the Organic Law of the Constitutional Court: the former establishes that all public powers are bound to comply with the resolutions adopted by the Court (Article 87.1), the latter gives the Court the power to annul any act or resolution that infringes, impairs or contravenes its resolutions (Article 92.1).

That said, the Court nullified the challenged Resolution as it contravened the mandates derived from Judgment 259/2015 and ignored the warnings contained in Order 141/2016. In fact, it gave continuity and support to the acts connected to the process towards the independence of Catalonia that had already been considered contrary to the Constitution and therefore annulled.

The Court stated that regional parliamentary activity may have the aim of analysing the possibility of changing the foundations of the constitutional order, but only if political projects are developed in accordance with democratic principles and in the framework of the Constitution, which is not the case in this instance.

Therefore, the Constitutional Court concluded that the President of the Parliament of Catalonia infringed her duty because she should have prevented any initiative that implied the contravention of the mandates established in the Constitutional Court Judgments 259/2015 and 141/2016. For this reason, the Court decided to inform personally the President, the Secretary General of the Parliament of Catalonia, all other members of the Bureau of the Parliament, and also the President and members of the Government of Catalonia of the Order. The Constitutional Court also advised these persons to refrain from taking any action aimed at fulfilling Resolution 263/XI.

Finally, the Court informed the Public Prosecutor in order to attest the eventual criminal liability of the President and other members of the Bureau of the Parliament of Catalonia who ignored the resolutions of the Constitutional Court.

Cross-references:

- Article 9.1 of the Constitution;
- Articles 4.1, 87.1 and 92 of the Organic Law on the Constitutional Court.

Constitutional Court:

- no. 259/2015, 02.12.2015;
- no. 128/2016, 21.06.2016;

- no. 141/2016, 21.06.2016.

Languages:

Spanish.



Identification: ESP-2016-3-013

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 20.10.2016 / **e)** 177/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 285, 25.11.2016; <http://boe.es/boe/dias/2016/11/25/pdfs/BOE-A-2016-11124.pdf> / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/25131>; CODICES (Spanish).

Keywords of the systematic thesaurus:

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**
5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture.**

Keywords of the alphabetical index:

Autonomy, regional / Bullfighting / Cultural heritage, preservation / Cultural heritage, protection.

Headnotes:

Autonomous Communities cannot ban bullfighting as it is part of the common cultural heritage of Spain.

Summary:

I. In 2010 the Parliament of Catalonia passed a Law banning bullfighting and all spectacles that include the death of bulls. More than 50 Senators of the Popular Party lodged an action of unconstitutionality against this Law.

Afterwards, in 2013, the Spanish Parliament passed a Law declaring bullfighting as part of Spain's intangible cultural heritage and providing it the pertinent legal protection. This Law was not challenged before the Constitutional Court.

II. The judgment passed by the Plenum of the Constitutional Court nullified the regional law.

The judgment stated that the State has the duty to preserve the common cultural heritage. The Catalan Parliament had overstepped its competences in the area of culture when it banned bullfighting and other bull spectacles in the Autonomous Community. This jeopardises the preservation of bullfighting. Finally, the judgment concluded that prohibition impairs the power of the State. The judgment pointed out that Autonomous Communities can regulate the development of bullfighting shows and establish requirements for the special care of the fighting bull, provided that they do not ignore the general framework set by the State.

III. Two dissenting opinions were issued against the majority judgment, one of them signed by two judges.

The former opinion holds that the Article 149.2 of the Constitution, which is used by the Court to recognise the State power on culture, is not a regulative power and has never been considered so by the Court's case law. Consequently, this power should not have prevailed over the regional jurisdiction on cultural heritage and the preservation of animal welfare. This opinion also rejects the judicial construction of an "impairment of the State power" in a situation where there is no regulative contradiction. The dissenting judges sustain that the Catalan Law did not challenge the cultural character of bullfighting.

The latter opinion holds that the State power must combine with the regional jurisdiction to protect multiculturalism in Spain. In particular, the dissenting judge points out that bullfighting has become a marginal phenomenon in Catalonia and that the regional legislature has taken note of that.

Cross-references:

- Articles 149.1.28 and 149.2 of the Constitution;
- Law 18/2013, 12.11.2013, that recognises bullfighting as part of the common cultural heritage of Spain;
- Catalan Law no. 28/2010, 03.08.2010, that modifies the Catalan Law about animal's protection.

Constitutional Court:

- no. 17/1991, 31.01.1991;
- no. 31/2010, 28.06.2010.

Languages:

Spanish.



Identification: ESP-2016-3-014

a) Spain / b) Constitutional Court / c) Plenary / d) 22.10.2016 / e) 154/2016 / f) / g) *Boletín Oficial del Estado* (Official Gazette), 263, 31.10.2016; <https://www.boe.es/boe/dias/2016/10/31/pdfs/BOE-A-2016-10018.pdf> / h) http://hj.tribunalconstitucional.es/en/Resolucion/Show/25089#complete_resolucion&completa; CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of Fundamental Rights and freedoms.**

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

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

5.3.7 Fundamental Rights – Civil and political rights – **Right to emigrate.**

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

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

Keywords of the alphabetical index:

Detention on remand, duration / Foreigner, expulsion.

Headnotes:

Associations do not have overall active standing to promote *habeas corpus* proceedings or to lodge an *amparo* appeal on behalf of others.

Summary:

I. A non-profit Association called "*Algeciras acoge*" (Algeciras shelters) requested the judge to initiate a *habeas corpus* procedure on behalf of

250 immigrants who had arrived in Spain after crossing the Strait of Gibraltar. The immigrants spent 8 days under police custody in a sports complex.

The judge, taking as a starting point a report issued by the Public Prosecution Service, rejected the initiation of the proceedings, stating that the immigrants had not been deprived of their personal liberty but were waiting for police procedures prior to the regularisation of their administrative situation in Spain.

After this ruling, the Association lodged an *amparo* appeal claiming violation of the fundamental rights to an effective remedy and personal liberty of the immigrants concerned.

II. The Plenum of the Constitutional Court of Spain issued an inadmissibility judgment in the case. The resolution held that “*Algeciras acoge*” does not have an active standing right to bring an action on behalf of the immigrants. Firstly, it established that the Association had not been a party in the *habeas corpus* proceedings. On the contrary, it had merely urged the judge to initiate the procedure. Secondly, the ruling stated that “*Algeciras acoge*” was not entitled to lodge an *amparo* appeal for the protection of an individual liberty such as the one concerned (personal liberty as protected by Article 17 of the Constitution). The Association did not have a qualified interest in the case and does not enjoy the right to stand on behalf of third parties.

III. Four judges signed a dissenting opinion, contending that the acting association was entitled to lodge an *amparo* appeal on behalf of the immigrants’ fundamental rights. The dissenting judges claimed that the judgment had overruled existing constitutional case law on procedural legitimation to stand for the protection of fundamental rights ignoring that “*Algeciras acoge*” had a legitimate interest in the defence of the immigrants’ rights.

Cross-references:

- Articles 17.2; 17.3; 17.4 and 24.1 of the Constitution;
- Article 162.1.b of the Constitution;
- Article 46.1.b of the Organic Law on the Constitutional Court (Organic Law 2/1979);
- Article 3 of the Organic Law of *Habeas Corpus* (Organic Law 6/1984).

Constitutional Court:

- no. 140/1997, 22.07.1997;
- no. 158/2002, 16.09.2002;
- no. 57/2014, 05.05.2014;
- no. 39/2016, 03.03.2016.

Languages:

Spanish.



Identification: ESP-2016-3-015

a) Spain / b) Constitutional Court / c) Plenary / d) 03.11.2016 / e) 185/2016 / f) Execution of decisions of the Constitutional Court / g) *Boletín Oficial del Estado* (Official Gazette), 299, 12.12.2016; <http://boe.es/buscar/doc.php?id=BOE-A-2016-11818> / h) <http://tcdshj:8080/es/Resolucion/Show/25151>; CODICES (Spanish).

Keywords of the systematic thesaurus:

- 1.1.1.1.1 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Constitution.**
- 1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**
- 1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**
- 1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**
- 1.5.5.2 Constitutional Justice – Decisions – Individual opinions of members – **Dissenting opinions.**
- 4.5.6 Institutions – Legislative bodies – **Law-making procedure.**
- 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs.**

Keywords of the alphabetical index:

Constitution, supremacy / Constitutional system, allegiance / Enforcement of judgment, law / Execution of judgment / Execution of sentence / Execution, effect of suspending / Measure, coercive, non-punitive, criteria / Parliament, committee, competences.

Headnotes:

Reform of the Organic Law on the Constitutional Court in 2015, to strengthen the execution powers of the Court, is in accordance with the Constitution.

Summary:

I. In 2015 the state legislator passed a law strengthening the execution powers of the Constitutional Court. The new measures included in this reform are:

- i. “suspending authorities or public employees at the Administration responsible for the breach of their duties”; and
- ii. “the execution by substitution of the ruling delivered in constitutional processes” (new Article 92.4 of the Organic Law 2/1979, 3 October, on the Constitutional Court).

The government of the Autonomous Community of Basque Country filed an action of unconstitutionality against this legal reform.

II. The validity of the Law was upheld.

From a procedural point of view, the judgment stresses that the Law was the product of a parliamentary initiative conducted through the summary procedures established in the Parliament Regulations (both *Congreso de los Diputados* and *Senado*). These procedures cannot be considered as constitutionally flawed and, in particular, they do not ignore the rights of the Members of Parliament (MPs).

Considering the substantive content of the legal reform, the judgment stated that it does not imply a distortion of the constitutional jurisdiction designed by the Constitution. The legislature had acted within the framework established by the Constitution and conferred a set of powers the Court in order to strengthen the supremacy of the Constitution and, therefore, of the resolutions taken by its supreme interpreter (Article 1 of the Organic Law on the Constitutional Court).

Regarding the interim suspension of authorities or public employees, the judgment denied that it has a punitive function or that it breaches parliamentary privilege guaranteed by Article 71.1 of the Constitution. Although it can be considered a severe measure, it is not inspired by retributive or punitive purposes as it seeks to ensure the effectiveness of, and compliance with, the resolutions passed by the Court. In addition, the

suspension can only last as long as is required to ensure the enforcements of those resolutions.

Finally, concerning the execution by substitution the judgment held that enforcement measures are not control mechanisms of the State over the Autonomous Communities. In this case, after a hearing, the Court may request the State Government to co-operate, in the terms provided by the Court. In particular, it is foreseen that the Government must take those measures strictly necessary to ensure the enforcement of the decisions. Therefore, the judgment stated that these instruments do not represent an interference on the self-government guaranteed to Autonomous Communities by the Constitution.

III. Three dissenting opinions were issued to the judgment.

The first stated that the judgment does not address the constitutional issues raised by the appellant. Moreover, this opinion held that the measure of suspending authorities or public employees should have been nullified due to its punitive nature. It cannot be considered an executive measure because, apart from being suspended, the public employee or authority loses its capacity to enforce the particular resolution. For this reason, it concluded that there is also a punishment purpose.

The second dissenting opinion stressed that the judgment should not have focused on the Court's assumption of the power in the abstract to agree on a measure of suspension, but on the specific suspension of public employees or authorities. Such an approach should have led to discussion of the compatibility of this mechanism with constitutional principles such as parliamentary immunity, political autonomy of the Autonomous Communities and even the system of constitutional jurisdiction. Eventually this opinion considered that the judgment should have declared the unconstitutionality and nullity of both measures (suspending authorities or public employees and execution by substitution).

The last dissenting opinion also stressed that both measures should have been declared unconstitutional. On the one hand, regarding the suspension of authorities and public employees, the true purpose of this measure is “to break the non-compliant will”. On the other hand, regarding the execution by substitution, it is held that the reform of the Organic Law on the Constitutional Court changes its nature by enabling the Court to decide about the execution by substitution.

Cross-references:

- Articles 23, 25, 155, 161, 164 and 165 of the Constitution;
- Articles 87 and 92 of the Organic Law no. 2/1979, 03.10.1979, on the Constitutional Court.

Constitutional Court:

- no. 215/2016, 15.15.2016.

Languages:

Spanish.



Sweden

Supreme Administrative Court

Important decisions

Identification: SWE-2016-3-002

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 26.05.2016 / **e)** 4047-15 / **f)** / **g)** HFD 2016 ref. 41 / **h)** CODICES (Swedish).

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:

Disabled parking permit, appeal against grant.

Headnotes:

A disabled person's entitlement to a parking permission constitutes a civil right for the purposes of Article 6.1 ECHR.

Summary:

Under Swedish traffic regulations, disabled people can apply to the Local Authority where they live for a special parking permit, allowing them to park where parking is otherwise forbidden. A decision from the Local Authority not to grant such a permit can be appealed to the County Administrative Board and further to the Swedish Transport Agency. Under the regulations, the Agency's decision is not subject to appeal.

The case concerned A.L. whose application for a parking permission was refused by the Local Authority. He appealed to the County Administrative Board as well as to the Swedish Transport Agency but his appeal was rejected. In spite of the regulation stating that the Agency's decision could not be appealed, he appealed to the Administrative Court, claiming that the impossibility to appeal amounted to a violation of Article 6.1 ECHR and of his right to access to courts.

The Supreme Administrative Court found that the entitlement of disabled persons to a parking permit constitutes a civil right for the purposes of Article 6.1 ECHR and there was accordingly a right to appeal against such a decision to an administrative court.

Languages:

Swedish.



Identification: SWE-2016-3-003

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 26.05.2016 / **e)** 4047-15 / **f)** / **g)** HFD 2016 ref. 44 / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

Keywords of the alphabetical index:

Civil rights / Patients, psychiatric care.

Headnotes:

Court decisions ordering continued compulsory care for a patient who had been sentenced to forensic psychiatric care but had absconded from the institution and been absent for a very long time were not proportionate.

Summary:

Under the Forensic Mental Care Act (1991:1129), the compulsory care of a patient who is subject to forensic psychiatric care with special discharge review shall be terminated when there is no longer a risk that the patient will relapse into crime which is of a severe nature, and it is not necessary for the patient to be subject to compulsory care, in the light of his or her mental condition and other personal circumstances.

The case concerned a patient who had previously been sentenced to forensic psychiatric care with special discharge review. The patient had absconded from the institution and had been absent for 20 years. Taking these circumstances into account, the Supreme Administrative Court examined whether continuing special discharge review was meaningful. In this appraisal, the assessment of proportionality was of particular importance. The Supreme Administrative Court stated that the patient had not been subject to actual compulsory care for many years. The continuous decisions on compulsory care had consequently not satisfied the need of psychiatric care, nor had the decisions brought society the protection which the compulsory care aims to provide. The Supreme Administrative Court therefore found that the continuing compulsory care of the patient was no longer proportionate.

Languages:

Swedish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2016-3-005

a) Switzerland / **b)** Federal Court / **c)** Second Court of Public Law / **d)** 13.09.2015 / **e)** 2C_66/2015 / **f)** Foundation Salvation Army Switzerland and Salvation Army Social Work Trust v. The Grand Council and the State Council of the Republic and Canton of Neuchâtel / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 142 I 195 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 5.2 Fundamental Rights – **Equality**.
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Medical assistance / Healthcare facility, access / Charitable institutions, subsidies / Charitable institutions, obligations / Balancing of interests / Patient, right to self-determination / Patient, best interest / Suicide, assisted / Suicide, right.

Headnotes:

Articles 8.1, 10.2, 13.1, 15 and 36 of the Federal Constitution; Articles 8 and 9 ECHR; Article 35a of the Neuchâtel cantonal health law. Legal obligation for recognised charitable institutions to permit assisted suicide on their premises; a conflict between the freedom to choose how and when to die and the freedom of religion and conscience; the principle of equality.

Overview of the legal framework and case-law concerning assisted suicide and the right to self-determination (recitals 3 and 4). When the different interests are weighed up, the freedom to decide how

and when to die for residents and patients of the healthcare facility in question takes precedence over the freedom of religion and conscience of the organisation that houses them (recital 5). Granting of subsidies may be subject to appropriate conditions; consequently, imposing outside help for the purposes of assisted suicide solely on recognised charitable institutions (and not on non-recognised institutions) does not violate the principal of equality (recital 6).

Summary:

I. The Grand Council of the canton of Neuchâtel adopted a law modifying its cantonal health law. These new provisions give every person capable of exercising judgment the right to choose how and when to die. They also provide that recognised charitable institutions must respect the decision of a patient or resident who requests assisted suicide from an outside source on their premises, if the person is suffering from either an illness or the after-effects of an accident, which are serious and incurable, and they no longer have a home or returning to their home cannot be reasonably expected of them. Lastly, in the event that an institution refuses to respect the decision of the patient or resident, the latter may refer the case to the relevant monitoring authority.

The Foundation Salvation Army Switzerland and the Salvation Army Social Work Trust (hereinafter, the Salvation Army) appealed to the Federal Court seeking the annulment of the provisions on the grounds that they violate freedom of religion and conscience and the principle of equality.

II. The Federal Court rejected the challenge after allowing that the Salvation Army enjoys protection of its freedom of religion and conscience.

The Federal Court examined the legal framework and the existing case-law for assisted suicide and held in the light thereof that every person has the right to decide how and when to die based on the right to self-determination enshrined in Article 8.1 ECHR and personal freedom (Article 10.2 of the Constitution). However, the State is not required to guarantee the right to assisted suicide. An individual who wishes to die does not have a specific right to receive assisted suicide, whether through the provision of the necessary means or through active assistance. Yet the law does protect the individual if they are unlawfully hindered in their plan to commit suicide. Therefore, persons capable of exercising judgment who are able to take the lethal drug themselves are also protected.

The Salvation Army owns a healthcare facility (hereinafter, “EMS”), which is recognised as a charitable institution that is subject to the impugned new provisions. These provisions require it to open its doors to assisted suicide organisations, even though the religious conviction of the appellant prohibits it from helping anyone to commit suicide, as it regards human life to be of fundamental value. It considers that this constraint infringes its freedom of religion and conscience, a freedom which enables it to act in accordance with its religious convictions and not be forced to commit acts that conflict with its religious beliefs.

In this instance, there is a conflict between the two freedoms in question, namely the freedom of religion and conscience and the freedom to commit suicide. In order to resolve the conflict of freedoms, it falls to the courts to confirm that the decision taken ensures a proper balance between the different fundamental rights concerned by following the principles of Article 36 of the Constitution, which requires any restriction on a fundamental right to have a sufficient legal basis, be justified in the public interest or for the protection of another fundamental right and be proportionate to the aim pursued.

The Neuchâtel health law is a sufficient legal basis (Article 36.1 of the Constitution) to restrict the freedom of religion and conscience of the appellant. In adopting this rule, the cantonal parliament established a legal hierarchy of values with regard to charitable institutions receiving subsidies and clearly made a choice to give the right to self-determination of residents and patients precedence over charitable organisations’ freedom of religion and conscience (Article 36.2 of the Constitution).

Concerning proportionality (Article 36.3 of the Constitution), it has to be determined whether the obligation to permit persons assisting in a patient or resident’s suicide on its premises is or is not tolerable for an appellant who believes that a human being cannot end their own life. In this connection, the Federal Court observes that cases requiring assisted suicide in institutions ought not to become commonplace and that, in addition, assisted suicide in institutions receiving subsidies is subject to various restrictive conditions: the person must be suffering from either an illness or the after-effects of an accident, which are serious and incurable, and they must no longer have a home or returning to their home cannot be reasonably expected of them. These aspects are in line with a tolerable breach to the guarantee relied on by the appellant. In the rare cases where all of the conditions for assisted suicide are met, the appellant’s freedom of religion and conscience would conflict with the fundamental right

of the resident to choose how and when to die. The Federal Court observes that the appellant would not be required to take an active part in the process of assisted suicide; they would only need to allow it. When adopting the restrictive conditions giving access to the controversial assistance, the cantonal parliament was careful to encroach as little as possible upon the fundamental right of the appellant. It must also be noted that the appellant may avoid the disputed obligation by renouncing its charitable status, thereby losing its subsidies. If the situation were reversed and freedom of religion and conscience were to prevail over the right to commit suicide, it would mean that residents and patients (who are not always able to choose where they stay) seeking the assistance in question would permanently be deprived of their right to self-determination, without any alternative for exercising it. Consequently, when the different interests are weighed up, the freedom to choose how and when to die for residents and patients of the appellant’s EMS takes precedence over the latter’s freedom of religion and conscience.

The obligation for recognised charitable institutions to allow assisted suicide on their premises, even though private organisations avoid this, may constitute unequal treatment and falls within the scope of protection of Article 8.1 of the Constitution. In principle, the cantons are not under an obligation to subsidise an EMS. When they do so, the granting of subsidies may be subject to appropriate conditions. Thus, according to case-law, a canton implementing a legal system intended solely for EMS which are charitable institutions does not, in itself, breach the principle of equal treatment. In this case, the appellant’s EMS is a private organisation responsible for a task that is in the public interest. It therefore receives subsidies. Parliament has made payment conditional on the obligation to permit the actions of assisted suicide organisations on EMS premises. This is a condition designed to ensure respect for a fundamental right for residents and patients that parliament had every right to set. Insofar as non-charitable institutions do not receive subsidies, different treatment with regard to assisted suicide of these two types of entities does not breach the principle of equality. The appeal is dismissed.

Languages:

French.



Identification: SUI-2016-3-006

a) Switzerland / **b)** Federal Court / **c)** Second Civil Law Court / **d)** 02.06.2016 / **e)** 5A_724/2015 / **f)** A.A. and B.A. v. Adult and Child Protection Agency / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 142 I 188 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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.**

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

Keywords of the alphabetical index:

Family law / Child, parental custody / Child, placement / Child, protection / Parent, right / Public hearing, right.

Headnotes:

Article 310 of the Swiss Civil Code; Article 6.1 ECHR; removal from parental custody and placement; right of the parents to a public hearing along with a personal and oral hearing.

As part of child protection procedures, conditions in which the cantonal appeals authority may exceptionally refuse to hold a public hearing along with a personal and oral hearing of the parties (recital 3).

Summary:

I. A.A. and B.A. have three young children. The Adult and Child Protection Agency removed the parents' right of custody and ordered the children to be placed with a foster family. The appeal lodged by the couple against the Agency's decision was dismissed by the Cantonal Administrative Court.

A.A and B.A. firstly appealed to the Federal Court to have the case referred back to the cantonal court for the latter to make a new decision in compliance with the right to a fair hearing. Relying on Article 6.1 ECHR, the appellants complained of the cantonal body's refusal to hold a public hearing and failure to

conduct a personal and oral hearing. The Federal Court dismissed the appeal.

II. The first part of Article 6.1 ECHR, namely the right of each individual to have their case heard publicly, implies the right to a public hearing being held before a competent court. The principle of the proceedings being public is intended to prevent any form of judicial secrecy and to enable the public to exercise (democratic) control over the work of the authorities, which helps to increase public confidence in the justice system. The obligation to hold a public hearing is, however, not absolute. The wording of Article 6.1 ECHR does not prevent the courts deciding to depart from the principle on account of the specificities of individual cases. In particular, a court is not therefore required to hold a public hearing when the protection of the private life of the parties so requires.

With regard to cases relating to family law, two scenarios may be identified:

- a. when the dispute is between members of the same family, the court is not required to hold a public hearing on the grounds that the protection of the private life of the parties is at issue;
- b. when the dispute is between the State and private individuals, as is the case with decisions on the removal of parental custody rights and child placement, the court cannot simply rely on the protection of the private life of the parties as grounds for departing from the principle of public proceedings. In this case, the decision not to hold a public hearing requires a specific reason and must be justified by exceptional circumstances.

The instant case involved a family law dispute between the State and private individuals in which the Federal Court found that there were specific grounds to justify the absence of public proceedings. The case file mentions that the appellants' three children have health problems and are affected by developmental difficulties. The specific circumstances consequently constituted grounds for violating the principle of having a legal process open to the public.

With regard to the second complaint, Article 6.1 ECHR does not confer in an abstract way a formal right to a personal and oral hearing. The court is only required to give parties the opportunity to plead their case personally and orally when the circumstances demand that the judges form their own impression of the situation. It is therefore the party exercising this right which is responsible for establishing the existence of such circumstances.

With regard to whether the appellants should have been granted the right to a personal and oral hearing before the Plenary Court of the Cantonal Administrative Court, the Federal Court noted that the couple had been listened to orally and personally on several occasions during the procedure. A.A. and B.A were not only interviewed several times by the Agency, but were also heard by a delegation from the Cantonal Administrative Court (the investigating judge and registrar). Therefore there were no grounds for summoning them to an additional hearing before all of the members of the body called upon to give a ruling. Taking all of the above into account, the Federal Court concluded that the cantonal body had not infringed the parties' right to a fair trial.

Languages:

German.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2016-3-004

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 25.09.2016 / e) U.br. 2/2016 / f) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 193/2016, 18.10.2016 / g) / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

4.7.15 Institutions – Judicial bodies – **Legal assistance and representation of parties.**

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

Keywords of the alphabetical index:

Defence counsel, proceedings, criminal / Lawyer, choice, restriction / Lawyer, conditions for practicing.

Headnotes:

The right to have a counsel in criminal proceedings is an exclusive right of choice of the accused person to decide which lawyer will represent him or her before the court.

The right to choose a defence counsel may not be made conditional upon the fulfilment, by the lawyer, of additional special conditions different from the conditions for obtaining the working licence.

Summary:

I. The applicant requested the Court to review the constitutionality of Article 71.5 of the Code of Criminal Procedure, which provided that for crimes punishable by imprisonment of at least ten years a defence counsel must be an attorney with experience of at least five years after passing the bar examination.

The applicant argued that the contested provision violated the defendant's right to have a counsel of his own choosing and that it also discriminated against the less experienced lawyers and in favour of those with more experience. In the applicant's view, the contested provision was also problematic because it related only to defence counsel, but not to public prosecutors, although they were considered as equal parties in criminal proceedings. The applicant argued that the contested provision puts public prosecutors in a more favourable position than attorneys, as it assumes that public prosecutors are more competent than defence counsel, regardless of the years of their professional service.

II. The Court evaluated the contested provision against the constitutional principles of the rule of law (Article 8.1.3 of the Constitution), equality of citizens (Article 9 of the Constitution) and freedom of entrepreneurship (Article 55 of the Constitution). It also referred to Article 53 of the Constitution, which defines attorneyship as an autonomous and independent public service that provides legal assistance and carries out public mandates in accordance with the law.

The Court considered the relevant provisions of the Law on Attorneyship and noted that under Article 12 of the Law, any person, who is a citizen of the Republic of Macedonia, who meets the general conditions of employment in the bodies of state administration, and who is a graduated lawyer who has passed the bar exam and who enjoys a reputation for the performance of legal activities, can be registered in the Registry of Attorneys.

The Court also took into account the provision of the Criminal Procedure Code which laid down that only registered attorneys may act as defence counsels in the criminal procedure.

In its reply concerning the allegations of the applicant, the Government of the Republic of Macedonia submitted that the contested provision was not discriminatory, but rather provided additional protection for citizens. The reason for introducing this provision was to raise the standards and quality of defence of those accused of more serious crimes, thereby protecting the interests of the defendants and providing them with a better quality defence.

The Court did not accept the Government's explanation and noted that the arguments put forward could not justify the unconstitutionality of the contested provision. The Court found that the contested provision undoubtedly discriminates between attorneys, depending on their experience after passing the bar exam, as it ignores the fact that

with the entry in the Registry of Attorneys of the Bar, the attorney acquires a working licence which entitles him or her to provide legal assistance to natural and legal persons before courts. In the opinion of the Court, the right to choose a defence counsel may not be made conditional upon the fulfilment of additional special conditions different from the conditions for obtaining the working licence.

The defendant in criminal proceedings holds an exclusive right to choose which attorney will represent him/her in a specific court proceeding. The quality of defence is ensured by the stipulation that only registered attorneys may act as defence counsel in criminal proceedings. According to the Court, the prescribing of additional conditions for attorneys in certain procedural actions, other than the conditions for obtaining a working licence, puts attorneys in an unequal position and leads to a violation of the equal position of all subjects in the market, contrary to constitutional provisions.

The Court also noted that the disputed provision was insufficiently clear and precise which is contrary to the principle of the rule of law, as a fundamental value of the constitutional order of the Republic of Macedonia.

Consequently, the Court found that Article 71.5 of the Criminal Procedure Code was not in accordance with Articles 8.1.3, 51 and 55.2 of the Constitution. The Court therefore repealed Article 71.5 of the Code of Criminal Procedure.

Languages:

Macedonian, English (translation by the Court).



Turkey

Constitutional Court

Important decisions

Identification: TUR-2016-3-008

a) Turkey / **b)** Constitutional Court / **c)** Plenary / **d)** 11.05.2016 / **e)** 2012/3262 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 12.10.2016, 29855 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**

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

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

Keywords of the alphabetical index:

Sexual abuse, of minors / Positive obligation, investigation.

Headnotes:

Inadequate investigation of claims with respect to sexual abuse of minors, where consent is disputed, constitutes a violation of the procedural aspect of the prohibition of torture and degrading treatment.

Summary:

I. The application relates to the alleged violation of the prohibition of torture and ill-treatment due to the prosecutor's decision not to pursue criminal charges on aggravated sexual abuse of a minor, insult, assault causing bodily injury, and deprivation of liberty for sexual purposes.

According to the statement of the applicant, the facts are as follows: The applicant met the suspect when she was 16 years old and they got closer to each other in a short period of time. Soon after, the suspect started to threaten and beat the applicant in order to force her to marriage. After continuous pressures, the applicant and her family consented to marriage. The applicant and suspect then started

to live together without the conducting of a civil ceremony for marriage. They had sexual intercourse several times. The suspect beat the applicant several times, and after living together for about nine months they got separated. The applicant filed an official complaint against the suspect and the prosecutor initiated a criminal investigation. Under the investigation, the expertise report of the social worker indicated that the psychological state of the applicant was not stable due to incidents she had experienced and that she should be treated in a child psychology clinic. The suspect denied the allegations and claimed that the applicant had cheated on him. The prosecutor terminated the investigation on the ground that the law requires a complaint to be filed within six months after the incident of sexual abuse in order to initiate prosecution under the charge of "sexual abuse of a minor with consent," and that the applicant failed to file a criminal complaint within the legal time-limit.

II. The Constitutional Court found the application admissible, noting that the allegations must be examined under the prohibition of torture and ill-treatment rather than the right to privacy given that sexual abuse of a minor is by its nature a grave and serious incident.

The Court began its analysis by emphasising the importance of protecting minors from sexual abuse and noting the legal framework under international agreements and national laws in that regard.

The Court found no violation of the substantive aspect of the prohibition of torture and ill-treatment because the applicant had wilfully continued to live with the suspect and had not notified the authorities about the incidents, which prevented the authorities from becoming aware of the situation of the applicant.

The Court, however, held that the procedural aspect of the prohibition on torture and ill-treatment had been breached because the prosecutor had conducted a superficial investigation into the allegations. The Court stated that the investigation was based on the presumption that sexual abuse had taken place with the consent of the victim. The Court also pointed out several other deficiencies in the investigation process, such as failure to inquire about the exact date of the continuous offences of sexual abuse and thereby determining the time-limit to file an official complaint, the allegations of threats to force the applicant into marriage, and misvaluation of other existing evidence such as mobile phone texts (SMSs) of the applicant.

Languages:

Turkish.

*Identification:* TUR-2016-3-009

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 28.09.2016 / **e)** 2014/5167 / **f)** Fatma Çavuşoğlu v. Bilal Çavuşoğlu / **g)** *Resmi Gazete* (Official Gazette), 17.11.2016, 29891 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Confiscation of a property / Confiscation, asset, penalty / Confiscation, proportionality.

Headnotes:

The confiscation of a truck used for illegal hunting does not constitute a violation of the right to property.

Summary:

I. The application relates to alleged violation of the right to property due to confiscation of a truck used for illegal hunting.

Following an anonymous report to the authorities, gendarmerie discovered that the applicants had engaged in hunting without a license and outside of the hunting season, and that they had used the headlight of a truck for hunting. The truck was registered in the name of the applicant's wife. The gendarmerie also found a weapon and a recently shot rabbit in the truck. The truck and weapon were confiscated on the grounds of illegal hunting. The applicant filed a lawsuit against confiscation, and it was dismissed.

The applicant asserted that it was not proportionate to confiscate a truck that belonged to another person for the hunting of only one rabbit.

II. The Court found the application admissible. The Court stated that the confiscation constituted an infringement of the right to property. The Court noted that the infringement had a legal basis and pursued the legitimate aim of protecting wildlife. Under proportionality analysis, the Court stated that the public interest in question is not “an economic interest”, given that the aim of protecting wildlife cannot be measured with economic values. Therefore, no comparison can be made with the public interest in question and the economic value of the confiscated truck used for illegal hunting. Noting that it was not disputed by the applicants that the truck was used for illegal hunting, the Court found that the infringement was proportionate and there was no violation of the right to property.

Languages:

Turkish.

*Identification:* TUR-2016-3-010

a) Turkey / **b)** Constitutional Court / **c)** Plenary / **d)** 13.10.2016 / **e)** 2014/16701 / **f)** G.G. / **g)** *Resmi Gazete* (Official Gazette), 02.11.2016, 29876 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel**.
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Dismissal / Dismissal, employee's behavior / Due process / Proportionality.

Headnotes:

Removal from office based on conduct solely related to private life violates the principle of proportionality and therefore the right to private life.

Summary:

I. The application relates to violation of the right to privacy due to the removal of military personnel from office based on immoral conduct.

The applicant's sexually explicit pictures and videos were released on the internet and then on the media without his consent. An investigation was conducted within the military and the applicant was removed from his position by a joint decree. The applicant was interviewed during the investigation. The applicant stated that he was asked detailed questions about his sexual life during the interview. The applicant asserted that the interview and his following removal did not follow due process, that he was questioned under pressure and in a misleading manner, that he was asked questions only about his private life, that the removal was not based on non-disciplinary conduct, that his distinguished military record was ignored, and that the removal was not proportionate. Prior to the individual application, the applicant had filed a lawsuit in the high military court against his removal asserting the above-stated arguments. However, the case was dismissed on the basis of insufficient evidence.

II. The Court found the application admissible and examined it on the merits. The Court noted that the removal from the office constituted an infringement of the right to privacy, which had a legal basis, and pursued the legitimate purpose of "maintaining military discipline" and therefore national security.

In its analysis regarding the element of proportionality and necessity in a democratic society, the Court stated that although military personnel may be subjected to sanctions due to immoral conduct, removal from office would have serious effects on the applicant's life, and therefore it must be a sanction of last resort. The Court also stated that the applicant's arguments had not been duly addressed by the high military court. The Court further pointed out that the high military court had not considered due process deficiencies in the investigation and removal processes, and it had not discussed the potential effect of the applicant's private life on his military service, particularly taking into account the fact that the investigation was initiated two years later from the date of the incidents.

For these reasons, the Court found a violation of the right to privacy and ordered a retrial in the high military court.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2016-3-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.09.2016 / **e)** 6-rp/2015 / **f)** The conformity with the Constitution (constitutionality) of the provisions of Article 21.5 of the Law on Freedom of Conscience and Religious Organisations (the case of advance notification of public services, religious rites, ceremonies and processions) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Freedom of assembly, peaceful, public, religious / Freedom of assembly, public, peaceful, advance permission, advance notice.

Headnotes:

Provisions of law requiring that peaceful assemblies, in particular, religious assemblies, be authorised by the relevant authorities are unconstitutional where the Constitution only requires that peaceful assemblies be notified to those authorities.

Summary:

The petitioner, the Ukrainian Parliamentary Commissioner for Human Rights, applied to the Constitutional Court requesting that it consider the conformity (constitutionality) of Article 21.5 of the Law on Freedom of Conscience and Religious Organisations, as amended, (hereinafter referred to as the “Law”) with the Constitution.

Article 21.1 to 21.4 of the Law set out, *inter alia*, the cases in which:

- i. public worship and religious rites may be freely held; and
- ii. public worship, religious rites, ceremonies and processions may be freely held.

Under Article 21.5 of the Law, in other cases, public worship, religious rites, ceremonies and processions may be held only with the permission of the relevant local executive or government body. Except in urgent cases, applications for permission must be submitted at least ten days beforehand.

The petitioner submitted that the provisions of Article 21.5 of the Law “are contrary to the constitutional prescriptions on peaceful assemblies enshrined in Article 39 of the Constitution, as the provisions of the Law set out an authorisation procedure instead of a notification procedure”.

In Ukraine, everyone has the right to freedom of belief and religion. This right includes freedom to profess or not to profess any religion, to perform alone or collectively and without constraint religious rites and ceremonial rituals, and to conduct religious activity (Article 35.1 of the Constitution). Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government (Article 39.1).

The right to freedom of belief and religion may be performed alone or collectively, in private or public places. Implementation of this right, particularly in a public place, is related to the implementation of the right to assemble peacefully, enshrined in Article 39.1 of the Constitution.

Under the case-law of the European Court of Human Rights, Article 9 ECHR, which provides for the right of everyone to freedom of thought, conscience and religion, should be interpreted in accordance with Article 11 ECHR, which guarantees to everyone the freedom of peaceful assembly and freedom of association. Religious gatherings are protected by Article 11, which applies to both private meetings and meetings in public places, as well as static assemblies and public processions.

The Constitutional Court considers that, based on a systematic analysis of the norms of the Constitution, the right to freedom of belief and religion may be exercised, in particular, in the form of public worship, religious rites, ceremonies and processions. If these are public and peaceful, they should fall under the

requirements of Article 39 of the Constitution, including advance notification of executive authorities or local government.

The restrictions set out in Article 39.2 of the Constitution may apply to the organisers and participants of a peaceful assembly of a religious nature in a public place, that is to say, a court may, in accordance with the law, restrict the exercise of the right to freedom of religion of individuals in a public place in the interests of national security and public order, to prevent disorder or crime, or to protect public health or the rights and freedoms of others.

The Constitutional Court considers that the requirement of obtaining prior permission for specific peaceful religious gatherings in public places, provided for by Article 21.5 of the Law, runs contrary to the provisions of Article 39 of the Constitution, which as norms of direct effect, lay down only the requirement of notifying the executive agencies or local governments in advance of the intention to hold a peaceful assembly, be it of a religious or non-religious nature.

Under Article 24.2 of the Constitution, there shall be no privileges or restrictions based on religious and other beliefs. Article 21.5 of the Law lays down an authorisation procedure for peaceful religious meetings, which differs from the procedure for non-religious assemblies.

In a democratic, law-based state, a different procedure cannot be introduced for peaceful assemblies depending on their organisers and participants, purpose and location, form, etc., leading to a situation where a permit is required in some cases, and prior notification in others.

Article 24 of the Constitution, in conjunction with Articles 35.1 and 39.1, obliges the State to create common legal mechanisms that regulate the holding of religious and non-religious public assemblies. Such meetings should take place after prior notification of relevant bodies of the executive authorities or local government.

In the light of the above, the Constitutional Court concludes that the provisions of Article 21.5 of the Law contradict the requirements of Articles 8, 24, 35 and 39 of the Constitution.

The Constitutional Court notes that the Law was adopted before the entry into force of the Constitution. According to item 1 of Section XV "Transitional Provisions" of the Constitution, laws and other normative acts adopted prior to the entry

into force of the Constitution apply only in so far as they do not contradict the Constitution.

Having established that the provisions of Article 21.5 of the Law contradict the Constitution, the Constitutional Court, on this ground, declares them to be not in compliance with the Constitution (unconstitutional), and, therefore, they shall not be applied.

The Constitutional Court is the sole body of constitutional jurisdiction in Ukraine, which decides on issues of conformity of laws and other legal acts with the Constitution (Article 147 of the Constitution).

Item 1 of Section XV "Transitional Provisions" of the Constitution applies not only to legislative acts, but also to legal acts of Ukrainian SSR and the Soviet Union which continue to be applied after the adoption of the Constitution.

The Resolution of the parliament (*Verkhovna Rada*) no. 1545-XII of 12 September 1991 on the procedure of temporary application of certain legislative acts of the Soviet Union on the territory of Ukraine sets out: "before the relevant legislation of Ukraine is enacted, the legislation of the Soviet Union shall be applicable within the territory of the republic in respect of issues that have not been regulated by the legislation of Ukraine, and in so far as that they do not contradict the Constitution and laws of Ukraine". Consequently, on the territory of Ukraine, public authorities and local governments continue to apply the Decree of the Presidium of the USSR Supreme Council no. 9306-XI of 28 July 1988 on the procedure for organising and holding meetings, rallies, street marches and demonstrations in the Soviet Union. The Decree sets out that citizens may hold peaceful assemblies only if permission is obtained from relevant body of state power or local government.

In the light of Article 39 of the Constitution, which requires only that the executive bodies or local authorities be notified in advance of the intention to hold a peaceful assembly, as well as the legal positions set out in this Decision, the Constitutional Court declares that the Decree contradicts the Constitution and, in accordance with item 1 of Section XV "Transitional provisions" of the Constitution, is invalid on the territory of Ukraine and may not be applied.

III. Judges M. Hultai, O. Lytvynov, M. Melnyk, I. Slidenko attached their dissenting opinion.

Supplementary information:

Guidelines on Freedom of Peaceful Assembly (2nd edition), prepared by the Organisation for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights and the Venice Commission (the European Commission for Democracy through Law), approved by the Venice Commission on 4 June 2010 (83rd plenary session).

Cross-references:

Constitutional Court:

- no. 4-rp/2001, 19.04.2001;
- no. 2-rp/2016, 01.06.2016.

European Court of Human Rights:

- *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, 14.06.2007;
- *Barankevich v. Russia*, no. 10519/03, 26.07.2007.

Languages:

Ukrainian.

*Identification:* UKR-2016-3-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.12.2016 / **e)** 7-rp/2016 / **f)** The conformity with the Constitution (constitutionality) of the provisions of the second sentence of Article 43.7 and the first sentence of Article 54.1 of the Law on pension provision of persons dismissed from military service and some other persons / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Person, dismissed, family, members, forces, armed, service / Pension, provision, person, dismissed, forces, armed, service / Pension, military / Pension, reduction, suspension.

Headnotes:

Where persons, who have served in the Armed Forces, enjoy constitutional guarantees for the unconditional provision of social protection, the amendments to an ordinary law restricting the maximum amount of their pensions and suspending the payment of pensions granted to them are unconstitutional.

Summary:

The Supreme Court applied to the Constitutional Court asking it to recognise that certain provisions of legislation amending pension provision to persons dismissed from military service are not in conformity with the Constitution (unconstitutional). The provisions of legislation at issue are as follows: the second sentence of Article 43.7 (originally Article 43.5) and the first sentence of Article 54.1 of Law no. 2262-XII of 9 April 1992 on pension provision of persons dismissed from military service and some other persons, as amended, (hereinafter, Law no. 2262), in conjunction with item 2 of Chapter III “Final provisions” of Law no. 213-VIII of 2 March 2015 amending certain legislative acts of Ukraine on pensions (hereinafter, “Law no. 213”) and item 2 of Chapter II “Final provisions” of Law no. 911-VIII of 24 December 2015 amending certain legislative acts of Ukraine (hereinafter, “Law no. 911”).

The provisions of the second sentence of Article 43.7 of Law no. 2262 provide that, as a temporary measure, from 1 January 2016 to 31 December 2016 the maximum amount of pension (including bonuses, promotions, increases and other additional payments, with the exception of increases to allowances of certain categories of persons having special merits before the Motherland) may not exceed 10,740 UAH. The provisions of the first sentence of Article 54.1 suspend the payment of pensions granted to persons (except invalids in groups I and II, disabled veterans in group III, military veterans and combatants, persons falling under Article 10.1 of the Law on the status of war veterans and guarantees of their social protection) working in positions and under conditions set out in the Law on state service, the Law on the Prosecutor’s Office or the Law on the judicial system and status of judges.

The Constitutional Court notes that the provision of social protection of citizens serving in the Armed Forces and other military units and members of their family is laid down in Article 17.5 of Chapter I “General Principles” of the Constitution. This Article defines the fundamentals of the constitutional order in Ukraine as, in particular, sovereignty, territorial integrity and inviolability of Ukraine, the protection of which relies on the Armed Forces and other military units.

Article 156 of the Constitution provides: “a draft law on introducing amendments to Chapter I “General Principles” of the Constitution, is submitted to the parliament (*Verkhovna Rada*) by the President, or by no less than two-thirds of the constitutional composition of the parliament (*Verkhovna Rada*), and on the condition that it is adopted by no less than two-thirds of the constitutional composition of the parliament (*Verkhovna Rada*), and is approved by an All-Ukrainian referendum designated by the President.”

The special constitutional procedure for introducing amendments to Chapter I “General Principles” of the Constitution is required by the specificity of the subject-matter it regulates, that is to say, the constitutional order in Ukraine, in particular, the need to ensure national security and defence, and the need to protect the national sovereignty of and the territorial integrity of Ukraine as a sovereign and independent, democratic, social and law-based state.

The above is the ground for concluding that the persons serving in the Armed Forces and other military units formed in accordance with the laws and members of their families enjoy a special status and special conditions of social protection.

The organisational, legal and financial measures for ensuring adequate social protection of citizens serving in the Armed Forces and other military units and members of their family are not associated with disability, unemployment or lack of sufficient means of subsistence (Article 46 of the Constitution), but with the particular nature of the duties performed by them concerning the provision of one of the most important functions of the state – protection of the sovereignty and territorial indivisibility of Ukraine (Article 17.1 of the Fundamental Law).

The Constitutional Court considers that the norms of Article 17.5 of the Constitution concerning the provision by the state of social protection of citizens serving in the Armed Forces and other military units and the members of their families are a priority and of an absolute nature. Thus, the measures aimed at ensuring the social protection of this category of

persons by the state cannot be abolished or limited for reasons related to, in particular, economic suitability, social and economic circumstances.

The Constitutional Court declares that the restriction of the maximum amount of pensions of and the suspension of payment of pensions granted to persons entitled to pension provision introduced by Law no. 2262 violate the constitutional guarantees, set out in Article 17.5 of the Constitution, concerning unconditional provision of social protection of the persons who are obliged to protect sovereignty, territorial indivisibility and inviolability of Ukraine.

III. Judge I. Slidenko attached his dissenting opinion.

Cross-references:

Constitutional Court:

- no. 5-rp/2002, 20.03.2002, on the constitutional petition of 55 People's Deputies regarding the conformity with the Constitution (constitutionality) of the provisions of Articles 58 and 60 of the Law on the State Budget for 2001 and of the Supreme Court regarding the conformity with the Constitution (constitutionality) of the provisions of Article 58.1.2, 58.1.3, 58.1.4, 58.1.5, 58.1.8 and 58.1.9 of the Law on the State Budget for 2001 and Article 1.1 of the Law on certain measures for the budget savings (the case regarding benefits, compensation and guarantees);
- no. 7-rp/2004, 17.03.2004, on the constitutional petition of 55 People's Deputies regarding the conformity with the Constitution (constitutionality) of the provisions of Article 59.3 and 59.4 of the Law on the State Budget for 2003 (the case regarding social protection of servicemen and employees of law enforcement bodies).

Languages:

Ukrainian.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2016-3-004

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 31.08.2016 / **e)** C 315 / **f)** Flor Freire v. Ecuador / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality.**

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

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

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

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

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

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

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

Keywords of the alphabetical index:

Armed forces, discrimination based on sexual orientation / Discrimination, based on perception / Armed forces, disciplinary sanctions.

Headnotes:

A person's sexual orientation depends entirely on his or her self-identification.

Discrimination based on a perception has the effect and purpose of hindering and nullifying the recognition, enjoyment and exercise of a person's human rights and fundamental freedoms, irrespective of whether the person identifies with a certain

category or not. As a consequence, the person is reduced to the only characteristic attributed to him or her regardless of other personal conditions.

Sexual orientation, whether real or perceived, is a category protected under Article 1.1 ACHR. The prohibition of discrimination based on sexual orientation is not limited to the fact of being a homosexual *per se*, but includes its expression and the ensuing consequences in a person's life project. The international recognition of the right to non-discrimination on the grounds of sexual orientation, whether real or perceived, is accompanied by the prohibition of the criminalisation of consented sexual acts between adults of the same sex. The prohibition of discrimination based on sexual orientation in the armed forces has been recognised in international instruments and jurisprudence, including that of the European Court of Human Rights.

The prohibition of discrimination based on sexual orientation covers and extends to all spheres of the personal development of those persons within the State's jurisdiction. Hence, the exclusion of members of the armed forces based on their sexual orientation is contrary to the American Convention.

The American Convention does not prohibit the sanctioning, through disciplinary proceedings, of conducts not considered to be criminal offences. The disciplinary control's purpose is to assess a person's conduct, suitability and performance regarding his or her post or function as a public official. The control exercised through criminal law sanctions conducts that harm legal interests that should be protected and which the legislator has deemed reasonable and proportionate to be repudiated for the functioning of the society. Although the disciplinary control and the control exercised through criminal law are both a manifestation of the State's punitive power, they do not always coincide, nor do they have to coincide.

The right to have one's honor respected, understood as the esteem or deference with which each person, because of his or her human dignity, should be treated by other members of the community who know and deal with that individual, is a right to be protected so as not to undermine the intrinsic value of individuals, and to ensure the adequate consideration and valuation of individuals within the community.

A reputation may be damaged as a result of false or incorrect information which is disseminated and distorts the public opinion held with regard to an individual. Therefore, an individual's reputation is closely interrelated with the concept of human dignity, inasmuch as it protects individuals against attacks that restrict a person's projection in the public sphere.

A disciplinary decision's lack of adequate reasoning may have a direct impact on the victim's capacity to exercise his or her rights of defense during the proceedings of subsequent remedies. The obligation to state reasons requires a response to the main arguments with regard to the subject matter in order to ensure that the parties have been heard.

Summary:

I. The applicant, Mr Homero Flor Freire, had been a member of the Ecuadorian Armed Forces, when he was dismissed from his position as lieutenant for allegedly engaging in homosexual acts inside military quarters with another soldier. However, the applicant has continuously denied such acts and does not identify as homosexual.

After the alleged acts, Mr Flor Freire's Commander released him from his functions and responsibilities. Disciplinary proceedings were initiated on the basis of Article 117 of the Regulations on Military Discipline. This provision established the dismissal of members of the armed forces, *inter alia*, when caught in homosexual acts inside or outside military facilities. At the same time, Article 67 of the Regulations provided for the temporary arrest or suspension of members that engaged in non-homosexual acts inside military facilities.

During the disciplinary proceedings, the Commander acted as judge and determined that Mr Flor Freire had engaged in homosexual acts, thus recommending his dismissal. This recommendation was accepted by the Council of Officers. A subsequent constitutional complaint filed by the applicant was found inadmissible on the grounds that the judgment rendered in the disciplinary proceedings was in accordance with the rule of law.

On 11 December 2014, the Inter American Commission of Human Rights submitted the case, alleging violations to Articles 1.1, 2, 8.1, 24 and 25.1 ACHR.

The State submitted one preliminary objection alleging the non-exhaustion of domestic remedies. According to Ecuador, the suitable remedy for the applicant's dismissal would have been a contentious administrative appeal. The Court held that the State did not submit evidence to rule out the representative's questioning of the appeal's availability. Therefore, the State did not fulfill its burden of proof regarding the remedy's availability, suitability and effectiveness and, as a consequence, the Court rejected the preliminary objection.

II. On the merits, the Court found the State internationally responsible for the violation of the right to equal protection before the law established in Article 24 ACHR in conjunction with Articles 1.1 and 2 ACHR. The Court acknowledged the reasonableness and legitimacy of restrictions on sexual activity inside military facilities or during active duty with the purpose of preserving military discipline. Nevertheless, in the case at hand, the Court found that there was an unjustified difference between the sanction of non homosexual acts and homosexual acts, with the latter receiving a much harsher punishment. The Court held that the State had the burden to provide an objective and reasonable justification for the more severe punishment assigned to homosexual acts. Since the State failed to provide such a justification, the State is responsible for a violation of the right to equal protection before the law and the prohibition of discrimination.

In addition, the Court found a violation of the right to have one's honour respected and the right to dignity, codified in Article 11.1 ACHR, due to the social context and the specific circumstances that led to the applicant's dismissal as a member of the armed forces. Furthermore, the Court held that the applicant's honour and reputation was harmed due to the discriminatory disciplinary proceedings he was subjected to, which led to a distortion of the public opinion regarding his person.

In contrast, the Court did not find a violation of Article 9 ACHR (principle of legality) because:

- i. the sanction imposed on the applicant was not exclusively based on an administrative regulation, but also on the Law of Personnel of the Armed Forces;
- ii. in matters of disciplinary sanctions, certain undetermined legal concepts may be specified, in terms of their interpretation and content, through regulations or jurisprudence in order to avoid an excessive discretion in their application; and
- iii. the American Convention on Human Rights does not prohibit the sanctioning, through disciplinary proceedings, of conducts not considered to be criminal offences. Therefore, the decriminalisation of homosexuality in Ecuador did not imply a general prohibition to sanction the applicant for engaging in sexual acts inside military facilities.

With regard to the guarantee of impartiality, the Court noted that the mere fact that the applicant's superior was the one who exercised disciplinary control over him was not contrary to the American

Convention on Human Rights. However, the Court found that the fact that the same Commander who had released the applicant from his functions and responsibilities later acted as a judge in the disciplinary proceedings, implied a prior judgment of the facts. Therefore, the Court determined that it was not possible to affirm that his approximation to the facts lacked prejudice or preconceived notions with respect to the incident, in a way that could have allowed him to form an opinion solely based on the evidence gathered during the proceedings. In conclusion, the Court established the State's responsibility for a violation of Article 8.1 ACHR in conjunction with Article 1.1 ACHR.

Additionally, the Court found that the Council of Officers' confirmation of the adequately reasoned decision passed by the Court of Law complied with the duty of reasoning required by the American Convention within the scope of disciplinary proceedings, established in Article 8.1 ACHR in conjunction with Article 1.1 ACHR.

Moreover, the Court did not find a violation of Article 25.1 ACHR in conjunction with Articles 1.1 and 2 ACHR, given that:

- i. Ecuador demonstrated that the applicant could have lodged a contentious administrative appeal to challenge the disciplinary decisions leading to his dismissal; and
- ii. the applicant did not lodge it. Therefore, the Court could not assess its suitability and effectiveness in the present case.

Finally, the Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered that the State, *inter alia*:

- i. give Mr Flor Freire the status of a military officer in retirement with the corresponding rank and social benefits of his peers;
- ii. eliminate the reference to the disciplinary proceedings from his military record;
- iii. publish the judgment and its official summary;
- iv. implement training programmes for members of the armed forces on the prohibition of discrimination based on sexual orientation; and
- v. pay compensation in respect of pecuniary and non-pecuniary damages, as well as costs and expenses.

Languages:

Spanish, English.



Identification: IAC-2016-3-005

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 20.10.2016 / **e)** C 318 / **f)** Fazenda Brasil Verde Workers v. Brazil / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

5.3.5.2 Fundamental Rights – Civil and political rights – Individual liberty – **Prohibition of forced or compulsory labour.**

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

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

Keywords of the alphabetical index:

Discrimination based on economic status, prohibition / Slavery, prohibition / Trafficking, women, prohibition / Trafficking in persons, prohibition / Servitude / Slavery, definition.

Headnotes:

Slavery, servitude, forced labour, slave trade and trafficking of women are all prohibited by Article 6 ACHR. The rights not to be submitted to slavery, servitude, forced labour or trafficking in persons have an essential role in the American Convention, given that they are non-derogable.

The prohibition of slavery is considered an imperative norm of international law (*jus cogens*) and entails *erga omnes* obligations. Brazil and most States in the Americas are party to the two main international treaties on the subject: the 1926 Convention on Slavery and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

An overview of relevant provisions of binding international instruments and decisions of international tribunals on the international crime of slavery (or enslavement) confirms its absolute and universal prohibition in international law, and that its legal

definition has not varied substantially since the 1926 Slavery Convention.

The concept of slavery and its analogous forms has evolved and is not limited to ownership over the person, but also encompasses the loss of the person's own will or a considerable deprivation of personal autonomy. This manifestation of the exercise of the attributes of property, in modern times, should be understood as the control over a person that significantly restricts or deprives his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of a person. Usually, this exercise will be supported by and obtained through means such as violence force, deception and/or coercion.

In order to classify a situation as modern-day slavery, the following elements that manifest the "attributes of the right to ownership" should be assessed:

- a. restriction or control over one's individual autonomy;
- b. loss or deprivation of liberty of movement;
- c. the perpetrator obtains a benefit;
- d. absence of consent or free choice of the victim, or the impossibility or irrelevance of consent due to the threat of use of violence or other forms of coercion, fear of violence, deception or false promises;
- e. use of physical or psychological violence;
- f. the vulnerability of the victim;
- g. detention or bondage; and
- h. exploitation.

The expression "involuntary servitude" in Article 6.1 ACHR should be interpreted as "the obligation to carry out work for others, imposed by means of coercion, and the obligation to live on the property of another person, without the possibility of changing this condition." This is considered analogous to slavery and should receive the same protection and entail the same obligations as traditional slavery.

According to the definitions developed in international law, the prohibition of slave trade and trafficking in women "in all its forms" is broad and absolute.

In the current state of development of international law, the concepts of slave trade and trafficking in women have transcended their literal meaning in order to protect "persons" trafficked into various forms of exploitation without their consent. The element that links the prohibitions of slave trade and trafficking in women is the same: that is, the control exerted by the perpetrators over the victims during the transportation or transfer of the latter with the aim of exploitation.

The following elements are common to both forms of trafficking:

- i. control over movement or control of the physical environment;
- ii. psychological control;
- iii. adoption of measures to prevent escapes; and
- iv. forced or compulsory labour, including prostitution.

In light of the development of international law in this field over the last few decades, the expression "slave trade and traffic in women" established in Article 6.1 ACHR should be interpreted broadly to refer to "trafficking in persons." The protection established in this Article cannot be limited to women only or to "slaves," in light of the principle of most favourable interpretation and *pro persona* principle. The above is important to give concrete effect to the prohibition established in the American Convention in accordance to the evolution of the phenomenon of trafficking in persons in our societies.

The prohibition of "the slave trade and traffic in women" refers to:

- i. the recruitment, transportation, transfer, harbouring or receipt of persons;
- ii. by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. These requirements are not a necessary condition for the characterisation of trafficking in the case of persons under 18 years old;
- iii. for any exploitative purpose.

Summary:

I. As of 1988, a series of complaints were filed before the Federal Police and the Council for the Defence of Human Rights, alleging the practice of slave labour in the *Fazenda Brasil Verde* (Brazil Verde Farm), located in the state of Pará, Brazil.

In the State of Piauí, one of the poorest in the country, workers had been enticed by a recruiter, known locally as a "cat," who offered them a good salary and even payment in advance. They travelled several days by bus, train, and on the back of a truck. When they arrived at the *Fazenda*, their work permits were retained and they were obliged to sign blank documents. The regime consisted of 12 working hours or more, with a break of half an hour for lunch and only one day off per week. Dozens of workers slept in hammocks in ranches

without electricity, beds, or sanitary facilities. The food was insufficient, of poor quality and discounted from their wages. They got sick regularly and were not given medical attention. The work was carried out under orders, threats, and armed surveillance. In addition, in order to receive their salary they had to meet a production goal, which was difficult to achieve, so some were not paid for their services. These conditions generated a desire to flee. However, the vigilance, the lack of salary, the isolated location of the *Fazenda*, and its surroundings with the presence of wild animals, prevented it.

In March 2000, two young men managed to escape from the *Fazenda*. After receiving notice of the situation, the Ministry of Labour organised an inspection, during which the workers expressed their desire to leave. The audit report noted that 82 workers were submitted to slavery. The inspectors obliged the manager to pay them the amounts due in order to fulfill their labour contracts and to return their work permits. After the inspection, a public civil action was brought against the *Fazenda*. In a hearing in July 2000, the *Fazenda* committed to abstaining from keeping its workers under slave conditions and to improve working conditions or be fined. In August 2000 the proceedings were archived.

On 14 April 2015, the Inter American Commission of Human Rights submitted the case, alleging violations to Articles 1.1, 2, 5, 6, 7, 8, 22 and 25 ACHR.

The State submitted 10 preliminary objections:

- i. inadmissibility of the submission of the Case to the Court due to the publication of the Merits Report by the Inter-American Commission;
- ii. lack of jurisdiction *ratione personae* regarding some alleged victims;
- iii. lack of jurisdiction *ratione personae* over theoretical or abstract violations;
- iv. two objections of lack of jurisdiction *ratione temporis* over facts that occurred before the acceptance of the Court's jurisdiction by the State;
- v. lack of jurisdiction *ratione materiae* regarding the principle of subsidiarity of the Inter-American System;
- vi. lack of jurisdiction *ratione materiae* over alleged violations of the prohibition of trafficking in persons;
- vii. lack of jurisdiction *ratione materiae* over alleged violations of labour rights;
- viii. non-exhaustion of domestic remedies; and

- ix. prescription of the petition regarding pecuniary and non-pecuniary damages. The Court partially admitted the objection of lack of jurisdiction *ratione temporis* over facts that occurred before the acceptance of the Court's jurisdiction by the State. However, the Court rejected the other preliminary objections.

II. On the merits, the Court found the State internationally responsible for the violation of the rights to freedom from slavery and trafficking established in Article 6.1 ACHR, in relation to Article 1.1 ACHR (obligation to respect and ensure rights without discrimination), Article 3 ACHR (right to juridical personality), Article 5 ACHR (right to personal integrity), Article 7 ACHR (right to personal liberty), Article 11 ACHR (right to privacy) and Article 22 ACHR (freedom of movement and residence), to the detriment of 85 workers rescued from the Brazil Verde Farm on 15 March 2000, because the State did not adopt specific measures, taking into account their circumstances, to prevent the occurrence of a violation of Article 6.1 ACHR. Nor did the State act with the due diligence required to prevent this contemporary form of slavery. Furthermore, it did not act in accordance with the circumstances of the case to put an end to this type of violation. The Court considered that this breach of the duty to guarantee was particularly serious given the context known by the State and the obligations imposed by virtue of Article 6.1 ACHR.

Furthermore, the facts of the case show that one victim was subjected to child labour and that the State had knowledge of this and of the possibility that other children were facing the same conditions of slavery and violence. However, despite the gravity of these facts, it did not adopt measures to put an end to that situation and to provide rehabilitation and social reinsertion to the child. The State also failed to provide primary education or professional training. Therefore, the Court found the State responsible for the violation of Article 6.1 ACHR, also in relation to Article 19 ACHR with respect to this victim.

Additionally, the Court found that in the instant case, due to discrimination based on economic status, the State did not take into account the vulnerability of the 85 workers rescued in the year 2000. The Court then concluded that Brazil was responsible for violating Article 6.1 ACHR, in relation to Article 1.1 ACHR, in a situation of historic structural discrimination based on the economic status.

The Court also established that the State violated Articles 8.1 ACHR and 25.1 ACHR, in relation to Articles 1.1 ACHR and 2 ACHR, to the detriment

of 43 workers rescued during the inspection carried out on 23 April 1997 and of the 85 workers rescued during the inspection carried out on 15 March 2000. The Court held that none of the procedures initiated to investigate and prosecute the facts established during the two inspections were able to determine any responsibility for the crimes and did not provide reparation to the victims. The merits of the cases were never debated by a court of law. Besides, the Court concluded that the use of the figure of prescription in the proceedings, despite that the facts under investigation had the status of crimes of international law, was an obstacle to the investigation of the facts, to the determination and punishment of those responsible and the reparation of the victims. The Court also held that the lack of action and punishment of these facts was due to the normalisation of the conditions to which the persons with specific characteristics from the poorest states in Brazil were submitted. The Court found that the victims of the 2000 inspection shared these characteristics, which put them in a situation of vulnerability. Finally, with regard to the victim who was a child at the moment of the inspection, the Court considered that the violation of Article 25 ACHR is related to Article 19 ACHR.

Notwithstanding, the Court held that the alleged disappearances of Iron Canuto da Silva y Luis Ferreira da Cruz were not proved and, as a consequence, it did not establish state responsibility therefore.

Finally, the Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered, among other measures, that the State:

- i. publish the judgment and its official summary;
- ii. restart, with due diligence, investigations and/or criminal proceedings with regard to the facts, within a reasonable time, in order to identify, prosecute and, if applicable, punish those responsible;
- iii. adopt the necessary measures to ensure that the figure of prescription does not apply to the international law crime of slavery and its analogous forms; and
- iv. pay compensation for non-pecuniary damages, as well as costs and expenses.

Languages:

Spanish, English.



Identification: IAC-2016-3-006

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c) / d)** 30.11.2016 / **e)** C 329 / **f)** I.V. v. Bolivia / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.

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

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

Keywords of the alphabetical index:

Personal integrity / Health, sexual and reproductive / Consent, informed / Gender stereotyping / Discrimination, gender, access to justice / Reproductive capacity.

Headnotes:

Informed consent is an essential aspect of medical practice, which is based on the respect for autonomy and freedom of choice in each person's life plan. In other words, informed consent ensures the *effet utile* of the norm that recognises autonomy as a vital element of human dignity.

Because of doctors' specialised professional expertise and control over information, the doctor-patient relationship is characterised by an asymmetry of power. This relationship is governed by several principles of medical ethics, e.g. autonomy of the patient, beneficence, non-maleficence and justice. Since doctors, as any person, have their own preferences and convictions, some of their decisions may conflict with the decisions of their patients. For this reason, the principle of autonomy is of vital importance in the health field and acts as a balancing instrument between beneficent medical actions and the patient's power to decide, in order to prevent submitting patients to paternalistic acts.

Informed consent regarding the permanent loss of reproductive capacity, as occurs with the tubal ligation procedure, belongs to the realm of autonomy and private life of a woman. As such, every woman should be able to decide, in accordance with her life plans, if she wants to maintain her reproductive capacity, as well as the number and spacing of her children. Thus, the obligation to obtain free and informed consent is largely about setting boundaries to the medical practice in order to avoid arbitrary interference with personal integrity and private life. This issue is especially important for women's access to health services of family planning and other related services concerning sexual and reproductive health.

The rule of informed consent is related to the right to access information in the health field, because a patient can only give free and informed consent if she has received and understood enough information to allow her to do so. The right to access information in the health sphere acts as essential for achieving the effective implementation of the right to autonomy in reproductive health matters.

From the perspective of international law, informed consent is an obligation that has been established in the development of the human rights of patients. It is not only an ethical obligation, but also a binding legal obligation of the medical personnel, which forms part of the good medical practice and expertise (*lex artis*), guaranteeing accessible and acceptable health services.

Informed consent is a decision to willingly submit to a medical act understood in a broad sense, obtained freely and prior to the procedure, that is, without any type of threat, coercion or inducement. That decision must have been expressed after obtaining adequate, complete, reliable, comprehensible and accessible information, which the patient must have fully understood. Informed consent is not only an act, but rather the result of a process where certain elements should be fulfilled, namely:

- i. consent should be given prior to any medical act; the only exception being when an emergency or life threatening situation occurs and consent cannot be obtained;
- ii. consent should be free, voluntary and autonomous; and
- iii. consent should be full and informed.

In cases of sterilisation, consent can only be given by the woman concerned; thus, the authorisation of a partner or other party should not be requested. Consent in cases where women are not in conditions

to make an informed decision does not constitute free consent, because of the stress and vulnerability that she is submitted to, for example, before and after delivery or a caesarean section. This situation of vulnerability is compounded when women are faced with multiple grounds of discrimination, such as gender stereotypes, race, disability, socioeconomic or refugee status.

The freedom and autonomy of women with regard to sexual health matters has been historically limited, restricted or denied based on negative and harmful gender stereotypes. Negative or harmful gender stereotypes can impact and affect access to women's sexual and reproductive health information, as well as the process and manner in which consent is obtained. The phenomenon of involuntary sterilisation is the product of historical inequities between men and women. Although sterilisation can be used as a contraceptive method for men and women, involuntary sterilisation, as a phenomenon, affects women disproportionately because of the socially assigned reproductive role as responsible for contraception. In other terms, women are more exposed to involuntary sterilisation during caesarean sections.

The existence of a clear and coherent regulation regarding the provision of health services is imperative to guarantee sexual and reproductive health. Due regulation of family planning and other types of information needed in the sexual and reproductive health areas, as well as the enactment of legislation on informed consent and its elements, all contribute to the prevention of violations of the human rights of women.

While historically the protection against torture and ill-treatment has been developed in response to acts and practices which occurred during an interrogation, as well as in the context of imprisonment, the international human rights community has begun to acknowledge progressively that torture and ill-treatment can happen in other contexts. Such contexts include custody and the field of health services, specifically reproductive health. In this regard, the concept of discrimination plays a fundamental role in analysing human rights violations against women, as well as understanding torture and ill-treatment from a gender perspective.

Concerning access to justice, if prior, free, full and informed consent is a requirement for a sterilisation to be in accordance with international standards, then authorities should guarantee legal remedies in cases where consent was not appropriately obtained. There is a growing recognition that forced, coerced, non-consented and involuntary sterilisation

cannot go unpunished, because it could institutionalise discriminatory stereotypes in the reproductive health field based on the belief that women are not capable of adopting responsible decisions about their own body and health. Thus, States must put in place adequate, effective and accessible mechanisms to establish responsibilities in the disciplinary, administrative or judicial fields in order to guarantee reparations to victims.

Summary:

I. On 1 July 2000, Ms I.V. entered the Women's Hospital of La Paz, Bolivia, due to pain caused by the spontaneous rupture of her membrane at week 38.5 of gestation, which led to a caesarean delivery. The caesarean section was initiated by a third-year resident doctor at about 7:00 pm. However, during the surgical procedure, the presence of multiple adhesions remaining on the lower part of the uterus was observed. Because of the difficulty of the procedure, the obstetrician gynaecologist took over the operation. After the neonatologist carried away the new-born baby, a bilateral salpingo-oophorectomy was performed to I.V. through the Pomeroy method, commonly known as tubal ligation. Both of these surgical procedures were performed with the patient under epidural anaesthesia.

It was alleged that I.V. was never informed nor consulted prior to the sterilisation procedure, and that she found out about the permanent loss of her reproductive capacity upon being told by the resident doctor the day after the surgery. The State rejected these claims, stating that I.V. consented verbally during the procedure.

After the facts and claims presented by I.V.:

- i. three audits were carried out;
- ii. the Ethics Tribunal of the Medical Association of the Department of La Paz issued an opinion;
- iii. an administrative procedure was brought before the Legal Counsel of the La Paz Health Services office; and
- iv. criminal proceedings were initiated against the doctor for the crime of physical injury which ended because of statutory limitations. Notwithstanding the State's efforts with regard to I.V.'s claims, no one has been found responsible, disciplinary, administratively or criminally, for her non-consented sterilisation.

The dispute in this case consisted in determining if the tubal ligation performed on I.V. by a public servant in a public hospital was in contravention with the international obligations of the State. The

fundamental issue was to determine if the procedure was obtained with the informed consent of the patient, under the parameters of international law for this type of medical procedure at the time that the events occurred.

On 23 April 2015, the Inter-American Commission on Human Rights submitted the case, alleging violations to Articles 5.1, 8.1, 11.2, 13.1, 17.2 and 25.1 ACHR in relation to Article 1.1 thereof and Article 7.a, 7.b, 7.c, 7.f and 7.g of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("*Belém do Pará Convention*").

The State submitted two preliminary objections: i) lack of jurisdiction *ratione loci*, and ii) non-exhaustion of domestic remedies. The Court rejected the first preliminary objection, considering that the object of the claims made by the representatives was the tubal ligation that took place in Bolivia, not the facts that occurred when I.V. lived in Peru. The second preliminary objection was also rejected on the grounds that the State did not explain why the constitutional *amparo* recourse was an adequate, appropriate, and effective remedy in the circumstances of the instant case.

II. On the merits, the Court found the State internationally responsible for the violation of the duty to respect and guarantee, as well as the obligation not to discriminate, the rights recognised in Articles 5.1, 7.1, 11.1, 11.2, 13.1 and 17.2 ACHR in relation to Article 1.1 ACHR and Article 7.a and 7.b of the *Belém do Pará Convention*, to the detriment of I.V. This stems from the following facts:

- i. even though general regulations existed in terms of informed consent, the State did not adopt preventive measures to assure Ms I.V. her right to make her own decisions regarding her reproductive health and the election of contraceptive measures that better adjusted to her life plan, in order to prevent any involuntary sterilisation;
- ii. sterilisation is not an urgent surgery or emergency procedure;
- iii. even in the case alleged by the State that Ms I.V. had given her verbal consent during the surgery, the physician failed to comply with the duty to obtain prior, free, full and informed consent as required by the American Convention on Human Rights because she was under the pressure, stress and vulnerability of a patient undergoing surgery. This situation did not allow for the manifestation of free and full will, and thus prevented valid consent;

- iv. the authorisation signed by the husband for the caesarean section does not count as a valid authorisation for I.V.'s tubal ligation. Consequently, the Court concluded that Ms I.V. was submitted to a non-consented or involuntary sterilisation.

The Court also established that the non-consented or involuntary sterilisation that I.V. was submitted to, in the particular circumstances of the case, constituted a cruel, inhuman and degrading treatment, against the dignity of the human being and in violation of Article 5.1 and 5.2 ACHR in relation to Article 1.1 ACHR. The Court analysed the intensity of the suffering endured by I.V. and concluded that she:

- i. lost her reproductive capacity permanently;
- ii. had several physical consequences which led to another surgery afterwards because she was diagnosed with placental remains in the endometrial cavity;
- iii. suffered severe psychological consequences that required psychiatric treatment;
- iv. the sterilisation affected her private life which led to her separation from her husband;
- v. the non-consented sterilisation also interfered with her relationship with her family, particularly her daughters;
- vi. the non-consented sterilisation caused an economic burden on I.V. in her pursuit of justice; and
- vii. the absence of response from the judicial system caused I.V. a feeling of impotence and frustration.

The Court established that the State did not comply with its obligation to guarantee, without discrimination, the right to access to justice in the terms of Articles 8.1 and 25.1 ACHR in relation to Article 1.1 ACHR. In addition, the State did not comply with its positive obligation to take preventive measures to repair discriminatory situations in violation of Article 7.b, 7.c, 7.f, 7.g of the Belém do Pará Convention. The Court considered that the State had the duty to act with due diligence and to adopt appropriate measures to avoid delays in the proceedings, in order to guarantee a prompt resolution of the case and to avoid impunity. The Court noted that during the criminal proceedings there were several obstacles and flaws that affected the effectiveness of the procedure and led to the extinction of the legal action after 4 years without a final decision. Moreover, the Court noted that in I.V.'s case multiple factors of discrimination came together in an intersectional manner in the access to justice, associated with her status as a woman, a refugee, and her socio-economic condition. In particular, the Court stated that there was a geographic obstacle in

accessing the tribunal that implied a high socio-economic cost because of the necessity to move far away in order to get to the court, and the vulnerability caused by her pursuit of justice led to several pressures, including investigations into her residence status in Bolivia.

Finally, the Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered that the State:

- i. provide free, immediate, adequate and effective medical and psychological or psychiatric treatment to the victim, especially in sexual and reproductive health matters;
- ii. publish the Judgment and its official summary;
- iii. to perform an act to acknowledge the State's international responsibility;
- iv. to design a publication or brochure which contains accessible and clear information regarding the reproductive and sexual rights of women with specific mention of the requirement of prior, free, full and informed consent;
- v. to incorporate a continuing education program on topics such as informed consent, gender discrimination, stereotypes and violence against women, for medical students, doctors and all personnel working in to health and social security; and
- vi. to pay pecuniary and non-pecuniary damages, as well as costs and expenses.

Languages:

Spanish, English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2016-3-011

a) European Union / **b)** Court of Justice of the European Union / **c)** Third Chamber / **d)** 27.10.2016 / **e)** C-428/15 / **f)** / **g)** ECLI:EU:C:2016:819 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**

Keywords of the alphabetical index:

Judicial cooperation in civil matters / Case, transfer to a court of another EU Member State / Child, best interests.

Headnotes:

1. Article 15 of Council Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation no. 1347/2000, must be interpreted as meaning that it is applicable where a child protection application brought under public law by the competent authority of a Member State concerns the adoption of measures relating to parental responsibility, such as the application at issue in the main proceedings, where it is a necessary consequence of a court of another Member State assuming jurisdiction that an authority of that other Member State thereafter commence proceedings that are separate from those brought in the first Member State, pursuant to its own domestic law and possibly relating to different factual circumstances.

2. Article 15.1 of Regulation no. 2201/2003 must be interpreted as meaning that:

- in order to determine that a court of another Member State with which the child has a particular connection is better placed, the court having jurisdiction in a Member State must be satisfied that the transfer of the case to that other court is such as to provide genuine and specific added value to the examination of that case, taking into account, *inter alia*, the rules of procedure applicable in that other Member State;
- in order to determine that such a transfer is in the best interests of the child, the court having jurisdiction in a Member State must be satisfied, in particular, that that transfer is not liable to be detrimental to the situation of the child.

3. Article 15.1 of Regulation no. 2201/2003 must be interpreted as meaning that the court having jurisdiction in a Member State must not take into account, when applying that provision in a given case relating to parental responsibility, either the effect of a possible transfer of that case to a court of another Member State on the right of freedom of movement of persons concerned other than the child in question, or the reason why the mother of that child exercised that right, prior to that court being seized, unless those considerations are such that there may be adverse repercussions on the situation of that child.

Summary:

I. This request for a preliminary ruling has arisen in the context of a dispute between the Child and Family Agency, Ireland (hereinafter, the “Agency”) and Ms J. D., concerning the action to be taken in relation to her second child, the young minor R.

Ms D., national of the United Kingdom, pregnant with her second child was still resident in this country. Her first child was placed in institutional care in the United Kingdom in 2010, after Ms D. was diagnosed as suffering from an ‘anti-social’ personality disorder, and had, further, physically abused that child. Ms D was, in the light of the medical and family history, subject to a ‘pre-birth assessment’ carried out by the child protection authorities of United Kingdom. The competent authorities nonetheless considered that her second child should after his birth be placed in the care of a foster family, pending the commencement of adoption proceedings by a third party. Ms D. then moved to Ireland where was born her second child R on 25 October 2014.

Shortly after R.'s birth, the Agency made an application to the District Court having jurisdiction for an order that the child should be placed in care. That application was however dismissed on the ground that hearsay evidence from the United Kingdom on which the Agency relied was inadmissible.

The Agency further made an application to the High Court requesting that the substance of the case be transferred to the High Court of Justice of England and Wales, pursuant to Article 15 of Regulation no. 2201/2003. That application was supported by R.'s guardian *ad litem*.

By his judgment, the High Court authorised the Agency to make an application to the High Court of Justice of England and Wales to assume jurisdiction in relation to the case at issue. So, Ms D. sought leave to bring an appeal against that judgment directly before the Supreme Court who submitted in this regard questions to the Court of Justice of the European Union for a preliminary ruling.

II. In its judgment, the Court points out first of all that, on the one hand, the Article 15 of Regulation no. 2201/2003 is in Section 2 of Chapter II of that regulation, that section establishing a body of rules of jurisdiction in cases concerning parental responsibility, and, on the other, this article lays down a specific rule of jurisdiction that derogates from the general rule of jurisdiction, laid down in Article 8 of that regulation, that designates the courts of the place where the child is habitually resident as the courts having jurisdiction as to the substance of those cases.

Next, the Court points out that, under the requirement that the transfer of a case to a court of another Member State must be in the best interests of the child constitutes an expression of guiding principle that was, on the one hand, followed by the legislature in this Regulation, and that must, on the other, determine the form of its application in cases relating to parental responsibility within its scope.

The Court has also ruled that the rule of transfer to a court of another Member State laid down in the abovementioned Article 15.1 constitutes a special rule of jurisdiction that derogates from the general rule of jurisdiction laid down in Article 8.1 of that regulation, and consequently it must be interpreted as meaning that the court of a Member State that normally has jurisdiction to deal with a given case must, if it is to be able to request a transfer to a court of another Member State, be capable of rebutting the strong presumption in favour of maintaining its own jurisdiction, on the basis of that regulation.

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-2016-3-012

a) European Union / **b)** Court of Justice of the European Union / **c)** Sixth Chamber / **d)** 10.11.2016 / **e)** C-548/15 / **f)** J.J. de Langue v. Staatssecretaris van Financiën / **g)** ECLI:EU:C:2016:850 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Tax concession / Tax deduction / Employment, job-creating measure / Employment, training, vocational, tax deduction / Youth, protection.

Headnotes:

Article 3.1.b of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that a taxation scheme, such as that at issue in the main proceedings, which provides that the tax treatment of vocational training costs incurred by a person differs depending on his age, comes within the material scope of that Directive to the extent to which the scheme is designed to improve access to training for young people. In those circumstances, a taxation scheme such as that at issue in the main proceedings can be regarded as relating to access to vocational training, within the meaning of Article 3.1.b of Directive 2000/78.

Article 6.1 of Directive 2000/78 must be interpreted as not precluding a taxation scheme, such as that at issue in the main proceedings, which allows persons who have not yet reached the age of 30 to deduct in full, under certain conditions, vocational training costs from their taxable income, whereas that right to deduct is restricted in the case of persons who have reached that age, in so far as, first, that scheme is objectively and reasonably justified by a legitimate objective relating to employment and labour market policy and, second, the means of attaining that objective are appropriate and necessary. It is for the national court to determine whether that is the case.

In fact, the objective of promoting the position of young people on the labour market in order to promote their vocational integration or ensure their protection can be regarded as legitimate for the purposes of Article 6.1 of Directive 2000/78. Moreover, as regards, the appropriateness of a taxation scheme such as that in the main proceedings, it is common ground that such a scheme is capable of improving the position of young people on the labour market in that, for them, it amounts to an incentive to pursue vocational training. Finally, concerning the contested taxation scheme is strictly necessary, it does not appear, account being taken of the broad discretion enjoyed by the Member States and both sides of industry enjoy in the field of social policy and employment, that by adopting this taxation scheme the national legislature has gone beyond what is necessary to achieve the objective pursued.

Summary:

I. In the course of 2008, when he was 32 years old, Mr de Lange started training as a commercial airline pilot. In his 2009 declaration for income tax and social security contributions, he included, as a personal deduction, an amount of EUR 44 057 corresponding to the costs stemming from that training.

It follows from the order for reference that the legislation at issue in the dispute in the main proceedings allows, under certain conditions, persons under the age of 30 to deduct in full from their taxable income the costs of vocational training. By contrast, that right to deduction is limited to an amount of EUR 15 000 for persons who have reached that age.

The Netherlands tax authorities thus acknowledged the applicant's right, based on Article 6.30 of the Law on income tax, to a flat-rate deduction of EUR 15 000 only. The action brought by Mr de Lange against that decision having been dismissed by the first-instance and appellate courts, Mr de Lange has appealed on a point of law to the referring court.

In those circumstances, the *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands) is unsure as to the applicability of Directive 2000/78 and of the principle of non-discrimination on grounds of age to a taxation scheme concerning the deduction of study costs. As appropriate, it queries whether the difference in treatment which arises from such a scheme and which consists in the granting, or not, of a right to full deduction on the basis, in particular, of the criterion of age can be justified.

II. The Court of Justice of the European Union recalled that, it is apparent both from the title and preamble and from the content and purpose of Directive 2000/78 that that Directive is intended to lay down a general framework in order to guarantee equal treatment in employment and occupation for all persons, by offering them effective protection against discrimination on any of the grounds mentioned in its Article 1, which include age.

Moreover, the Court found that, in the light of Article 16.a of Directive 2000/78, pursuant to which Member States must take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished, Article 3.1.b of that Directive must be taken to mean that it also covers a tax provision such as that at issue in the main proceedings, adopted with the aim of promoting access to training for young people and, consequently, improving their position on the labour market.

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-2016-3-013

a) European Union / **b)** Court of Justice of the European Union / **c)** First Chamber / **d)** 24.11.2016 / **e)** C-443/15 / **f)** David L. Parris c. Trinity College Dublin e.a. / **g)** ECLI:EU:C:2016:897 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Retirement, age / Homosexual, partnership, registration / Pension, survivor, partnership, time of registration / Civil partnership, same-sex, registered.

Headnotes:

Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that a national rule which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age, does not constitute discrimination on grounds of sexual orientation. In fact, the Member States are free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect.

Consequently, EU law, in particular Directive 2000/78, did not require the Member State to provide before the date to entry into force of Law on marriage or a form of civil partnership for same-sex couples, nor to give retrospective effect to the Civil Partnership Act and the provisions adopted pursuant to that act, nor, as regards the survivor's benefit at issue in the main proceedings, to lay down transitional measures for same-sex couples in which the member of the scheme had already reached the age of 60 on the date of entry into force of the act.

Moreover, Articles 2 and 6.2 of Directive 2000/78 must be interpreted as meaning that a national rule does not constitute discrimination on grounds of age. Such a rule thus treats members who marry or enter into a civil partnership after their 60th birthday less favourably than those who marry or enter into a civil partnership before reaching the age of 60. It follows that the national rules at issue in the main proceedings establish a difference in treatment based directly on the criterion of age.

However, that legislation fixes an age for entitlement to an old age benefit, and that, consequently, the rule is covered by Article 6.2 of Directive 2000/78. In that respect, by making the acquisition of the right to receive a survivor's benefit subject to the condition that the member marries or enters into a civil partnership before the age of 60, that rule merely lays down an age limit for entitlement to that benefit. In other words, the national rule at issue in the main proceedings fixes an age for access to the survivor's benefit under the pension scheme concerned.

Articles 2 and 6.2 of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation.

Summary:

I. Dr Parris was born on 21 April 1946 and has dual Irish and British nationality. He has lived with his same-sex partner in a committed relationship for more than 30 years. Dr Parris was employed as a lecturer at Trinity College from 1972 to 2010. In that capacity he was also admitted as a non-contributory member to the Trinity College pension scheme.

On 17 September 2010, Dr Parris made a formal application to Trinity College to have his partner's right to a survivor's pension recognised. That application was rejected under Rule 5 of the pension scheme, Dr Parris's civil partnership not having been entered into before his 60th birthday. The Higher Education Authority confirmed the decision given by Trinity College.

Dr Parris lodged a complaint against the negative decisions with the Equality Tribunal, an anti-discrimination agency, arguing that he had been directly and/or indirectly discriminated against on grounds of his age and sexual orientation in breach of the Pensions Act 1990 as amended. Since that complaint was also unsuccessful, Dr Parris finally brought the pending action before the Labour Court.

By its request for a preliminary ruling, the national court seeks to clarify whether that age limit constitutes discrimination prohibited by EU law under Directive 2000/78, given that, until a few years ago, same-sex couples in Ireland were not able either to marry or to contract a civil partnership. More specifically, it was for legal reasons impossible in Ireland for homosexual employees, such as Dr Parris, who were born before 1 January 1951 to meet the

requirement to enter into a marriage or civil partnership before reaching the age of 60. While it is true that Dr Parris could have entered into a civil partnership before his 60th birthday abroad (that is to say, in the United Kingdom), this, as the referring court points out, would not have been recognised in Ireland before he reached the age limit of 60.

II. The Court of Justice of the European Union first found that a survivor's pension provided for under an occupational pension scheme falls within the scope of Article 157 TFEU. The Court has stated that the fact that such a pension, by definition, is paid not to the worker but to his survivor cannot affect that interpretation, since, such a pension being a benefit deriving from the survivor's spouse's membership of the scheme, the pension accrues to the survivor by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the spouse's employment. For determining whether a pension scheme falls within the concept of 'pay', the arrangements for its funding and management are not conclusive.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



Identification: ECJ-2016-3-014

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 24.11.2016 / **e)** C-454/15 / **f)** Jürgen Webb-Sämann v. Christopher Seagon / **g)** ECLI:EU:C:2016:891 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Employment, worker, pension, protection / Social security, contribution, basis / Insolvency, worker, pension, protection.

Headnotes:

1. Article 8 of Directive 2008/94 on the protection of employees in the event of the insolvency of their employer, must be interpreted as meaning that it does not require that, in the event of employer insolvency, money withheld from a former employee's salary converted into pension contributions, which that employer should have paid into a pension fund on behalf of that employee, be excluded from the scope of insolvency proceedings.

In that regard, the Court has already held that a correct transposition of Article 8 of that directive, on margin of appreciation when implementing this provision, requires an employee to receive, in the event of the insolvency of his employer, at least half of the old-age benefits arising out of the accrued pension rights for which he has paid contributions under a supplementary occupational pension scheme, although that does not mean that, in other circumstances, the losses suffered could also, even if their percentage differs, be regarded as manifestly disproportionate in the light of the obligation to protect the interests of employees, referred to in Article 8 of that directive.

Therefore, in so far as a Member State fulfils the obligation to ensure the minimum level of protection required in the event of the insolvency of their employer by Article 8 of Directive 2008/94, its margin of appreciation as regards the mechanism for protection of entitlements to old-age benefits under a supplementary occupational pension scheme in the event of insolvency of the employer cannot be affected.

2. In this regard, the protection guaranteed by Article 8 is complementary to that guaranteed by Article 3 of that directive, and they can both apply together to the same situation. The fact remains that Article 3 and Article 8 of Directive 2008/94 have different purposes and concern two different types of protection.

Therefore, Article 8 of Directive 2008/94, for its part, has a more restricted material scope in so far as it seeks to protect the interest of employees in securing payment of their pension claims. Moreover, that article, unlike Articles 3 and 4 of that directive, does not provide expressly for Member States to have the

power to limit the level of protection. Finally, contrary to Article 3 of that directive, Article 8 thereof seeks to guarantee the protection of the long-term interests of employees, given that, as regards immediate or prospective entitlements, such interests extend, in principle, over the entire retirement period.

Summary:

I. Mr Jürgen Webb-Sämann, the applicant, had been employed since 18 November 1996 on a part-time basis by *Baumarkt Praktiker* DIY GmbH and its predecessors in law ('the general debtor'). Certain amounts of money were withheld from the applicant's salary by his employer and converted into pension contributions.

On 1 October 2013, insolvency proceedings were opened against the general debtor. It became apparent that for the period between January and September 2013 the general debtor had not paid the applicant's pension contributions over to the relevant pension fund.

The *Hessisches Landesarbeitsgericht* (Higher Labour Court, Hessen, Germany), the referring court, before which the applicant appealed against the judgment of first instance who dismissed the applicant's action, decided to stay the proceedings and to refer the following question to the Court of Justice on interpretation of Article 8 of Directive 2008/94.

II. The Court of Justice of the European Union recalled that Directive 2008/94, aims to ensure, in the context of EU law, a minimum degree of protection for those employees in the event of the insolvency of their employer, without prejudice, in accordance with Article 11 thereof, to more favourable provisions which the Member States may apply or introduce. The level of protection required by that Directive for each of the specific guarantees that it establishes must be determined having regard to the words used in the corresponding provision, interpreted, if need be, in the light of the jurisprudence.

Moreover, the Court pointed out although pension contributions are not expressly referred to in Article 8 of Directive 2008/94, they are closely connected with the rights conferring immediate or prospective entitlement to old-age benefits, which that provision seeks to protect. Those contributions are designed to finance the immediate entitlement of employees at the time of their retirement. The employer to pay contributions could constitute a cause of underfunding of a supplementary occupational pension scheme, a situation which falls under Article 8 of that directive.

Languages:

Bulgarian, 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-2016-3-010

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 13.09.2016 / **e)** 50541/08 *et al.* / **f)** Ibrahim and Others v. the United Kingdom / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

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.**

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

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

Keywords of the alphabetical index:

Public safety, threat, imminent / Lawyer, access, delayed.

Headnotes:

Delayed access to a lawyer during police questioning owing to exceptionally serious and imminent threat to public safety.

The test for determining whether compelling reasons existed for restrictions on access to legal advice at the first interrogation of the suspect is a stringent one – such restrictions are only permitted in exceptional circumstances, and must be of a temporary nature, be based on an individual assessment of the particular circumstances of the case and have a basis in domestic law. Where compelling reasons are found to have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were “fair” for the purposes of Article 6.1 ECHR. Where there are no compelling reasons for restricting access, the onus will be on the respondent Government to demonstrate convincingly

why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice (see paragraphs 258, 264 and 265 of the judgment).

Summary:

I. On 21 July 2005, two weeks after 52 people were killed as the result of suicide bombings in London, further bombs were detonated on the London public transport system but, on this occasion, failed to explode. The perpetrators fled the scene. The first three applicants were arrested but were refused legal assistance for periods of between four and eight hours to enable the police to conduct “safety interviews” (A safety interview is an interview conducted urgently for the purpose of protecting life and preventing serious damage to property. Under the Terrorism Act 2000, such interviews can take place in the absence of a solicitor and before the detainee has had the opportunity to seek legal advice.). During the safety interviews they denied any involvement in or knowledge of the events of 21 July. At the trial, they acknowledged their involvement in the events but claimed that the bombs had been a hoax and were never intended to explode. The statements made at their safety interviews were admitted in evidence against them and they were convicted of conspiracy to murder. The Court of Appeal refused them leave to appeal.

The fourth applicant was not suspected of having detonated a bomb and was initially interviewed by the police as a witness. However, he started to incriminate himself by explaining his encounter with one of the suspected bombers shortly after the attacks and the assistance he had provided to that suspect. The police did not, at that stage, arrest and advise him of his right to silence and to legal assistance, but continued to question him as a witness and took a written statement. He was subsequently arrested and offered legal advice. In his ensuing interviews, he consistently referred to his written statement, which was admitted as evidence at his trial. He was convicted of assisting one of the bombers and of failing to disclose information about the bombings. His appeal against conviction was dismissed.

II. Article 6.1 ECHR in conjunction with Article 6.3.c ECHR

a. General principles

i. Clarification of the principles governing restrictions on access to a lawyer – The Grand Chamber considered it necessary to clarify the two stages of

the *Salduz v. Turkey* – test for assessing whether a restriction on access to a lawyer was compatible with the right to a fair trial and the relationship between those two stages. It recalled that the first stage of the *Salduz* test required the Court to assess whether there were compelling reasons for the restriction, while the second stage required it to evaluate the prejudice caused to the rights of the defence by the restriction, in other words, to examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.

The criterion of compelling reasons was a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice were permitted only in exceptional circumstances, and had to be of a temporary nature and be based on an individual assessment of the particular circumstances of the case. Relevant considerations when assessing whether compelling reasons had been demonstrated was whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them.

Where a respondent Government convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this could amount to compelling reasons to restrict access to legal advice for the purposes of Article 6 ECHR. However, a non-specific claim of a risk of leaks could not.

As to whether a lack of compelling reasons for restricting access to legal advice was, in itself, sufficient to found a violation of Article 6 ECHR, the Court reiterated that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6.3 ECHR rights as specific aspects of the overall right to a fair trial rather than ends in themselves. The absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6 ECHR.

However, the outcome of the “compelling reasons” test was nevertheless relevant to the assessment of overall fairness. Where compelling reasons were found to have been established, a holistic assessment of the entirety of the proceedings had to be conducted to determine whether they were “fair” for the purposes of Article 6.1 ECHR. Where there were no compelling reasons, the Court had to apply a very strict scrutiny to

its fairness assessment. The failure of the respondent Government to show compelling reasons weighed heavily in the balance when assessing the overall fairness of the trial and could tip the balance in favour of finding a breach of Article 6.1 and 6.3.c ECHR. The onus would be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.

ii. Principles governing the right to notification of the right to a lawyer and the right to silence and privilege against self-incrimination – In the light of the nature of the privilege against self-incrimination and the right to silence, in principle there could be no justification for a failure to notify a suspect of these rights. Where access to a lawyer was delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer and his right to silence and privilege against self-incrimination took on particular importance. In such cases, a failure to notify would make it even more difficult for the Government to rebut the presumption of unfairness that arises where there are no compelling reasons for delaying access to legal advice or to show, even where there are compelling reasons for the delay, that the proceedings as a whole were fair.

b. Application of the principles to the facts

i. First three applicants – The Government had convincingly demonstrated in the case of the first three applicants the existence of an urgent need when the safety interviews were conducted to avert serious adverse consequences for the life and physical integrity of the public. The police had had every reason to assume that the conspiracy was an attempt to replicate the events of 7 July and that the fact that the bombs had not exploded was merely a fortuitous coincidence. The perpetrators of the attack were still at liberty and free to detonate other bombs. The police were operating under enormous pressure and their overriding priority was, quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot. There was a clear legislative framework basis for the restriction in domestic law regulating the circumstances in which access to legal advice for suspects could be restricted and offering important guidance for operational decision-making, an individual decision to limit each of the applicants’ right to legal advice was taken by a senior police officer based on the specific facts of their cases and there had been strict limits on the duration of the restrictions, which had to end as soon as the circumstances justifying them ceased to exist and in any case within 48 hours.

There had thus been compelling reasons for the temporary restrictions on the first three applicants' right to legal advice.

The Court also concluded that in the cases of each of the first three applicants and notwithstanding the delay in affording them access to legal advice and the admission at trial of statements made in the absence of legal advice, the proceedings as a whole had been fair. In so finding it noted among other things that:

- a. apart from errors made when administering the cautions, the police had adhered strictly to the legislative framework and to the purpose of the safety interviews (to obtain information necessary to protect the public) and the applicants had been formally arrested and informed of their right to silence, their right to legal advice and of the reasons for the decision to restrict their access to legal advice;
- b. the applicants were represented by counsel and had been able to challenge the safety interview evidence in *voir dire* proceedings before the trial judge, at the trial and on appeal;
- c. the statements made during the safety interviews were merely one element of a substantial prosecution case against the applicants;
- d. in his summing up to the jury, the trial judge had summarised the prosecution and defence evidence in detail and carefully directed the jury on matters of law, reminding them that the applicants had been denied legal advice before the safety interviews; and
- e. there was a strong public interest in the investigation and punishment of terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily lives.

The Court therefore found no violation of Article 6.1 ECHR.

ii. The fourth applicant – As with the first three applicants, the Grand Chamber accepted that there had been an urgent need to avert serious adverse consequences for life, liberty or physical integrity. However, it found that the Government had not convincingly demonstrated that those exceptional circumstances were sufficient to constitute compelling reasons for continuing with the fourth applicant's interview after he began to incriminate himself without cautioning him or informing him of his right to legal advice. In so finding, it took into account the complete absence of any legal framework enabling the police to act as they did, the lack of an individual and recorded determination on the basis of the applicable provisions of domestic law of whether to restrict his access to legal advice and, importantly, the deliberate

decision by the police not to inform the fourth applicant of his right to remain silent.

In the absence of compelling reasons for the restriction of the fourth applicant's right to legal advice, the burden of proof shifted to the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. The Grand Chamber found that the Government had not discharged that burden, for the following reasons:

- a. the decision, without any basis in domestic law and contrary to the guidance given in the applicable code of practice, to continue to question the fourth applicant as a witness meant that he was not notified of his procedural rights; this constituted a particularly significant defect in the case;
- b. although the fourth applicant had been able to challenge the admissibility of his statement in a *voir dire* procedure at the trial, the trial court did not appear to have heard evidence from the senior police officer who had authorised the continuation of the witness interview and so, along with the court of appeal, was denied the opportunity of scrutinising the reasons for the decision and determining whether an appropriate assessment of all relevant factors had been carried out;
- c. the statement formed an integral and significant part of the probative evidence upon which the conviction was based, having provided the police with the framework around which they subsequently built their case and the focus for their search for other corroborating evidence; and
- d. the trial judge's directions left the jury with excessive discretion as to the manner in which the statement, and its probative value, were to be taken into account, irrespective of the fact that it had been obtained without access to legal advice and without the fourth applicant having been informed of his right to remain silent.

Accordingly, while it was true that the threat posed by terrorism could only be neutralised by the effective investigation, prosecution and punishment of all those involved, the Court considered that in view of the high threshold applicable where the presumption of unfairness arises and having regard to the cumulative effect of the procedural shortcomings in the fourth applicant's case, the Government had failed to demonstrate why the overall fairness of the trial was not irretrievably prejudiced by the decision not to caution him and to restrict his access to legal advice.

The Court therefore found a violation of Article 6.1 ECHR.

Cross-references:

European Court of Human Rights:

- *A. and Others v. the United Kingdom* [GC], no. 3455/05, 19.02.2009, *Reports of Judgments and Decisions* 2009;
- *Aleksandr Zaichenko v. Russia*, no. 39660/02, 18.02.2010;
- *Allan v. the United Kingdom*, no. 48539/99, 05.11.2002, *Reports of Judgments and Decisions* 2002-IX;
- *Brennan v. the United Kingdom*, no. 39846/98, 16.10.2001, paragraph 45, *Reports of Judgments and Decisions* 2001-X;
- *Brusco v. France*, no. 1466/07, 14.10.2010;
- *Bykov v. Russia* [GC], no. 4378/02, 10.03.2009, paragraphs 89-93;
- *Can v. Austria*, no. 9300/81, 30.09.1985, Commission's report, 12.07.1984, Series A, no. 96;
- *Dayanan v. Turkey*, no. 7377/03, 13.10.2009;
- *Deweer v. Belgium*, no. 6903/75, 27.02.1980, paragraphs 42-46, Series A, no. 35;
- *Dvorski v. Croatia* [GC], no. 25703/11, 20.10.2015, *Reports of Judgments and Decisions* 2015;
- *Eckle v. Germany*, no. 8130/78, 15.07.1982, paragraph 73, Series A, no. 51;
- *Gäfgen v. Germany* [GC], no. 22978/05, 01.06.2010, paragraphs 166-169, *Reports of Judgments and Decisions* 2010;
- *Heaney and McGuinness v. Ireland*, no. 34720/97, 21.12.2000, paragraphs 47-55, *Reports of Judgments and Decisions* 2000-XII;
- *Imbrioscia v. Switzerland*, no. 13972/88, 24.11.1993, paragraphs 36-38, Series A, no. 275;
- *Jalloh v. Germany* [GC], no. 54810/00, 11.07.2006, paragraphs 97-100, *Reports of Judgments and Decisions* 2006-IX;
- *John Murray v. the United Kingdom*, no. 18731/91, 08.02.1996, paragraphs 45-49, *Reports of Judgments and Decisions* 1996-I;
- *Magee v. the United Kingdom*, no. 28135/95, 06.06.2000, *Reports of Judgments and Decisions* 2000-VI;
- *Mayzit v. Russia*, no. 63378/00, 20.01.2005, paragraph 77;
- *McFarlane v. Ireland* [GC], no. 31333/06, 10.09.2010, paragraph 143;
- *Nada v. Switzerland* [GC], no. 10593/08, 12.09.2012, *Reports of Judgments and Decisions* 2012;
- *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21.04.2011, paragraph 262;
- *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, 29.06.2007, paragraph 53, *Reports of Judgments and Decisions* 2007-III;
- *O'Kane v. the United Kingdom* (dec.), no. 30550/96, 06.07.1999;
- *Pishchalnikov v. Russia*, no. 7025/04, 24.09.2009;
- *Plonka v. Poland*, no. 20310/02, 31.03.2009;
- *Saadi v. Italy* [GC], no. 37201/06, 28.02.2008, *Reports of Judgments and Decisions* 2008;
- *Salduz v. Turkey* [GC], no. 36391/02, 27.11.2008, *Reports of Judgments and Decisions* 2008;
- *Saunders v. the United Kingdom*, no. 19187/91, 17.12.1996, paragraphs 68-69, *Reports* 1996-VI;
- *Schatschaschwili v. Germany* [GC], no. 9154/10, 15.12.2015, paragraphs 100-101, *Reports of Judgments and Decisions* 2015;
- *Schmid-Laffer v. Switzerland*, no. 41269/08, 16.06.2015, paragraphs 29 and 39;
- *Seleznev v. Russia*, no. 15591/03, 26.06.2008, paragraph 67;
- *Shabelnik v. Ukraine*, no. 16404/03, 19.02.2009;
- *Sher and Others v. the United Kingdom*, no. 5201/11, 20.10.2015, paragraph 149, *Reports of Judgments and Decisions* 2015 (extracts);
- *Taxquet v. Belgium* [GC], no. 926/05, 16.11.2010, paragraph 84, *Reports of Judgments and Decisions* 2010;
- *Weh v. Austria*, no. 38544/97, 08.04.2004.

Languages:

English, French.



Identification: ECH-2016-3-011

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 08.11.2016 / **e)** 18030/11 / **f)** Magyar Helsinki Bizottsag v. Hungary / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Freedom to impart information / Freedom to receive information.

Headnotes:

Authorities' refusal to provide an NGO conducting a survey with the names of public defenders and the number of their appointments.

Article 10 ECHR did not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular the freedom to receive and impart information and where its denial constitutes an interference with that right (see paragraph 156).

Summary:

I. The applicant NGO was founded in 1989 with the task of monitoring the implementation of international human rights standards in Hungary and providing related legal representation, education and training. In the context of a survey regarding the efficiency of the system of public defence, the applicant requested from various police departments the names of the public defenders retained by them and the number of their respective appointments. Seventeen police departments complied with the request; a further five disclosed the requested information following a successful legal challenge. However, the applicant was unsuccessful in its action against a further two police departments which refused to disclose the requested information.

II. Article 10 ECHR

a. Applicability and the existence of an interference – The Convention had to be interpreted in the light of the rules provided for in Articles 31 to 33 of the Vienna Convention on the Law of Treaties 1969 and of the object and purpose of the Convention read as a whole. The Court could not disregard common international or domestic-law standards of European States and the consensus emerging from specialised international instruments and the practice of

Contracting States could also constitute a relevant consideration. Finally, when interpreting the Convention, recourse could also be had to supplementary means of interpretation including the *travaux préparatoires*.

In the light of those principles the Court had to consider whether and to what extent a right of access to State-held information could be viewed as falling within the scope of Article 10 ECHR, notwithstanding the fact that such a right was not immediately apparent from the text of that provision.

National legislation in the majority of Contracting States recognised a statutory right of access to information and a broad consensus existed on the need to recognise an individual right of access to State-held information so as to enable the public to scrutinise and form an opinion on any matter of public interest, including on the manner of functioning of public authorities in a democratic society. A high degree of consensus had also emerged at the international level. In particular, the right to seek information was expressly guaranteed by Article 19 of the International Covenant on Civil and Political Rights 1966 and the existence of a right of access to information had been confirmed by the United Nations Human Rights Committee on a number of occasions. In addition, Article 42 of the European Union Charter of Fundamental Rights guaranteed citizens a right of access to certain documents. The adoption of the Council of Europe Convention on Access to Official Documents, even though it had only been ratified by seven member States, denoted a continuous evolution towards the recognition of the State's obligation to provide access to public information.

Taking those factors into account the Court did not consider that it was prevented from interpreting Article 10.1 ECHR as including a right of access to information. The Court recognised that in the interest of legal certainty, foreseeability and equality before the law, it should not depart, without good reason, from precedents laid down in previous cases but, since the Convention was first and foremost a system for the protection of human rights, regard had also to be had to the changing conditions within Contracting States and the Court had to respond to any evolving convergence as to the standards to be achieved.

The right to receive information could not be constructed as imposing positive obligations on a State to collect and disseminate information of its own motion and Article 10 ECHR did not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. However, such a

right or obligation could arise, firstly, where disclosure of the information had been imposed by a judicial order which had gained legal force and, secondly, in circumstances where access to the information was instrumental for the individual's exercise of his or her right to freedom of expression, in particular the freedom to receive and impart information and where its denial constituted an interference with that right.

Whether and to what extent the denial of access to information constituted an interference with an applicant's freedom of expression had to be assessed in each individual case and in the light of its particular circumstances including:

- i. the purpose of the information request;
- ii. the nature of the information sought;
- iii. the role of the applicant; and
- iv. whether the information was ready and available.

The Court was satisfied that the applicant in the present case wished to exercise the right to impart information on a matter of public interest and had sought access to information to that end and that the information was necessary for the exercise of its right to freedom of expression. The information on the appointment of public defenders was of an eminently public-interest nature. There was no reason to doubt that the survey in question contained information which the applicant undertook to impart to the public and which the public had a right to receive and the Court was satisfied that it was necessary for the applicant's fulfilment of that task to have access to the requested information. Lastly, the information was ready and available.

There had therefore been an interference with a right protected under Article 10 ECHR, which was applicable in the case.

b. Whether the interference was justified – The Court accepted that the interference had been prescribed by law and that the restriction on the applicant's freedom of expression pursued the legitimate aim of protecting the rights of others. The request for data, although consisting of personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In that sense, public defenders' professional activities could not be considered to be a private matter. The information sought did not relate to the public defender's actions or decisions in connection with the carrying out of their tasks as legal representatives or consultations with their clients and the Government had not demonstrated that the disclosure of the information requested could have affected the public defenders' enjoyment of their right to respect for private life

within the meaning of Article 8 ECHR. There was no reason to assume that information about the names of public defenders and their appointments could not be known to the public through other means. The interests invoked by the Government with reference to Article 8 ECHR were not of such a nature and degree as could warrant engaging the application of that provision and bringing it into play in a balancing exercise against the applicant's right protected by Article 10 ECHR.

The subject matter of the survey concerned the efficiency of the public defenders system and was closely related to the right to a fair hearing, a fundamental right in Hungarian law and a right of paramount importance under the Convention. Any criticism or suggested improvement to a service so directly connected to fair-trial rights had to be seen as a subject of legitimate public concerns. The Court was satisfied that the applicant intended to contribute to a debate on a matter of public interest and the refusal to grant the request had effectively impaired its contribution to a public debate on a matter of general interest. Although the information requested concerned personal data, it did not involve information outside the public domain. The Court concluded that notwithstanding the State's margin of appreciation, there had not been a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.

The Court therefore found a violation of Article 10 ECHR.

Cross-references:

European Court of Human Rights:

- *Bader v. Austria*, no. 26633/95, 15.05.1996, Commission decision,;
- *Dammann v. Switzerland*, no. 77551/01, paragraph 52, 25.04.2006;
- *Eccleston v. the United Kingdom* (dec.), no. 42841/02, 18.05.2004;
- *Gaskin v. the United Kingdom*, no. 10454/83, 07.07.1989, Series A, no. 160;
- *Gillberg v. Sweden* [GC], no. 41723/06, 03.04.2012;
- *Grupo Interpres SA v. Spain*, no. 32849/96, Commission decision, 07.04.1997, *Decisions and Reports* 89, p. 150;
- *Guerra and Others v. Italy*, no. 14967/89, 19.02.1998, *Reports of Judgments and Decisions* 1998-I;
- *Guseva v. Bulgaria*, no. 6987/07, 17.02.2015;
- *Johnston and Others v. Ireland*, no. 18.12.1986, paragraphs 51 *et seq.*, Series A, no. 112;

- *Jones v. the United Kingdom* (dec.), no. 42639/04, 13.09.2005;
- *Kenedi v. Hungary*, no. 31475/05, 26.05.2009;
- *Leander v. Sweden*, no. 9248/81, 26.03.1987, Series A, no. 116;
- *Lithgow and Others v. the United Kingdom*, nos 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, 08.07.1986, paragraphs 114 and 117, Series A, no. 102;
- *Loiseau v. France* (dec.), no. 46809/99, 28.09.2004, *Reports of Judgments and decisions* 2003-XII (extracts);
- *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27.09.1999, paragraph 82;
- *Nurminen and Others v. Finland*, no. 27881/95, 26.02.1997, Commission decision;
- *Observer and Guardian v. the United Kingdom*, no. 13585/88, 26.11.1991, paragraph 59, Series A, no. 216;
- *P.G. and J.H. v. the United Kingdom*, no. 44787/98, 25.09.2001, paragraph 57, *Reports of Judgments and decisions* 2001-IX;
- *Peck v. the United Kingdom*, no. 44647/98, 28.01.2003, paragraph 62, *Reports of Judgments and decisions* 2003-I;
- *Roche v. the United Kingdom* [GC], no. 32555/96, 19.10.2005, paragraph 172, *Reports of Judgments and decisions* 2005-X;
- *Roşianu v. Romania*, no. 27329/06, 24.06.2014;
- *Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10.07.2006;
- *Shapovalov v. Ukraine*, no. 45835/05, 31.07.2012;
- *Sigurður A. Sigurjónsson v. Iceland*, no. 16130/90, 30.06.1993, paragraph 35, Series A, no. 264;
- *Sinan Işık v. Turkey*, no. 21924/05, 02.02.2010, paragraphs 42-53, *Reports of Judgments and decisions* 2010;
- *Sîrbu and Others v. Moldova*, nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01, paragraphs 17-19, 15.06.2004;
- *Sixteen Austrian Communes and Some of Their Councillors v. Austria*, nos. 5767/72 etc., 31.05.1974, Commission decision, Yearbook 1974, p. 338;
- *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14.04.2009;
- *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, 07.02.2012, paragraph 106, *Reports of Judgments and decisions* 2012;
- *Weber v. Germany* (dec.), no. 70287/11, 06.01.2015, paragraph 26;
- *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25.06.2013;

Languages:

English, French.

**Identification:** ECH-2016-3-012

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.11.2016 / **e)** 24130/11 and 29758/11 / **f)** A and B v. Norway / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Ne bis in idem, tax offence / Proceedings, criminal and administrative parallel.

Headnotes:

Parallel administrative and criminal proceedings in respect of the same conduct.

For dual criminal and administrative proceedings to be regarded as sufficiently connected in substance and in time and thus compatible with the *bis* criterion in Article 4 Protocol 7 ECHR, the relevant considerations were: whether the different proceedings pursued complementary purposes and thus addressed different aspects of the social misconduct involved; whether the duality of proceedings concerned was a foreseeable consequence, both in law and in practice, of the same impugned conduct; whether the relevant sets of proceedings were conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence and whether the sanction imposed in the proceedings which became final first was taken into account in those which become final last, so as to prevent the individual concerned being made, in the end, to bear an excessive burden.

Summary:

I. The applicants had tax surcharges imposed on them in administrative proceedings for failing to declare certain income on their tax returns. In parallel criminal proceedings they were convicted and sentenced for tax fraud for the same omissions. The applicants complained under Article 4 Protocol 7 ECHR that they had been prosecuted and punished twice in respect of the same offence.

II. Article 4 Protocol 7 ECHR: This provision contained three distinct guarantees and provided that for the same offence, no one should be (i) liable to be tried, (ii) tried, or (iii) punished. Whether the administrative proceedings were criminal for the purposes of Article 4 Protocol 7 ECHR was to be assessed on the basis of the three Engel criteria developed for the purposes of Article 6 ECHR. The question as to whether the offences dealt with in separate proceedings were the same required a facts-based assessment rather than a formal assessment consisting of comparing the essential elements of the offences.

The object of Article 4 Protocol 7 ECHR was to prevent the injustice of a person being prosecuted or punished twice for the same criminalised conduct. It did not outlaw legal systems which took an integrated approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response by different authorities and for different purposes. A fair balance had to be struck between duly safeguarding the interests of the individual protected by the *ne bis in idem* principle, on the one hand, and accommodating the particular interest of the community in being able to take a calibrated regulatory approach in the area concerned, on the other.

Article 4 Protocol 7 ECHR did not exclude the conduct of dual proceedings provided that certain conditions were fulfilled. In particular, the respondent State had to demonstrate convincingly that the dual proceedings in question were sufficiently closely connected in substance and in time. That implied not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected. Material factors for determining whether there was a sufficiently close connection in substance included:

i. whether the different proceedings pursued complementary purposes and therefore addressed different aspects of the social misconduct involved,

- ii. whether the duality of the proceedings concerned was a foreseeable consequence, both in law and in practice,
- iii. whether the relevant sets of proceedings were conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set was also used in the other set; and
- iv. whether the sanction imposed in the proceedings which became final first was taken into account in those which became final last, so as to prevent the individual concerned bearing an excessive burden. The connection in time had to be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time. The weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings.

The national authorities had found that the applicants' conduct called for two responses, an administrative penalty and a criminal one. The administrative penalty of a tax surcharge served as a general deterrent and to compensate for the considerable work and costs incurred by the tax authorities on behalf of the community in carrying out checks and audits in order to identify such defective declarations. The criminal conviction served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud. It was particularly important that, in sentencing the applicants, the domestic court had had regard to the fact that they had already been sanctioned by the imposition of the tax penalty. The conduct of the dual proceedings, with the possibility of different cumulated penalties had been foreseeable in the circumstances and the establishment of facts made in one set of proceedings had been relied upon in the other.

There was no indication that the applicants had suffered any disproportionate prejudice or injustice and there was a sufficiently close connection, both in substance and in time, between the two sets of proceedings.

The Court therefore found a no violation of Article 4 Protocol 7 ECHR.

Cross-references:

European Court of Human Rights:

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- *Boman v. Finland*, no. 41604/11, 17.02.2015;
- *Carlberg v. Sweden* (dec.), no. 9631/04, 27.01.2009;
- *Engel and Others v. the Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 23.11.1976, paragraph 82, Series A, no. 22;
- *Franz Fischer v. Austria*, no. 37950/97, 29.05.2001, paragraph 29;
- *Glantz v. Finland*, no. 37394/11, 20.05.2014;
- *Göktan v. France*, no. 33402/96, 02.07.2002, paragraph 51, *Reports of Judgments and Decisions* 2002-V;
- *Gradinger v. Austria*, no. 15963/90, 23.10.1995, paragraph 51, Series A, no. 328-C;
- *Grande Stevens and Others v. Italy*, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 04.03.2014;
- *Haarvig v. Norway* (dec.), no. 11187/05, 11.12.2007;
- *Janosevic v. Sweden*, no. 34619/97, 23.07.2002, paragraphs 68-71, *Reports of Judgments and Decisions* 2002-VII;
- *Jussila v. Finland* [GC], no. 73053/01, 23.11.2006, paragraph 43, *Reports of Judgments and Decisions* 2006-XIV;
- *Kapetanios and Others v. Greece*, nos. 3453/12, 42941/12 and 9028/13, 30.04.2015, paragraph 72;
- *Klass and Others v. Germany*, no. 5029/71, 06.09.1978, paragraph 68, Series A, no. 28;
- *Kudła v. Poland* [GC], no. 30210/96, 26.10.2000, paragraph 152, *Reports of Judgments and Decisions* 2000-XI;
- *Lucky Dev v. Sweden*, no. 7356/10, 27.11.2014;
- *Maaouia v. France* [GC], no. 39652/98, 05.10.2000, paragraph 36, *Reports of Judgments and Decisions* 2000-X;
- *Manasson v. Sweden* (dec.), no. 41265/98, 08.04.2003;
- *Mjelde v. Norway* (dec.), no. 11143/04, 11.02.2007;
- *Muslija v. Bosnia and Herzegovina*, no. 32042/11, 14.01.2014;
- *Nykänen v. Finland*, no. 11828/11, 20.05.2014;
- *Österlund v. Finland*, no. 53197/13, 10.02.2015;
- *Phillips v. the United Kingdom*, no. 41087/98, 05.07.2001, paragraph 34, *Reports of Judgments and Decisions* 2001-VII;
- *R.T. v. Switzerland* (dec.), no. 31982/96, 30.05.2000;
- *Rinas v. Finland*, no. 17039/13, 27.01.2015;
- *Rosenquist v. Sweden* (dec.), no. 60619/00, 14.09.2004;
- *Ruotsalainen v. Finland*, no. 13079/03, 16.06.2009;
- *Sismanidis and Sitaridis v. Greece*, nos. 66602/09 and 71879/12, 09.06.2016;
- *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, 12.04.2006, paragraph 48, *Reports of Judgments and Decisions* 2006-VI;
- *Storbråten v. Norway* (dec.), no. 12277/04, 01.02.2007;
- *Synnelius and Edsbergs Taxi AB v. Sweden* (dec.), no. 44298/02, 17.06.2008;
- *Taxquet v. Belgium* [GC], no. 926/05, 16.11.2010, paragraph 83, *Reports of Judgments and Decisions* 2010;
- *Tomasović v. Croatia*, no. 53785/09, 18.10.2011;
- *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23.07.2002, paragraphs 79-82;
- *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10.02.2009, *Reports of Judgments and Decisions* 2009.

Languages:

English, French.

**Identification: ECH-2016-3-013**

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.11.2016 / **e)** 28859/11 and 28473/12 / **f)** *Dubská and Krejzová v. the Czech Republic* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Home births, European consensus / Health, public health, public interest / Private life, right / Social policy / Woman, private life, child birth.

Headnotes:

Legislation preventing health professionals assisting with home births

Giving birth was a unique and delicate moment in a woman's life encompassing issues of physical and moral integrity, medical care, reproductive health and the protection of health-related information. These issues, including the choice of the place of birth, were therefore fundamentally linked to the woman's private life and fell within the scope of that concept for the purposes of Article 8 ECHR.

However, in the absence of a European consensus in favour of allowing home births, the national authorities were to be afforded a wide margin of appreciation in the light of the complex issues of health-care policy and general social and economic policy considerations involved.

Summary:

I. The applicants wished to give birth at home with the assistance of a midwife. However, under Czech law, health professionals assisting with home births ran the risk of disciplinary and criminal penalties. In practice, therefore, the applicants had the choice between giving birth at home unassisted or delivering in hospital. The first applicant gave birth to her child at home unaided while the second applicant delivered her child in a maternity hospital.

In their applications to the European Court, the applicants complained of a violation of Article 8 ECHR in that Czech law did not allow health professionals to assist them with giving birth at home.

II. The applicants' case had involved an interference with their right to avail themselves of the assistance of midwives when giving birth at home, owing to the threat of sanctions for midwives, who in practice were prevented from assisting the applicants by the operation of the law. That interference was in accordance with the law and, since it was designed to protect the health and safety of the mother and the child during and after delivery, pursued the legitimate aims of protecting health and the rights of others. The Court went on to consider whether the interference had been necessary in a democratic society.

In that connection, it found that the respondent State had to be afforded a wide margin of appreciation as:

- a. the case involved a complex matter of health-care policy requiring an assessment by the

- b. national authorities of expert and scientific data concerning the risks of hospital and home births; general social and economic policy considerations came into play, including the allocation of financial means, since budgetary resources may need to be shifted from the general system of maternity hospitals to the provision of a framework for home births; and
- c. there was no consensus among the member States of the Council of Europe capable of narrowing the State's margin of appreciation in favour of allowing home births.

The Court found that, having regard to that wide margin of appreciation, the interference with the applicants' right to respect for their private life had not been disproportionate. The risk for mothers and newborn babies was higher in the case of home births than in the case of births in maternity hospitals which were fully staffed and adequately equipped from a technical and material perspective, and even if a pregnancy proceeded without any complications and could therefore be considered "low-risk", unexpected difficulties could arise during delivery which would require immediate specialist medical intervention, such as a Caesarean section or special neonatal assistance. Moreover, maternity hospitals could provide all the necessary urgent medical care, which was not possible in the case of home births, even with a midwife attending (the Czech Republic had not set up a system of specialist emergency assistance for home births).

While the Court could not disregard the fact that conditions in a number of Czech maternity hospitals appeared to be questionable, it nevertheless acknowledged that since 2014 the Government had taken initiatives with a view to improving the situation. It invited the Czech authorities to make further progress by keeping the relevant legal provisions under constant review, so as to ensure that they reflected medical and scientific developments whilst fully respecting women's rights in the field of reproductive health, notably by ensuring adequate conditions for both patients and medical staff in maternity hospitals across the country.

The Court therefore found no violation of Article 8 ECHR.

Cross-references:

European Court of Human Rights:

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- *Fernández Martínez v. Spain* [GC], no. 56030/07, 12.06.2014, *Reports of Judgments and Decisions* 2014 (extracts);
- *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, 13.11.2012, *Reports of Judgments and Decisions* 2012 (extracts);
- *Maurice v. France* [GC], no. 11810/03, 21.06.2006, *Reports of Judgments and Decisions* 2006-IX;
- *Odièvre v. France* [GC], no. 42326/98, 13.02.2003, *Reports of Judgments and Decisions* 2003-III;
- *Parrillo v. Italy* [GC], no. 46470/11, 27.08.2015, *Reports of Judgments and Decisions* 2015;
- *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 04.12.2008, *Reports of Judgments and Decisions* 2008;
- *S.H. and Others v. Austria* [GC], no. 57813/00, 03.11.2011, *Reports of Judgments and Decisions* 2011;
- *Shelley v. the United Kingdom* (dec.), no. 23800/06, 04.01.2008;
- *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, 12.04.2006, *Reports of Judgments and Decisions* 2006-VI;
- *Ternovszky v. Hungary*, no. 67545/09, 14.12.2010;
- *Van Der Heijden v. the Netherlands* [GC], no. 42857/05, 03.04.2012.

Languages:

English, French.



Identification: ECH-2016-3-014

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 29.11.2016 / **e)** 34238/09 / **f)** *Lhermitte v. Belgium* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Jury, verdict, reasoning, absence / Verdict, reasoning, comprehension.

Headnotes:

Provision of reasons for assize courts' guilty verdicts

The fact that a lay jury did not directly provide reasons for a guilty verdict against a defendant did not necessarily infringe the right to a fair hearing within the meaning of Article 6 ECHR if the safeguards afforded in the proceedings were sufficient to enable the defendant to understand the reasons for the verdict.

Summary:

I. The applicant was committed to stand trial for the murder of her five children. She was tried in 2008 by an Assize Court composed of three judges and a lay jury. Her defence counsel argued that at the time of the events she had been suffering from a mental disturbance making her incapable of controlling her actions. Having initially taken the opposite view, the psychiatric experts ultimately supported this opinion in the light of certain new items of evidence produced at the trial. The jury, however, answered “yes” to the questions of guilt and premeditation. On the same day, the Assize Court sentenced the applicant to life imprisonment. The Court of Cassation dismissed a subsequent appeal on points of law in which the applicant had complained of the lack of reasons given for the jury's verdict and the sentencing judgment.

II. The case did not relate either to whether and how the impugned acts had been committed – both of which matters were established and had been admitted by the applicant – or to the legal characterisation of the offences or the severity of the sentence. The question arising was whether or not the applicant had been able to understand the reasons why the jury had found that she had been responsible for her actions at the material time, despite the fact that the psychiatric experts had changed their opinion at the end of the hearing. The Court answered this question in the affirmative, on the basis of the following observations and considerations.

Adversarial nature of the proceedings – The following safeguards had been in place during the trial:

- at the start of the trial the indictment had been read out in full and the nature of the offence forming the basis of the charge and any

- circumstances that might aggravate or mitigate the sentence had likewise been indicated;
- the case against the applicant had then been the subject of adversarial argument, each item of evidence being examined and the defendant, assisted by counsel, having the opportunity to call witnesses and respond to the testimony heard; and
 - the questions put by the president to the twelve members of the jury at the end of the ten-day hearing had been read out and the parties had been given a copy.

b. Combined impact of the indictment and the questions to the jury – Firstly, counsel for the applicant had not raised any objections on learning of the president's questions to the jury, seeking neither to amend them nor to propose others.

Furthermore, since the first question had concerned the applicant's guilt, a positive answer necessarily implied that in the jury's view, she had been responsible for her actions at the material time. The applicant could not therefore maintain that she had been unable to understand the jury's position on this matter.

Admittedly, the jury had not provided any reasons for its finding in that regard. However, compliance with the requirements of a fair trial had to be assessed on the basis of the proceedings as a whole by examining whether, in the light of all the circumstances of the case, the procedure followed had made it possible for the accused to understand why he or she had been found guilty.

Such an examination in the present case revealed a number of factors that might have dispelled any doubts on the applicant's part as to the jurors' conviction that she had been criminally responsible at the time of the events:

i. From its preliminary stage, the investigation had focused on the applicant's psychological state at the time of the killings. The indictment, which had been some fifty pages long, had given an account of the precise sequence of events, the steps taken and evidence obtained during the investigation, and the forensic medical reports, but a substantial part of it had also discussed the applicant's personal history and family life and the motives and reasons that had prompted her to carry out the killings, particularly in the light of the expert assessments of her psychological and mental state.

Admittedly, the indictment had been of limited effect in assisting an understanding of the verdict to be reached by the jury, since it had been filed before the

trial hearing, the crucial part of proceedings in the Assize Court; Article 6 ECHR required an understanding not of the reasons that had prompted the judicial investigating bodies to send the case for trial in the Assize Court, but rather of the reasons that had persuaded the members of the jury, after attending the trial hearing, to reach their decision on the issue of guilt. Moreover, the Court could not speculate as to whether or not the findings of fact set out in the indictment had influenced the deliberations and the decision ultimately reached by the jury.

ii. During the trial in the Assize Court, the question of the applicant's criminal responsibility had been a central focus of the proceedings, since the emergence of new evidence had led the president to order a further psychiatric assessment, the conclusions of which had then been examined.

iii. The sentencing judgment had explicitly mentioned both the applicant's resolve to commit the murders and the cold-blooded manner in which she had carried them out. The conclusion as to her criminal responsibility had been logical in view of the jury's answers to the questions. The Court of Cassation, moreover, had not interpreted the sentencing judgment in any other way, since it had held that consideration of the applicant's cold-blooded manner and her determination to carry out her crimes had constituted the Assize Court's reason for finding that she had been criminally responsible at the time of the events.

c. Drafting of the sentencing judgment by professional judges who had not attended the deliberations on the issue of guilt – This factor could not call into question the value and impact of the explanations provided to the applicant, seeing that:

- the explanations had been provided without delay, at the end of the Assize Court session, since the sentencing judgment had been delivered on the day of the verdict;
- although the judgment in question had been formally drafted by the professional judges, they had been able to obtain the observations of the twelve members of the jury, who had in fact sat alongside them in deliberating on the sentence and whose names appeared in the judgment; and
- the professional judges had themselves been present throughout the trial hearing, and must therefore have been in a position to place the jurors' observations in their proper context.

d. Lack of specific explanations for the difference in opinion between the jury and the psychiatric experts on the issue of the applicant's ability to control her

actions at the time of the events – Admittedly, in their last report the three psychiatric experts had stated their unanimous opinion that the applicant had been “suffering at the time of the events from a severe mental disturbance making her incapable of controlling her actions”.

However, the Court had already found that statements made by psychiatric experts at an Assize Court trial formed only one part of the evidence submitted to the jury.

Moreover, the experts themselves had played down the impact of their findings by stating that their answers reflected their personal conviction while acknowledging that they were only ever “an informed opinion, and not an absolute scientific truth”.

Accordingly, the fact that the jury had not indicated the reasons that had prompted it to adopt a view at variance with the psychiatric experts’ final report in favour of the applicant had not been capable of preventing her from understanding the decision to find her criminally responsible.

In conclusion, the applicant had been afforded sufficient safeguards enabling her to understand the guilty verdict.

The Court therefore found no violation of Article 6 ECHR.

Cross-references:

European Court of Human Rights:

- *Agnelet v. France*, no. 61198/08, 10.01.2013;
- *Bernard v. France*, no. 22885/93, 23.04.1998, *Reports of Judgments and Decisions* 1998-II;
- *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, 05.02.2015, *Reports of Judgments and Decisions* 2015;
- *Bodein v. France*, no. 40014/10, 13.11.2014;
- *Fraumens v. France*, no. 30010/10, 10.01.2013;
- *Judge v. the United Kingdom* (dec.), no. 35863/10, 08.02.2011;
- *Legillon v. France*, no. 53406/10, 10.01.2013;
- *Oulahcene v. France*, no. 44446/10, 10.01.2013;
- *Papon v. France* (no. 2) (dec.), no. 54210/00, 25.07.2002, *Reports of Judgments and Decisions* 2002-XII;
- *Salduz v. Turkey* [GC], no. 36391/02, 27.11.2008, *Reports of Judgments and Decisions* 2008;
- *Saric v. Denmark* (dec.), no. 31913/96, 02.02.1999;

- *Schenk v. Switzerland*, no. 10862/84, 12.07.1998, Series A, no. 140;
- *Shala v. Norway* (dec.), no. 1195/10, 10.07.2012;
- *Suominen v. Finland*, no. 37801/97, 01.07.2003;
- *Tatishvili v. Russia*, no. 1509/02, 22.02.2007, *Reports of Judgments and Decisions* 2007-I;
- *Taxquet v. Belgium* [GC], no. 926/05, 16.11.2010, *Reports of Judgments and Decisions* 2010;
- *Voica v. France*, no. 60995/09, 10.01.2013.

Languages:

English, French.



Identification: ECH-2016-3-015

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 29.11.2016 / **e)** 76943/11 / **f)** Lupeni Greek Catholic Parish and Others v. Romania / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Material law, substantive right / Case-law, discrepancies / Religion, church, property restitution, access to court.

Headnotes:

Application of the substantive criterion of “the wishes of the worshippers in the communities in possession of the properties” in deciding on the restitution of places of worship to the Greek Catholic Church.

The distinction between procedural and substantive elements was determinative of the applicability and, as appropriate, the scope of the guarantees of

Article 6 ECHR, which could, in principle, have no application to substantive limitations on a right existing under domestic law. Thus, with regard to the right of access to a court, the criterion of the worshippers' wishes could not be considered as limiting in any way the courts' jurisdiction to decide actions for recovery of possession in respect of places of worship, but as qualifying a substantive right.

Summary:

I. In 1948 the applicants – entities belonging to the Romanian Church United to Rome (also known as the Greek Catholic or Uniate Church) – were dissolved on the basis of Decree no. 358/1948. Pursuant to that Decree, property belonging to this denomination was transferred to the State, with the exception of parish property. The latter was transferred to the Orthodox Church under Decree no. 177/1948, which stated that if the majority of the worshippers in a church became members of another church the property that had belonged to the first would be transferred to the possession of the second. In 1967 the church building and adjoining courtyard, which had belonged to the first applicant, was entered in the land register as having been transferred to the ownership of the Romanian Orthodox Church.

After the fall of the communist regime in December 1989, Decree no. 358/1948 was repealed by Legislative Decree no. 9/1989. The Uniate Church was officially recognised by Legislative Decree no. 126/1990 on certain measures concerning the Romanian Church United to Rome (Greek Catholic Church). Article 3 of that Legislative Decree provided that the legal status of property that had belonged to the Uniate parishes and that was in the possession of the Orthodox Church was to be determined by joint committees made up of representatives of both Uniate and Orthodox clergy. In reaching their decisions, the committees were to take into account “the wishes of the worshippers in the communities in possession of these properties”.

Article 3 of Legislative Decree no. 126/1990 was amended by Government Ordinance no. 64/2004 of 13 August 2004 and Law no. 182/2005. Under this amended decree, in the event of disagreement between the members of the clergy representing the two denominations in a joint committee, the party with an interest in bringing judicial proceedings could do so under ordinary law.

The applicant parish was legally re-established on 12 August 1996. The applicants took steps to have the church building and adjoining courtyard returned to them. The meetings of the joint committee

produced no result. The applicants therefore brought judicial proceedings under ordinary law, but without success. The courts based their decision on the special criterion of “the wishes of the worshippers in the communities in possession of these properties”.

II. The action brought by the applicants concerned a civil right and was intended to establish, through the courts, a right of ownership, even if the subject matter of the dispute was a place of worship. Accordingly, Article 6.1 ECHR was applicable.

a. Right of access to a court – The applicants had not been prevented from bringing their action for restitution of the church building before the domestic courts, which had carried out a detailed examination of their case.

The domestic courts, which were independent and impartial, had clearly had a discretionary power of assessment in exercising their jurisdictional competence, and their role was not limited to endorsing a pre-determined outcome.

Thus, what was at stake was not a procedural obstacle hindering the applicants' access to the courts, but a substantive provision which, while it was such as to have an impact on the outcome of the proceedings, did not prevent the courts from examining the merits of the dispute. In reality, the applicants complained about the difficulty in satisfying the conditions imposed by substantive law in order to obtain restitution of the place of worship in question.

However, the distinction between procedural and substantive elements remained determinative of the applicability and, as appropriate, the scope of the guarantees of Article 6 ECHR, which could, in principle, have no application to substantive limitations on a right existing under domestic law.

The criterion of the worshippers' wishes in issue in the present case could not be considered as limiting in any way the courts' jurisdiction to decide actions for recovery of possession in respect of places of worship, but as qualifying a substantive right. The domestic courts had had full jurisdiction to apply and interpret the national law, without being bound by the refusal of the Orthodox parish to reach a friendly settlement in the context of the procedure before the joint committee.

The criterion in dispute had given rise to heated debates when it was adopted by Parliament and when the amendments made to Legislative Decree no. 126/1990 by Law no. 182/2005 had been adopted. Equally, both of the Churches concerned had been consulted as part of the legislative process

that resulted in adoption of the criterion in dispute. The Constitutional Court's case-law had been consistent with regard to the compatibility of this criterion with the Constitution, both in its application by the joint committees and when applied in the context of judicial proceedings based on the provisions of ordinary law.

In the *Sâmbata Bihor Greek Catholic Parish v. Romania* judgment, the Court had found a restriction of the right of access to a court, having examined the legislative framework which existed prior to the amendments made to the text of Article 3 of Legislative Decree no. 126/1990 by Ordinance no. 64/2004 and Law no. 182/2005, and thus before the possibility, clearly provided for by these amendments, of bringing legal proceedings based on the provisions of ordinary law became available.

Having regard to the considerations set out above, the applicants had not been deprived of the right to a determination of the merits of their claims concerning their property right over a place of worship. The difficulties encountered by the applicants in their attempts to secure the return of the contested church building had resulted from the applicable substantive law and had been unrelated to any limitation on the right of access to a court.

The Court therefore found no violation of Article 6 ECHR.

b. Compliance with the principle of legal certainty – The conflicting interpretation of the concept of “ordinary law” had existed within the High Court itself, called upon to settle these disputes at last instance. This had been reflected in the decisions taken by the lower courts, which also delivered contradictory judgments.

From 2012 onwards the High Court and the Constitutional Court had aligned their respective positions in procedures concerning the restitution of places of worship, which, in practice, had resulted in harmonisation of the case-law of the lower courts.

From 2007 to 2012, however, the High Court delivered judgments that were diametrically opposed. These fluctuations in judicial interpretation could not be regarded as evolving case-law which was an inherent trait of any judicial system, given that the High Court had reversed its position.

Lastly, the legal uncertainty had concerned, successively, the questions of access to a court and the applicable substantive law.

It followed that in the present case “profound and long-standing differences” had existed in the case-law, within the meaning of the Grand Chamber's judgment in the case of *Nejdet Şahin and Perihan Şahin v. Turkey*.

The context in which the action brought by the applicants had been examined, namely one of uncertainty in the case-law, coupled in the present case with the failure to make prompt use of the mechanism foreseen under domestic law for ensuring consistent practice even within the highest court in the country, had undermined the principle of legal certainty and, in so doing, had had the effect of depriving the applicants of a fair hearing.

The Court therefore found a violation of Article 6 ECHR.

Cross-references:

European Court of Human Rights:

- *Albu and Others v. Romania*, nos. 34796/09 and sixty-three other applications, 10.05.2012;
- *Anđelković v. Serbia*, no. 1401/08, 09.04.2013;
- *Beian v. Romania* (no. 1), no. 30658/05, 06.12.2007, *Reports of Judgments and Decisions* 2007-V (extracts);
- *Bellet v. France*, no. 23805/94, 04.12.1995, Series A, no. 333-B;
- *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, 05.02.2015, *Reports of Judgments and Decisions* 2015;
- *Boulois v. Luxembourg* [GC], no. 37575/04, 03.04.2012, *Reports of Judgments and Decisions* 2012;
- *Cordova v. Italy* (no. 1), no. 40877/98, 30.01.2003, *Reports of Judgments and Decisions* 2003-I;
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- *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, 13.12.2001, *Reports of Judgments and Decisions* 2001-XII;
- *Fălie v. Romania*, no. 23257/04, 19.05.2015;
- *Fayed v. the United Kingdom*, no. 17101/90, 21.09.1994, Series A, no. 294-B;
- *Ferreira Santos Pardal v. Portugal*, no. 30123/10, 30.07.2015;
- *García Ruiz v. Spain* [GC], no. 30544/96, 21.01.1999, *Reports of Judgments and Decisions* 1999-I;
- *Golder v. the United Kingdom*, no. 4451/70, 21.02.1975, Series A, no. 18;

- *Guerra and Others v. Italy*, no. 14967/89, 19.02.1998, *Reports of Judgments and Decisions* 1998-I;
- *Hayati Çelebi and Others v. Turkey*, no. 582/05, 09.02.2016;
- *Khamidov v. Russia*, no. 72118/01, 15.11.2007;
- *Kutić v. Croatia*, no. 48778/99, 01.03.2002, *Reports of Judgments and Decisions* 2002-II;
- *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, 12.10.2010;
- *Markovic and Others v. Italy* [GC], no. 1398/03, 14.12.2006, *Reports of Judgments and Decisions* 2006-XIV;
- *McElhinney v. Ireland* [GC], no. 31253/96, 21.11.2001, *Reports of Judgments and Decisions* 2001-XI;
- *Micallef v. Malta* [GC], no. 17056/06, 15.10.2009, *Reports of Judgments and Decisions* 2009;
- *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, 20.10.2011;
- *Nunes Dias v. Portugal* (dec.), nos. 2672/03 and 69829/01, 10.04.2003, *Reports of Judgments and Decisions* 2003-IV;
- *Bogdan Vodă Greek Catholic Parish v. Romania*, no. 26270/04, 19.11.2013;
- *Siseşti Greek Catholic Parish v. Romania*, no. 32419/04, 03.11.2015;
- *Pruniş Greek Catholic Parish v. Romania* (dec.), no. 38134/02, 08.04.2014;
- *Sâmbata Bihor Greek Catholic Parish v. Romania*, no. 48107/99, 12.01.2010;
- *Sfântul Vasile Polonă Greek Catholic Parish v. Romania*, no. 65965/01, 07.04.2009;
- *Perez v. France* [GC], no. 47287/99, 12.02.2004, *Reports of Judgments and Decisions* 2004-I;
- *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, 12.07.2001, *Reports of Judgments and Decisions* 2001-VIII;
- *Roche v. the United Kingdom* [GC], no. 32555/96, 19.10.2005, *Reports of Judgments and Decisions* 2005-X;
- *Stanev v. Bulgaria* [GC], no. 36760/06, 17.01.2012, *Reports of Judgments and Decisions* 2012;
- *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, no. 20390/92, 10.07.1998, *Reports* 1998-IV;
- *Z and Others v. the United Kingdom* [GC], no. 29392/95, 25.10.1999, *Reports of Judgments and Decisions* 2001-V;
- *Zelca and Others v. Romania* (dec.), no. 65161/10, 06.09.2011;
- *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, 28.10.1999, *Reports of Judgments and Decisions* 1999-VII.

Languages:

English, French.



Identification: ECH-2016-3-016

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 13.12.2016 / **e)** 41738/10 / **f)** Paposvili v. Belgium / **g)** *Reports of Judgments and Decisions* 2016 / **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.**

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

Keywords of the alphabetical index:

Foreigner, expulsion, right to family life / Foreigner, expulsion, health, deterioration, risk.

Headnotes:

Threatened expulsion of a seriously ill person to his country of origin, where it was not clear that he would be able to receive the appropriate medical treatment.

In addition to situations in which death is imminent, “other very exceptional cases” may exist which raise an issue under Article 3 ECHR. These include situations involving the removal of a seriously ill person in which substantial grounds had been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. These situations correspond to a high threshold for the application of Article 3 ECHR in cases concerning the removal of foreigners suffering from serious illness.

Summary:

I. The applicant, a Georgian national, arrived in Belgium via Italy in November 1998, accompanied by his wife and the latter's six-year-old child. The couple subsequently had two children. The applicant received several prison sentences for robbery. He suffered from tuberculosis, hepatitis C and chronic lymphocytic leukaemia (hereinafter, "CLL"). An asylum request by the applicant and his wife was refused in June 1999. The applicant then submitted a number of requests for regularisation of his residence status, but these were rejected by the Aliens Office. The applicant and his wife were subsequently issued with several orders to leave the country, including one in July 2010.

On 23 July 2010, relying on Articles 2, 3 and 8 ECHR, the applicant applied to the European Court for an interim measure under Rule 39 of the Rules of Court, arguing that if he were removed to Georgia he would no longer have access to the health care he required and that in view of his very short life expectancy he would die even sooner, far away from his family. On 28 July 2010 the Court granted his request.

The order to leave Belgian territory was extended until 28 February 2011. On 18 February 2012 the Aliens Office issued an order to leave the country "with immediate effect" pursuant to the ministerial deportation order of 16 August 2007.

A medical certificate issued in September 2012 stated that failure to treat the applicant for his hepatitis and his lung disease could lead to organ damage and significant disability and that failure to treat his leukaemia (CLL) could result in death. A return to Georgia would expose the patient to inhuman and degrading treatment. The applicant was requested to report to the Aliens Office's medical service on 24 September 2012 for a medical check-up and to enable the Belgian authorities to "reply to the Court's questions". Referring to the Grand Chamber's judgment in *N. v. the United Kingdom*, the Aliens Office found in its report that the applicant's medical records did not warrant the conclusion that the threshold of gravity required by Article 3 ECHR had been reached. The applicant's life was not directly threatened and no on-going medical supervision was necessary in order to ensure his survival. Furthermore, his disease could not be considered to be in the terminal stages at that time.

On 29 July 2010 the applicant's wife and her three children were granted indefinite leave to remain. The applicant died in June 2016.

II.1. Following the applicant's death his relatives had expressed the wish to pursue the proceedings. The Court noted that there were important issues at stake in the present case, notably concerning the interpretation of the case-law in relation to the expulsion of seriously ill aliens. The impact of this case therefore went beyond the particular situation of the applicant. Accordingly, special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto required the Court to continue the examination of the application in accordance with Article 37.1 ECHR *in fine*.

2. In the case of *N. v. the United Kingdom* the Court had stated that, in addition to situations of the kind addressed in *D. v. the United Kingdom* in which death was imminent, there might be other very exceptional cases where the humanitarian considerations weighing against removal were equally compelling. An examination of the case-law subsequent to *N. v. the United Kingdom* had not revealed any such examples. The application of Article 3 ECHR only in cases where the person facing expulsion was close to death had deprived aliens who were seriously ill, but whose condition was less critical, of the benefit of that provision.

The Grand Chamber found in the present case that the "other very exceptional cases" which might raise an issue under Article 3 ECHR should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds had been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. These situations corresponded to a high threshold for the application of Article 3 ECHR in cases concerning the removal of aliens suffering from serious illness.

It was for applicants to adduce evidence capable of demonstrating that there were substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR.

Where such evidence was adduced it was for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it. The risk alleged had to be subjected to close scrutiny in the course of which the authorities in the returning State had to consider the foreseeable consequences of removal for the individual

concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances.

The impact of removal on the person concerned had to be assessed by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State.

It was necessary to verify on a case-by-case basis whether the care generally available in the receiving State was sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3 ECHR.

The authorities were also required to consider the extent to which the individual in question would actually have access to that care and those facilities in the receiving State.

Where, after the relevant information had been examined, serious doubts persisted regarding the impact of removal on the persons concerned, it was for the returning State to obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment would be available and accessible to the persons concerned so that they did not find themselves in a situation contrary to Article 3 ECHR.

The applicant had been suffering from a very serious illness and his condition had been life-threatening. However, his condition had become stable as a result of the treatment he had been receiving in Belgium, aimed at enabling him to undergo a donor transplant. If the treatment being administered to the applicant had had to be discontinued his life expectancy, based on the average, would have been less than six months.

Neither the treatment the applicant had been receiving in Belgium nor the donor transplant had been available in Georgia. As to the other forms of leukaemia treatment available in that country, there was no guarantee that the applicant would have had access to them, on account of the shortcomings in the Georgian social insurance system.

The opinions issued by the Aliens Office's medical adviser regarding the applicant's state of health, based on the medical certificates he had provided, had not been examined either by the Aliens Office or by the Aliens Appeals Board from the perspective of Article 3 ECHR in the course of the proceedings concerning regularisation on medical grounds.

Likewise, the applicant's medical situation had not been examined in the context of the proceedings concerning his removal.

The fact that an assessment of this kind could have been carried out immediately before the removal measure was to be enforced did not address these concerns in itself, in the absence of any indication of the extent of such an assessment and its effect on the binding nature of the order to leave the country.

In conclusion, in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities had been insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 ECHR.

The Court therefore found the applicant's expulsion would have entailed a violation of Article 3 ECHR.

3. It was not disputed that family life had existed between the applicant, his wife and the children born in Belgium. The case was therefore examined from the perspective of "family life" and the complaint was considered from the standpoint of the Belgian authorities' positive obligations.

Having observed that the Belgian authorities had not examined the applicant's medical data and the impact of his removal on his state of health in any of the proceedings brought before them, the Grand Chamber had concluded that there would have been a violation of Article 3 ECHR if the applicant had been removed to Georgia without such an assessment being carried out.

A fortiori, the Belgian authorities had likewise not examined, under Article 8 ECHR, the degree to which the applicant had been dependent on his family as a result of the deterioration of his state of health. In the context of the proceedings for regularisation on medical grounds the Aliens Appeals Board, indeed, had dismissed the applicant's complaint under Article 8 ECHR on the ground that the decision refusing him leave to remain had not been accompanied by a removal measure.

If the Belgian authorities had ultimately concluded that Article 3 ECHR as interpreted above did not act as a bar to the applicant's removal to Georgia, they would have been required, in order to comply with Article 8 ECHR, to examine in addition whether, in the light of the applicant's specific situation at the time of removal, the family could reasonably have been

expected to follow him to Georgia or, if not, whether observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.

The Court therefore found the applicant's expulsion would have entailed a violation of Article 8 ECHR.

Cross-references:

European Court of Human Rights:

- *A.S. v. Switzerland*, no. 39350/13, 30.06.2015;
- *Airey v. Ireland*, no. 6289/73, 09.10.1979, Series A, no. 32;
- *Aswat v. the United Kingdom*, no. 17299/12, 16.04.2013;
- *Bouyid v. Belgium* [GC], no. 23380/09, 28.09.2015, *Reports of Judgments and Decisions* 2015;
- *D. v. the United Kingdom*, no. 30240/96, 02.05.1997, *Reports of Judgments and Decisions* 1997-III;
- *E.O. v. Italy* (dec.), no. 34724/10, 10.05.2012;
- *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, 13.12.2012, *Reports of Judgments and Decisions* 2012;
- *F.G. v. Sweden* [GC], no. 43611/11, 23.03.2016, *Reports of Judgments and Decisions* 2016;
- *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23.02.2012, *Reports of Judgments and Decisions* 2012;
- *Karagoz v. France* (dec.), no. 47531/99, 15.11.2001;
- *Karner v. Austria*, no. 40016/98, 24.07.2003, *Reports of Judgments and Decisions* 2003-IX;
- *Khachatryan v. Belgium* (dec.), no. 72597/10, 07.04.2015;
- *Kochieva and Others v. Sweden* (dec.), no. 75203/12, 30.04.2013;
- *M.S.S. v. Belgium and Greece*, [GC], no. 30696/09, 21.01.2011, *Reports of Judgments and Decisions* 2011;
- *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, 12.07.2001, *Reports of Judgments and Decisions* 2000-XII;
- *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 04.02.2005, *Reports of Judgments and Decisions* 2005-I;
- *Maslov v. Austria* [GC], no. 1638/03, 23.06.2008, *Reports of Judgments and Decisions* 2008;
- *Murray v. the Netherlands* [GC], no. 10511/10, 26.04.2016, *Reports of Judgments and Decisions* 2016;
- *N. v. the United Kingdom*, [GC], no. 26565/05, 27.05.2008, *Reports of Judgments and Decisions* 2008;
- *Pretty v. the United Kingdom*, no. 2346/02, 29.04.2002, *Reports of Judgments and Decisions* 2002-III;
- *S.H.H. v. the United Kingdom*, no. 60367/10, 29.01.2013;
- *Saadi v. Italy*, [GC], no. 37201/06, 28.02.2008, *Reports of Judgments and Decisions* 2008;
- *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, 28.06.2011;
- *Tarakhel v. Switzerland* ([GC], no. 29217/12, 04.11.2014, *Reports of Judgments and Decisions* 2014 (extracts);
- *Tatar v. Switzerland*, no. 65692/12, 14.04.2015;
- *Trabelsi v. Belgium*, no. 140/10, 04.09.2014, *Reports of Judgments and Decisions* 2014 (extracts);
- *V.S. and Others v. France* (dec.), no. 35226/11, 25.11.2014;
- *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30.10.1991, Series A, no. 215;
- *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, 20.12.2011.

Languages:

English, French.



Identification: ECH-2016-3-017

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 13.12.2016 / **e)** 53080/13 / **f)** Béláné Nagy v. Hungary / **g)** *Reports of Judgments and Decisions* 2016 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Disability pension / Possessions, right to respect for.

Headnotes:

Loss of disability benefits due to newly introduced eligibility criteria.

For the recognition of a possession consisting in a legitimate expectation, a person must have an assertable right which may not fall short of a sufficiently established, substantive proprietary interest under national law. Where the domestic legal conditions for the grant of any particular form of benefits or pension has changed and where the person concerned no longer satisfies them due to the change in conditions, a careful consideration of the individual circumstances of the case – in particular, the nature of the change in the requirement – may be warranted in order to verify the existence of a sufficiently established, substantive proprietary interest under national law (see paragraphs 79 and 89 of the judgment).

Summary:

I. In 2001 the applicant was granted a disability pension, which was withdrawn in 2010 after her degree of disability was re-assessed at a lower level using a different methodology. She underwent further examinations in the following years and was eventually assessed at the qualifying level. However, new legislation which had entered into force in 2012 introduced additional eligibility criteria, which the applicant did not fulfil and which related to the duration of the social-security cover. As a consequence, although her degree of disability would otherwise have entitled her to a disability allowance under the new system, her applications were refused.

II. Article 1 Protocol 1 ECHR

a. *Applicability:* In certain circumstances a legitimate expectation of obtaining an asset could enjoy the protection of Article 1 Protocol 1 ECHR. A legitimate expectation had to be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. At the same time, a proprietary interest recognised under domestic law – even if revocable in certain circumstances – could constitute a possession.

Amendments to social-security legislation may be adopted in response to societal changes and evolving views on the categories of people who need social assistance. Where the domestic legal conditions for the grant of any particular form of benefit or pension have changed and where the person concerned no longer fully satisfies them due to a change in these conditions, careful consideration of the individual circumstances of the case – in particular, the nature of the change in the requirement – may be warranted in order to verify the existence of a sufficiently established, substantive proprietary interest under the national law.

The applicant fulfilled all the conditions of eligibility for receiving a disability pension as of right for almost ten years. The decision granting her a disability pension in accordance with the provisions of the relevant act and which formed the basis of her original entitlement could thus be regarded as representing an existing possession. Throughout that period, she could, on the basis of the act, entertain a certain legitimate expectation of continuing to receive disability benefits should her disability persist to the requisite degree.

The question was whether, at the time of entry into force of the new legislation in 2012, the applicant still had a legitimate expectation of receiving disability benefit. The change in the law effectively imposed on a certain category of insured persons, including the applicant, a condition which had not been foreseeable during the relevant potential contributory period and which they could not possibly satisfy once the new legislation entered into force. During the intervening period between the discontinuation of the applicant's disability pension in 2010 and the legislature's introduction of the new contribution requirement in 2012, the applicant not only continued to be part of the social-security system but also continued to fulfil the relevant length-of-service requirements for disability benefits. As such, while not in receipt of a pension, she continued to entertain a legitimate expectation covered by the notion of possession in Article 1 Protocol 1 ECHR.

The applicant's right to derive benefits from the social-insurance scheme in question was infringed in a manner that resulted in the impairment of her pension rights. Article 1 Protocol 1 ECHR was thus applicable.

b. *Compliance with Article 1 Protocol 1 ECHR:* The Court was satisfied that the interference complied with the requirement of lawfulness and pursued the communal interest of protecting the public purse, by means of rationalising the system of disability-related social-security benefits. Article 1 Protocol 1 ECHR required that any interference be reasonably proportionate to the aim sought to be realised. The requisite fair balance would not be struck where the person concerned bore an individual and excessive burden. The applicant had been subjected to a complete deprivation of entitlement, rather than to a commensurate reduction in her benefits. She did not have any other significant income on which to subsist and she had difficulties in pursuing gainful employment and belonged to a vulnerable group of disabled people.

The disputed measure, albeit aimed at protecting the public purse by overhauling and rationalising the scheme of disability benefits, consisted in legislation

which, in the circumstances, failed to strike a fair balance between the interests at stake. Such considerations could not justify legislating with retrospective effect and without transitional measures corresponding to the particular situation, entailing as it did the consequence of depriving the applicant of her legitimate expectation that she would receive disability benefits. Such a fundamental interference with the applicant's rights was inconsistent with preserving a fair balance between the interests at stake. There was no reasonable relation of proportionality between the aim pursued and the means applied. Despite the State's wide margin of appreciation, the applicant had had to bear an excessive individual burden.

The Court therefore found a violation of Article 1 Protocol 1 ECHR.

Cross-references:

European Court of Human Rights:

- *Alajos Kiss v. Hungary*, no. 38832/06, 20.05.2010, paragraph 42;
- *Antoni Lewandowski v. Poland*, no. 38459/03, 02.10.2012, paragraphs 78 and 82;
- *Carson and Others v. the United Kingdom* [GC], no. 42184/05, 16.03.2010, paragraphs 85-89, *Reports of Judgments and Decisions* 2010;
- *Domalewski, v. Poland* (dec.), no. 34610/97, 28.04.2004, *Reports of Judgments and Decisions* 1999-V;
- *Kjartan Ásmundsson v. Iceland*, no. 60669/00, paragraphs 39-45, 12.10.2004, *Reports of Judgments and Decisions* 2004-IX;
- *Kopecký v. Slovakia* [GC], no. 44912/98, 28.09.2004, *Reports of Judgments and Decisions* 2004-IX;
- *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, paragraphs 61-63, 31.05.2011;
- *Moskal v. Poland*, no. 10373/05, 15.09.2009, paragraph 41;
- *N.K.M. v. Hungary*, no. 66529/11, 14.05.2013, paragraphs 49 and 61;
- *Pressos Compania Naviera S.A. and Others v. Belgium*, no. 17849/91, 20.11.1995, paragraph 43, Series A, no. 332;
- *Rasmussen v. Poland*, no. 38886/05, 28.04.2009;
- *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, 12.04.2006, *Reports of Judgments and Decisions* 2006-VI;
- *Stefanetti and others v. Italy*, nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10, 15.04.2014;

- *Valkov and Others v. Bulgaria*, nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, 25.10.2011;
- *Wieczorek v. Poland*, no. 18176/05, 08.12.2009.

Languages:

English, French.



Identification: ECH-2016-3-018

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.12.2016 / **e)** 16483/12 / **f)** *Khlaifia and Others v. Italy* / **g)** *Reports of Judgments and Decisions* 2016 (extracts) / **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.**

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:

Expulsion, detention pending, conditions / Foreigner, expulsion, collective, interdiction / Foreigner, expulsion, danger of ill treatment / Foreigner, expulsion, remedy, effective.

Headnotes:

Removal to Tunisia of Tunisian migrants who arrived by sea in a large group

Article 4 Protocol 4 ECHR did not guarantee in all circumstances the right to an individual interview, provided that each foreigner had an effective possibility of raising arguments against his or her expulsion and that those arguments were appropriately examined. The lack of any suspensive effect of an appeal against a removal decision did not in itself constitute a violation of Article 13 ECHR where the applicants did not allege that they faced a real risk of a violation of rights guaranteed by

Articles 2 or 3 ECHR in the destination country. Under Article 3 ECHR, the general context of an exceptional migration crisis might have to be taken into account for the assessment of the conditions in which foreigners were held pending their removal.

Summary:

I. The applicants, who were Tunisian nationals, were part of a group of migrants who had set off by boat from Tunisia in September 2011 heading for Italy. Their makeshift vessels were intercepted by the Italian Coastguard, which escorted them to a port on the island of Lampedusa, where they were placed in an early reception centre (hereinafter, the "CSPA"). The centre was gutted by fire during a riot and the applicants were then taken to ships moored in Palermo harbour. They were issued with refusal-of-entry orders. Before being put on planes bound for Tunisia they were received by the Tunisian Consul, who recorded their identities. Once in Tunis they were released. The whole Series of events lasted about twelve days. In 2012 a judge dismissed complaints by a number of associations for abuse of power and arbitrary arrest.

II.1. Article 4 Protocol 4 ECHR did not guarantee the right to an individual interview in all circumstances; the requirements of this provision might be satisfied where each foreigner had a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments were examined in an appropriate manner by the authorities of the respondent State.

In the present case, the applicants, who could reasonably have expected to be returned to Tunisia, had remained for between nine and twelve days in Italy. Even assuming that they had encountered objective difficulties in the CSPA or on the ships, during that not insignificant period of time they had had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy.

Firstly, the applicants had undergone two identity checks:

- a. The first identity check, according to the respondent Government, took place after the applicants' arrival in the reception centre and it involved taking photos of them and recording their fingerprints. While the Government had admittedly failed to produce the applicants' personal records, they had plausibly attributed that failure to the fire in the centre. As to the alleged lack of communication and mutual understanding between the migrants and the

Italian authorities, it was reasonable to assume that the difficulties had been alleviated by the undisputed presence in the centre of some one hundred social operators, including social workers, psychologists and about eight interpreters and cultural mediators.

- b. A second identity check took place before the applicants boarded the planes for Tunis: they had been received by the Tunisian Consul, who had recorded their identities. Even though the check was carried out by the representative of a third State, this subsequent check enabled verification of the migrants' nationality and provided them with a last chance to present arguments against their expulsion, on grounds such as age or nationality (some of the migrants had thus not been returned).

Secondly, while the refusal-of-entry orders had been drafted in comparable terms, only differing as to the personal data of each migrant, the relatively simple and standardised nature of the orders could be explained by the fact that the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion. It was therefore not unreasonable in itself for those orders to have been justified merely by the applicants' nationality, by the observation that they had unlawfully crossed the Italian border, and by the absence of any of the situations provided for in the relevant law (political asylum, granting of refugee status or the adoption of temporary protection measures on humanitarian grounds).

Thirdly, it was not decisive that a large number of Tunisian migrants had been expelled at the relevant time or that the three applicants had been expelled virtually simultaneously. This could be explained as the outcome of a Series of individual refusal-of-entry orders. Those considerations sufficed for the present case to be distinguished from the cases of *Čonka v. Belgium*, *Hirsi Jamaa and Others v. Italy*, *Georgia v. Russia (I)* and *Sharifi and Others v. Italy and Greece*.

In addition, the applicants' representatives had been unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients' presence on Italian territory and preclude their removal. That called into question the usefulness of an individual interview in the present case.

To sum up, the applicants had undergone two identity checks, their nationality had been established, and they had been afforded a genuine and effective possibility of submitting arguments against their expulsion.

The Court therefore found no violation of Article 4 Protocol 4 ECHR.

2. In the present case, the refusal-of-entry orders indicated expressly that the individuals concerned could appeal against them to the Agrigento Justice of the Peace within a period of sixty days.

There was no reason to doubt that, in that context, the Justice of the Peace would also be entitled to examine any complaint about a failure to take account of the personal situation of the migrant concerned and based therefore, in substance, on the collective nature of the expulsion.

As to the fact that this appeal did not have suspensive effect, an in-depth analysis of the *De Souza Ribeiro v. France* judgment, compared with the judgments in *Čonka* and *Hirsi Jamaa and Others*, cited above, led the Court to the following conclusions.

Where an applicant had not alleged that he or she would face violations of Articles 2 and 3 ECHR in the destination country, removal from the territory of the respondent State would not expose him or her to harm of a potentially irreversible nature. In such cases the Convention thus did not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely required that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. In the present case, the remedy available satisfied those requirements.

Moreover, the fact that the remedy available to the applicant did not have suspensive effect had not been a decisive consideration for the conclusion reached in the *De Souza Ribeiro* case. That conclusion had been based on the fact that the applicant's "arguable" complaint under Article 8 ECHR had been dismissed extremely hastily (his removal to Brazil had been implemented less than an hour after his appeal to the Administrative Court).

The Court therefore found no violation of Article 13 ECHR taken together with Article 4 Protocol 4 ECHR.

3. The applicants had complained about the conditions in which they had been held.

After reiterating that the factors stemming from an increase in the arrival of migrants could not release the member States from their obligations, the Court took the view that it would be artificial to examine the

facts of the case outside the context of the humanitarian emergency.

The year 2011 had been marked by a major migration crisis. The arrival *en masse* of North African migrants (over 50,000 during the year) on Lampedusa and Linosa had undoubtedly created organisational, logistical and structural difficulties for the Italian authorities.

In addition to that general situation there had been some specific problems just after the applicants' arrival which had contributed to exacerbating the existing difficulties and creating a climate of heightened tension: a revolt among the migrants at the reception centre; an arson attack which gutted the centre; a demonstration by 1,800 migrants through the streets of Lampedusa; clashes between the local community and a group of aliens threatening to explode gas canisters; and acts of self-harm and vandalism.

Those details showed that the State had been confronted with many problems as a result of the arrival of exceptionally high numbers of migrants and that the authorities had been burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people and to maintain law and order.

The decision to concentrate the initial reception of the migrants on Lampedusa could not be criticised in itself. As a result of its geographical situation, it was not unreasonable to transfer the survivors to the closest reception facility.

a. Conditions in the reception centre – The Court found, noting the following points, that the conditions in which the applicants had been held in the centre did not reach the threshold of severity required for them to be characterised as inhuman or degrading.

- i. While certain reports by parliamentary committees or NGOs showed that there was overcrowding in the centre, together with a lack of hygiene, privacy and outside contact, their findings were, however, counterbalanced by a report of the Council of Europe's Parliamentary Assembly covering a period that was closer to that of the applicants' stay there, so the conditions in question could not be compared to those which had led the Court to find a violation of Article 3 ECHR in other cases.
- ii. Even though the number of square metres per person in the centre's rooms had not been established, and even supposing that the centre's maximum capacity had been exceeded by a percentage of between 15% and 75%,

the freedom of movement enjoyed by the applicants in the centre must have alleviated the constraints.

- iii. Although the applicants had been weakened because they had just made a dangerous sea-crossing, they did not have any specific vulnerability (they were not asylum-seekers, did not claim to have endured traumatic experiences in their country of origin, belonged neither to the category of elderly persons nor to that of minors, and did not claim to be suffering from any particular medical condition).
- iv. They had not lacked food or water or medical care and had not been exposed to abnormal weather-related conditions.
- v. In view of the short duration of their stay (3-4 days), their lack of contact with the outside world had not had any serious individual consequences.
- vi. While the authorities had been under an obligation to take steps to find other satisfactory reception facilities with enough space and to transfer a sufficient number of migrants to those facilities, in the present case the Court could not address the question whether that obligation had been fulfilled, because only two days after the arrival of the last two applicants, the Lampedusa CSPA had been gutted by fire during a revolt.
- vii. Generally speaking, situations that the Court had sometimes found to be in breach of Article 3 ECHR had been more intense or longer in duration.

The Court therefore found no violation of Article 3 ECHR.

b. Conditions on board the two ships – The threshold of severity had not been reached on the ships either.

First, the applicants had failed to produce any documents or third-party testimony certifying any signs of the alleged ill-treatment or confirming their version of the facts (overcrowding, insults, lack of hygiene), so there was no reason to reverse the burden of proof.

Second, it could be seen, by contrast, from a judicial decision (based on a press agency note and there being no reason to doubt that it had been taken with the requisite procedural safeguards) that an MP had boarded the ships and had observed that the migrants were accommodated in satisfactory conditions.

The Court therefore found no violation of Article 3 ECHR.

Cross-references:

European Court of Human Rights:

- *A.A. v. Greece*, no. 12186/08, 22.07.2010;
- *A.F. v. Greece*, no. 53709/11, 13.06.2013;
- *Aarabi v. Greece*, no. 39766/09, 02.04.2015;
- *Aksoy v. Turkey*, no. 21987/93, 18.12.1996, *Reports 1996-VI*;
- *Alver v. Estonia*, no. 64812/01, 08.11.2005;
- *Amuur v. France*, no. 19776/92, 25.06.1996, *Reports 1996-III*;
- *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10.01.2012;
- *Andrei Frolov v. Russia*, no. 205/02, 29.03.2007;
- *Andric v. Sweden* (dec.), no. 45917/99, 23.02.1999;
- *B.M. v. Greece*, no. 53608/11, 19.12.2013;
- *Babushkin v. Russia*, no. 67253/01, 18.10.2007;
- *Belevitskiy v. Russia*, no. 72967/01, 01.03.2007;
- *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, 16.06.2005;
- *Bouyid v. Belgium* [GC], no. 23380/09, 28.09.2015, *Reports of Judgments and Decisions 2015*;
- *Brega v. Moldova*, no. 52100/08, 20.04.2010;
- *C.D. and Others v. Greece*, nos. 33441/10, 33468/10 and 33476/10, 19.12.2013;
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- *Chahal v. the United Kingdom*, no. 22414/93, 15.11.1996, *Reports 1996-V*;
- *Čonka v. Belgium*, no. 51564/99, 05.02.2002, *Reports of Judgments and Decisions 2002-I*;
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- *De Souza Ribeiro v. France* [GC], no. 22689/07, 13.12.2012, *Reports of Judgments and Decisions 2012*;
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- *Del Río Prada v. Spain* [GC], no. 42750/09, 21.10.2013, *Reports of Judgments and Decisions 2013*;
- *Delbec v. France*, no. 43125/98, 18.06.2002;
- *Denisenko and Bogdanchikov v. Russia*, no. 3811/02, 12.02.2009;
- *Dougoz v. Greece*, no. 40907/98, 06.03.2001, *Reports of Judgments and Decisions 2001-II*;
- *Dritsas v. Italy* (dec.), no. 2344/02, 01.02.2011;
- *E. v. Norway*, no. 11701/85, 29.08.1990, Series A, no. 181-A;

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- *Efremidze v. Greece*, no. 33225/08, 21.06.2011;
 - *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, 13.12.2012, *Reports of Judgments and Decisions* 2012;
 - *F.H. v. Greece*, no. 78456/11, 31.07.2014;
 - *Gäfgen v. Germany* [GC], no. 22978/05, 01.06.2010, *Reports of Judgments and Decisions* 2010;
 - *Gavrilovici v. Moldova*, no. 25464/05, 15.12.2009;
 - *Georgia v. Russia (I)* [GC], no. 13255/07, 03.07.2014, *Reports of Judgments and Decisions* 2014 (extracts);
 - *Ghulami v. France* (dec.), no. 45302/05, 07.04.2009;
 - *Ha.A. v. Greece*, no. 58387/11, 21.04.2016;
 - *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23.02.2012, *Reports of Judgments and Decisions* 2012;
 - *Ireland v. the United Kingdom*, no. 5310/71, 18.01.1978, Series A, no. 25;
 - *István Gábor Kovács v. Hungary*, no. 15707/10, 17.01.2012;
 - *Jalloh v. Germany* [GC], no. 54810/00, 11.07.2006, *Reports of Judgments and Decisions* 2006-IX;
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 - *Kanagaratnam and Others v. Belgium*, no. 15297/09, 13.12.2011;
 - *Kantjyrev v. Russia*, no. 37213/02, 21.06.2007;
 - *Karalevičius v. Lithuania*, no. 53254/99, 07.04.2005;
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 - *Mursič v. Croatia* [GC], no. 7334/13, 20.10.2016;
 - *Naoumenko v. Ukraine*, n°42023/98, 10.02.2004;
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 - *Sultani v. France*, no. 45223/05, 20.09.2007, *Reports of Judgments and Decisions* 2007-IV;
 - *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, 17.07.2014, *Reports of Judgments and Decisions* 2014 (extracts);
 - *T. and A. v. Turkey*, no. 47146/11, 21.10.2014;
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- *Z. and Others v. the United Kingdom* [GC], no. 29392/95, 10.05.2001, *Reports of Judgments and Decisions* 2001-V.

Languages:

English, French.



Systematic thesaurus (V22) *

* 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.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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2.1.1.4.2	Universal Declaration of Human Rights of 1948	
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³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

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³⁸ Including its Protocols.

³⁹ Presumption of constitutionality, double construction rule.

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⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

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⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.

⁵² Including the body responsible for revising or amending the Constitution.

⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

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⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

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⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

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⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

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⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, Panachage, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹¹ For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

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⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

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¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Including all questions of non-discrimination.

¹⁰⁹ Taxes and other duties towards the state.

¹¹⁰ "One person, one vote".

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¹¹¹ According to the European Convention on Nationality of 1997, ETS no. 166, “nationality’ means the legal bond between a person and a state and does not indicate the person’s ethnic origin” (Article 2) and “... with regard to the effects of the Convention, the terms ‘nationality’ and ‘citizenship’ are synonymous” (paragraph 23, Explanatory Memorandum).

¹¹² For example, discrimination between married and single persons.

¹¹³ This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

¹¹⁴ Detention by police.

¹¹⁵ Including questions related to the granting of passports or other travel documents.

¹¹⁶ May include questions of expulsion and extradition.

5.3.13.3	Access to courts ¹¹⁷	24, 62, 80, 174, 181, 189, 199, 289, 325, 364, 370, 407, 444, 458, 461, 501, 502, 502, 549, 560, 616, 632, 670, 711
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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.

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.

5.3.30	Right of resistance	
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¹²⁵ Aspects of the use of names are included either here or under "Right to private life".

¹²⁶ Including compensation issues.

¹²⁷ This keyword also covers "Freedom of work".

¹²⁸ This should also cover the term freedom of enterprise.

¹²⁹ Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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Keywords of the alphabetical index *

* The précis presented in this *Bulletin* are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

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