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).

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)*
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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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Strasbourg, November 2017

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There was no relevant constitutional case-law during the reference period 1 January 2017 – 30 April 2017 for the following countries:

Japan, Ireland, Luxembourg, Monaco, Norway, Ukraine.

Albania
Constitutional Court

Important decisions

Identification: ALB-2017-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 18.01.2017 / **e)** 2/2017 / **f)** Laws and other rules having the force of law / **g)** *Fletorja Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.10 General Principles – **Certainty of the law**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Judges, prosecutors, evaluation.

Headnotes:

The process of transitional re-evaluation for all the judges and prosecutors as well as the members of the Constitutional Court, the High Court and the General Prosecutor, which includes a control of the legality of assets and a control of his or her proficiency, is not unconstitutional.

Summary:

I. On 22 July 2016, the Assembly approved Law no. 76/2016 "On some additions and amendments to Law no. 8417, 21 October 1998" ("the Constitution").

Part of those constitutional amendments is the creation of an entire process of transitional re-evaluation for all the judges and prosecutors in Albania as well as the members of the Constitutional Court, the High Court and the General Prosecutor, which includes a control of the legality of assets, a background assessment and a control of his or her proficiency.

According to Article 179/b of the Constitution, the re-evaluation system is created for the purpose of guaranteeing the functioning of the rule of law, the independence of the justice system and also to return public trust to the institutions of this system (point 1). It will be done on the basis of the principles of due process of law, and also respecting the fundamental rights of the evaluation subject (point 2). Also, according to point 5 of this Article, the re-evaluation is performed by an Independent Qualification Commission (hereinafter, "IQC"), whilst the appeals of re-evaluation subjects or the Public Commissioner are examined by the College of Appealing (hereinafter, "CA") at the Constitutional Court, which are independent, impartial organs (point 6).

In implementation of Article 179/b of the Constitution, the Assembly approved the law "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", which has the purpose of defining the special rules for the transitional re-evaluation of all re-evaluation subjects and the principles of the organisation of the re-evaluation process for all judges and prosecutors, the methodology, procedures and standards of re-evaluation, the organisation and functioning of the re-evaluation institutions, as well as the role of the International Monitoring Operation (hereinafter, "IMO"), the other state organs and the public in the re-evaluation process.

The applicants, a group of 31 deputies of the Assembly and members of the Parliamentary Group of the Democratic Party, addressed the Constitutional Court with an application for the declaration of this law as incompatible with the Constitution, as well as Articles 6 and 8 ECHR, concerning the rights to fair trial and respect for private and family life, respectively. The applicants' central argument against the law's constitutionality was that it violates the principle of separation and balancing of powers, as one of the fundamental principles of the rule of law. The law not only allocates an active role in the re-evaluation process to existing auxiliary institutions (the High Inspectorate of Declaration and Audit of Assets and Conflicts of Interest (hereinafter, "HIDAACI"), Directorate of the Security of Classified Information (hereinafter, "DSCI") and School of Magistrates), but also renders them organs on which all the activity of the new constitutional organs depends.

II. The Constitutional Court held that the claim that the existing organs replace the new re-evaluation organs is without foundation. According to point 5 of Article 179/b of the Constitution, the re-evaluation is performed by the IQC, whereas according to Article 4/2 of the law: "The Commission and the College of Appealing are the institutions that decide on the final evaluation of the re-evaluation subjects". Regardless of the formulation of this provision, it cannot be read in a manner disconnected from, but in

harmony with, the other legal provisions that define in detail the competences of the organs involved in the process and the competences that are exercised by the IQC itself during this process.

It is provided in Article 5.1 of the law that "the re-evaluation process of all assessees shall be carried out by the Commission, the Appeal Chamber and the Public Commissioners in collaboration with international observers". It also turns out, as was mentioned above, that based on the provisions of Chapter VII of Law no. 84/2016, whilst they perform their constitutional function, the re-evaluation organs carry out a genuine process of control and evaluation and do not base themselves on, nor are they bound by, the conclusions submitted to them by other auxiliary organs.

Although the constitution drafters conceived and constructed a new system of re-evaluation, clearly defining the competences and margin of evaluation of the new constitutional organs, this cannot be read to mean that they had the purpose of undoing the entire existing system of control and evaluation of public functionaries and the competences of the institutions created for that purpose. On the contrary, the purpose was for the re-evaluation process to be carried out by the new constitutional organs, but in cooperation with and with the assistance of the existing organs, with the role of each organ involved in the process and their relations in the framework of realising that process being clearly provided. As long as the existing executive organs have only an auxiliary role in the re-evaluation process, since their activity is conducted under the supervision and control of the constitutional re-evaluation organs (the IQC and the CA), they cannot exercise their functions without the latter having been constituted and having started to function.

The applicants also claimed that the law violates the principle of legal certainty, because the text of its norms is unclear, confusing and, in some cases, even contradictory. The law creates an unclear situation that could lead to the discharge from office of members of the Constitutional Court, the High Court, advisers, legal assistants, and even the General Prosecutor, because it has not provided what institution performs their professional evaluation.

Concerning this claim, the Court, based also on the provisions that define the competences of the other organs involved in the process, HIDAACI, DSCI and the work group or the organs of professional evaluation mentioned above in this decision, concluded that they do not have a lack of clarity that could lead to their misinterpretation or misapplication. Furthermore, the Court found that at the end of the re-evaluation process, the IQC gives a reasoned opinion in connection with the evidence and the reasons on which the conclusions reached by it have been based.

The applicants claimed that the new re-evaluation organs are put under the supervision and control of the executive power, because the telecommunications and financial income of their members are controlled periodically by agencies under the government. They also claimed that the provision made by Article 28 does not meet the constitutional standards of a restriction of fundamental rights and freedoms, because it does not provide any rule about the way in which this activity is accomplished and the monitoring of the data is not accompanied by any criterion that guarantees proportionality and the need for the intervention.

The Court found that, according to Article A of the Annex to the Constitution, for the purpose of performing the re-evaluation process, the implementation of several articles of that Constitution, especially the articles related to the right to private life, as well as Articles 36 and 37, the provisions related to the burden of proof, Articles 128, 131.f, 135, 138, 140, 145.1, 147.a, paragraph 1.b, 149.a, paragraph 1.b, are partially restricted, according to Article 17 of the Constitution. According to point 4 of Article C of the Annex to the Constitution, the members and employees of the re-evaluation institutions sign a written declaration, according to law, to authorise the performance of an annual control of their assets, systematic monitoring of their financial transactions and accounts, and also special restrictions of the right to the secrecy of communications during the time length of duty. Consequently, the restrictions of the rights of the members of the re-evaluation institutions have been imposed by the Constitution and not by the law, and therefore, they cannot be the object of constitutional control.

The Court found that the intervention in this case is justified by the public interest, which is a reduction of the level of corruption and the return of the trust of the public in the justice system, that is, it is linked with interests of national security, public security and protection of the rights and freedoms of others. Consequently, in the concrete case the intervention has been done for a lawful purpose, in the viewpoint of the second paragraph of Article 8 ECHR on the right to private and family life, as well as respecting Article A of the Annex to the Constitution, which restricts this right.

The Court emphasised again that it is a duty of the new constitutional re-evaluation organs, during the supervision and control of the activity of the law-implementing organs, to seek respect for European standards and the jurisprudence of the Constitutional Court, as above.

The Court held that from the manner of qualification of the Appeal Chamber in the Constitution and in the law on the transitional re-evaluation of judges and prosecutors, those texts provide sufficient elements to reach the conclusion that it can be considered as special jurisdiction, which gives judicial guarantees to persons affected by the re-evaluation procedure and that the rights and guarantees included in the legislative and constitutional scheme seem to be quite broad.

From the way in which the entire re-evaluation system has been conceived in the Constitution, that is, the organs that carry it out, the manner of election of their members and the guarantees that they enjoy, the competences that those organs will exercise and the legal basis on which this activity is supported, it is judged that those organs provide all the guarantees required for due process of law in the meaning of Article 42 of the Constitution and Article 6 ECHR.

As a consequence, because of the guarantees that those organs provide, it is judged that in accordance with Article 43 of the Constitution the re-evaluation subjects have the right to appeal to a higher court, which has the right to try the case on its merits and to decide conclusively in connection with it.

For these reasons, the Constitutional Court, by a majority of votes, refused the application.

Languages:

Albanian.

Armenia
Constitutional Court

Statistical data

1 January 2017 – 30 April 2017

- 67 applications were filed, including:
  - 15 applications filed by the President, concerning the constitutionality of obligations deriving from international treaties
  - 1 application by the Prosecutor General, concerning the constitutionality of legal provisions
  - 2 applications by domestic judges, concerning the constitutionality of legal provisions
  - 1 application by candidates in the election of deputies of the National Assembly, concerning the constitutionality of the decision of the Central Electoral Commission on the results of the elections of the National Assembly
  - 48 applications filed as individual complaints concerning the constitutionality of legal provisions
- 28 cases were admitted for review, including:
  - 15 applications filed by the President, concerning the compliance of obligations deriving from international treaties
  - 1 application filed by candidates in the election of deputies of the National Assembly concerning the constitutionality of the decision of the Central Electoral Commission on the results of the elections of the National Assembly
  - 2 applications by domestic judges, concerning the constitutionality of legal provisions
  - 1 application by the Prosecutor General concerning the constitutionality of legal provisions
  - 9 applications filed as individual complaints concerning the constitutionality of legal provisions

- 30 cases heard and 39 decisions delivered, including:
    - 1 application filed by a candidate for deputy of the National Assembly concerning the constitutionality of the decision of the Central Electoral Commission on the results of the elections of the National Assembly
    - 17 applications filed by the President concerning the constitutionality of obligations deriving from the international treaties
    - 2 applications filed by the Human Rights Defender concerning the constitutionality of legal provisions
    - 1 application filed by the General Prosecutor concerning the constitutionality of legal provisions
    - 2 applications filed by domestic judges concerning the constitutionality of legal provisions
    - 6 applications filed as individual complaints concerning the constitutionality of legal provisions
    - 1 application filed by 1/5 of the deputies of the National Assembly concerning the constitutionality of legal provisions

Important decisions

Identification: ARM-2017-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 24.01.2017 / **e)** / **f)** On the conformity with the Constitution of the provisions of the Code on Administrative Offences and the Law on Police / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

2.2.2.1.1 Sources – Hierarchy – Hierarchy as between national Sources – Hierarchy emerging from the Constitution – **Hierarchy attributed to rights and freedoms**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.24 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the reasons of detention**.
5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges**.

Keywords of the alphabetical index:

Liberty, deprivation / Liberty, deprivation, human rights and freedoms / Arrest, administrative / Human rights, applicable, directly.

Headnotes:

Interference with the constitutional right to personal liberty takes place from the moment of factual deprivation of liberty. From that moment, the guaranteed fundamental rights apply, regardless of whether or not they are enshrined in the legislation on administrative offences, for the reason that Article 3 of the Constitution lays down that the public authorities are bound by the basic human rights and freedoms as directly applicable law.

Summary:

The case originated in an application filed by the Human Rights Defender of the Republic of Armenia. He challenged some provisions of the Code on Administrative Offences and Law on Police. The main issue, he stated, concerned that of legal guarantees of persons subjected to administrative arrest. The applicant stated that, according to the impugned provisions, a person may be arrested up to 3 hours – which is deprivation of liberty in its nature – but the guarantees safeguarded by the Constitution did not cover such a case under the provisions of the Code on Administrative Offences.

The Constitutional Court considered the case and held that Article 27 of the Constitution sets out a comprehensive list of the cases in which a person may be deprived of his or her liberty. Deprivation of liberty may take place in the definite manner set out in the law, which in turn must comply with the requirements of the principle of proportionality of restriction of rights and the principle of legal certainty with respect to such restriction, as laid down by Articles 78 and 79 of the Constitution. At the same time the Constitution guarantees certain rights which a person enjoys from the moment that person is deprived of his or her liberty. In particular, the person must be informed of the reasons for the deprivation of liberty in a language which he or she understands and, in cases where a criminal charge is brought, also of the charge.

The Court also held that informing a person immediately of the reasons for the deprivation of his or her liberty is a public obligation of state authorities which excludes any discretion. The Court also stated that Article 27 of the Constitution also lays down that everyone deprived of his or her personal liberty is entitled to have a person of his or her choosing immediately informed of this. This right is also directly applicable.

The Court also considered the issue of challenging the deprivation of liberty. The Court held that the right of access to a court is also a right which is directly applicable, hence a person enjoys that right in any case of deprivation of liberty.

Languages:

Armenian.

Identification: ARM-2017-1-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 21.03.2017 / **e)** / **f)** On the conformity with the Constitution of the provisions of the Criminal Procedure Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

Keywords of the alphabetical index:

Human dignity, reputation / Criminal case, death, accused, suspect / Criminal procedure, rights, relatives, deceased accused / Presumption of innocence, deceased accused.

Headnotes:

Human dignity is the vital element of the legal status of a human being. It has profound importance for the free realisation of fundamental human rights and freedoms. Inviolability of human dignity, the right to honour and reputation give birth to the state obligation to create legal guarantees for the protection of human dignity and reputation of the deceased.

Summary:

The case was considered by the Constitutional Court upon an application filed by the Criminal Court of Appeal. The case concerned the constitutionality of the Criminal Procedure Code, which, in the list of circumstances excluding criminal prosecution, set out that:

i. a criminal case may not be instituted;
ii. criminal prosecution may not be commenced; and
iii. an instituted criminal case is subject to suspension, if the person, that is to say, the suspect or the accused, has died, except in cases where the proceedings are necessary to rehabilitate the rights of the deceased or where new circumstances appear with respect to other persons.

The applicant claimed that the impugned article contradicted the Constitution of the Republic of Armenia as it allows criminal proceedings or the prosecution to be discontinued in cases of death of the suspect or the accused without taking into account the consent of his or her relatives. The applicant noted that, in such cases, the guilt of the suspect or the accused is considered to be proved. For the applicant, as the suspect or the accused was deprived of the possibility of seeking the continuation of criminal proceedings, he or she could not seek the protection of his or her dignity, honour, reputation and presumption of innocence. The applicant also noted that, though the impugned provision permits the continuation of the procedure on some occasions, there are no definite regulations on its implementation, which in turn results in a violation of legal certainty.

The Constitutional Court considered the case and held that, in cases of death of the suspect or the accused, the question of criminal liability cannot arise; however, in some cases it may be necessary to prove his or her guilt or innocence. The Court also stated that, in cases of death of the suspect or the accused, he or she is considered to be innocent if not proven guilty by a court in the manner laid down by law.

The Court clarified that, in the impugned article, the death of the suspect or the accused serves as a legal condition upon which criminal proceedings may not be instituted, criminal prosecution may not be commenced and the pending criminal case must be discontinued.

i. At the same time, the legislator stipulated two cases as exceptions to the general rule. Those exceptions were:the recovery of the rights of the suspect or the accused, or
ii. the appearance of new circumstances with respect to other persons. In such cases, the criminal case is to be continued regardless of the death of the suspect or the accused.

The Court held that the legal provision on the continuation of the criminal case for the protection of the rights of the suspect or the accused is a legal guarantee and aimed at ensuring human dignity, right to inviolability of the honour and reputation, and the presumption of innocence. The Court also stated that the relatives of the deceased have the right to request the continuation of the case. The Court noted the lack of procedural legal regulations for the implementation of the above-mentioned provision and stated that the legislator should introduce proper amendments. Until the legislator enacts the appropriate legal regulations, the practice for implementing the law is to be developed on the following basis: if upon the death of an accused or a suspect the criminal prosecution is not pursued or the criminal case is discontinued, his or her relatives must be informed of this. The Court also stated that in such cases their right to be heard shall be ensured. In cases where the rights of the suspect or the accused need to be protected, the relative's request for the continuation of the criminal case shall be satisfied and the presence of the relative during the whole process concerning the protection of the rights of the suspect or the accused shall be ensured.

Based on the above, the Constitutional Court declared the impugned legal provision to be in accordance with the Constitution in the framework of the legal views expressed by the Constitutional Court in this decision.

Languages:

Armenian.

Austria
Constitutional Court

Important decisions

Identification: AUT-2017-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 14.03.2017 / **e)** G 405/2016 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.19 General Principles – **Margin of appreciation**.
5.2 Fundamental Rights – **Equality**.
5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.

Keywords of the alphabetical index:

Criminal proceedings, fairness / Costs, criminal trial.

Headnotes:

If criminal proceedings have been discontinued, the legislator enjoys a margin of discretion in determining any reimbursement of costs to be awarded to the person accused.

Summary:

I. The applicant had been charged with breach of trust. After the trial, the public prosecutor withdrew the indictment, and the competent regional court (sitting as a panel of professional and lay judges) discontinued the criminal proceedings.

After the pronouncement of discontinuation of the proceedings the applicant claimed a contribution to the necessary legal costs in the amount of EUR 248,756, including EUR 146,544 for necessary legal defence throughout the trial which had lasted 33 days. The regional court partly allowed the applicant's claim and awarded a contribution to the costs of the legal defence in the amount of EUR 5,000 as well as reimbursement of cash expenses in the amount of EUR 10,524.

The applicant appealed against this decision; at the same time, he filed a normative constitutional complaint *(Parteiantrag auf Normenkontrolle)* with the Constitutional Court, claiming that Article 393a of the Code of Criminal Procedure *(Strafprozessordnung* – hereinafter, "StPO") infringed the constitutional principle of equality as well as his right to a fair trial.

Article 393a StPO provides that if an accused person has been acquitted of the alleged offence or if the criminal proceedings have been discontinued after the trial, he or she is entitled to receive a contribution to the costs of his or her legal defence. This contribution includes all necessary cash expenses as well as a lump-sum allowance for the costs of the defence counsel (except in cases where the accused person had been granted legal aid). This lump-sum allowance shall be determined by the criminal court, taking into account the extent and complexity of the legal defence as well as the extent to which the involvement of a defence counsel has been necessary or appropriate. However, the maximum amount of the allowance is EUR 10,000 in jury proceedings, EUR 5,000 in proceedings before a regional court sitting as a panel of professional and lay judges, EUR 3,000 in proceedings before a regional court sitting as a single judge, and EUR 1,000 in proceedings before a district court.

II. The Constitutional Court pointed out that criminal proceedings aim to enforce criminal law by investigating criminal offences, prosecuting suspects and punishing persons sentenced. As for the public prosecutor's office, it is not authorised to bring prosecutions unless the facts of the matter have been clarified sufficiently and a conviction appears to be probable. Any indictment may be appealed by the person accused on the grounds of illegality. After the indictment has become final, the public prosecutor's office becomes a party to the (main) criminal proceedings directed by the competent criminal court. Nevertheless, throughout the entire proceedings the public prosecutor's office is committed to the principle of objectivity. As a consequence, it must consider any evidence, whether incriminating or exculpatory, in the same way and lodge a complaint also for the benefit of the person accused if necessary.

With regard to the various specifics of criminal proceedings, such proceedings cannot be compared with (contentious) civil proceedings where the unsuccessful party is liable for the costs of the opposing party. Apart from that, if prosecutions have been brought unlawfully and culpably, the person accused may claim damages arising from public liability; such a claim may also extend to the costs of legal defence.

The Constitutional Court therefore found that the question whether a person charged with a criminal offence shall be granted full reimbursement of legal costs where proceedings taken against him or her have been discontinued falls within the margin of appreciation given to the legislator.

As for the system of maximum amounts of reimbursement of legal costs set out in Article 393a StPO, the Court observed that it is based on the type of criminal court having jurisdiction, i.e., implicitly, on the type of criminal offence to be prosecuted, which may be considered an objective aspect under the general principle of equality.

The Court was also satisfied that the lump-sum allowance for legal costs is quite proportionate to the necessary and appropriate costs of legal defence. The fact that in a manageable number of cases the legal costs incurred by the person accused (far) exceed the statutory maximum lump-sum allowance could not affect this finding.

Finally, referring to the case-law of the European Court of Human Rights, the Constitutional Court held that neither Article 6.2 ECHR (concerning the presumption of innocence) nor any other provision of the European Convention on Human Rights gives a person charged with a criminal offence a right to reimbursement of his or her costs.

Cross-references:

European Court of Human Rights:

- *Reinmüller v. Austria*, no. 69169/01, 18.11.2004;
- *Hibbert v. The Netherlands*, no. 30087/97, 26.01.1999;
- *Englert v. Germany*, no. 10282/83, 25.08.1987, Series A, no. 123.

Languages:

German.

Identification: AUT-2017-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 30.06.2017 / **e)** G 53/2017 / **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**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

Keywords of the alphabetical index:

Nazism, pilgrimage-site, prevention / Nazism, fight / Expropriation, by law, challenge in court.

Headnotes:

A legal expropriation may be challenged before the Constitutional Court and is therefore compatible with the fundamental right of access to justice. The expropriation of Adolf Hitler's birthplace in Upper Austria serves a legitimate aim springing from Austria's specific historical context and from the Austrian State Treaty and is proportionate to this aim.

Summary:

I. As per the Federal Act on the expropriation of the property at Salzburger Vorstadt no. 15, *Braunau am Inn (Bundesgesetz über die Enteignung der Liegenschaft Salzburg Vorstadt* no. 15, *Braunau am Inn)* adopted in December 2016, the Republic of Austria, aiming to permanently prevent fostering, promotion or spread of national socialist thought as well as positive commemoration of National Socialism, assumed ownership of Adolf Hitler's birthplace in *Braunau am Inn* (Upper Austria). Under the same Act the Republic expressly undertakes to retain ownership of this property and to arrange for a use compatible with the legal aims of the expropriation. Finally, the Act provides for compensation to be granted to the former owner, the amount of which shall be determined by the Federal Minister of the Interior. If, after the expropriation has become effective, it is established that parts of the property are not required to achieve the aims of this measure, the Republic is obliged to offer them for sale to the former owner.

II. In order to safeguard the Republic's entitlement to property resulting from this Act, the competent district court granted a provisional priority notice to be entered into the land register. The applicant, who is the former owner of the property, appealed against this decision. At the same time, she filed a normative constitutional complaint *(Parteiantrag auf Normenkontrolle)* with the Constitutional Court, claiming that the relevant Federal Act on the expropriation of her property infringed her fundamental rights to a fair trial and to property.

III. The Constitutional Court pointed out that, in principle, the Constitution does not prohibit the legislator from bringing an expropriation directly, i.e., without providing for administrative proceedings to be conducted previously. In particular, such a legal expropriation does not affect the (former) owner's rights more adversely than administrative measures based on a general expropriation act would do: Since any legal expropriation may be challenged before the Constitutional Court, the (former) owner's right of access to justice is fully ensured as the Court, for questions which fall within its specific range of jurisdiction, such as reviewing the constitutionality of general norms, qualifies as a tribunal within the meaning of Article 6.1 ECHR before which a public hearing has to be held if the parties so demand.

As regards the right to property, measures depriving a person of his or her possessions must be considered unconstitutional unless such an expropriation is required by the public interest. This is only the case if there is a specific demand the fulfillment of which is in the public interest, if the property in question is appropriate to satisfy this need and if it is impossible to meet this need in another way than by resorting to expropriation.

The Court, referring to its settled case-law, recalled that the unconditional rejection of National Socialism is a fundamental principle of the Republic restored in 1945. Since 1947, any re-engagement in Nazi activities is prohibited and punishable by constitutional law. What is more, under the State Treaty for the Re-establishment of an Independent and Democratic Austria of 1955, the Republic has expressly undertaken to "continue the efforts to eliminate from Austrian political, economic and cultural life all traces of Nazism, to ensure that (Nazi) organisations are not revived in any form, and to prevent all Nazi [...] activity and propaganda in Austria" (Article 9.1 of the State Treaty) as well as to "give effect" to this principle by adopting appropriate measures (Article 10.1 of the State Treaty). With a view to this specific historical and legal context all public authorities carry a special responsibility for fighting Nazism.

As regards Hitler's birthplace, on account of its uniqueness this place has the potential to become a “pilgrimage site” for neo-nazis. However, under the State Treaty Austria is obliged to take all necessary steps to counter such worshipping. In order to deprive this site of its particular symbolic power, extensive construction measures destroying its recognition value appear to be necessary. Since under civil law only the owner is entitled to use a thing at will, the necessary measures can only be taken if the Republic obtains full power of disposal of the property. In fact, the Republic had repeatedly tried to buy the property in the past, but in the end all these attempts had failed.

The Court therefore found that the expropriation act at issue strikes a fair balance between the outweighing public interests and the applicant's right to property.

Cross-references:

European Court of Human Rights:

- *Kugler v. Austria*, no. 65631/01, 14.10.2010;
- *Perinçek v. Switzerland* (GC), no. 27510/08, 15.10.2015, *Reports of Judgments and Decisions* 2015 (extracts).

Languages:

German.

Belgium
Constitutional Court

Important decisions

Identification: BEL-2017-1-001

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 23.02.2017 / **e)** 27/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette), 02.05.2017 / **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**.
2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.
2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Union**.
4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction**.
4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar**.
5.2 Fundamental Rights – **Equality**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms**.
5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.
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**.
5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Court of Justice of the European Union, preliminary question, reply / Charter of Fundamental Rights of the European Union / Services provided by lawyers, VAT / Lawyers, fees, VAT / Lawyers, professional secrecy / Law, shortcoming / Legislative omission / Ground, admissibility.

Headnotes:

The law at issue, which has the effect of submitting lawyers' services to 21% value-added-tax, is a direct follow-up to Directive 2016/112/EC, which the Court of Justice did not, in its Judgment C-543/14 of 28 July 2016, consider incompatible with Article 47 of the Charter of Fundamental Rights of the European Union.

Although the costs relating to this law are not in themselves the cause of the breaches to the right to an effective remedy because of the inequality of arms alleged by the applicant parties, they nevertheless have the effect of increasing the financial burden entailed in exercising these rights.

Summary:

I. The Constitutional Court, before which an application for the annulment of Article 60 of the law of 30 July 2013 containing various provisions and repealing the exemption from value-added-tax which had previously applied to lawyers, put several preliminary questions to the Court of Justice of the European Union by its Judgment no. 165/2014 of 13 November 2014 [BEL-2014-3-008]. In its Judgment C-543/14 of 28 July 2016, the Court of Justice finds that specific costs resulting from the imposition of VAT at the rate of 21% on services supplied by lawyers do not in themselves violate the right to an effective remedy given that "individuals who are not entitled to legal aid […] are deemed, according to the relevant provisions of national law, to have sufficient resources to have access to justice by being represented by a lawyer" (para. 28). It considers that the charging of VAT on the services supplied by lawyers does not constitute "an insurmountable obstacle to access to justice" or that it does not "make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order" (para. 36). It also notes that the financial benefit conferred on individual who have the status of taxable persons as compared with non-taxable individuals "is not likely to affect the procedural balance of the parties" (para. 43).

II. The Constitutional Court notes that the impugned provision is a direct follow-up to Directive 2006/112/CE, which the Court of Justice did not consider incompatible with Article 47 of the Charter of Fundamental Rights of the European Union, which expressly enshrines the rights invoked by the applicant parties. The Court also held that there was no reason, in the instant case, that could lead it to another conclusion with regard to the review of the impugned provisions from the standpoint of the constitutional provisions relied upon (Articles 10, 11, 13, 23 and 172 of the Constitution), taken in conjunction with Article 6 ECHR, Articles 14 and 26 of the International Covenant on Civil and Political Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

The Court nevertheless notes that the legislator should take account of the increased financial burden relating to the exercise of an effective remedy and the principle of the equality of arms when it takes other measures likely to increase the cost of judicial proceedings. It should ensure that the right of access to courts is not restricted for certain individuals in such a way that the very essence of the said right is violated. It must also take account of the relative inequality of arms resulting from the impugned provision and, where necessary, adapt the rules on legal aid so that there is no violation of the right to legal counsel of persons who do not have sufficient resources to have access to justice by being represented by a lawyer, in view of the real costs of legal proceedings. In this respect the Court refers to paragraph 37 of the judgment of the Court of Justice, stating that "if, owing the particular circumstances of a given case, the charging of VAT on the services supplied by lawyers were to create, by itself, an insurmountable obstacle to access to justice or make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order, account would have to be taken of this by framing the right to legal aid appropriately, in accordance with Article 47.3 of the Charter". The operative part of the judgment refers to this recital. The Court rejects the applications in the light of what is said therein.

The Court then examined the other arguments concerning the need to respect professional secrecy. It nevertheless considered that the applicant parties' complaints in this respect do not stem from the impugned provision, which repeals the article of the VAT Code exempting the services provided by lawyers as part of their everyday activities, but from the absence in the VAT Code of provisions applying specifically to lawyers, which are intended to protect their professional secrecy. The arguments, which have no relation to the impugned provision, are therefore inadmissible.

Cross-references:

Constitutional Court:

- no. 65/2014, 13.11.2014, *Bulletin* 2014/3 [BEL-2014-3-008].

Languages:

French, Dutch, German.

Identification: BEL-2017-1-002

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 23.02.2017 / **e)** 29/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette), 09.05.2017 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.2.2 Sources – Categories – Unwritten rules – **General Principles of law**.
4.7.16.1 Institutions – Judicial bodies – Liability – **Liability of the State**.
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**.
5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

Keywords of the alphabetical index:

Civil liability, State, judicial authorities, error, last resort / Judge, impartiality, general principle / Tribunal, impartial, composition / Court of Cassation, impartiality, composition / Access to the courts, access to an impartial court / Right to a fair hearing, judge, cassation, self-regulation.

Headnotes:

It is of fundamental importance in a democratic law-based state that members of the public, and in particular the parties to a hearing, have confidence in the courts and tribunals. To this end, Article 6.1 ECHR requires that the courts to which this provision applies should be impartial.

With regard to objective impartiality, it is necessary to consider whether, irrespective of the judges' behaviour, there are verifiable facts engendering doubt with regard to their impartiality.

When the Court of Cassation rules on the lawfulness of a decision handed down by a civil court concerning the State's responsibility for an error by the said court in the performance of its judicial functions, doubts may arise as to its objective impartiality on account of the composition of the Court. The general principle of the subjective and objective impartiality of the judge, which also applies to the Court of Cassation, implies that the Court should take steps to determine the composition so that the judges who rule on an appeal against decisions concerning the liability of the Court of Cassation are not the same judges as those who allegedly made the original error.

Summary:

I. The Brussels Court of Appeal was to rule on two cases concerning a claim for liability brought against the Belgian State on the basis of Article 1382 of the Civil Code, because of an alleged error by the Court of Cassation, the highest court in the Belgian legal order, in the performance of its judicial functions.

In the first case, the Court of Cassation was accused of having made an error by refusing to take account of a procedural document, which, at the request of the lawyer of one of the parties to the proceedings, had been signed by another lawyer who failed to mention his capacity.

In the second case, the Court of Cassation was accused of having made an error by violating EU law, because it allegedly refused, without stating its reasons, to put a preliminary question to the Court of Justice, because the statement of grounds of appeal, in which this request was made, was submitted belatedly.

In the instant case, the Court of Appeal considered that the requests could, in principle, result in the establishment of the State's liability on the basis of Article 1382 of the Civil Code, for an error made by the Court of Cassation in the performance of its judicial functions. The Court of Appeal questions whether the right of access to an independent and impartial court is respected, when the parties to the proceedings who are bringing a claim for liability are confronted with the fact that, if an appeal on points of law was lodged against the decision handed down in

the civil court, the Court of Cassation could itself have a decisive influence on the appraisal of its own alleged error.

The Court of Appeal therefore decided to put preliminary questions to the Court concerning the compatibility of several articles of the Judicial Code with the right to a fair hearing and with the right of access to an independent and impartial judge.

II. The Constitutional Court notes that it may happen that the Court of Cassation has to rule on a decision handed down by civil courts ruling on the State's liability for an error made by the Court of Cassation itself in the performance of its judicial functions. The Court must therefore consider whether the procedure which allows the Court of Cassation to take such a decision is compatible with the right to a fair hearing before an independent and impartial court.

The principle of impartiality may be violated when a judge must rule on a case which he or she has already examined in another capacity. Nevertheless, a previous intervention by the judge does not give the parties to the case legitimate grounds for suspecting that the judge will be biased. In order for the principle of impartiality to be violated, the judge's intervention must be such as to give the impression that he or she decided in advance on the substance of the case.

It would be contrary to the right of access to an impartial court for judges, who have taken part in the drafting of a decision from which a claim for liability based on Article 1382 of the Civil Code stemmed, to rule on the lawfulness of the decision handed down by the appeal court with regard to the claim. The judges of the Court of Cassation may be stood down on grounds of legitimate suspicion and any judge who is aware of a reason for his standing down has a duty to do so. The general principle of the subjective and objective impartiality of the judge requires that the Court of Cassation take the necessary steps to ensure that the judges whose impugned decision is the reason for the liability claim against the State do not rule on the decision handed down by the civil court on the subject of that claim. The Court of Cassation may, for example, guarantee that the composition of the Court is impartial by referring the case to another chamber.

The Court concludes that the question concerning the need to put preliminary questions to the Court of Justice should be answered in the negative.

Cross-references:

Constitutional Court:

- no. 99/2014, 30.06.2014, *Bulletin* 2014/2 [BEL-2014-2-005].

Languages:

French, Dutch, German.

Identification: BEL-2017-1-003

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 27.04.2017 / **e)** 45/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette), 07.07.2017 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution**.
3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
3.17 General Principles – **Weighing of interests**.
5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, limit, choice of the Constituent Assembly / Separation between the Church and the State, principle / Teaching, religious instruction, inspection / Religion, organisation, autonomy, limit / Religion, religious community, self-determination, law, limit / Conforming interpretation.

Headnotes:

The organisational autonomy of religious communities is an integral part of the protection of freedom of religion, which comprises, among other things, the freedom to express one's religion, alone or together with others; this freedom is protected by both Articles 19 and 21.1 of the Constitution and by Article 9 ECHR.

The principle of the separation between the Church and the State, which derives from Article 21.1 of the Constitution, is not absolute and is not incompatible with all forms of interference by the State in the autonomy of religious communities.

Summary:

I. An application to set aside an implicit decision of the French Community refusing to remove an inspector of religion from office, as requested by the head of a recognised religious faith, was brought before the State Council. The latter put a preliminary question to the Court. It asked that the Court verify the compatibility of the difference in treatment with regard to the rules on termination of employment between inspectors of religion and all other education inspectors of the French Community with Articles 10, 11 and 24 of the Constitution, whether taken in conjunction with Articles 6, 13 and 14 ECHR or not, if Article 9.4 of the Law of 29 May 1959 amending certain provisions of education legislation is interpreted in such a way that the inspector of religion who has lost the confidence of the head of the religious faith must be removed from office without the French Community, and subsequently the State Council, having the opportunity to examine the reasons for such loss of confidence, whatever those reasons might be.

II. The Court considers that this provision, thus interpreted, is not the outcome of a choice made by the Constituent Assembly, which would meant that it had no jurisdiction in the case. Admittedly, the organisational autonomy of religious communities derives from the right to freedom of religion safeguarded by Article 21.1 of the Constitution but the principle of the separation of the Church and the State, inferred from Article 21.2 of the Constitution, is of a variable and evolving scope, is not absolute and does not prevent the State from interfering in that organisational autonomy. In the field of education, account should be taken of the historical existence in Belgium, of different networks of education, which are in keeping with the Constituent Assembly's concern to safeguard freedom of opinion, protected by Article 19 of the Constitution, and also freedom of education safeguarded by Article 24 of the Constitution, as these two constitutional freedoms are inseparable. This article makes it compulsory for schools organised by the public authorities to offer, until the end of a pupil's compulsory schooling, the choice between classes in one of the recognised religions or in non-religious ethics. When the legislators arrange for the inspection of these lessons in religion, they are obliged to respect the autonomy of the religious communities. That does not, however, mean that the arrangements should not be monitored by the Court.

As to the substance, the disputed arrangements provide for the inspection of religious instruction in the schools of the Community by inspectors appointed by the ministers "at the proposal of the heads of the religious faiths concerned"; the aim is to guarantee the authenticity of the teaching of the religion by allowing the heads of the religious faiths who so wish to participate in the nomination of inspectors of religious instruction.

The inspectors of religious instruction in the schools of the French Community therefore have a different status from inspectors of other subjects appointed by the French Community. This difference in treatment derives from the joint involvement of the public authorities and the heads of the religious faith in the careers of the inspectors of religious instruction. It is based on an objective and relevant criterion, i.e. the subject of the inspection, which justifies that the heads of religious faiths be involved in appointing and drawing up the rules governing conduct of the inspectors they put forward for appointment.

The Court then considered whether, the disputed provision, as interpreted by the court in question, did not have disproportionate effects vis-à-vis the objective pursued. It noted in this respect that, interpreted in this way, it would create an absolute case for removing public officials who have been appointed on an indefinite basis from office without the possibility for the Community or the State council to examine the grounds for their removal. Although the status of inspectors of religious instruction is hybrid, it is apparent from the text of the disputed provision that their mission is in the general interest of ensuring a high standard of teaching and is of an overriding public nature. The fact that inspectors of religious instruction are appointed by the public authorities reflects this overriding public nature. In the court's interpretation, the provision at issue entails effects which go beyond the need to respect the autonomy of religious communities in the inspection of religious instruction and violates the constitutional rules invoked in this case.

The Court notes, nevertheless, that the provision can be interpreted in such a way that it is in keeping with both the principles of equality and non-discrimination and the autonomy of religious communities. In this interpretation, as in respect of the appointment of inspectors of religious instruction, the head of the religious faith may propose that an inspector be removed from office if he or she is no longer capable of guaranteeing the authenticity of the religious instruction. The inspector must then be removed from office by his or her employer, in the instant case, the French Community, but only if the grounds for the loss of confidence are of such a nature that they

constitute a reasonable indication that the person concerned has breached his or her duty of loyalty to their religious community and that these grounds are acceptable in a democratic society.

When the fundamental rights of the person concerned are affected, the head of the religious faith must show in the light of the circumstances of the case that the risk of violation of the autonomy of the religious community is probable and serious, that the interference in the fundamental right of the persons concerned does not go beyond that which is necessary to rule out this risk and that the interference does not serve any purpose that is incompatible with the autonomy of the religious community. It must not violate the essence of the fundamental rights of the person concerned. It is for the French Community and subsequently for the competent court to undertake a detailed examination of the circumstances of the case and to carefully balance the conflicting interests involved.

When the reasons for loss of confidence have nothing to do with the duty of loyalty, nothing justifies that they should not be subject to full examination by the French Community and, where appropriate, by the State Council.

In this interpretation, the disputed provision is in keeping with the constitutional rules invoked. In its judgment, the Court applies the two interpretations and the resulting finding of violation or non-violation, and in the case of the second interpretation, it refers to the important passages of the judgment.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2017-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 12.01.2016 / **e)** AP 757/12 / **f)** / **g)** / **h)** CODICES (Bosnian).

Keywords of the systematic thesaurus:

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

War crimes / Court, evidence, assessment.

Headnotes:

No violation of the right to a fair trial has occurred when the court has given detailed reasons for finding that the applicant had committed the criminal offences.

Summary:

I. The applicant was found guilty, by judgments of the Court of Bosnia and Herzegovina, of a war crime against prisoners of war and a war crime against civilians and a compound prison sentence of twelve years duration was imposed. The applicant alleged a breach of his rights under Article 6 ECHR on the basis that the assessment of evidence presented in the first judgment and the assessment of his complaints presented in the second-instance judgment were arbitrary; his guilt had not been proved “beyond reasonable doubt”. The applicant pointed out that his defence counsel had presented sufficient arguments during the proceedings to prove that he had an alibi in respect of the time when the prisoners had been shot down, but that nevertheless he was charged with that. He claimed to have had a valid alibi which “removed reasonable doubt” and for this reason the prosecutor’s task was to prove beyond reasonable doubt that the facts forming the basis for the indictment were true despite his alibi.

The other arguments the applicant put forward in respect of the right to a fair trial were mainly related to these allegations.

II. The Constitutional Court began by noting that the European Convention on Human Rights did not impose any obligation on Member States to regulate their criminal justice systems in a particular fashion; the method of assessment of evidence is an issue to be dealt with by national legislation. The criminal procedural legislation of Bosnia and Herzegovina prescribes the free assessment of evidence as the manner in which courts should assess evidence adduced in criminal proceedings. The Constitutional Court, as the final authority in the safeguarding of human rights at a national level, has adopted the view in its case-law that the free assessment of evidence, together and separately, is a crucial element of the right to a fair trial.

The Constitutional Court reiterated that proof "beyond reasonable doubt" is a feature of the adversarial legal system, a typical example of which is the criminal justice system of the USA. The court in such a system is composed of lay jurors who decide on the existence of guilt, the prosecutor must prove "beyond reasonable doubt" the guilt of the accused, and the court's task is not to establish the "truth"; instead, the court relies exclusively on the evidence of the parties. Although the judge has rather a passive role in evidentiary proceedings in such legal systems, he or she is under a duty to give certain instructions to the jury, relating to the application of law to the established facts and must explain to the jury which party has the burden of proof in respect of certain facts, along with the meaning of the term "beyond reasonable doubt". A mixed system is in force in Bosnia and Herzegovina and despite the fact that there are elements of adversarial proceedings in the criminal justice system in force, the inquisitorial principle has been retained in terms of establishing the truth; the judge also has an active role in the evidentiary proceedings. Furthermore, it is the court which determines, on the basis of the free assessment of evidence, whether the charges have been proved. Its assessment is not limited to specific formal evidence, but must be "conscientious".

In this case, the Constitutional Court noted that the Court of Bosnia and Herzegovina had given detailed reasons for finding that the evidence for the prosecution proved beyond any doubt that the applicant had committed the criminal offences in the manner and at the time indicated in the indictment. There was nothing to indicate that the court's assessment of evidence had not been "conscientious" or that it had been "manifestly arbitrary." The arguments presented by the applicant related exclusively to his intention to convince the Constitutional Court that his analysis of the adduced evidence was correct whereas the analysis presented in the contested judgment was erroneous. The Constitutional Court found his allegations of a breach of his right to a fair trial under Article 6 ECHR were unfounded.

Languages:

Bosnian, Croatian, Serbian.

Identification: BIH-2017-1-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 20.04.2016 / **e)** AP 377/16 / **f)** / **g)** / **h)** CODICES (Bosnian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Marriage, religious / Prisoner, visit.

Headnotes:

A prohibition on visits and communication with women with whom a prisoner has contracted an Islamic marriage does not violate the right to family life.

Summary:

I. The Court of Bosnia and Herzegovina found the applicant guilty of the criminal offence of encouragement of terrorist activities in public in conjunction with the criminal offence of recruitment for terrorist activities and the criminal offence of organising a terrorist group. He was sentenced to seven years imprisonment. The measure of detention imposed on him was extended, whereupon the Court issued rulings preventing him from receiving any visits and telephone calls except from close family members (his wife and his children born in and out of wedlock) and his legal counsel. The applicant argued that

his right to family life had been breached, explaining that he had a large family, consisting of sixteen children, five of whom were born in wedlock with his wife S.B., and eleven of whom were born to three different women, with whom he had concluded a marriage under the Islamic law. The applicant contended that by only allowing him visits and contacts with his legal wife, the court had stopped his underage children born out of wedlock from visiting him as their mothers were forbidden from paying him visits and the children could not travel without them.

II. The Constitutional Court observed that the Court of Bosnia and Herzegovina had not drawn a distinction in its rulings between the applicant's children; both those born inside wedlock and those born out of wedlock were allowed to visit him. The Constitutional Court held that the restrictions imposed by the challenged rulings related exclusively to access to the detention ward in which the applicant was placed. The claims as to the impossibility of the applicant's under age children born out of wedlock travelling and visiting him unless accompanied by their mothers were therefore unfounded.

The Constitutional Court noted that the Court of Bosnia and Herzegovina, in its decision-making about the mothers of the children born out of wedlock, with whom the applicant had contracted an Islamic marriage, had taken into account the fact that Bosnia and Herzegovina is a secular state and under Article 3 of the Family Law, a man is only allowed to be in a marriage or common law marriage with one woman. Because the legal framework mentioned above does not recognise the matrimonial relationships which the applicant had established with three women, the Constitutional Court found that the allegation made by the applicant did not fall under the scope of the protection under Article 8 ECHR. The issue of protection of the right to family life did not come into play.

Languages:

Bosnian, Croatian, Serbian.

Brazil
Federal Supreme Court

Important decisions

Identification: BRA-2017-1-001

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 05.11.2015 / **e)** Extraordinary Appeal 603616 (RE 603616) / **f)** Inviolability of domicile and flagrante delicto / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 93, 10.05.2016 / **h)**.

Keywords of the systematic thesaurus:

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.
5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.

Keywords of the alphabetical index:

Drug, trafficking / Inviolability of the home / Police, custody, legality / Police, duty to seek judicial permission for arrest / Police force, duty / Police, investigation.

Headnotes:

The forced entry into a home without a court order, even at night, is only permissible if grounded on well-founded reasons, duly justified *a posteriori*, indicating that a situation of *flagrante delicto* was occurring within the house. In this hypothesis, evidence collected in the searched home will also be lawful. The absence of a justified reason entails the disciplinary, civil and criminal responsibility of the agent or authority and nullifies the acts performed.

Summary:

I. This case refers to an extraordinary appeal concerning the legality of evidence obtained through forced entry of a domicile by police authorities without a court order. In this case, the applicant and third

person were being investigated for the crime of drug trafficking. The third person was spotted driving a truck with 23 kilograms of cocaine. After the arrest, he stated that the drug belonged to the applicant, which is why police officers went to the applicant's home, where they entered without judicial authorisation. There they found 8 kilograms of drugs, and the applicant was arrested in *flagrante delicto*.

The lower court recognised the permanent nature of the crime of drug trafficking and upheld the applicant's criminal conviction based on the evidence gathered in the home search even without a court order. It found that the forced entry into the applicant's house was supported by the prior monitoring of the suspects and the statements of the third party, elements considered sufficient to indicate well-founded reasons that the defendant was committing the crime of drug trafficking.

The appellant argued that the evidence obtained by means of the domicile invasion by police authorities is unlawful, since the indispensable search and seizure order had not been presented. He contended that this fact breaches the fundamental right of inviolability of the domicile and the right of inadmissibility of evidence obtained by illegal means (Article 5.XI and 5.LVI of the Federal Constitution). He also claimed the violation of his rights to adversary proceeding and opportunity to be heard, alleging that the conviction was based only on the evidence obtained during the police investigation phase (Article 5.LV of the Federal Constitution).

II. The Supreme Court, by a majority, denied the extraordinary appeal. Regarding theme 280 of the general repercussion (general repercussion relates to the issuance of a precedent binding *erga omnes*), the Full Court established the following thesis: forced entry into a home without a court order is only permissible, even at night, when supported by well-founded reasons, duly justified *a posteriori*, indicating that inside the house occurs a situation of *flagrante delicto*, under penalty of disciplinary, civil and criminal responsibility of the agent or authority, and nullity of the acts carried out.

The Court stated that the Federal Constitution ensures the inviolability of the home as a fundamental right. The subject is also mentioned in international human rights treaties (American Convention on Human Rights; and International Covenant on Civil and Political Rights), which protect the domicile from "abusive and arbitrary interference." The Court, however, asserted that forced entry into a home is tolerated in four exceptional situations: *flagrante delicto*, disaster, to provide assistance, and by court order.

According to the traditional interpretation of this Court, the court order is not necessary when there is a *flagrante delicto* of a permanent crime (i.e. an ongoing crime). So, it is possible to carry out the measures without considering the evidence illicit. This is because, in permanent crimes, the consummation continues in time, which allows us to consider that the perpetrator is constantly *in flagrante delicto* as long as he does not cease the criminal act (Article 303 of the Code of Criminal Procedure, hereinafter, "CPP", in Portuguese acronym). In this case, while the defendant kept drugs in his residence, he was committing the crime of drug trafficking provided in Article 33 of Drugs Law (Law 11343/2006). Thus, he was liable to be arrested in the act of flagrante delicto and, therefore, the forced entry by police agents, regardless of court order, was feasible.

The Rapporteur, however, said that this understanding is unsatisfactory. He suggested an interpretation that would guarantee the inviolability of the house and also protect the public security agents, by offering safer guidance on their performance. He asserted that, considering the current position, if the police officer invades a residence due to the suspicion of a crime in progress and finds no reason for arrest *in flagrante*, he will respond for the crime of violation of domicile, enhanced by his status as a civil servant (Article 150.2 of the Penal Code). Thus, forced entry into a home without justification would be an arbitrary act. The statement of a flagrant situation, after the forced entry, would not justify the measure.

In this context, the Court established that judicial control of a criminal investigation is indispensable to make the right of freedom compatible with the interests of public security. The importance of reinforcing posterior control was stressed, in which police officers are required to demonstrate that the measure was adopted on well-founded reasons (justified grounds). The indication of minimum elements that authorise forced entrance into the home is therefore indispensable. The Court held that this subsequent justification is a simple requirement, compatible with the stage of taking evidence. The communication to the judge of the *flagrante delicto* will be immediate, and this authority will be responsible to analyse the legality of the measure.

The police officer may invoke his own testimony to justify the measure. Unlawful evidence, anonymous information, statements by informants and, in general, elements that have no evidentiary force in court, however, do not serve to justify invasive measures. In demonstrating the well-founded reasons for the measure, the agent no longer takes the risk of committing the crime of invasion of domicile, even if the diligence does not have the expected result.

Eventually, the judge may consider that the measure was not justified on sufficient grounds. This, however, will not generate the accountability of the officer, except in case of inexcusable abuse. Thus, both the right to inviolability of domicile and the legal certainty of State agents will be optimised.

III. In a dissenting position, Justice Marco Aurélio granted the extraordinary appeal as he understood that it was not a case of permanent crime. Therefore, forced entry into a residence without a court order is unfeasible, since the situation of *flagrante delicto* was not characterised.

Supplementary information:

- Article 5.XI of the Federal Constitution: The house is the inviolable refuge of the individual, and no one may enter therein without the consent of the dweller, except in the event of flagrante delicto or disaster, or to give help, or during the day, by court order;
- Article 5.LIV and 5.LV of the Federal Constitution;
- Article 303 of the Code of Criminal Procedure;
- Article 150.2 of the Criminal Code;
- Pact of San José, Costa Rica;
- International Covenant on Civil and Political Rights;
- Article 33 of Drugs Law (Law 11343/2006);
- This case refers to the subject 280 of general repercussion: Evidence obtained by invasion of domicile by police without search and seizure order.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2017-1-002

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 09.06.2016 / **e)** Referendum of preliminary injunction in direct action of unconstitutionality 5357 (ADI 5357 MC-Ref) / **f)** Private schools and access for people with disabilities / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 240, 11.11.2016 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.
3.17 General Principles – **Weighing of interests**.
3.21 General Principles – **Equality**.
3.25 General Principles – **Market economy**.
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**.
5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach**.
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Disability, discrimination / Disabled person, benefit, right / Disabled person, care, appropriate / Education, access / Education, duty of the state / Education, equal opportunity / Education, institution / Education right / Education, school, choice / Education, school, private, national education policy, application / School, access, equal protection / School, private, equal treatment.

Headnotes:

A law that compels private schools to promote the inclusion of persons with disabilities in regular education and to adopt the necessary adaptation measures is constitutional. The financial burden resulting from the necessary adaptation measures cannot be charged on tuition, annuities, and fees.

Summary:

I. A direct action of unconstitutionality was brought to the Supreme Court to challenge the constitutionality of Law 13146/2015, which requires that both public and private schools promote the integration of persons with disabilities into regular education.

II. The Supreme Court declared the constitutionality of the contested provisions of Law 13146/2015.

The Court pointed out that inclusive education is not a foreign rule to the Brazilian legal order, but rather an explicit provision. After all, inclusive education is a stable public policy, incorporated into the Federal Constitution as a rule and enforced in national and international norms. In addition, the United Nations Convention on the Rights of Persons with Disabilities, which has constitutional amendment status, recognises the right to education without any discrimination, based on equal opportunity, and

provides for an inclusive educational system at all levels of education, so that students with disabilities cannot be excluded from the general education system on the sole ground that they are disabled (Article 24).

The plenary Court asserted that the State's role in the inclusion of people with disabilities fulfils the constitutional principles of equality and human dignity and brings benefits not only to people with special needs, but also to the entire population. Moreover, the plurality – of people, creeds, ideologies, etc. – is an essential element of democracy. Only through welcoming and living with differences may we build a free, fair, and supportive society that aims for the good of all, without prejudice against origin, race, gender, colour, age, or any other form of discrimination (Article 3.I and 3.IV of the Federal Constitution).

Although the public education service is open to private initiative – private schools do not depend on the State's concession or permission to act in this area – the economic agents who provide it cannot act without limit or responsibility. Authorisation and quality assessment by the State is necessary, as well as compliance with the general norms of national education. Besides, private teaching institutions cannot claim the social function of property, the generation of jobs, high cost, compliance with labour and tax legislation, or the potential psychological suffering of educators and students who do not have disabilities to exempt themselves from the duties imposed on the educational system of Brazil. In short, schools cannot choose, segregate nor separate students, since it is their duty to teach, to include, and to live with the differences.

Law 13146/2015 indicates an ethical commitment to democratic plurality by requiring that both public and private schools promote the integration of persons with disabilities into regular education. The necessary adaptation measures, such as accessibility to all indispensable services for learning and adaptation of spaces and resources to overcome barriers, must be implemented indistinctly, without transferring the financial burden to the tuition, annuities or fees. These duties should apply to all economic agents. A different understanding would result in the consolidation of discrimination in private educational institutions and in noncompliance with the international obligation assumed by Brazil to guarantee an inclusive educational system. Lastly, the Court deduced that, if it is the State's duty to facilitate the full and equal participation of persons with disabilities in the educational system and in the community, there is no reason for limitation of their access to only one kind of educational institution, whether public or private.

Supplementary information:

- Articles 3.I and 3.IV; 5.*caput.*XXII, 5.*caput.*XXIII and 5.*caput.*LIV; 170.II and 170.III; 205; 206.*caput.*II and 206.*caput*.III; 208.*caput*.III; 209; 227.*caput*.1.II of the Federal Constitution;
- Articles 28.1 and 30.*caput* of Law 13146/2015;
- International Convention on the Rights of Persons with Disabilities.

Languages:

Portuguese, English (translation by the Court).

Identification: BRA-2017-1-003

a) Brazil / **b)** Federal Supreme Court / **c)** First Panel / **d)** 21.06.2016 / **e)** Investigation 3932 (Inq 3932) / **f)** Incitement to commit crime of rape, injury and Parliamentary immunity / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 65, 08.04.2016 / **h)**.

Keywords of the systematic thesaurus:

4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers**.
4.5.9 Institutions – Legislative bodies – **Liability**.

Keywords of the alphabetical index:

Defamation, through press / Parliamentary immunity / Rape / Violence, prohibition of incitement.

Headnotes:

The constitutional guarantee of parliamentary immunity protects members of Congress regardless of where they exercise their freedom of expression and whenever it has connection with the legislative role or is exercised because of the legislative role.

Summary:

I. The Federal Prosecution Office filed an investigation against a federal deputy due to statements made inside the Chamber of Deputies and, afterwards, in a press interview. According to the petition, the accused said to a federal deputy that "he

would not rape her because she does not deserve it". The prosecution office alleged the act consists of incitement to commit crime (Article 286 of the Criminal Code), as when he affirmed the possibility to practice rape, merely subject to his own discretion on the woman´s deservedness, he diminished the sense of security and legal peace of all women. After the statements, she began receiving messages on her social networks about the possibility of becoming victim of sexual harassment.

On the other hand, the offended deputy filed a criminal complaint bringing charges of slander against the deputy for having allegedly said that she had called him a rapist. Moreover, she brought charges of crime of defamation, twice, due to the statements made in the plenary session and, afterwards, during a press interview on the following day when he reaffirmed that "he would not rape her since she did not deserve it and she was not his kind of woman". She alleged that the statements were threatening and incite violence, besides offending her sexual dignity, honour and citizenship.

The deputy argued that the facts are protected by the material parliamentary immunity provided for in Article 53 of the Federal Constitution, which states that "deputies and senators enjoy civil and criminal inviolability on account of any of their opinions, words and votes". He argued that such immunity is absolute in view of the fact that the declarations took place within the parliamentary House, both in the plenary and in the interview held in his office.

II. The First Panel of the Supreme Court, by majority, in accordance with the Judge Rapporteur, accepted the investigation for the alleged incitement to commit crime and rejected the complaint concerning the alleged crime of defamation. The Panel considered that the constitutional guarantee of material immunity protects the parliamentary, regardless of where he exercises his freedom of opinion, whenever his manifestations are connected with the legislative role performance or have been made because of it. Besides, the Court's jurisprudence adopts the absolute immunity when declarations take place inside the Legislative House. However, the statements under analysis in this case had no connection whatsoever to the legislative activity performance, since they have no minimal political content about any fact of the public debate concerning the society interest. In addition, the statements made in the plenary session were later reaffirmed during a press interview to a large national circulation newspaper. Although the interview was in the deputy's office, and therefore within the Legislative House, the statements were strictly personal and created great repercussions.

As to the crime definition, the Court stressed that the incitement to crime involves a different legal interest other than the one protected by the crime of rape, which protects the honour, psychic integrity and sexual freedom of women. The belittling comments made to the legal interest protected by the crime of "rape" has the potential to incite criminal behaviour, acts of violence against women (physical, sexual, psychological or moral), and to encourage the idea of male supremacy towards women. As for the defamation, the Court pointed out that the same statements would feature the crime, in theory, since they have the potential to undercut the complainant's moral dignity and breach her subjective honour.

III. In a dissenting vote, one of the Justices considered that forwarding the criminal procedure would not contribute to the equal treatment of gender, as it would only aggravate the mood and an inverted prejudice of women against men. In addition, he considered that there was no incitement to commit the crime of rape since there was no evidence of intent, which is the subjective element of the crime. The acts were committed inside the Chamber of Deputies and had subsequent external repercussions. Therefore, they fall under the protection of the parliamentary immunity.

Supplementary information:

- Article 53.1 of the Federal Constitution;
- Articles 40 and 286 of the Criminal Code.

Cross-references:

Federal Supreme Court:

- *Federal deputy Jair Bolsonaro v. Maria do Rosário,* 15.08.2017.

Languages:

Portuguese, English (translation by the Court).

Canada
Supreme Court

Important decisions

Identification: CAN-2017-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 26.01.2017 / **e)** 36495 / **f)** B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General) / **g)** *Canada Supreme Court Reports* (Official Digest), 2017 SCC 6, [2017] 1 S.C.R. 93 / **h)** http://scc-csc.lexum.com/scc-csc/en/nav.do; [2017] S.C.J. no. 6 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Electoral law, advertising, sponsor / Electoral process, transparency / Electoral process, public accountability.

Headnotes:

Individuals who neither pay others for advertising services nor receive advertising services from others without charge are not "sponsors" within the meaning of the Election Act of British Columbia (hereinafter, the "Act"). By confining the registration requirement to sponsors and exempting individual political self-expression by persons who are not sponsors, Section 239 of the Act tailors the impingement on expression to what is required by the object of the Act since only political expression in the form of sponsorship of election advertising stands to be delayed or inhibited.

Summary:

I. In 2009 and 2013, the B.C. Freedom of Information and Privacy Association sponsored election advertising within the meaning of the Act. It was therefore subject to the impugned registration requirement in Section 239 of the Act. The Association sought a declaration that the registration requirement, to the extent that it applies to sponsors of election advertising who spend less than $500 in a given campaign period, infringes Section 2.b of the Canadian Charter of Rights and Freedoms and is not saved by Section 1. Specifically, it argued that requiring that individuals or organisations who wish to "sponsor election advertising" to register is not a reasonable and demonstrably justified limit on expression by persons who convey political messages through small-scale election activities like displaying homemade signs in their windows, putting bumper stickers on their cars, or wearing T-shirts with political messages on them. The trial judge dismissed the application. He accepted the Attorney General of British Columbia's concession that Section 239 of the Act was an infringement of the right of free expression, but concluded that the infringement was justified under Section 1 of the Charter. A majority of the Court of Appeal reached the same conclusion.

II. The Supreme Court of Canada unanimously dismissed the appeal. Properly interpreted, Section 239 does not catch the categories of expression upon which the Association relies. The words of Sections 228, 229 and 239 of the Act, read in their grammatical and ordinary sense and harmoniously with the statutory scheme, the object of the Act, and the intention of the legislature, indicate that a "sponsor" required to register is an individual or organisation who receives an advertising service from another individual or organisation, whether in exchange for payment or without charge. The Court explained that individuals who neither pay others for advertising services nor receive advertising services from others without charge are not "sponsors" within the meaning of Section 229.1. They may transmit their own points of view, whether by posting a handmade sign in a window, or putting a bumper sticker on a car, or wearing a T-shirt with a message on it, without registering.

The Court found that although the registration requirement imposed on sponsors limits their right of expression guaranteed by Section 2.b of the Charter, the limit on the expression of sponsors who spend less than $500 is justified under Section 1. The purpose of the registration requirement – increasing transparency, openness, and public accountability in the electoral process and thus promoting an informed electorate – is pressing and substantial, and the registration requirement is rationally connected to this objective. The Court concluded that the limit is also minimally impairing. By confining the registration requirement to sponsors and exempting individual political self-expression by persons who are not sponsors, Section 239 tailors the impingement on expression to what is required by the object of the Act. Moreover, the forms of advertising likely to be "sponsored" within the meaning of the Act are also

likely to be subject to the Act's attribution requirements, which are not challenged. The registration requirement's deleterious effects are limited since only political expression in the form of sponsorship of election advertising stands to be delayed or inhibited. There will be few cases in which an individual or group is subject to the registration requirement but not the attribution requirement, and so the number of sponsors for whom Section 239 is the sole reason they cannot protect their anonymity will be few.

The Court observed that the registration process is simple and unlikely to deter much, if any, expression in which a sponsor would otherwise engage. These limited deleterious effects are outweighed by the benefits of the scheme – permitting the public to know who is engaged in organised advocacy in their elections, ensuring that those who sponsor election advertising must provide the public with an assurance that they are in compliance with election law, and providing the Chief Electoral Officer with information that can assist in the enforcement of the Act and in informing sponsors of its requirements.

The Court added that the Attorney General of British Columbia was not obligated to lead social science evidence in order to discharge its burden of justification under Section 1 of the Charter. Although not leading social science evidence may seriously diminish the government's ability to justify the infringement of a Charter right, social science evidence may not be necessary where, as here, the scope of the infringement is minimal.

Languages:

English, French (translation by the Court).

Costa Rica
Supreme Court of Justice

Important decisions

Identification: CRC-2017-1-001

a) Costa Rica / **b)** Supreme Court of Justice / **c)** Constitutional Chamber / **d)** 01.07.2011 / **e)** 2011-08724 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.4 Constitutional Justice – Jurisdiction – **Types of litigation**.
5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law**.
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:

Business activity / Commercial freedom, restriction / Non-discrimination / Same-sex relationships.

Headnotes:

Anyone is entitled to seek relief for fundamental rights infringements through the writ of *amparo*, even if produced by a private individual or legal person. As a remedy it protects any person from those exercising public capacities, or who are in fact or in law, in a position of power whereas other remedies are insufficient or too slow to provide protection for fundamental rights and freedoms.

Human dignity is absolute. Therefore, the prohibition to discriminate against such dignity is absolute. To discriminate, in general, means to differentiate against those rights and dignity of the people or of their groups, such as happens when the discrimination is based on sexual orientation or preferences.

In accordance with the principle of comparison businesses can place limits and/or restrictions on homosexual individuals' behaviour to the extent that those same limits and/or restrictions are also used to limit heterosexual individuals' behaviour.

Summary:

I. A same-sex couple complained they were discriminated against by a restaurant owner because they held hands in the restaurant. The owner told them to refrain from such behaviour or he would ask them to leave the premises. The writ of *amparo* against private individuals as regulated in the Law of the Constitutional Jurisdiction grants entry to these types of claims.

II. The Constitutional Chamber of the Supreme Court deemed the business to be in a position of power. Other ordinary and jurisdictional remedies would be too late to achieve any meaningful form of protection. The Constitutional Chamber considered that the defendant, the restaurant owner, was in a position of power by using his own private security personnel to remove the plaintiffs. Moreover, due to the nature of the claim, there is no other better, quicker remedy to address the discriminatory practices against the sexual orientation of the plaintiff.

The defendant argued that businesses have the right to limit and/or restrict patrons' behaviours that upset other clients. He alleged that the plaintiff and his companion began hugging and holding hands, making clear statement of their sexual preference. The restaurant, he argued is a family establishment, therefore such exaggerated, affectionate interactions can be legitimately restricted.

The Constitutional Chamber considered it important to determine whether the behaviour of the plaintiff was erotic or a disproportionate display that was not in accordance with the social standards of the restaurant and country. It also deemed it important to determine if the conduct would have been acceptable behaviour for heterosexual couples, but not to homosexuals. Another question to be corroborated related to complaints about the conduct from other clients and any consequent harm done to the business.

Citing an earlier case of the Court (no. 2010-20233) concerning a couple that was lawfully removed from a bar for their explicit and profoundly erotic conduct, the Court found that in the current case, there was no evidence of similar behaviour. The conduct that the same sex-couple was displaying was neither excessive nor contrary to norms of conduct of the restaurant and of the country. Heterosexual couples are permitted to hold hands in the restaurant and is not considered an excessive or disproportionately sexual display. Security video was analysed. The Court was unable to locate the clients who complained to receive their statements as their addresses were invalid.

III. Justice Castillo Víquez dissented and wrote a separate opinion, stating that private enterprises are free to set the rules of conduct they wish for people to observe at their businesses, in accordance to their own values. Even though the fundamental rights should be considered an objective system of values, capable of being exerted by the Constitutional Chamber over any private person, a right cannot be enforced to invalidate another person's fundamental right. The case does not purport a significant infraction and it is not for the business owner to accept conduct he or she deems incompatible with his or her values: doing so might compel the business to close. Such consequences too are clearly an infringement of the right to enterprise.

Supplementary information:

Currently, the Constitutional Chamber is still discussing similar cases around the country where same sex-couples find themselves in similar situations to the facts of this case.

Cross-references:

Constitutional Chamber:

- Article 26 of the International Covenant on Civil and Political Rights, concerning protection against discrimination;
- nos. 2007-18660 as it establishes that to discriminate against someone on the basis of his or her sexual orientation is contrary to the concept of human dignity. Discrimination based on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is prohibited and therefore it is unlawful to discriminate against a person's right to equal treatment and human dignity based on sexual orientation. Homosexuals are entitled to equal treatment and non-discriminatory practices by commercial establishments;
- no. 2010-20233 concerning the lawful measure to limit and/or restrict inappropriate and implicit erotic behaviours by business owners.

Languages:

Spanish.

Croatia
Constitutional Court

Important decisions

Identification: CRO-2017-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.02.2017 / **e)** U-I-60/1991 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 25/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.6 Constitutional Justice – **Effects**.
3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
3.18 General Principles – **General interest**.
3.19 General Principles – **Margin of appreciation**.
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Abortion / Foetus, legal status / Law, not yet aligned with new Constitution, review / Pregnancy, voluntary termination.

Headnotes:

An unborn being, as a value protected by the Constitution, enjoys constitutional protection only to the extent that such protection is not in conflict with a woman's right to private life. The right to life of an unborn being within this meaning is not protected in such a way as to have priority or greater protection than a woman's right to private life. Within this meaning, the legislator enjoys freedom of discretion in striking a fair balance between a woman's right to make decisions and her right to private life, on the one hand, and public interest to ensure protection of an unborn being, on the other. It is the task of the Constitutional Court, within its wide margin of appreciation, to examine whether the legislator has struck the right balance between their rights and interests. The question of "when life begins" is not within the jurisdiction of the Constitutional Court.

The legislative solution stating that the termination of pregnancy may be performed at a woman's request only before the expiration of the 10th week of pregnancy is in conformity with the Constitution.

Summary:

I. The Constitutional Court did not accept proposals filed by seven applicants to institute proceedings to review conformity with the Constitution of the Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth (hereinafter, the "Act"). The Court instructed the Croatian Parliament to pass a new law within two years, in accordance with the findings of the Constitutional Court provided in the statement of reasons of this ruling.

Article 1 of the impugned Act, which sets out its aim and purpose, lays down that, *inter alia*, it recognises the right to make free decisions regarding giving birth. The right is not absolute, it may be restricted by law in order to protect the health of a pregnant woman (Article 2). Article 25 of the Act confirms that the protection of the life and health of a pregnant woman is of primary importance; it states that termination of pregnancy must be performed or completed regardless of the criteria and procedures laid down in the Act if there is an immediate threat to the life or health of a pregnant woman or if the termination of pregnancy has already started.

Article 15 of the Act defines termination of pregnancy as a medical procedure that may be performed before the end of the 10th week of the date of conception and, after that, only subject to the approval of a commission in accordance with the terms and procedures set out in law.

Termination of pregnancy is performed at the request of a pregnant woman if no more than 10 weeks have passed from the date of conception. In other cases, termination of pregnancy may be performed only if a commission issues its approval, in accordance with the terms and procedures laid down by law (Article 15.2 and 15.3 of the Act).

The applicants raised two basic objections. The first consisted of claims that the impugned Act was unconstitutional because the 1974 Constitution of the former Socialist Republic of Croatia (hereinafter, the "SRC Constitution"), and consequently Article 272, ceased to have effect following the promulgation of

the 1990 Constitution on the basis of which the impugned Act was adopted. In other words, the impugned Act became unconstitutional in its entirety after the termination of validity of the constitutional basis on which it was passed.

The second objection was that the Act was not in conformity with the Constitution in force, especially its Article 21, prescribing that each human being has the right to life. The applicants based their arguments on the fact that the right to life was beyond any doubt a fundamental human right that was above and before all other human rights and that the term "human being" in Article 21.1 of the Constitution included both an unborn and a born human being. They deemed that the embryo is a human being equal in dignity with other human beings and that it enjoys the right to life guaranteed by the Constitution. In view of the indisputable fact that the unborn child is a legal subject, any indication of a threshold in pregnancy relating to the permission for or the prohibition of the termination of pregnancy is superfluous. The constitutional right to life, according to the applicants, may not be annulled by an imaginary right of the mother to terminate her pregnancy. There is no special right to termination of pregnancy, yet the desire of the woman to terminate pregnancy is transformed into a right, while the termination of pregnancy is detrimental to society in its totality and to the public order.

II. The Constitutional Court began by examining the objection of unconstitutionality on the grounds of the termination of the existence of the constitutional basis on which the impugned Act was adopted.

The Constitutional Court noted that the impugned Act had been enacted pursuant to the 1974 Constitution of the former SRC. The 1990 Constitution, which is in force, does not include a provision that would be the same or similar to the one in Article 272 of the SRC Constitution, which laid down that the right to make free decisions concerning the birth of children may be restricted only to protect health.

In relation to the applicants' contention that, after the termination of the validity of the earlier Constitution, the Act enacted on the basis of that Constitution automatically ceased to be valid, the Court pointed out that the impugned Act was not aligned with the Constitution. The Republic of Croatia, in accordance with the principle of state continuity and succession in relation to the former Socialist Republic of Croatia and the former Socialist Federative Republic of Yugoslavia, basically accepted the legislation and other acts of those states until the adoption of new legislation or their alignment with its own legal order.

In Notification no. U-X-838/2012 of 15 February 2012, addressed to the Parliament, the Constitutional Court adopted the position concerning the hierarchy of constitutional laws for the implementation of the Constitution in the system of legal standards and concerning the legal force (of a binding nature) of the time limits laid down in those constitutional laws to align "old" laws with the Constitution. In relation to the prescribed time limits for alignment, it found that they were not preclusive but instructive in character, so the fact that certain laws were adopted according to the "old" Constitution, which was valid before the adoption of the "new" 1990 Constitution, does not mean that they become unconstitutional and cease to be valid, but that their conformity or non-conformity with the "new" Constitution is subject to re-examination on a case-by-case basis.

Further to the foregoing, the Constitutional Court held that the fact that the Act had not been brought into conformity with the "new" Constitution was not sufficient in itself to determine the constitutionality or otherwise of the Act. In other words, in the procedure of the review of an Act's constitutionality or unconstitutionality, the Constitutional Court is acting as if it were adopted pursuant to the "new" Constitution.

In terms of non-conformity with the 1990 Constitution, the Constitutional Court was expected to resolve the dispute, determine when life begins and, thus, act as an arbitrator between the two sides: one side that holds that life begins at conception, so that the unborn being is protected by Article 21 of the Constitution as of the moment of conception and excludes "a woman's right to termination of pregnancy", and the other side that holds that life begins at birth, so that the unborn being is outside the protection of Article 21 of the Constitution, in which case a woman's rights take precedence.

The Constitutional Court pointed out that the right to life is a condition for all other rights because all other human rights and freedoms arise from it. Article 21, which states in paragraph 1 that each human being has the right to life, is the first article of Section 2 "Personal and Political Liberties and Rights" of Chapter III "Protection of Human Rights and Fundamental Freedoms".

Following what has been said, the Constitution guarantees the right to life for "each human being". However, it does not elaborate on what is meant by the term "human being", i.e., whether it includes, in addition to someone who was born and who undoubtedly has legal subjectivity, unborn beings.

Further, the rights to liberty and personality are fundamental human rights. The Constitution includes the principle of the inviolability of liberty and personality (Article 22 of the Constitution), which may be restricted only under the conditions set out in the Constitution.

In addition, the Constitution guarantees respect and legal protection of each person's private and family life and dignity (Article 35 of the Constitution; hereinafter, "the right to private life").

The right to private life guaranteed in Article 35 of the Constitution includes the right of each person to the freedom of decision-making, self-determination, and dignity. Therefore, the right to private life is an inherent right of a woman to her own spiritual and physical integrity, which includes her decision whether to conceive and how her pregnancy is to progress. By staying pregnant (either planned or unplanned, voluntarily or as a consequence of violence), a woman does not waive her right to self-determination. Any restriction of the right of a woman to decide in her autonomous self-realisation, including whether or not she wishes to bring pregnancy to term, represents interference in her constitutional right to private life.

Therefore, interference with the right to private life is permitted only if it is in conformity with law. The law must follow a certain legitimate aim and must be necessary to protect those aims in a democratic society. Interference with someone's private life must be the result of a crucial societal need to protect a legitimate aim, or several such aims, and must be an appropriate means to protect the achievement of such aims.

The Constitutional Court established that an unborn being, as a value protected by the Constitution, enjoys constitutional protection under Article 21 of the Constitution only to the extent that such protection is not in conflict with a woman's right to private life. The right to life of an unborn being within that meaning is not protected so that it has an advantage over or greater protection than a woman's right to a private life. Within that meaning, the legislator enjoys freedom of discretion in striking a fair balance between a woman's right to free decision-making and private life, on the one hand, and the public interest in ensuring the protection of an unborn being, on the other. Accordingly, the Constitutional Court recalled that, according to the case law of the European Court of Human Rights, although termination of pregnancy is included in the domain of a woman's private life, it should not be understood as a family planning measure or as a means of contraception.

The Constitutional Court pointed out that the question of "when life begins" is not within the jurisdiction of the Constitutional Court. The Constitutional Court should examine the legislation regulating the question of termination of pregnancy in order to establish whether it is in conformity with the constitutional principles and values, i.e., whether it strikes a fair balance between the opposing rights and interests inevitable in complex cases such as this – a woman's right to decide whether to terminate her pregnancy and the interest of society to protect the life of an unborn being.

On the basis of these general positions, the Constitutional Court found that the legislative solution, stating that termination of pregnancy may be performed at the request of a woman before the end of the 10th week of pregnancy and afterwards only subject to an approval of a competent authority if it is established, on the basis of medical indications, that life cannot be saved or the deterioration of a woman's health during pregnancy, birth or post-partum cannot be resolved, if it can be expected that the child will be born with serious physical or mental defects, if conception was connected with the commission of certain criminal acts (Article 22 of the Act) or in the event of immediate danger to the life or health of a pregnant woman and if termination of pregnancy had already started (Article 25 of the Act), was in conformity with the Constitution.

In conclusion, the Constitutional Court found that the impugned legislative solution did not undermine a fair balance between a woman's constitutional right to private life (Article 35 of the Constitution) and to liberty and personality (Article 22 of the Constitution), on the one hand, and the public interest of protecting the life of unborn beings guaranteed by the Constitution as a constitutionally protected value (Article 21 of the Constitution), on the other.

Further to the finding that the impugned Act was not formally aligned with the Constitution because it included certain legal concepts or terms that no longer existed in the constitutional order and because of the construction of a completely new legal and institutional framework for health, social, and science and educational systems since the adoption of the 1990 Constitution, the Constitutional Court instructed the Croatian Parliament to enact a new law within two years. The said systems are based on different values and principles, and they are aligned with the Constitution and international standards as well as with the progress of science and medicine, which are complemented with changes in the systems of health care, education, and social policy.

It is therefore up to the legislator to prescribe in the new law educational and preventive measures, in addition to the essential legislative changes required for the reasons mentioned above, so that termination of pregnancy is an exception.

III. Justice Miroslav Šumanović attached a dissenting opinion to the majority decision.

Cross-references:

Constitutional Court:

- no. U-X-838/2012, 15.02.2012, *Bulletin* 2012/1 [CRO-2012-1-002].

Languages:

Croatian, English.

Identification: CRO-2017-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.04.2017 / **e)** U-I-246/2017 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 35/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

Keywords of the alphabetical index:

Conviction, criminal, consequences / Rehabilitation.

Headnotes:

The prohibition on running in local elections for persons who have committed one of the listed criminal offences and who have been convicted by a final court decision (including a suspended sentence) consisting of at least six months of imprisonment meets the constitutional and European legal standards because it is prescribed by law, has a legitimate aim, is proportionate, and is limited in time.

When a separate law contains no provisions on the legal consequences of conviction and on when the rehabilitation begins, the appropriate provisions of the Act on the Legal Consequences of a Conviction, Criminal Records and Rehabilitation apply as *lex generalis* regulating the subject matter.

Summary:

I. The Constitutional Court did not accept the proposals to institute proceedings to review the conformity with the Constitution of Article 1.2 of the Act on Amendments to the Local Elections Act (hereinafter, “AALEA”), and the AALEA as a whole.

Article 1.2 AALEA prescribes a prohibition on running in local elections for persons against whom a final and effective court decision has been pronounced for a minimum of six months of imprisonment (including a suspended sentence) for more than 80 listed criminal offences (including murder, kidnapping, high treason, genocide, crimes against humanity, preparing criminal offences against the values protected by international law, abuse of position and authority, unlawful intercession, taking bribes, giving bribes and trading in influence).

The proposals were submitted by four natural persons disputing the conformity of the AALEA with the Constitution for reasons of a formal legal and substantive nature. The applicants objected to the prescribed prohibition on the basis that it had the effect of disproportionally restricting voting rights for all those convicted of the criminal offences listed, that it represented a new punishment for those already convicted of criminal offences and that it ran counter to international law and an earlier decision of the Constitutional Court.

II. The Constitutional Court held that these objections, and certain others, were unfounded.

The objections disputing the conformity of Article 1.2 AALEA with the Constitution all came down to the assertions that the legislator, through this prohibition, failed to respect the principled positions of international documents dealing with elections (particularly the Preliminary Report on Exclusion of Offenders from Parliament, Opinion no. 807/2015, CDL-AD(2015)019, Strasbourg, 30 June 2015 of the Commission for Democracy through Law (Venice Commission), the standards established in the case law of the European Court of Human Rights in the application of Article 3 Protocol 1 ECHR or the positions of the Constitutional Court stated in its decision and ruling no. U-I-1397/2015 of 24 September 2015.

The Constitutional Court had to assess the compliance of the impugned provision of the AALEA with the positions outlined above.

Starting from the relevant conclusions of the Venice Commission in the Preliminary Report (that it is in the general public interest to prevent those who have committed criminal offences from having an active role in political decision-making, that it is appropriate to regulate by the Constitution at least the most important aspects of restricting the right to be elected and the loss of a term of office in Parliament, and that it may be appropriate to prescribe in the legislation that the restrictions apply automatically for the most serious criminal offences or convictions), as well as from the relevant parts of its decision and ruling no. U-I-1397/2015 (that preventing those who have committed serious and specific criminal offences from having active roles in political decision-making is a precondition for the development and preservation of the foundations of democracy governed by the rule of law and public morals, that the restrictions on the passive voting right and prohibitions must be based on clear statutory norms and must be regulated in such a way that they actually contribute to the realisation of the legitimate aim and that they are proportionate to that aim), the Constitutional Court held that the impugned prohibition on running in local elections for those who committed the listed criminal offences and were convicted by a final and effective court decision (including a suspended sentence) to imprisonment for a minimum of six months satisfied the constitutional and European legal standards and was in conformity with the previous Constitutional Court decision.

The basis of this decision was that the measure was prescribed by law; it had a legitimate aim (avoiding the active role of convicted persons in public life and participation in politics as a pledge to regain citizens' trust in public officials who protect the legal order and establish democracy); it was proportionate (it refers to a wide circle of offenders who have committed any of the listed criminal offences); it is limited in time (although this is not expressly prescribed) on the basis of the Act on the Legal Consequences of a Conviction, Criminal Records and Rehabilitation (hereinafter, "ALCCCRR") and it lasts until rehabilitation begins. The impugned provision of the AALEA was accordingly proportionate to the legitimate aim pursued.

Regarding the objections that the impugned provision of the AALEA regarding the prohibition on running in local elections (thus also denying the possibility of holding office in local government) had all the characteristics of a criminal sanction, and that the convicted persons, in view of the legal consequences of the conviction, were deprived of their passive voting rights forever, the Constitutional Court noted that the applicable provisions of the ALCCCRR set forth the conditions for the beginning of the legal consequences of the conviction and the rehabilitation. Under Article 18 ALCCCRR, a perpetrator of a criminal offence, convicted or acquitted on the basis of an effective decision, is entitled, after the lapse of the statutory time limit and under the conditions stipulated in the Act, to be treated as a person who has not committed a criminal offence. His or her rights and freedoms may not be different from the rights and freedoms of somebody who has not committed a criminal offence.

Therefore, the Constitutional Court held that when a separate Act does not contain provisions on the legal consequences of a conviction, or on the beginning of rehabilitation, the applicable provisions of the ALCCCRR apply (as lex generalis regulating this subject matter).

The Constitutional Court thus held that the impugned Article 1.2 AALEA, restricting passive voting rights in local elections, met the requirement of proportionality laid down in Article 16.2 of the Constitution and did not breach Articles 30, 31.1 and 31.2 of the Constitution.

Cross-references:

Constitutional Court:

- no. U-I-1397/2015, 24.09.2015, *Bulletin* 2015/3 [CRO-2015-3-008].

Languages:

Croatian, English.

Identification: CRO-2017-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.04.2017 / **e)** U-I-3685/2015 *et al.* / **f)** / **g)** *Narodne novine* (Official Gazette), 39/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
3.16 General Principles – **Proportionality**.
3.17 General Principles – **Weighing of interests**.
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection**.

Keywords of the alphabetical index:

Contract, foreign currency.

Headnotes:

In view of the debt crisis in which Croatian citizens find themselves on account of loans taken out in Swiss francs, the state had a positive obligation to take certain economic measures, i.e., to become involved in the market to ensure the exercise of fundamental social rights and social security as well as to eliminate or reduce extreme social differences resulting from the appreciation of the Swiss franc.

Summary:

I. Proposals to institute proceedings to review the conformity with the Constitution of the Act on Amendments to the Consumer Loans Act (hereinafter, "AACLA") were filed by several natural persons and eight credit institutions. The credit institutions also proposed, for substantially identical reasons, the institution of proceedings to assess the constitutional conformity of the Act on Amendments to the Credit Institutions Act (hereinafter, the "AACIA").

Both impugned acts regulate the same type of relations, but the AACIA stipulates a wider circle of authorised persons and addressees than that included in the provisions of the AACLA.

The impugned acts set the basis for the resolution of the problem of loans denominated in Swiss francs and loans denominated in Croatian kuna with a foreign currency clause in Swiss francs (hereinafter, "loans in CHF"). Under these acts, the loans in CHF were converted into loans denominated in euros or in Croatian kuna with a foreign currency clause in euros, so that the beneficiaries of the loans in CHF would be in the same position as if they had concluded such loans from the outset. The conversion was made further to the exchange rate applied by the credit institutions on that same day to loans of the same type and term denominated in euros or in Croatian kuna with a foreign currency clause in euros.

The conversion did not include loans in CHF of legal persons and loans in CHF repaid in full before the date of entry into force of the impugned acts by voluntary or involuntary repayment of the debt as well as those converted to some other currency.

The applicants also disputed the formal and substantive conformity of the impugned acts with the Constitution. Regarding material conformity, they claimed that the acts were not in line with the constitutional principle of proportionality (Article 16 of the Constitution) and that they had retroactive effect contrary to Article 90.4 and 90.5 of the Constitution.

II. The Constitutional Court did not accept the proposals to institute proceedings to review the conformity of the impugned acts with the Constitution. These acts, as one-off, intervention-style measures on the part of the legislator, were required to achieve the legitimate aims that needed to be attained by them.

In Ruling no U-I-2780/2015-PM and others of 11 November 2015, the Constitutional Court found that the impugned acts were special non-systemic laws with permanent effect that introduced specific intervention-style legal public law measures, which were adopted to eliminate imbalances in the relations between debtors and creditors in the case of loans in CHF.

In terms of the substantive conformity of the impugned acts with the Constitution, the Constitutional Court observed that the Constitution belongs to a group of so-called "socially conscious constitutions" and that the Republic of Croatia is established as a social state (Article 1 of the Constitution), with a positive obligation to encourage the economic progress and social wellbeing of its citizens and to care for the economic development of the country (Article 49.3 of the Constitution). It also took note of the requirements of social justice as a component of the social state that obliges the state to be engaged, in the legislative and "implementing" sense, in the establishment and maintenance of a just social order. The concept of the social state obliges the state to ensure the existence of a just social order, where, in the performance of that obligation, the legislator has wide discretion in decision-making (for example, decision and ruling no. U-IP-3820/2009, U-IP-3826/09 and others.)

Data from the Ministry of Finance shows that, after ten years, the monthly instalments for the borrowers of the loan in CHF, after the regular repayment of their debt, increased by 60% to 80%, while the principal rose by 30% to 40%, putting those who had borrowed in CHF in an unequal and debt-dependent position towards the credit institutions.

Regarding the applicants' claim that the impugned measure was disproportionate and out of line with Article 16 of the Constitution, the Constitutional Court had to consider the aim of the legislator in adopting the impugned acts, whether this was legitimate and whether the measure concerned was proportionate to the aim that needed to be achieved or whether it placed an excessive burden on the credit institutions.

The Constitutional Court held that the impugned acts had a legitimate aim: to improve social protection, prevent unfair business practices by the credit institutions and prevent the deepening of the debt crisis.

It found that the impugned measure (conversion) was appropriate to achieve the legitimate aim. The data submitted by the Ministry of Finance and the Croatian National Bank, which was not brought into question by the applicants, showed that the conversion did not cause any distortive effects in the operation of banks or in national monetary policy; the negative impact of the conversion was considerably smaller than assessed.

In terms of the necessity of the measure, the Constitutional Court started with the function and *ratio legis* of the foreign currency clause (Article 22.1 of the Civil Obligations Act). The purpose of this clause is to protect the real value of a monetary claim (the value that existed at the time of the establishment of the contractual relations), to ensure equality of the parties and equal value of performance and to maintain a contractual balance.

In effect, the aim is to protect rather than to profit, so that the foreign currency clause does not become an instrument for the enrichment of creditors and the impoverishment of debtors; a way of distorting the contractual balance and equality of the parties that leads to the pronounced inferiority of the debtor. In view of the circumstances of this case (the appreciation of the Swiss franc,) the Constitutional Court found that the protective clause had slipped away from its functional limits, which follow from the legal nature and reach of the mechanism.

In the case of loans in CHF, in view of the appreciation of the Swiss franc on the one hand and a regulatory omission on the other, by receiving payments of the loan instalments in CHF, the credit institutions obtained a larger number of monetary units in stable domestic currency with the same purchasing power as at the time of contracting, thus undoubtedly generating considerable benefit as a result of the manifest undermining of the principle of equal value of contractual performances and equality of the parties. It also followed from the statements of the Ministry of Finance, which the credit institutions and the Croatian National Bank did not question in their claims, that the credit institutions did not expose themselves to a foreign currency risk in Swiss francs because they obtained funds for credit placements to domestic consumers from their own deposits in Croatian kuna and euros or borrowings in euros.

The Constitutional Court also noted that the impugned acts were the fourth measure that the Government had executed in order to ease the position of the beneficiaries of loans in CHF as a result of insufficient attention on the part of the credit institutions to find an optimal solution for the loans in CHF. The first measure was taken in 2011 when the Government signed a Memorandum on measures to ease the position of housing loan beneficiaries; the second was taken in 2014 when the interest rate as of January 2014 on housing loans in Swiss francs was fixed at 3.23% in the case of a rise in the exchange rate over 20%, and the third in January 2015 when the rate was fixed at HRK 6.39 for one Swiss franc.

The Constitutional Court found that the impugned acts were essential; in the case of a loan in CHF there was no other less restrictive measure.

The Constitutional Court pointed out that in the "Croatian case" not even the smallest measure was taken to prevent an exchange rate risk in the form of a timely warning to consumers, a practice adopted, for example, by the Austrian Financial Market Authority (hereinafter, the "FMA"). The FMA systematically and successfully performed various activities from 2003 onwards in order to protect consumers against the harmful effects of foreign currency loans indexed in Swiss francs, warning that they were "high risk products". These actions by the FMA ended when CHF loans were banned in 2008.

The Constitutional Court then had to establish whether the impugned measure imposed, despite its appropriateness and necessity, an excessive burden on the credit institutions. The Constitutional Court examined the legal and economic position of the beneficiaries of the loans in CHF before the passing of the impugned acts, on the one hand, and the potential benefit for the credit institutions from the effects of the conversion, on the other. It found that the impact of the increase in value of the mechanism

in Swiss francs for the credit institutions represented, in most cases and to the greatest extent, unrealised gains; they were not the consequence of any real inflow of money in the said currency and the initial outflow of money of the credit institutions was not in Swiss francs but in Croatian kuna.

The Constitutional Court found that it could not be concluded that the impugned measure placed a burden on the credit institutions that could be described as insufferable. The impugned acts satisfied the requirements of proportionality referred to in Article 16 of the Constitution.

The Constitutional Court approached the problem of retroactive effect of the impugned measures at both a substantive level (in relation to the actual and legal effect of these measures on the contractual relations as found) and at a formal law level (regarding the requirements arising from Article 90.5 of the Constitution that only individual provisions of a law can have retroactive effect.)

In terms of the substantive level, the Constitutional Court pointed out that the impugned acts, as a "new legal rule", did not cover legal situations (contractual relations arising from loans in CHF) completed (by repayment of debt or conversion of a loan in CHF into a loan in some other currency) before they came into force. Under the doctrine and case law of the European Union, in such cases the matter involves not the so-called "actual" but the so-called "apparent", i.e., "unreal or quasi-retroactive effect", in the event of which the new legal rule applies to contractual relations that occurred before its entry into force if they are still not complete. As opposed to the "actual" retroactive effect which is prohibited without exception, the quasi-retroactive effect of the new legal rule on the legal relations as found is permitted exceptionally only in cases where the aim of the measure – which should be achieved via the "new legal rule" – could not be attained in some other way. For the quasi-retroactive effect to be permitted, an assessment is required of the necessity of such retroactive effect for the aim to be achieved. Taking into consideration all the circumstances of this particular case, and especially the legitimate aims to be achieved by the impugned acts, the Constitutional Court held that the necessity described could not be achieved in some other way without interfering with existing contractual relations.

In relation to the formal law aspect of the problem of retroactive effect, the Constitutional Court noted that not all of the provisions of the impugned acts had retroactive effect. For example, there is no retroactive effect in the provisions of the Consumer Loans Act stipulating a transitional period for the payment of instalments, i.e., annuities of the loans in CHF (Article 19f of the Consumer Loans Act), the provisions on the rights of persons required by the creditor or with respect to whom the creditor may require performance of an obligation arising from their loan in CHF (Article 19g of the Consumer Loans Act), the provisions on the obligation of the creditor to submit a report to the Ministry of Finance on the results of implementation of the conversion of the loans in CHF (Article 19i of the Consumer Loans Act) or Article 26a of the Consumer Loans Act that includes provisions stipulating a pecuniary penalty for creditors in the case of non-performance of their obligations in the implementation of the conversion. The Constitutional Court therefore held that the impugned acts were in accordance with Article 90.4 and 90.5 of the Constitution.

III. Justice Andrej Abramović attached a partly dissenting opinion to the majority decision.

Cross-references:

Constitutional Court:

- no. U-I-2780/2015-PM *et al.,* 11.11.2015;
- nos. U-IP-3820/2009, U-IP-3826/09 and others, 17.11.2009, *Bulletin* 2009/3 [CRO-2009-3-011].

Languages:

Croatian, English.

Czech Republic
Constitutional Court

Statistical data
1 January 2017 – 30 April 2017

- Judgments of the Plenary Court: 2
- Judgments of panels: 65
- Other decisions of the Plenary Court: 6
- Other decisions of panels: 1 332
- Other procedural decisions: 35
- Total: 1 440

Important decisions

Identification: CZE-2017-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 02.01.2017 / **e)** I. ÚS 2078/16 / **f)** Failure to provide medical assistance to an adult and legally competent person is not a criminal offence if that person has not consented to it / **g)** http://nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Inviolability of the person / Treatment, medical, refusal / Offence, criminal, element / Patient, consent.

Headnotes:

If a legally competent adult has not agreed to being provided with care by a physician or other person, their wish must be respected. Any other approach would amount to violating their fundamental right to respect for their free will. In such circumstances, the failure to provide care does not constitute the criminal offence of failure to provide assistance, as it would not fulfil one of the necessary characteristics of a criminal offence, the illegality of the conduct.

Summary:

I. The applicant was found guilty by the District Court of having committed the criminal offence of failure to provide assistance. A sentence of imprisonment of eight months was imposed, suspended for sixteen months. The applicant had allegedly committed this misdemeanour by failing to provide and arrange professional medical care for his mother who was in a serious medical condition and who died as a consequence of failure to address it in the long term. This verdict was reached on the basis that the applicant should have ensured his mother received the assistance necessary, although she had refused the care he had offered. The Municipal Court dismissed the applicant's appeal. The Supreme Court then dismissed the applicant's case as inadmissible, on the basis that although his mother had rejected the solution to her critical health condition offered by the applicant, he should, in his capacity as a physician, have ensured her care using other medical resources. In his constitutional complaint, the applicant alleged that the ordinary courts had failed to address the issue of whether, given that his mother had refused his care, he was obliged to intervene at all and whether, in this situation, a duty was imposed on him which he had breached.

II. The Constitutional Court agreed with the applicant's objection that the ordinary courts had erroneously and insufficiently addressed his argument that his mother had refused his assistance. Its own case law and that of the European Court of Human Rights, both based in this regard on the rules anchored in the Convention on Human Rights and Biomedicine, clearly implied that any intervention carried out without free and informed consent represented an interference with the right to the inviolability of the person under Article 7.1 of the Charter or the right to physical integrity protected by Article 8 ECHR. Respect for human dignity and freedom lies right at the core of the European Convention on Human Rights and Biomedicine; concepts such as self-determination and personal autonomy are important principles on the grounds of which the Convention is interpreted. These principles are reflected in Article 28.1 of the Act on Healthcare Services, which prescribes that healthcare services may be provided to the patient only with their free and informed consent, unless otherwise stipulated by this Act. The exemptions provided for in the statute reflect the exceptions contained in the Convention on Human Rights and Biomedicine. The Constitutional Court took the view that the principles of freedom and autonomy of the will are also of general applicability outside the area of providing healthcare services.

The Constitutional Court noted that even within the field of health care provision, full respect must be given to the principle of freedom and autonomy of the will and the patient's option to refuse care even if it is deemed crucial for preserving their life. Physicians and other healthcare professionals may convince such persons or try to change their approach if it is manifestly harmful to them, but ultimately, they cannot prevent a fully competent adult from exercising their free and serious will to refuse care simply because they believe that this decision will harm the person concerned. For this reason, if somebody acts in accordance with these rules and does not provide the necessary care in the context of lack of consent by a fully competent adult patient, they are not committing the criminal offence of failure to provide assistance, as it would not fulfil one of the necessary characteristics of a criminal offence, i.e. the illegality of the conduct.

The applicant's mother was not restricted in her legal capacity; there was nothing to indicate that in the material period, she would not have had the capacity to grant or refuse consent to the care because of her health condition. Exemptions regarding provision of care without consent were therefore out of the question. In any case, the ordinary courts did not examine this issue and did not base their decision on this. If his mother refused the care the applicant offered, he could not act against her will. Had he done so, he would have acted contrary to the right to respect for her personal autonomy. In respecting his mother's wishes, the applicant acted in compliance with the law; the element of the illegality of the conduct, an essential statutory condition of a criminal offence, was missing. Consequently, the ordinary courts in their decisions had violated his right under Article 39 of the Charter, according to which it is for the law alone to designate which acts constitute a crime.

The Constitutional Court accordingly allowed the constitutional complaint and set aside the contested decisions, as they would have resulted in violation of the fundamental right to respect for the free will of a person, as implied in Article 7.1 of the Charter and Article 8 ECHR, and would have represented an interpretation contrary to the Convention on Human Rights and Biomedicine.

III. Kateřina Šimáčková served as the Judge Rapporteur in this case. None of the Judges submitted a dissenting opinion.

Cross-references:

European Court of Human Rights:

- *Jehovah's Witnesses of Moscow and others v. Russia*, no. 302/02, 10.06.2010.

Languages:

Czech.

Identification: CZE-2017-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 03.01.2017 / **e)** I. ÚS 2201/16 / **f)** Ruling out of conditional release from a prison sentence only on the basis of the convicted person's criminal past / **g)** http://nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.14 General Principles – ***Nullum crimen, nulla poena sine lege***.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.14 Fundamental Rights – Civil and political rights – ***Ne bis in idem***.

Keywords of the alphabetical index:

Convicted person, release / Rehabilitation / Prison, sentence, discretion.

Headnotes:

General courts which rule out the possibility of release for a convicted person, without taking into account subsequent changes and reforms which may have occurred while he or she was serving their sentence, and other relevant current information relating to him or her, violate the convicted person's constitutional rights to a fair trial and the principle of *nulla poena sine lege* as they are making his or her criminal punishment more severe in the absence of any legal basis.

Summary:

I. The Regional Court turned down the applicant's complaint against a decision by the District Court, which had in turn denied his application for conditional release from a prison sentence, because he had not met the statutory condition of a presumption that he would lead an orderly life in future, in particular when assessing his records in the criminal register and the fact that he had already been released conditionally twice in the past but in both cases was eventually ordered to serve the remainder of his sentence. The applicant took issue with the courts' conclusions, pointing out that a conditional release includes measures for continuing the process of re-socialisation; the statutory condition of a prognosis that he would lead an orderly life relates to the future, and therefore non-fulfilment of it cannot be deduced from a convicted person's past conduct. The applicant also contended that the nature and gravity of the crime committed cannot be repeatedly taken into account when ruling on a conditional release; this would violate the prohibition of double attribution.

II. The Constitutional Court pointed out that there is no constitutionally guaranteed right for a convicted person's application for conditional release from a prison sentence to be granted; assessment of whether statutory conditions have been met is a matter for judicial discretion.

The Constitutional Court only intervenes in the decision-making of general courts on an application by a convicted person for conditional release from prison in exceptional cases; its case law indicates that this has been the case in situations where the general courts, in conflict with Article 36.1 of the Charter, have ruled on the basis of a wholly inadequate determination of the facts of the case, relying only on information from the time of the applicant's conviction, or when they formally obtained sufficient documentation, but did not materially take it into account in their decision making; also, when they assessed the statutory condition of a prognosis of leading an orderly life when released only on the basis of the applicant's past conduct, or circumstances relating to the nature and gravity of the crime committed, meaning that they violated the prohibition of double attribution, and thus also the principle *ne bis in idem* under Article 40.5 of the Charter; or when, while ruling on a convicted person's application for conditional release, they did not observe the principle of an adversarial proceeding and equality of arms under Article 38.2 of the Charter.

However, grounds for intervention by the Constitutional Court also exist if the general courts rule out the possibility of release for a convicted person simply on the basis of his or her criminal past, without taking into account possible subsequent changes and reforms which may have occurred while he or she was serving their sentence, and other relevant current information. Such a ruling not only breaches the convicted person's right to a fair trial under Article 36.1 of the Charter, but also the principle of *nulla poena sine lege*, guaranteed by Article 39 of the Charter; the Court is effectively making his or her punishment more severe without any basis in the law.

The Constitutional Court noted that, in general, the institution of conditional release must be open to all convicted persons, including those given extra-ordinary sentences or convicted repeat offenders. The possibility of conditional release provides convicted persons with potential and hope and may motivate them to reform. Conditional release itself, in connection with accompanying measures such as probationary supervision, is a significant means for achieving reform and re-socialisation of the convicted person after release.

However, in this case the Regional Court had completely overlooked these circumstances. Having familiarised itself with a copy of the records from the criminal register concerning the applicant, including information about his two previous unsuccessful conditional releases, it simply gave up on him, and effectively ruled out the possibility of reform. It took no account of numerous current reports and statements about the applicant's personality, reform and other circumstances, which were fundamentally in his favour, thus violating his constitutionally guaranteed rights under Articles 36.1 and 39 of the Charter.

The Constitutional Court granted the constitutional complaint and overturned the contested decision.

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

Languages:

Czech.

Identification: CZE-2017-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenum / **d)** 14.02.2017 / **e)** Pl. ÚS 28/16 / **f)** Blocking of illegal gambling on the internet / **g)** *Sbírka nálezů a usnesení* (Court's Collection); http://nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Gambling, internet / Internet, access provider / Offence, administrative, internet service provider.

Headnotes:

Legislation on gambling which blocks illegal internet games of chance and legislative provisions which define the administrative offence which has been committed by the internet service provider which has failed to take the necessary measures to prevent access to the internet sites on which games of chance are operated are not contrary to the constitutional order. The legislation does not show such a degree of ambiguity or uncertainty that it would not fulfil the basic constitutional requirements of legal certainty and predictability.

Summary:

I. The provisions of Sections 82 and 84 of the Gambling Act regulate the "blocking" of illegal Internet games. Internet service providers in the Czech Republic are obliged, under these provisions, to prevent access to the internet sites on the list of illegal internet games (the blacklist.) This list is maintained by the Ministry of Finance; it decides *ex officio* on inclusion in and deletion from the list. Internet sites on which games of chance are operated, for which no permit has been granted or which have not been properly reported are included in the list. In administrative proceedings concerning inclusion in the list, documents are delivered to the party to the proceedings (a game of chance operator or a domain holder) by public notice and at their address of residence or registered office if known. Internet service providers are obliged to block access within 15 days of publication in the list, which is available on the Ministry's websites. Section 123.5 defines an administrative offence consisting in the fact that the internet service provider has failed to take within the statutory period the necessary measures to prevent access to the sites on the list. This offence attracts a fine of up to CZK 1,000,000. The applicant, a group of 21 senators of the Parliament of the Czech Republic, viewed the institution of blocking as constitutionally inadmissible censorship carried out arbitrarily by an executive power and regarded the contested legislation as inadmissible interference with the freedom of speech, the right to information, and the right to conduct business.

II. The Constitutional Court concluded that the petition was not justified. Games of chance operated on the internet are generally much less controllable and more dangerous than those operated in bricks and mortar establishments. Because it is possible to connect to them, in the absence of effective regulation, from virtually anywhere, children or pathological gamblers may take part easily, and playing games is faster and involves a greater amount of money. Illegal games of chance on the Internet often avoid taxation, both in the destination country where they are offered and in the country where they are operated. By not being subject to regulation or taxation, they offer better odds and are attractive for players who are not limited in terms of age and betting limits. This could be resolved by blocking access to the internet sites where the illegal games are offered, which is the option the state chose in the contested provisions. This procedure is quite common in other European Union countries. The games tend to be operated from a remote foreign country and those running them are virtually unreachable and non-punishable. Individual countries, therefore, often impose the obligation to block access upon the internet service providers whose task is to block access to illegal gambling effectively, making reasonable efforts and expending reasonable costs.

The blocking of illegal games of chance cannot be compared to the restrictions on the freedom of speech and the right to information (under Article 17.4 of the Charter of Fundamental Rights and Freedoms), the right to conduct business within the meaning of Article 26.2 of the Charter, and the protection of property rights under Article 11.3 of the Charter. The operators of illegal games of chance cannot enjoy protection by constitutionally protected values; their activity is an unlawful one which jeopardises a

number of important interests of the society and is often connected with serious criminal activities. The blocking cannot be compared to internet censorship as controlling or limiting the disclosure of information; this is a technical measure aimed at preventing illegal activities, which must be applied in order to avoid interference with lawful internet content. The Constitutional Court did not perceive a problem from the constitutional perspective with the fact that the power to decide on the inclusion of a particular site in the "blacklist" is conferred on the administrative authorities; this is done in the course of the administrative proceedings. The final decision is subject to standard judicial review which is an adequate safeguard of the legality of the procedure of administrative authorities.

The Constitutional Court disagreed with the contention about the uncertainty of the legislation. As for the term "internet service provider", the Constitutional Court referred to the government's comment on the extent of liability for an administrative offence, according to which liability for an administrative offence while preventing access to harmful internet sites only applies to businesses who provide internet services as their line of business; if a person is the recipient of internet access services and the misconduct occurred on the part of its provider, that person has been relieved of their liability for an administrative offence, even though it subsequently provided internet services to other users in the course of its business.

III. The judge-rapporteur in the case was Mr Jaromír Jirsa. None of the judges adopted a dissenting opinion.

Cross-references:

Court of Justice of the European Union:

- C-42/07, 08.09.2009, *Liga Portuguesa de Futebol Profissional* [2009] *European Court Reports* I-07633;
- C-203/08, 03.06.2010, *Sporting Exchange* [2010] *European Court Reports* I-04695;
- C-314/12, 27.03.2014, *UPC Telekabel Wien* [214].

Languages:

Czech, English.

France
Constitutional Council

Important decisions

Identification: FRA-2017-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 24.01.2017 / **e)** 2016-606/607 QPC / **f)** Mr Ahmed M. and another [Identity checks ordered by the public prosecutor] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.01.2017, text no. 135 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.

Keywords of the alphabetical index:

Foreign national, identity, checks.

Headnotes:

The implementation of identity checks, which is by law the preserve of the investigating police, must be carried out exclusively on the basis of criteria that preclude discrimination of any nature whatsoever between individuals.

The contested provisions cannot permit recourse to identity checks with the sole aim of controlling the lawful residence of the individuals concerned.

Summary:

On 24 October 2016 the Constitutional Council received two applications for a priority preliminary ruling on constitutionality from the Court of Cassation concerning the compatibility of the sixth sub-paragraph of Article 78-2 and Article 78-2-2 of the Code of Criminal Procedure (hereinafter, "CCP") and Articles L. 611-1 and L. 611-1-1 of the Code on the Entry and Residence of Foreigners and the Right of Asylum (hereinafter, "CESÉDA") with the rights and freedoms guaranteed by the Constitution.

The contested provisions of the CCP vest the public prosecutor with the power to authorise identity checks for the purpose of investigating and prosecuting offences specified by him or her, which he or she may order within a designated area and for a specific period of time.

The contested provisions of the CESÉDA enable the police authorities to check the right of residence of a foreign national and to detain him or her for the purpose of verifying his or her right of residence following an identity check ordered pursuant to Articles 78-2 and 78-2-2 of the CCP.

The Constitutional Council upheld the contested provisions of the CPP as constitutional after having given the following clarifications and expressed the following reservations concerning their interpretation.

The Constitutional Council deemed that the implementation of identity checks, by law the preserve of the investigating police, must take place exclusively on the basis of criteria that preclude discrimination of any nature whatsoever between individuals.

The Constitutional Council also expressed two reservations concerning interpretation. Firstly, the public prosecutor may not indicate locations and periods of time that are not linked to investigations into the offences to which his or her orders relate. Secondly, the public prosecutor may not authorise the practice of blanket identity checks over time or space, in particular by cumulating orders in relation to different locations or periods of time.

It falls to the judicial authorities to review the legality of the identity checks carried out, firstly by condemning and punishing any unlawful acts that may be committed and secondly by providing redress for their harmful consequences.

The Constitutional Council held that the contested provisions of the CESÉDA were otherwise constitutional.

In this regard, it considered that the provisions do not allow recourse to identity checks with the sole aim of controlling the lawful residence of the individuals concerned.

Languages:

French.

Identification: FRA-2017-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 26.01.2017 / **e)** 2016-745 DC / **f)** Law on equality and citizenship / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 28.01.2017, text no. 2 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.
5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

Keywords of the alphabetical index:

Gender, identity.

Headnotes:

The term “gender identity” is sufficiently clear and precise in order to ensure compliance with the principle of no punishment without law.

Summary:

The Constitutional Council ruled on the concept of “gender identity”, which was being introduced into various criminal law provisions concerning, in particular, defamation or discrimination under Articles 170, 171 and 207 of the law on equality and citizenship.

Previously, the legislation had used the concepts of sex, sexual orientation and sexual identity. The legislator had maintained the concepts of sex and sexual orientation, but replaced the concept of “sexual identity” with “gender identity”.

The Constitutional Council based its position on parliamentary preparatory works, which show that, in referring to this concept, the legislator intended to target the gender with which an individual identifies, irrespective of whether it coincides with the sex indicated in civil status registers or the various gender expressions of belonging to the male or female sex. The Council noted further that the notion of gender

identity is also to be found in various international legal instruments.

The Constitutional Council held that the term "gender identity" is sufficiently clear and precise in order to ensure compliance with the principle of no punishment without law.

Languages:

French.

Identification: FRA-2017-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 10.02.2017 / **e)** 2016-611 QPC / **f)** Mr David P. [Offence of habitual consultation of terrorist websites] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.02.2017, text no. 46 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.

Keywords of the alphabetical index:

Terrorism, website, consultation.

Headnotes:

In view of the preventive and punitive legislation available to the administrative and judicial authorities to combat incitement and provocation to commit terrorist attacks on websites, an article establishing a penalty of two years' imprisonment and a fine of 30,000 euros for habitual consultation of a public online communication service providing messages, images or representations that either directly incite the commission of terrorist attacks or justify such attacks, where that service includes images or representations depicting the commission of such acts involving wilful attacks on life, interferes with the right to freedom of communication in a manner that is not necessary, suitable and proportionate.

Summary:

On 7 December 2016 the Constitutional Council received an application for a priority preliminary ruling on constitutionality from the Court of Cassation concerning the compatibility of Article 421-2-5-2 of the Criminal Code, as in force following the enactment of Law no. 2016-731 of 3 June 2016 to reinforce the fight against organised crime, terrorism and the financing thereof and to enhance the efficacy and guarantees of criminal procedure, with the rights and freedoms guaranteed by the Constitution.

This article established a penalty of two years' imprisonment and a fine of 30,000 euros for habitual consultation of a public online communication service providing messages, images or representations that either directly incite the commission of terrorist attacks or justify such attacks, where that service includes to this end images or representations depicting the commission of such acts involving wilful attacks on life.

According to the contested article, this penalty did not apply where consultation took place in good faith, resulted from the normal exercise of a profession with the purpose of informing the public, occurred during the course of scientific research or was carried out in order to be used as evidence in judicial proceedings.

The Constitutional Council examined the constitutionality of these provisions by reference to its exacting case-law in the area of freedom of communication. According to this case-law, the legislator may only impose restrictions on this freedom through legislation that meets the three prerequisites of necessity, suitability and proportionality.

As regards the requirement of the necessity of the restriction on freedom of communication, the Constitutional Council noted first and foremost that the legislation in force encompasses a variety of criminal offences, in addition to that provided for under Article 421-2-5-2 of the Criminal Code, along with specific rules of criminal procedure aimed at preventing the commission of terrorist attacks.

In its decision the Council referred in particular to the scope of the following provisions of the Criminal Code:

- Article 421-2-1, which punishes participation in a group established or a conspiracy entered into with a view to preparing, through one or more material acts, a terrorist attack;

- Article 421-2-4, which punishes the act of making offers or promises to an individual, of proposing gifts, presents or other advantages, of threatening or exerting pressure on that individual in order to induce him or her to participate in a group or conspiracy falling under Article 421-2-1 or to commit a terrorist attack;
- Article 421-2-5, which punishes direct incitement to commit terrorist attacks or the public justification of such attacks;
- Article 421-2-6, which punishes the preparation of the commission of a terrorist attack where such preparation is intentionally linked to an individual enterprise that has the aim of causing serious disruption to public order through intimidation or terror and is characterised by the holding, searching for, procurement or fabrication of objects or substances that are of such a nature as to cause danger to others and by other actions such as the habitual consultation of a public online service or public online services that directly incite or justify the commission of terrorist attacks.

French criminal law thus includes numerous instruments conceived in order to combat terrorism. In particular, apart from the contested provisions, the criminal law punishes the consultation of terrorist websites if carried out in relation to a terrorist project, which moreover led the Government to object to the contested provisions during the course of the parliamentary discussions prior to their adoption.

The Constitutional Council also stated in its decision that, during the course of investigations relating to the offences mentioned above, judges and investigators have broad powers to intercept electronic correspondence and to collect technical data on connections, sound recordings, images and data capture. In addition, specific procedural provisions regarding police custody and searches may apply.

As the Council clarified in its decision, the administrative authorities also have numerous powers to prevent the commission of terrorist attacks. The provisions of Title V of Book VIII of the Internal Security Code, as in force following the enactment of the Law on intelligence, thus enable connection data to be accessed, telecommunications to be intercepted, and electronic images and data to be captured. The administrative authorities are also able to request any editor or host of a public online communication service to withdraw content that incites or justifies terrorist attacks.

The Constitutional Council accordingly concluded, in relation to the requirement of the necessity of the contested provisions, that the administrative and judicial authorities have numerous powers, distinct from the contested article, permitting them not only to control public online communication services that incite or justify terrorism and to punish their authors but also to monitor any individual who consults these services and to question and sanction that individual where such consultation is accompanied by conduct indicative of a terrorist intent before the plans can be put into effect.

As regards the requirements of suitability and proportionality in relation to restrictions on freedom of communication, the Constitutional Council held that the contested provisions did not require that an individual who habitually consults the public online communication services concerned must intend to commit terrorist attacks. They did not require proof that such access went hand in hand with a desire to adhere to the ideology expressed through these services. These provisions established a penalty of two years' imprisonment for the mere act of consulting a public online communication service on more than one occasion, irrespective of the intentions of the individual concerned, unless such consultation resulted from the normal exercise of a profession with the purpose of informing the public, occurred during the course of scientific research or was carried out in order to be used as evidence in judicial proceedings.

The Constitutional Council noted that, although the legislator provided that consultation carried out in "good faith" should not be criminalised, the parliamentary preparatory works did not make it possible to establish the scope which the legislator intended to give to this exemption, especially because, as mentioned above, the offence established did not require that the individual responsible for the acts must be motivated by a terrorist intent. The Council inferred from the above that the contested provisions introduced uncertainty as to the lawfulness of consulting certain public online communication services, and consequently concerning use of the Internet in order to search for information.

Applying the three criteria laid down in its case-law, the Constitutional Council consequently held, taking account of all the various aspects mentioned in its decision, including in particular the preventive and punitive legislation available to the administrative and judicial authorities to combat the incitement and provocation of terrorism online, that the contested provisions encroached upon the right to freedom of communication in a manner that was not necessary, suitable or proportionate. While the Council's decision clarifies the scope of freedom of communication, the reasons it gives are nevertheless related to the specific characteristics of the offence referred to it.

By its decision, the Constitutional Council thus declared unconstitutional the provisions of Article 421-2-5-2 of the Criminal Code, as in force following the enactment of the law of 3 June 2016. This declaration of unconstitutionality took effect immediately and was therefore applicable to all proceedings that had not been definitively concluded.

Languages:

French.

Identification: FRA-2017-1-004

a) France / **b)** Constitutional Council / **c)** / **d)** 16.03.2017 / **e)** 2017-624 QPC / **f)** Mr Sofiyan I. [House arrest in the event of a state of emergency II] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 17.03.2017, text no. 67 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

State of emergency, residence, house arrest.

Headnotes:

Prior authorisation by the *Conseil d'État* to extend an order of house arrest beyond twelve months violates the principle of impartiality and the right to effective judicial relief.

Summary:

On 20 January 2017 the Constitutional Council received an application for a priority preliminary ruling on constitutionality from the *Conseil d'État* concerning the compatibility, firstly, of Article 6.11 to 6.14 of the Law of 3 April 1955 on a state of emergency, as in force following the enactment of the Law of 19 December 2016 extending the application of the state of emergency and, secondly, of Article 2.II of the Law of 19 December 2016 with the rights and freedoms guaranteed by the Constitution.

These provisions established the conditions under which house arrest ordered in the event of a state of emergency could be renewed beyond a total duration of twelve months.

The Constitutional Council ruled first on the rules subjecting the extension of an order of house arrest beyond twelve months to a requirement of prior authorisation by the urgent applications judge of the *Conseil d'État*.

The Constitutional Council held that these provisions in fact vested the *Conseil d'État* with competence to authorise an order of house arrest by a definitive decision on the merits, whereas it might also be required to determine the legality of that measure of house arrest as a court of final resort.

The Constitutional Council held that, under these conditions, the part of the contested provisions that provided for a prior authorisation from the *Conseil d'État* to extend an order of house arrest beyond twelve months violated the principle of impartiality and the right to effective judicial relief. The Constitutional Council thus ruled the contested provisions partially unconstitutional in relation to this aspect.

The Constitutional Council then went on to rule on the remainder of the contested provisions, according to which, on the one hand, house arrest may not in principle exceed a period of twelve months and, on the other hand, such a measure may only be renewed thereafter for periods of three months.

The Council expressed a threefold reservation concerning interpretation regarding the possibility for an order of house arrest to be renewed beyond twelve months for three-month periods without causing excessive interference with freedom of movement:

- firstly, the conduct of the individual in question must constitute a threat of particular seriousness to security and public order;
- secondly, the administrative authorities must be capable of producing new or supplementary evidence capable of justifying the extension of the house arrest;

- finally, when examining the circumstances of the individual concerned, the total duration of his or her placement under house arrest, the conditions of this placement and the additional obligations associated with it must be taken into account.

The declaration of unconstitutionality by the Constitutional Council took effect on 16 March 2017.

Consequently, with effect from that date, it has fallen to the Interior Minister to rule on any extension of an order of house arrest, the duration of which exceeds that provided for under the contested provisions upheld as constitutional. His or her decision, which must take account of the reservations concerning interpretation formulated by the Constitutional Council, may be subject to review by the administrative courts, possibly under the urgent applications procedure, pursuant to Article 14-1 of the Law of 3 April 1955 on a state of emergency.

Languages:

French.

Identification: FRA-2017-1-005

a) France / **b)** Constitutional Council / **c)** / **d)** 16.03.2017 / **e)** 2017-747 DC / **f)** Law on the extension of the offence of obstructing a voluntary termination of pregnancy / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 21.03.2017, text no. 4 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.

Keywords of the alphabetical index:

Pregnancy, voluntary, termination, offence of obstruction.

Headnotes:

Freedom of expression and freedom of communication require that the mere dissemination of information intended for the public at large, on any medium, including in particular on a public online communication site, cannot be regarded as constituting pressure, threats or intimidation within the meaning of the contested provisions. The provisions can accordingly permit solely the punishment of acts aimed at preventing or attempting to prevent any particular person or persons from having recourse to a voluntary termination of pregnancy or from obtaining information concerning such a procedure.

Freedom of expression and freedom of communication also require that, insofar as it punishes moral and psychological pressure, threats or any intimidation of individuals who wish to obtain information concerning a voluntary termination of pregnancy, the offence of obstruction can only be committed if two prerequisites are met: that information and not an opinion is requested; that this information concerns the conditions under which a voluntary termination of pregnancy is carried out or its consequences and that it must be given by an individual having or purporting to have expertise in this area.

Summary:

By decision no. 2017-747 DC of 16 March 2017, following an application by more than sixty members of the National Assembly and more than sixty members of the Senate, the Constitutional Council ruled on the Law on the extension of the offence of obstructing a voluntary termination of pregnancy (hereinafter, a “termination”).

This law redrafts Article L. 2223-2 of the Code of Public Health, which defines the offence of obstructing a termination.

Having regard to the principle that there can be no punishment without a law and the constitutional objective that the law must be accessible and intelligible, the Constitutional Council held that the contested provisions were sufficiently precise.

Concerning the compatibility of these provisions with freedom of expression and freedom of communication, the Council held in the first place that, by punishing expressions and acts that disrupt access to or the functioning of establishments offering terminations, these provisions do not constitute interference disproportionate to the objective pursued.

The contested provisions also punish moral and psychological pressure, threats and intimidation against the staff of authorised establishments, women who attend them for the purpose of a termination or persons accompanying such women, along with any person who approaches them for information. In this matter, the Constitutional Council held that, insofar as they are confined to punishing certain abuses of freedom of expression and communication committed within establishments offering terminations or against their staff, the contested provisions do not violate this freedom in a manner disproportionate to the objective pursued.

Finally, the contested provisions also punish moral and psychological pressure, threats and intimidation of any person seeking information concerning a termination irrespective of the interlocutor approached, the location at which such information is provided and the medium for its provision. The Constitutional Council formulated two reservations concerning interpretation in relation to this issue.

Firstly, freedom of expression and freedom of communication require that the mere dissemination of information intended for the public at large, on any medium, including in particular on a public online communication site, cannot be regarded as constituting pressure, threats or intimidation within the meaning of the contested provisions. The provisions of the law brought before the Constitutional Council for review can thus solely allow the punishment of acts aimed at preventing or attempting to prevent any particular person or persons from having recourse to a termination or from obtaining information concerning such a procedure.

Secondly, freedom of expression and freedom of communication require that, insofar as it concerns moral and psychological pressure, threats or intimidation of individuals who wish to obtain information concerning a termination, the offence of obstruction can only be committed if two prerequisites are met: that information and not an opinion is requested; that this information concerns the conditions under which a termination is carried out or its consequences and that it must be given by an individual having or purporting to have expertise in this area.

Subject to these two important reservations, the Constitutional Council deemed the Law on the extension of the offence of obstructing a voluntary termination of pregnancy to be constitutional.

Languages:

French.

Identification: FRA-2017-1-006

a) France / **b)** Constitutional Council / **c)** / **d)** 07.04.2017 / **e)** 2017-625 QPC / **f)** Mr Amadou S. [Individual terrorist enterprise] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.04.2017, text no. 38 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Terrorism, intent.

Headnotes:

The legislator cannot punish a mere unlawful or criminal intent without violating the principle of the necessity of offences and penalties.

Proof of the intention of the perpetrator to prepare for the commission of an offence in relation to an individual terrorist enterprise cannot consist solely in the material facts classified as preparatory acts by the contested legislation. These material facts must corroborate the intention, which must be otherwise established.

In stipulating that “searching for” objects or substances that are of such a nature as to cause danger to others is one of the material facts that may constitute a preparatory act, without determining the acts that may constitute such a search as part of an individual terrorist enterprise, the legislator allowed the punishment of acts that do not in themselves reveal an intention to prepare for the commission of an offence.

Summary:

On 30 January 2017 the Constitutional Council received an application for a priority preliminary ruling on constitutionality from the Court of Cassation concerning the compatibility of Article 421-2-6 of the Criminal Code, as in force following the enactment of Law no. 2014-1353 of 13 November 2014 to reinforce

the provisions to combat terrorism, and Article 421-5 of the same Code, with the rights and freedoms guaranteed by the Constitution.

These provisions establish a penalty of ten years' imprisonment and a fine of 150,000 euros for the offence of an “individual terrorist enterprise”.

The offence is committed only if various prerequisites are met.

Firstly, the individual must prepare for the commission of a serious offence (wilful attack on life or bodily integrity, abduction, kidnapping, destruction by explosive or incendiary substances and so on). In addition, this preparation must be intentionally related to an individual enterprise that has the purpose of causing serious disruption to public order through intimidation or terror.

Secondly, two objective prerequisites must be met by such preparation. According to the contested legislation, the individual must hold, search for, procure or fabricate objects or substances that are of such a nature as to cause danger to others. The individual must also have carried out certain of the acts laid down by the contested legislation: obtaining information concerning potential targets, obtaining training or documentation concerning the handling of arms, habitually consulting terrorist websites and so on…

The Constitutional Council first held that this offence is sufficiently well defined by the contested legislation. It consequently considered that the legislation does not violate the principle of no punishment without law.

The Constitutional Council then went on to rule on the compatibility of the contested provisions with the principle of the necessity of offences and penalties.

After clarifying its case-law, it expressed a reservation concerning interpretation in relation to this issue and made a finding of partial unconstitutionality.

The Constitutional Council clarified first and foremost, in a paragraph laying down a general principle, that the legislator cannot punish a mere intent that is unlawful or criminal without violating the principle of the necessity of offences and penalties.

After pointing out that the contested provisions apply to acts preparatory to the commission of an offence involving a violation of human integrity carried out with a terrorist intent, the Constitutional Council went on to formulate a reservation concerning interpretation. It held that proof of the intention of the perpetrator to prepare for the commission of an offence in relation to an individual terrorist enterprise cannot consist solely in the material facts classified as preparatory acts by the contested legislation. These material facts must corroborate this intention, which must be otherwise established.

Lastly, the Constitutional Council made a finding of partial unconstitutionality. It held that, in stipulating that “searching for” objects or substances that are of such a nature as to cause danger to others is one of the material facts that may constitute a preparatory act, without determining the acts that may constitute such a search as part of an individual terrorist enterprise, the legislator allowed the punishment of acts that do not in themselves reveal an intention to prepare for the commission of an offence. The Constitutional Council consequently declared unconstitutional the words “searching for” appearing in Article 421-2-6. Conversely, having regard to the particular gravity of acts of a terrorist nature, it deemed the remainder of this article to be constitutional.

The Constitutional Council finally held that the penalty of ten years’ imprisonment and a fine of 150,000 euros was not manifestly disproportionate, given that it related to the preparation of acts liable to result in violations of human integrity in relation to an individual enterprise aimed at causing serious disruption to public order through intimidation or terror.

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2017-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 02.11.2016 / **e)** 1 BvR 289/15 / **f)** / **g)** / **h)** *Europäische Grundrechte Zeitschrift* 2017, 204; *Neue Zeitschrift für Verwaltungsrecht* 2017, 555; *Zeitschrift für Datenschutz* 2017, 231; CODICES (German).

Keywords of the systematic thesaurus:

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Demonstrator, right to peaceful assembly / Demonstration, identity check.

Headnotes:

1. The right to "assemble peacefully and unarmed" does not rule out that the police may take measures directed against a group of demonstrators for the purpose of criminal prosecution.

2. With regard to peaceful demonstrators, their right to "assemble peacefully and unarmed" must be protected even if individual participants in the assembly are involved in a riot. Mere participation in an assembly within which individual participants or minority groups instigate riots does not provide a sufficient basis for identity checks.

Summary:

I. In June 2013, the applicant attended a demonstration with the motto "European Solidarity against the crisis regime of the ECB and the Troika" in Frankfurt (Main). Some participants in the assembly had covered their faces even before the demonstration had started. After the march had started, some protesters lined up in a "U-formation" which was shielded from the outside by means of ropes and wooden poles, shields, tied banners as well as umbrellas, all of which the protesters had brought with them. During the course of the demonstration, pyrotechnic articles as well as paint bombs and bottles filled with paint were thrown at police officers from this section of the assembly. At 12:49 p.m. the police stopped this section of the assembly and separated it from the rest of the rally by containing 943 individuals, including the applicant, using "kettling" tactics. In consultation with the administrative authority, the police banned these persons from the assembly. After the police had checked his identity, searched the things he had brought with him, and collected information by means of videography, the applicant was able to leave the containment at about 5:30 p.m. at one of the 15 exit points that were equipped with video cameras. Preliminary proceedings were subsequently discontinued. His application for a declaratory judgment establishing the unlawfulness of the deprivation of liberty, the establishment of his identity and the search remained unsuccessful.

The applicant challenged the police measures and the court decisions that did not grant the relief sought.

II. The Federal Constitutional Court did not admit the constitutional complaint for decision. In the Court's opinion the challenged decisions did not violate the applicant's fundamental rights.

The decision is based on the following considerations:

If a demonstration is not expected to take a violent or riotous turn, the right of assembly of peaceful demonstrators must be protected even if individual protesters start rioting. Freedom of assembly does not rule out that repressive measures of criminal prosecution are taken against parts of an assembly. When interfering with these fundamental rights, state organs must interpret those provisions of the Code of Criminal Procedure that restrict the scope of fundamental rights in light of the relevance of the freedom of assembly in a free and democratic state. They also must limit their measures to what is necessary to protect equivalent legally protected interests. With regard to identity checks in cases in which somebody is suspected of having committed a criminal offence, this limitation means that the suspicion must be based on a sufficiently objective foundation of facts and be directed against one specific protester. Mere participation in an assembly within which individual participants or minority groups start riots is not sufficient for arousing such suspicion.

The decisions of the regular court meet these standards. It does not violate constitutional requirements if the police come to the conclusion that it is reasonable to assume that all members of a group arouse initial suspicion if this group stands out from the rest of the assembly because of their formation, shields and face covers and if a multitude of offences is being committed from among the group. The persons belonging to this part of the demonstration gave an impression of unity so that the police was allowed to assume that rioters would be encouraged in their decisions and actions.

The regular courts' conclusion that the applicant was only detained until he was able to leave the containment at one of the exit points and, hence, not longer than necessary to establish his identity, does not raise any constitutional concerns either. In particular, the police set up 15 exit points and was thus able to check the identity of about three persons per minute and on the spot. Parts of the group which was subject to police measures contributed to extending the duration by significant physical resistance against police forces.

It was also not necessary to bring the applicant before a judge to decide on the deprivation of liberty because it took less time to establish his identity at the place of the assembly than it would have taken had he been brought before a judge. This constitutes an exception from the rule that a judge must decide on measures of deprivation of liberty.

The regular courts did not violate the right to individual liberty under the second sentence of Article 2.2 of the Basic Law in conjunction with Article 104 of the Basic Law by not using the video material of the police as evidence. The legal assessment of the regular courts that a suspicion against the applicant was not ruled out simply because he did not, in fact, commit any offences does not raise any constitutional concerns either. In that regard, it was sufficient that he was part of a group that was easily distinguished from the rest of the demonstration and that numerous offences were committed from among that group.

Cross-references:

Federal Constitutional Court:

- 1 BvR 233/81, 14.05.1985, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 69, 315 <361>;
- 2 BvR 447/05, 13.12.2005.

Languages:

German.

Identification: GER-2017-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 23.12.2016 / **e)** 2 BvR 2023/16 and 2 BvR 2011/16, 2 BvR 2034/16 / **f)** / **g)** / **h)** *Strafverteidiger Forum* 2017, 64 (2 BvR 2023/16); *Zeitschrift für Wirtschafts- und Steuerstrafrecht* 2017, 187 (2 BvR 2023/16); *Neue Juristische Wochenschrift* 2017, 1233 (2 BvR 2011/16, 2 BvR 2034/16); CODICES (German).

Keywords of the systematic thesaurus:

4.7.2 Institutions – Judicial bodies – **Procedure**.
4.7.4.1 Institutions – Judicial bodies – Organisation – **Members**.
5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **"Natural judge"/Tribunal established by law**.

Keywords of the alphabetical index:

Judge, impartiality / Judge, lawful / Judge, lawful, right to.

Headnotes:

1. Provisions for determining someone's lawful judge (second sentence of Article 101.1 of the Basic Law) have to specify, in advance and as clearly as possible, the court, the adjudicating bodies, and the judges to whom the decision on an individual case will be assigned.

2. All provisions of an allocation of jurisdiction scheme *(Geschäftsverteilungsplan)* have to define, in advance and in a general-abstract manner, the competence of the adjudicating bodies and the assignment of the individual judges in order to determine the deciding judge "blindly" pursuant to general, previously established criteria.

3. As far as proceedings are already pending and are subject to a re-allocation of established competences, provisions only define the competence in advance and in a general-abstract manner if the re-allocation is based on the scheme allocating the jurisdiction. This is not the case if the provisions, in an individual case, allow for re-allocating or maintaining established competences, conditioning the competences on decisions by the adjudicating bodies.

4. If proceedings concern the question of whether a certain provision of an allocation of jurisdiction scheme can be considered to be general-abstract within the meaning of the second sentence of Article 101.1 of the Basic Law, the Federal Constitutional Court reviews the provision to its full extent to determine whether it is general-abstract.

Summary:

I. The Federal Constitutional Court decided in two proceedings (2 BvR 2023/16 of 23 December 2016 and 2 BvR 2011/16, 2 BvR 2034/16 of 16 January 2017) on the constitutional complaints that were lodged by three applicants. Due to details of the case the decision on one of the proceedings has already been made in December 2016. Apart from these details, the facts of the cases and also the reasons of the decisions are the same.

In July 2014, the applicants were charged with tax evasion as well as aiding and abetting tax evasion. According to the allocation of jurisdiction scheme of the Rostock Regional Court *(Landgericht)* in force at that time the Rostock Regional Court's division 18 (8th Grand Court division for serious criminal offences – *8. Große Strafkammer*) would have been the competent court division for these proceedings. After receiving the indictment, on 12 November 2014 the presiding judge of the 8th Grand Court division extended the time period for statements responding to the indictment for all the accused before trial until 1 December 2014. On the same day, the presiding judge of the 8th Grand Court division also notified the Presidium of the Regional Court *(Präsidium des Landgerichts)* of the division's excessive workload and explained the relevant details. Consequently, on 19 November 2014, the Presidium confirmed that the division's workload was excessive and established an additional court division for criminal offences *(Hilfsstrafkammer)* effective 25 November 2014. According to the Presidium's order the additional division was to be competent for all proceedings received by the 8th Grand Court division since 1 August 2014 and the main proceedings of which were not instituted by 24 November 2014. The applicants' main proceedings were not instituted until 27 January 2015. In the first oral hearing of these main proceedings conducted by the additional court division the applicants' legal representatives lodged objections concerning the composition of the court. The objections were mainly based on the assertion that the allocation of jurisdiction stipulated in the Presidium's order of 19 November 2014 violated the right to one's lawful judge under the Basic Law as it allowed for manipulations of competences by instituting or not instituting main proceedings. The objections were rejected. The additional court division found the applicants guilty and sentenced them to prison. The applicants' appeals on points of law remained without success.

The applicants challenge the judgment of the Rostock Regional Court and the order of the Federal Court of Justice *(Bundesgerichtshof)* dismissing their appeals on points of law and claim a violation of the right to their lawful judge under the second sentence of Article 101.1 of the Basic Law.

II. The Federal Constitutional Court held that the decisions of the criminal courts violated the applicants' rights to their lawful judge under the second sentence of Article 101.1 of the Basic Law. The relevant stipulation of the Presidium's order is not compatible with the guarantee to one's lawful judge under the Basic Law. Hence, the judgment of the additional court division is not a decision by the applicants' lawful judge. By dismissing the appeals on points of law the appellate court has perpetuated the violation of the right to one's lawful judge – a right which is equivalent to fundamental rights.

The decisions are based on the following considerations:

The right to one's lawful judge has the purpose of preventing the risk of improper interference in the administration of justice. One of its main functions is to safeguard the independence of jurisdiction and public confidence in the impartiality and objectivity of the courts. According to the constitutional guarantee the allocation of jurisdiction has to be as specific and unambiguous as possible. It has to be possible to determine the competent judge or court division for any proceedings by simply adhering to the allocation of jurisdiction scheme.

The solution chosen by the Regional Court's Presidium to introduce a deadline is incompatible with the Basic Law because it allows for undue influence of the adjudicating bodies by deciding on whether or not to initiate the main proceedings. A subsequent change of the allocation of jurisdiction may become necessary, if this is the only way to guarantee effective legal protection. Such a change is not generally prohibited by the right to one's lawful judge, but must comply with the standards set forth above.

The allocation of jurisdiction scheme in dispute did not contain any general-abstract provisions with regard to the initial case. The chosen solution which establishes a deadline only allows for a subsequent determination of specific competences, namely subject to whether main proceedings are initiated or not. Delegating the decision on the allocation of jurisdiction to adjudicating bodies who should in fact be the addressees of the general-abstract competence is incompatible with the second sentence of Article 101.1 of the Basic Law.

Cross-references:

Federal Constitutional Court:

- 2 BvR 42/63, 24.03.1964, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 17, 294 <299>;
- 1 PBvU 1/95, 08.04.1997, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 322 <329>;
- 2 BvR 581/03, 16.02.2005, Third Chamber of the Second Panel.

Languages:

German.

Identification: GER-2017-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 17.01.2017 / **e)** 2 BvB 1/13 / **f)** / **g)** to be published in the *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest) / **h)** *Neue Juristische Wochenschrift* 2017, 611; *Europäische Grundrechte Zeitschrift* 2017, 44; *Neue Zeitschrift für Verwaltungsrecht* 2017, Beilage 2, 46; *Bayerische Verwaltungsblätter* 2017, 337; *Verwaltungsrundschau* 2017, 172; *Die öffentliche Verwaltung* 2017, 508; CODICES (German).

Keywords of the systematic thesaurus:

1.3.4.7.1 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Banning of political parties**.
3.3 General Principles – **Democracy**.
4.5.10 Institutions – Legislative bodies – **Political parties**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

Keywords of the alphabetical index:

Political party, equal participation, right / Political party, constitutionality, establishment / Political party, dissolution, jurisdiction / Political party, hostility to human rights / Political party, non parliamentary / Political party, non-democratic / Political party, programme / Political party, prohibition, implementation.

Headnotes:

1. The prohibition of a political party under Article 21.2 of the Basic Law is the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against organised enemies. Its aim is to counter risks emanating from the existence of a political party with a fundamentally anti-constitutional tendency and from the typical ways in which it can exercise influence as an association.

2. The requirement that there be no informants at a political party's executive level *(Staatsfreiheit)* and the principle of fair trial are indispensable for carrying out proceedings for the prohibition of a political party.

a. The use of police informants and undercover investigators at the executive level of a political party during ongoing proceedings to prohibit the political party is incompatible with the rule-of-law requirement that there be no informants at the party's executive level *(Staatsfreiheit)*.
b. The same applies to the extent that an application for the prohibition of a political party is essentially supported by materials and facts that police informants and undercover investigators have played a crucial role in authoring.
c. The principle of a fair trial demands that observation of a political party during ongoing prohibition proceedings does not serve the purpose of spying out the procedural strategy of the party by constitutional protection authorities and requires that incidentally obtained information on the procedural strategy is not used against it.
d. An obstacle resulting in discontinuation of proceedings is the ultima ratio of possible legal consequences of violations of the Constitution. Therefore, in deciding whether irremediable procedural obstacles exist, the preventive purpose of proceedings for the prohibition of a political party, on the one hand, must be weighed up against the rule of law requirements which such proceedings need to meet, on the other hand.

3. The concept of the free democratic basic order within the meaning of Article 21.2 of the Basic Law requires concentration on a few central fundamental principles which are absolutely indispensable for the free constitutional state.

a. The free democratic basic order is rooted primarily in human dignity (Article 1.1 of the Basic Law). The guarantee of human dignity covers in particular the safeguarding of personal individuality, identity and integrity and elementary equality before the law.
b. In addition, the principle of democracy is a constitutive element of the free democratic basic order. The possibility of equal participation by all citizens in the process of forming political will and accountability to the people for the exercise of state authority (Article 20.1 and 20.2 of the Basic Law) are indispensable for a democratic system.
c. Rooted in the rule of law, the principle that the public authority is bound by the law (Article 20.3 of the Basic Law) and oversight in that respect by independent courts are determinative for the concept of the free democratic basic order. At the same time, the protection of the freedom of the individual requires that the use of physical force is reserved for the organs of the state which are bound by the law and subject to judicial oversight.

4. The concept of "abolishing" *(beseitigen)* the free democratic basic order involves the abolition of at least one of the constitutive elements of the free democratic basic order or its replacement with a different constitutional order or a different system of government. On this basis, the assumption of "under-mining" can be made if a political party, in accordance with its political concept, effectuates with sufficient intensity a noticeable threat to the free democratic basic order.

5. The fact that a political party aims to abolish the free democratic basic order must result from its aims and the behaviour of its adherents.

a. The aims of a political party are the embodiment of what a party is seeking to achieve politically.
b. Adherents are all those persons who espouse the political party's cause and profess allegiance to it, even if they are not members of the political party.
c. The activities of a political party's organs, specifically the party's executive committee and its leading functionaries, are ascribable to the political party. Statements or actions by ordinary members can only be ascribed to the political party if they are undertaken in a political context and if the political party has approved or condoned them. In the case of adherents who are not members of the political party, influence or approval, in whatever form, of their conduct by the political party is generally a necessary condition for ascribing such conduct to the party. Criminal offences and acts of violence, however, cannot be ascribed to the political party if there is no causal link to that end. The principle of indemnity does not preclude ascribing parliamentary statements to a political party.

6. In order to prohibit a political party, it does not suffice that that party has objectives that are directed against the free democratic basic order. Instead, the party must "seek" *(darauf ausgehen)* to undermine or abolish the free democratic basic order.

a. The concept of "seeking" requires active involvement. The prohibition of a political party does not constitute a prohibition of views or ideology. It requires that a party exceeds the threshold of actually combating the free democratic basic order.
b. A prohibition requires systematic action in the sense that a political party's acts constitute a qualified preparation for undermining or abolishing the free democratic basic order or to endanger the existence of the Federal Republic of Germany.
c. In that regard, it is not necessary that there is a specific danger to the legal interests protected under Article 21.2 of the Basic Law. However, specific and weighty indications must suggest that it is at least possible that action by the political party against the free democratic basic order or the existence of the Federal Republic of Germany could be successful.
d. The use of force is in itself a weighty indication to justify the assumption that action against the goods protected under Article 21.2 of the Basic Law may be successful. The same applies if a political party creates an "atmosphere of fear" in certain regions, which is likely to undermine in the long term the free and equal participation of all persons in the process of forming the political will of the people.

7. Within the scope of Article 21.2 of the Basic Law, there is no room for assuming the existence of further, unwritten, constituent elements.

a. The similarity in nature of a political party with National Socialism does not in and of itself justify its prohibition. It does, however, indicate that this political party is pursuing unconstitutional aims.
b. A separate application of the principle of proportionality is not necessary.

8. The mentioned requirements that need to be met to establish that a political party is unconstitutional are compatible with the case law of the European Court of Human Rights on prohibitions of political parties, which it derived from the European Convention on Human Rights.

9. According to these standards, the application is unfounded:

a. Considering its aims and its adherents' behaviour, the respondent aims at abolishing the existing free democratic basic order. It aims to abolish the existing system of parliamentary representation and replace it with a national state that adheres to the concept of an ethnic *Volksgemeinschaft*. The respondent's political concept disrespects the human dignity of those people who do not belong to this ethnic *Volksgemeinschaft*, and is incompatible with the Constitution's principle of democracy.
b. The respondent acts in a systematic manner and with sufficient intensity towards achieving its aims that are directed against the free democratic basic order. However, there is a lack of specific and weighty indications suggesting that this endeavour will be successful.

Summary:

I. The National Democratic Party of Germany (hereinafter, "NPD") advocates a concept aimed at abolishing the existing free democratic basic order. The NPD intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined "people's community" *(Volksgemeinschaft)*. Its political concept disrespects human dignity and is incompatible with the principle of democracy. Furthermore, the NPD acts in a systematic manner and with sufficient intensity towards achieving its aims that are directed against the free democratic basic order.

II. However, (currently) there is a lack of specific and weighty indications suggesting that this endeavour will be successful; for that reason, the Second Panel of the Federal Constitutional Court, in its judgment pronounced on 17 January 2017, unanimously rejected as unfounded the *Bundesrat*'s admissible application to establish the unconstitutionality of the NPD and its sub-organisations (Article 21.2 of the Basic Law).

Cross-references:

Federal Constitutional Court:

- 1 BvB 1/51, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 2, 1, 23. 10. 1952;
- 1 BvB 2/51 – *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 5, 85,17. 08.1956;
- 2 BvB 1/01, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 107, 339, 18.03.2003 (English press release available on the Court's website)

Languages:

German; English (translation on website).

Identification: GER-2017-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 23.01.2017 / **e)** 2 BvR 2584/12 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2017, 1731; *Zeitschrift für Datenschutz* 2017, 381; *Europäische Grundrechte Zeitschrift* 2017, 444; *Der Strafverteidiger* 2017, 637; CODICES (German).

Keywords of the systematic thesaurus:

3.22 General Principles – **Prohibition of arbitrariness**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

Keywords of the alphabetical index:

Legal protection, effective, guarantee.

Headnotes:

1. Article 19.4 of the Basic Law entitles individuals to effective judicial review; this comprises a conclusive assessment of the subject matter of the respective proceedings.

2. Insofar as a court is called upon to review the decision on an entry into the Federal Central Criminal Register (hereinafter, the "Register") with respect to its compatibility with the constitutional minimum standards, it may not narrow down this task by simply adopting the findings of the judgment despite the fact that the applicant's submission gave rise to review.

Summary:

I. In December 2010, the applicant was sentenced to a fine as well as a one year prison term subject to probation by a criminal court in Seville (Spain). The prison term was entered in the Register. The applicant only learned of that entry when he requested a copy of his criminal record. He unsuccessfully challenged this entry by lodging objections at the Federal Office of Justice and the Federal Ministry of Justice, and, with respect to the rule of law, claimed that the Spanish fast-track proceedings leading to his conviction had severe deficiencies. His application for a court decision also remained unsuccessful. The applicant primarily claims a violation of his general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) and of the fundamental right to effective legal protection (Article 19.4 of the Basic Law).

II. The Federal Constitutional Court decided that the fundamental right to effective legal protection was violated.

The decision is based on the following key considerations:

The precedence of application of European Union Law does not bar regular courts from reviewing whether a conviction by a foreign criminal court – registered according to Article 5 of the Council Framework Decision 2009/315/JHA – is the outcome of proceedings which satisfy procedural minimum standards.

In order to meet the requirement of effective legal protection the regular courts may only refrain from exhausting all possibilities to gather information if that evidence is impermissible, absolutely useless, unattainable, or irrelevant for the decision. In contrast, the courts may not abstain from taking evidence simply because investigating seems especially effortful or time-consuming.

The challenged order does not meet these requirements. The fact that the courts refrained from taking evidence with regard to the proceedings resulting in the conviction constitutes a violation of the fundamental right to effective legal protection under Article 19.4 of the Basic Law, as the requirement of adequate fact finding was not fulfilled. The applicant submitted a conclusive, consistent, precise and detailed statement of why the judgment deviates from the factual circumstances, and also offered proof. Against this background, there was cause for taking evidence because the facts to be proven were relevant for the decision and because the evidence was suitable and also attainable. Even if the trial court could, in principle, assume that the Spanish criminal sentence was correct, the substantiated submission gave rise to taking the offered evidence. The presumption that the Spanish conviction was correct must have been called into question due to the applicant's submission and offer of evidence. Therefore, the trial court was obliged to further investigate the facts of the case. It does not meet the requirements of a conclusive investigation of facts to refer, in a generalised manner, to the presumed correctness of the Spanish decision.

Furthermore, the trial court violated the applicant's fundamental right to effective legal protection by not following up on the applicant's critique of the legal design and the practical performance of the Spanish fast-track proceedings, and by failing to clarify the theoretical, formal concept and the performance of the fast-track proceedings.

In addition, the trial court also violated the prohibition of arbitrariness pursuant to Article 3.1 of the Basic Law because the evaluation of the applicant's submission is incomprehensible.

Cross-references:

Federal Constitutional Court:

- 1 BvR 103/52, 05.10.1955, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 4, 294 <297>;
- 1 BvR 385/90, 27.10.1999, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 101, 106 <122 *et seq.*>;
- 2 BvR 1533/94, 07.12.1999, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 101, 275 <294 *et seq.*>;
- 2 BvR 2735/14, 15.12.2015, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* (Official Digest), 140, 317 <349 *et seq.*>.

Languages:

German.

Identification: GER-2017-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 07.03.2017 / **e)** 1 BvR 1314/12, 1 BvR 1630/12, 1 BvR 1694/13, 1 BvR 1874/13 / **f)** Gambling Halls / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Deutsches Verwaltungsblatt* 2017, 697; *Landes- und Kommunalverwaltung* 2017, 217; *Zeitschrift für Wett- und Glücksspielrecht* 2017, 253; *Neue Zeitschrift für Verwaltungsrecht* 2017, 1111; *Verwaltungsrundschau* 2017, 244; *Gewerbearchiv* 2017, 339; CODICES (German).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
3.18 General Principles – **General interest**.
5.2 Fundamental Rights – **Equality**.
5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession**.
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Addiction, prevent and combat, general interest / Children and youth, protection, general interest / Gambling halls / Legitimate expectation, protection, non-retroactivity / Risk potential, distinction, criteria, equality / Deadlines, transitional periods / Transitional regulations.

Headnotes:

1. The *Laender* have the exclusive competence for regulating the requirements for the operation and licencing of gambling halls (Article 70.1 of the Basic Law in conjunction with Article 74.1.11 of the Basic Law).

2. The prohibition of gambling compounds, the distance requirements, the reduction of the maximum number of gambling machines per gambling hall, the requirement that a supervisor be present, and the transitional regulations of the State Treaty on Gambling and the laws of the *Laender* Berlin, Free State of Bavaria, and Saarland are compatible with the Basic Law.

3. Where in segments of the gambling market the state itself is pursuing fiscal interests, and where various gambling services are potentially competing with each other, the state must take measures that are genuinely aimed at combatting gambling addiction.

4. Prior to the conclusion of a state treaty between the *Laender*, any expectation that the existing legal framework will continue to apply is no longer legitimate when the envisaged reforms are sufficiently well-publicised and predictable.

Summary:

I. The four applicants operate gambling halls located in the *Laender* (federal states) Berlin, Free State of Bavaria, and Saarland. With their constitutional complaints, they challenge stricter requirements for the licencing and operation of gambling halls.

In 2012, following an increase in turnover generated by gambling machines situated outside casinos *(Spielbanken)*, and in response to studies showing the substantial risk potential stemming from commercialised machine gambling, the *Laender* established, by way of the First State Treaty Amending the State Treaty on Gambling, stricter requirements for the licencing and operation of gambling halls. These requirements introduced a prohibition of gambling compounds *(Verbundverbot)* pursuant to which a gambling hall shall not be situated at a location that is shared with other gambling halls. In addition, gambling halls are required to keep a minimum distance between their respective venues *(Abstandsgebot)*. Established gambling halls must fulfil the stricter requirements within certain transitional periods, even if they had already obtained a licence prior to the enactment of the new provisions of the State Treaty on Gambling and the corresponding laws of the *Laender*. Already in 2011, the *Land* of Berlin enacted a Law on Gambling Halls that additionally requires a minimum distance between a gambling hall and facilities for children and youth. The permissible maximum number of machines in gambling halls was lowered to eight machines; moreover, the Law imposes an obligation that a supervisor of the facility be present at all times.

The applicants essentially claim a violation of their fundamental freedom of occupation (Article 12 of the Basic Law) and the general principle of equality before the law (Article 3 of the Basic Law).

II. The Federal Constitutional Court decided that the challenged legal provisions are constitutional, based on the following key considerations:

The prohibition of gambling compounds and the distance requirements are compatible with Article 12.1 of the Basic Law. Aimed at preventing and averting the risks of addiction stemming from gambling, and at protecting children and youth, the relevant provisions pursue a particularly important objective of the common good. They serve the purpose of limiting the concentration as well as the overall number of gambling halls. The requirement of a minimum distance to facilities for children and youth aims to prevent gambling addiction as early as possible and to combat the effect of increasing adaption to addictive stimuli. The assessments of the legislator to that end are not manifestly incorrect.

The challenged legal provisions are genuinely pursuing the legitimate objective of combatting gambling addiction even though they do not address casinos operated by or in cooperation with the state. Casinos are equally subject to comprehensive regulations for the protection of gamblers. However, the *Laender* are obliged to ensure that the reduction of the number of gambling halls will not be undermined by an expansion of machine gambling or an increase of casino venues.

The prohibition of gambling compounds and the distance requirements are also proportionate. They constitute suitable means, as they at least contribute to combatting gambling addiction. It appears plausible that multi-complex compounds create an enhanced incentive for gambling due to the multiplication of the readily available offer. The distance requirement reduces the number of locations available for the establishment of gambling halls and limits their concentration. A less restrictive, yet equally effective means is not discernible. The requirements are also appropriate. In an overall balancing of the intensity of the interference, and the weight and urgency of the justifications in this regard, the statutory regulations on the whole comply do not impose excessive burdens.

The interferences with the freedom of occupation stemming from the reduction of the maximum number of machines in gambling halls, and from the obligation that a supervisor of the facility be present at all times, are justified as well. With the reduction of the maximum number of machines in gambling halls, the legislator pursues the objective of preventing addiction by limiting incentives for excessive gambling in gambling halls. The obligation that a supervisor of the facility be present aims to facilitate the detection of problematic gambling behaviour and enable an immediate intervention in these cases.

The challenged regulations do not violate the general guarantee of the right to equality under Article 3.1 of the Basic Law on the grounds that gambling-hall operators are subjected to stricter requirements than operators of casinos and of pubs where cash-gambling machines are situated. This unequal treatment is justified, as the differences in risk potential constitute a sufficient objective reason for differentiation.

The transitional regulations challenged by the applicants are also constitutional. The five-year transitional period is compatible with the principle of protection of legitimate expectations *(Vertrauens-schutz)* derived from Article 12 of the Basic Law. This principle does not guarantee an unconditional right to amortisation of investments made. The principle of proportionality is also satisfied. The interests of gaming hall operators have been adequately taken into account, not least because the *Laender* have provided for exceptions in individual cases of extreme hardship. The one-year transitional period, applicable to gambling halls licenced after 28 October 2011, is also compatible with Article 12.1 of the Basic Law. The distinction between the one-year and the five-year transitional period serves legitimate objectives of the common good and gives due consideration to the protection of legitimate expectations. Article 3.1 of the Basic Law does not preclude the legislator from opting for staggered transitional periods based on considerations of protection of legitimate expectations, together with a fixed deadline, in order to combat addiction as effectively as possible by way of reducing the offer of gambling halls as quickly as possible.

Cross-references:

Federal Constitutional Court (Selection):

- 1 BvR 1054/01, 28.03.2006, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* 115, 276-320, *Bulletin* 2006/1 [GER-2006-1-005];
- 1 BvR 539/96, 19.07.2000, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* 102, 197-224.

Court of Justice of the European Union (Selection):

- C-46/08, 08.09.2010, *Carmen Media Group*, [2010] *European Court Reports* I-8149;

- C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, 08.09.2010, *Markus Stoß and Others,* [2010] *European Court Reports* I-08069;
- C-243/01, 06.11.2003, *Piergiorgio Gambelli*, [2003] *European Court Reports* I-13031.

Languages:

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

Identification: GER-2017-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 13.03.2017 / **e)** 1 BvR 1438/15 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
3.19 General Principles – **Margin of appreciation**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

Keywords of the alphabetical index:

Defamation, via internet / Insult, criminal liability.

Headnotes:

The criminal sanctioning of the dissemination on the Internet of an image defaming a specific person pursuant to § 185 of the Criminal Code does not raise any constitutional objections with regard to the freedom of expression in cases where the regular courts plausibly substantiate that the accused espouses the contents presented by the image and where they reasonably arrive at the result, upon the constitutionally required weighing of interests, that the interests of personal honour outweigh those of the freedom of expression (both affirmed in this case).

Summary:

I. The applicant claimed a violation of his right to freedom of expression and freedom of the press under the first and second sentences of Article 5.1 of the Basic Law. He had been convicted of criminal charges and fined by the Grevesmühlen Local Court *(Amtsgericht)*, and was unsuccessful on appeal on points of law to the Rostock Higher Regional Court *(Oberlandesgericht)*.

The applicant had published an article on the Internet under the title "Jamel honours the 'Heroes of the North'". The article also contained a photograph of a sign situated on the town limits of Jamel, a town in Northern Germany which has made headlines for right-wing extremism. One side of the sign shows a caricature of a married couple that resides in Jamel dancing around a pot of gold, along with the words "The brazen and the lazy get the most money". The other side of the sign portrays the caricatured heads of the couple framed by the words "The village community salutes the 'Heroes' of the North". The "Heroes"-phrase references a headline published about the couple in several German newspapers, recognising their civic courage in the face of right-wing extremism.

II. The Third Chamber of the First Panel of the Federal Constitutional Court did not admit the constitutional complaint for decision.

The challenged court decisions remained within the regular courts' scope of appreciation and do not violate the applicant's freedom of expression. The regular courts plausibly reasoned that by publishing the image of the sign on the Internet, the applicant espoused the content portrayed therein. The article itself, as published on the Internet, was properly classified as a permissible expression of opinion in the initial proceedings. The photograph of the sign showing caricatures of a couple and labelling them "brazen" and "lazy", however, must be distinguished from the article. The regular courts, after undertaking the necessary constitutional weighing of interests, came to the unobjectionable conclusion that the interests of personal honour are preponderant in this regard. The text on the sign, as well as the labels "brazen" and "lazy" have no specific political message and serve merely to demean the portrayed persons. The prominent location of the sign at the entrance to the town and the caricature depiction pillory the couple in question and serve to ostracise them from the village community. Given this situational context, and the de-politicised nature of the statement itself, the finding that the interests of personal honour are preponderant is well justifiable and does not violate the applicant's freedom of expression.

Languages:

German.

Identification: GER-2017-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 28.03.2017 / **e)** 1 BvR 1384/16 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift-Rechtsprechungsreport Zivilrecht* 2017, 1001; CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Expression of opinion, legal assessment / Fundamental rights of communication, control exercised by the Federal Constitutional Court / Holocaust denial / Incitement to hatred, aiding and abetting / Inciting hatred against segments of the population, judgment under criminal law / Opinions, extreme right-wing.

Headnotes:

1. The first sentence of Article 5.1 of the Basic Law also protects statements of fact, with the exception of statements that are deliberately, or proven to be, untrue. Where it is not possible to separate the evaluative elements of a statement from its factual elements without altering its meaning, the statement as a whole must be regarded as an expression of opinion.
2. Pursuant to the second sentence of Article 5.2 of the Basic Law, the fundamental right to freedom of expression finds its limits in the restrictions imposed by the general laws. An exception to the requirement that laws restricting the expression of opinions be general in nature applies to legal provisions aimed at preventing any propagandistic approval of the National Socialist rule of violence and arbitrary force that took place from 1933 to 1945.
3. When interpreting and applying laws that limit the freedom of expression, regular courts must take due account of the fundamental right thus restricted. Even though the text of the Constitution states that the fundamental right is subject to restricting limits, such limits themselves are not without reservation, which follows from recognising the paramount significance of said fundamental right for the free and democratic state order.
4. Article 5.1 of the Basic Law is violated where, in the case of ambiguous statements, an interpretation resulting in a criminal conviction was chosen without providing compelling reasons as to why other possible interpretations were disregarded. In particular, courts must take the context and other relevant circumstances into consideration. In this regard, the findings of the regular courts are not binding for the constitutional review proceedings.

Summary:

I. The applicant is a free-lance publicist. On his website, he had published an article entitled "Conspiracy", an excerpt of which read as follows:

> "The state itself is not above using means of conspiracy in order to oppress undesirable opinions. Under false pretences, an overt call to "fight against right-wing extremism" is made. Strange as it may seem, but since 1944 not a single Jew was deported to Auschwitz. And since the Allied Forces stopped the bombardments of German cities, synagogues were no longer destroyed, but built. The horrifying anti-Semitism that the "fight against right-wing extremism" so determinedly targets these days refers to nothing but WORDS that – according to those in charge of controlling opinions *("Meinungskontrolleure")* – could possibly displease the Jews."

In proceedings before the criminal courts, the applicant was convicted for aiding and abetting the incitement to hatred against segments of the population *(Volksverhetzung)* pursuant to § 130.3 second alternative and § 27 of the Criminal Code, by way of denying the Holocaust committed by the Nationalist Socialist regime; the applicant was sentenced to a fine. Appeals on points of fact and law lodged by the applicant were ultimately unsuccessful. With his constitutional complaint, the applicant challenged the decisions of the criminal courts, claiming *inter alia* a violation of his freedom of expression (first sentence of Article 5.1 of the Basic Law).

II. The Federal Constitutional Court (hereinafter, the "Court") admitted the constitutional complaint for decision to the extent that it was directed against the judgment of the Regional Court *(Landgericht)* in the appeal on points of fact and law proceedings, and against the order of the Higher Regional Court *(Oberlandesgericht)* in the appeal on points of law proceedings. The Court granted the relief sought and remanded the matter to the Regional Court for a new decision.

The decision is based on the following key considerations:

The judgment of the Regional Court and the order of the Higher Regional Court violate the applicant's freedom of expression. The determination whether a statement is protected under the freedom of expression requires that the specific meaning of the statement in question has been accurately established. A criminal conviction in relation to the expression of a statement already violates the first sentence of Article 5.1 of the Basic Law, if as the basis for the conviction, courts rely on an understanding of the statement that is no longer covered by its objective meaning; such violation also occurs where, in the case of ambiguous statements, the interpretation resulting in the conviction was chosen without providing compelling reasons as to why other possible interpretations were disregarded. On the basis of the statement's wording, courts must give particular consideration to the context and other relevant circumstances of the matter.

The decisions under review do not meet these standards.

Both challenged decisions are based on the assumption that the sentence "Strange as it may seem, but since 1944 not a single Jew was deported to Auschwitz" can only be understood to mean that throughout the entire year of 1944 not a single person of Jewish faith had been deported to the Auschwitz concentration camp. The challenged decisions adopted this interpretation solely based on the argument that the applicant chose to start the sentence in question with the words "Strange as it may seem". Already with regard to the wording of the relevant statement, the regular courts failed to provide compelling arguments substantiating why a different yet equally plausible interpretation was disregarded, namely that the year 1944 – specifically the month of November – saw the final deportations of Jewish persons to the Auschwitz concentration camp at the hands of the National Socialist dictatorship. The wording by itself allows for both meanings to be attributed to the applicant's written statement, as "1944" does not refer to a definite point in time, but rather describes a period of time. The beginning of the sentence with the words "Strange as it may seem" alone does not constitute a viable basis for attributing to the applicant's statement the meaning ascribed to it by the regular courts.

To comprehensibly capture the meaning of the applicant's statement, it would have been necessary to take the context of the statement into account. The criminal courts would have been required to set out the arguments which, based on a reasonable assessment of all relevant circumstances, support the specific interpretation that would ultimately lead to a criminal conviction. In any case, a mere reference to the applicant's political views, which seem discernible from the published text as a whole, does not provide a sufficient basis for such an interpretation.

Even though the applicant's statement was linked to an expression of opinion in quite an apparent manner, the judgment handed down by the Regional Court completely lacks any critical consideration addressing the significance of the fundamental right to freedom of expression in relation to the matter before the criminal courts. In the case at hand, the Regional Court did not merely determine the scope of freedom of expression incorrectly, it disregarded this fundamental right entirely. As the criminal courts have yet to conduct the necessary weighing of interests, the criminal conviction is to be set aside and the matter is remanded for a new decision.

Cross-references:

Federal Constitutional Court:

- 1 BvR 2150/08, 04.09.2009, *Entscheidungen des Bundesverfassungsgerichts – BVerfGE* 124, 300 <320 *et seq.*>, *Bulletin* 2009/3 [GER-2009-3-030];
- 1 BvR 369/04, 1 BvR 370/04, 1 BvR 371/04, 04.02.2010, *Bulletin* 2010/1 [GER-2010-1-002];
- 1 BvR 1106/08, 08.12.2012, *Bulletin* 2011/1 [GER-2011-1-001];
- 1 BvR 461/08, 09.11.2011, *Bulletin* 2012/1 [GER-2012-1-001].

Languages:

German.

Israel
Supreme Court

Important decisions

Identification: ISR-2017-1-001

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** First Panel / **d)** 28.02.2017 / **e)** HCJ 5185/13 / **f)** Anonymous v. The High Rabbinical Court of Jerusalem / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers**.
4.7.3 Institutions – Judicial bodies – **Decisions**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.
5.3.13.11 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Public judgments**.

Keywords of the alphabetical index:

Civil rights, loss / Personal liberty, right.

Headnotes:

The judgment addresses the question whether explicit legal authorisation is necessary for the Rabbinical Court to impose social sanctions on "*Get* refusers", that is men who refuse to grant their wives a Jewish divorce *(*a *Get)*, as an incentive for them to abide by judgments that obligate them to grant their spouses a *Get*.

Summary:

Two petitions were joined and heard together by an extended bench of Supreme Court Justices, sitting as the High Court of Justice. The background of the petitions stems from Jewish law, by virtue of which matters of marriage and divorce of Jews in Israel are heard in the Rabbinical Courts. According to Israeli law, marriage and divorce in Israel are performed in accordance with the rules of the Torah (the Jewish law). According to Jewish law, there is a distinction between men and women in matters of divorce, in that the husband grants the Get and can withhold it, and the wife can only accept it. Because of this unique situation, various ways have been created in Jewish law, case-law, legislation and modern Israeli law to apply pressure on a husband who refuses to grant his wife a *Get* in situations in which a ruling has been delivered that he is required to do so. The various sanctions include orders that limit leaving the country, receiving passports and driving licences, limitations on bank accounts, and imprisonment. There are additional sanctions which are not explicitly stated in Israeli law, but which the Rabbinical Courts instruct in certain cases. These sanctions are based on the *"Harchakot Derabbeinu Tam"* religious rulings (the Rabbi Tam Distancing Rules) and include a religious ruling instructing the public to distance the husband from Jewish community life, including a recommendation not to include such husbands in the prayer minyan (a quorum of ten people for purposes of prayer), not to negotiate therewith and not to bury them. The question raised in the petitions is whether the religious courts are authorised to issue such sanctions in the absence of explicit authorisation in the law.

By a majority opinion – and against the dissenting opinion of the President of the Supreme Court, the Honourable Justice M. Naor, and that of Justice Y. Danziger – it was ruled that in the circumstances of the matter, the Rabbinical Court had the authority to recommend the *"Harchakot Derabbeinu Tam"*. Justice E. Hayut was of the opinion that the petitions should not have been examined and should have been dismissed *in limine*, in light of the fact that the Petitioners approached the Court with unclean hands. Although the majority held that the Rabbinical Court has the authority, in principle, to recommend the said sanctions, it ruled that the Rabbinical Court's recommendation not to facilitate the Jewish burial of one of the Petitioners should be cancelled.

The majority opinion (Deputy President Honourable Justice E. Rubinstein, joined by Justices I. Amit, U. Shoham and N. Hendel) ruled that the religious courts' decisions instructing that social sanctions be imposed upon *Get* refusers are non-binding decisions which should be deemed as unenforceable recommendations; therefore, it ruled that, as opposed to the case of a positive judicial determination, no explicit authorisation by law is required therefor. The majority further ruled that the use of the sanctions imposed on the Petitioners did not actually expand the authority of the Rabbinical Courts, but *de facto* derived from the authority with which they are vested by virtue of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, regarding divorce according to the laws of the

Torah. Justice I. Amit substantiated this position by applying various interpretation rules regarding this law, *inter alia*, due to the means being a lighter sanction in the hierarchy of means of coercion and limitations that the Israeli legislator granted the Rabbinical Courts by law, and based on the practice that these sanctions have been applied for decades. According to the majority opinion, the use of said sanctions is meant to provide a solution to the lack of gender equality in the divorce proceedings in Israel and is also constitutionally grounded, as part of the interpretation of the Basic Law: Human Dignity and Liberty, and by virtue of the wife's rights to dignity, liberty, equality and her own family life. Justice U. Shoham stated that the judgment should be limited only to non-binding sanctions or means of coercion, and that these sanctions should only be used once all other options have been exhausted. Justice N. Hendel examined the question of the religious courts' authority through the prism of the principles of administrative and constitutional law, and *inter alia*, weighed the recommendation's status and the intensity of the infringement of the Petitioners' right. The Deputy President Honourable Justice E. Rubinstein referred to the shaming that could be caused by applying the sanctions: the court's decision to instruct that these sanctions be published is indeed grounded in law, but should be used as a last resort, in a supervised, cautious and proportionate manner.

The minority opinion, voiced by Justice Y. Danziger, prescribed that the Rabbinical Court does not have the authority to apply social sanctions or to recommend that they be taken. According to him, despite the disgust at the Petitioners' actions and conduct, the Rabbinical Court has the obligation to respect and abide by the principle of legality and the rule of law – which is the fundamental principle that applies to any governmental institution. The principle of legality provides that a person cannot be harmed without authorisation and it is based on the fact that a governmental entity is granted only those powers which were prescribed by law. The decisive issue is therefore not whether the religious courts' recommendations can be enforced, but rather whether such recommendations have the power to harm a person or his rights. Since the purpose of the recommendations is to encourage the public to enforce social sanctions imposed on the individual, it is clear that such individuals are to be harmed and disgraced. Given the principle of legality, explicit authorisation by a law authorising the religious courts to impose such sanctions is required, and it does not currently exist, explicitly or implicitly, in Israeli law.

President M. Naor joined Justice Y. Danziger's position and added additional grounds to her decision. She ruled that on a linguistic, material and principle level, the Rabbinical Courts' decisions in this matter are orders, even if, *de facto*, they are not legally enforceable. She disagreed with Justice I. Amit's position that the fact that the law includes a more severe sanction constitutes approval for imposing a less severe sanction, without explicit authorisation to do so, particularly when the sanctions infringe basic rights. She also referred to the principle of legality and ruled that, according to this principle, the authority is entitled and authorised to perform only such actions which the law authorises it to do – and when the infringement of basic rights are at hand, the authorisation therefore must be clear and explicit in the law. She ruled that, in their decisions, the Rabbinical Courts had deviated from the principle of legality, and she stated that the authority to impose such sanctions is in the hands of the legislator and not the Court.

Languages:

Hebrew.

Identification: ISR-2017-1-002

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** First Panel / **d)** 11.09.2016 / **e)** HCJ 5304/15 / **f)** The Israeli Medical Association v. The Knesset / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
3.17 General Principles – **Weighing of interests**.
3.20 General Principles – **Reasonableness**.
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
5.3.4.1 Fundamental Rights – Civil and political rights – Right to physical and psychological integrity – **Scientific and medical treatment and experiments**.

Keywords of the alphabetical index:

Appeal, right / Conflict of interest / Constitutional right, Charter of rights and freedoms, violation / Honour and dignity, defence / Hospitalisation, forced / Political rights, loss / Prisoner, right, violation, remedy / Right to liberty, minimum impairment.

Headnotes:

An amendment to the Prisons Ordinance, which allows forcing medical treatment upon hunger-striking prisoners against their will, is constitutional and strikes a balance between the various rights and interests at hand. In particular, the medical consideration is the central consideration underlying the decision whether to permit forced treatments, while the security purpose, which is based on a concern of harming State security, is to be considered as the last consideration, based only on a suitable foundation of evidence.

Summary:

In the judgment, the High Court of Justice addressed the constitutionality of Amendment (no. 41) of the Prisons Ordinance, 5775-2015 (hereinafter, the "Law"), which addresses preventing damage to the health of a hunger-striking prisoner, and, in certain cases, allows forcing medical treatment upon hunger-striking prisoners, despite their refusal. The question of the constitutionality of Section 19n(e) of the Law, which instructs that in the framework of an application for a permit for medical treatment, the Court shall consider "considerations of concern for human life or a substantial concern of severe harm to State security, if and to the extent evidence of such matter has been presented thereto", was, *inter alia*, discussed, in the framework of the petitions.

The Supreme Court examined Israeli law, international law, as well as comparative law and Jewish law. After examining all of the above, it ruled, in a judgment of the Honourable Deputy President, that the Law meets the constitutionality criteria and strikes a delicate balance between the various values at hand – the sanctity of life and the public interest on the one hand, and an individual's right to dignity, including to autonomy and freedom of expression, on the other hand. In this matter, the Court relied on the fact that the Law prescribes a gradual procedure prior to forcing medical treatment and it includes a number of judicial, legal and medical control factors. The Court ruled that the Patients' Rights Law, 5766-1996 does not provide a full solution to the complex situation of hunger-striking prisoners who reach a stage at which their health or lives are at risk. The Court emphasised, in this matter, the central value of the sanctity of life, and stated that a hunger striker is not a "patient" in the regular sense, but rather a person who willingly and voluntarily puts his or her health at risk in order to protest or apply pressure to attain a public or personal goal. Additionally, when at issue is a hunger striker who is part of a collective hunger strike, primarily that of prisoners or detainees, it is not always clear whether the hunger strike indeed reflects a personal autonomous choice of each striker or rather is the result of collective pressure, or perhaps even duress. Additionally, the existence of a prisoners' hunger strike, and the results thereof, have implications that exceed the personal matter of the hunger striker. When at issue is a prisoner who is in the State's custody, the State has direct responsibility for preserving his or her life and health. The Court has ruled that the Basic Law: Human Dignity and Liberty not only prescribes the value of the sanctity of life as one of the basic principles of the Basic Law (Section 1 of the Basic Law), but also imposes an active obligation upon the State's authorities to protect the life and body of any human being (Section 4 of the Basic Law). This active obligation is all the more important when a prisoner is in State custody and the State is directly responsible for his or her life and health. Additionally, the State is also responsible for maintaining the security of the prison and for maintaining the safety of the other prisoners at the prison, and, of course, also has the duty and responsibility of maintaining the security and safety of the general public that could be influenced by events that are associated with a hunger strike of any group of prisoners.

In the judgment, the Court also addressed Section 19n(e) of the Law, which, as mentioned, prescribes that in the framework of an application seeking a permit for forced medical treatment, the Court shall also consider considerations of concern for human life or a substantial concern of severe harm to State security. The Court ruled that this section is also constitutional; however, it stated that the section should be used very sparingly and given a suitable foundation of evidence. In this context, the Honourable Justice Mazuz added that the concern raised by the Petitioners that the security consideration could tilt the scales at the expense of the medical consideration, is not unfounded. Therefore, Justice Mazuz suggested procedurally separating the hearing regarding the medical health conditions from the hearing regarding the security purpose. According to his approach, the transparency of the proceedings and the decision obtained by the procedural separation would prevent the mixing and obfuscation of the health consideration and the security consideration, and would allow a quick Supreme Court ruling on appeal. Justice Sohlberg joined

the position of Deputy President Justice Rubinstein, and in reference to the position of Justice Mazuz, was of the opinion that the Court should begin by examining the medical matter as the basis for the ruling and discuss the security matter, if and to the extent it is necessary, as the last matter discussed, but not necessarily by procedurally separating the two matters.

Languages:

Hebrew.

Italy
Constitutional Court

Important decisions

Identification: ITA-2017-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 23.11.2016 / **e)** 24/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 5, 01.02.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Union**.
2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Law of the European Union/EU Law and domestic law**.
2.2.1.6.1 Sources – Hierarchy – Hierarchy as between national and non-national Sources – Law of the European Union/EU Law and domestic law – **EU primary law and constitutions**.
3.12 General Principles – **Clarity and precision of legal provisions**.
3.13 General Principles – **Legality**.
3.14 General Principles – ***Nullum crimen, nulla poena sine lege***.

Keywords of the alphabetical index:

Criminal law, VAT fraud / Criminal code, limitation period / European Union, Court of Justice, preliminary request, national court, obligation to refer / European Union, financial interests of the Member State.

Headnotes:

Pursuant to Article 267 TFEU (Treaty on the Functioning of the European Union), the Italian Constitutional Court made a reference to the Court of Justice of the European Union for a preliminary ruling as to whether Article 325 TFEU must be "interpreted as requiring the criminal courts to disregard national legislation concerning limitation periods" even when:

1. "there is not a sufficiently precise legal basis for setting aside such legislation";

2. "…[that] limitation is part of the substantive criminal law in the Member State's legal system and is subject to the principle of legality"; and
3. "… the setting aside [of] such legislation would contrast with the supreme principles of the constitutional order of the member state or with inalienable human rights recognised under the Constitution of the member State".

Summary:

By the judgment of the Grand Chamber of 8 September 2015 in Case C-105/14, *Taricco*, the Court of Justice of the European Union held that Article 325 TFEU requires the Italian national courts to disregard the provisions of the last paragraph of Article 160, read in conjunction with Article 161.2 of the Criminal Code if the resulting national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union. The referring courts are hearing cases concerning prosecutions for tax fraud punishable by Legislative Decree no. 74 of 2000 relating to the collection of VAT, which they consider to be serious and which would have been time-barred if the last paragraph of Article 160 and Article 161.2 of the Criminal Code had been applicable. In both sets of proceedings, the prerequisites laid down by Article 325.1 and 325.2 TFEU have been met, and hence the courts should rule that the limitation period does not apply and decide on the merits. However, the referring courts doubt that this solution is compatible with the supreme principles of the Italian constitutional order and with the requirement to respect inalienable human rights, as laid down by Articles 3, 11, 24, 25.2, 27.3 and 101.2 of the Constitution, with particular reference to the principle of legality in criminal matters. In addition, the relevant legislation is not sufficiently precise, as it is not clear when fraud must be considered to be serious or when there is a sufficiently high number of cases involving an exemption from punishment as to require the last paragraph of Article 160 and Article 161.2 of the Criminal Code to be disregarded, thereby leaving the decision regarding this matter to the courts.

According to the Constitutional Court, firstly, the recognition of the primacy of EU law is an established fact within its case-law. However, according to such settled case-law, compliance with the supreme principles of the Italian Constitutional order and inalienable human rights is a prerequisite for the applicability of EU law in Italy. In this regard, there is no doubt that the principle of legality in criminal matters is an expression of a supreme principle of the legal order, laid down by Article 25.2 of the Constitution, which requires that criminal rules must be precise and must not have retroactive effect. Although it is well known that certain Member States of the European Union embrace a procedural concept of limitation, to which the judgment given in the *Taricco* case is closer, under the Italian legal system, the legal regime governing limitation periods is subject to the principle of legality in criminal matters laid down by Article 25.2 of the Constitution. It is therefore necessary to describe it in detail, as is done for the offence and the punishment, by means of a rule in force at the time the offence was committed. From this perspective, the Court is convinced that an individual could not have reasonably considered, prior to the judgment given in the *Taricco* case, that Article 325 TFEU required the courts to disregard the last paragraph of Article 160 and Article 161.2 of the Criminal Code. Were the application of Article 325 TFEU to entail the incorporation into the legal order of a rule incompatible with the principle of legality in criminal matters, as put forward by the referring courts, the Constitutional Court would be under a duty to prevent it.

Secondly, under the Italian legal system, as is the case under European Law, the criminal law cannot limit itself solely to setting objectives for the courts. It is not possible for EU law to set an objective as to the result for the criminal courts and for the courts to be required to fulfil it using any means available within the legal system, without any legislation laying down detailed definitions of factual circumstances and prerequisites.

Thirdly, even if the European judgment does not consider the compatibility of the rule with the supreme principles of the Italian constitutional order, it appears to expressly delegate this task to the competent national bodies. Were this interpretation of Article 325 TFEU and of the judgment given in the *Taricco* case to be correct, no grounds for incompatibility would remain and the question of constitutionality would not be upheld. It should be added that the circumstance that the Italian Constitution construes the principle of legality in criminal matters more broadly than European law entails a higher level of protection than that granted to accused persons by Article 49 of the Charter of Fundamental Rights of the European Union and Article 7 ECHR. It must therefore be considered to be safeguarded by EU law itself, pursuant to Article 53 of the Charter, read also in the light of the related explanation.

Finally, even in the event that it were concluded that limitation is procedural in nature, or that it may in any case also be regulated by legislation enacted after the

offence was committed, this would not affect the principle that the activity of the courts must be governed by sufficiently precise legal provisions. In this regard, while Article 325 TFEU sets out an obligation as to a clear and unconditional result, according to the ruling of the Court of Justice, it fails to indicate in sufficient detail the path which the criminal courts must follow in order to achieve that purpose. This could potentially end up allowing the judiciary to exceed the limits applicable to the exercise of judicial powers in a State governed by the rule of law, and does not appear to comply with the principle of legality laid down in Article 49 of the Charter.

In conclusion, given a continuing interpretative doubt concerning EU law, which must be resolved in order to decide on the question of constitutionality, the Italian Constitutional Court has sought a preliminary reference from the Court of Justice of the European Union concerning the interpretation of Article 325.1 and 325.2 TFEU.

Cross-references:

European Court of Human Rights:

- *Coëme and others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22.06.2000, *Reports of Judgments and Decisions* 2000-VII;
- *Oao Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20.09.2011.

Court of Justice of the European Union:

- C-105/14, *Taricco and Others,* 08.09.2015.

Languages:

Italian.

Identification: ITA-2017-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 07.12.2016 / **e)** 20/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 5, 01.02.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence**.

Keywords of the alphabetical index:

Criminal law, collecting evidence, mail correspondence, prisoner / Prison law, inspecting stamp / Crime, prevention and prosecution / Prisoner, rights.

Headnotes:

In light of the characteristics of the means of communication used and the unique status of prisoners, there is no manifest unreasonableness or arbitrariness in the discretional choices of the legislator in regulating the means of collecting evidence that may be used regarding mail correspondence in general (through the confiscation procedure set out in Article 254 of the Code of Criminal Procedure), and that of prisoners in particular (through the inspection stamp procedure prescribed by the prison laws). The legislator may prescribe, while respecting the provisions concerning reservation of law and jurisdiction set out in Article 15 of the Constitution and observing the principles of reasonableness and proportionality, secretive methods for seizing the contents of the communications that do not interrupt their flow.

Summary:

In this case, the Constitutional Court considered a referral order challenging three legal provisions regulating the collection of evidence from the contents of written mail correspondence.

The judge in the pending proceedings, in which secretly-made copies of a criminal defendant's correspondence were held to be inadmissible because the copies did not comply with the challenged provisions, alleged that the provisions were unconstitutional in that they provided only two permissible procedures for collecting evidence from written mail correspondence: confiscation for general mail, and inspection with the application of a stamp for prisoners' mail, both of which interrupt the flow of communication. The Referral Order claimed that this

violated the principle of equality found in Article 3 of the Constitution, both by differing from rules that, on the contrary, allowed for secretive interception of telecommunications and in-person conversations and by giving prisoners privileged status over defendants who are not incarcerated. It also alleged that they violated Article 112 of the Constitution by hindering the ability of prosecutors to proceed with criminal actions, as they are constitutionally bound to do.

The Constitutional Court first dismissed an objection by the President of the Council of Ministers alleging that the Referral Order provided inadequate facts and argumentation, on the grounds that the Order did not need to provide detailed accounts of irrelevant aspects of the case and the particulars of the inadmissible evidence in order for the Court to give a judgment on the merits.

The Court then declared the constitutional challenge to be unfounded. Citing the interrelated nature of constitutional rights, which may be curtailed in balance with other constitutional principles and constitutionally protected rights and interests, and the absolute reservation of law to the legislator set out in Article 15 of the Constitution, the Court outlined its limited role as being one of ensuring that the legislator had performed a balancing of constitutional rights and interests in a way that is consistent with the principles of appropriateness, necessity, and proportionality. The Court found that society had a paramount and constitutionally-protected interest in the prevention and prosecution of crimes, which the legislator could legitimately balance against the right of free and confidential communications, resulting in a limitation of that right. The Court then held that it was neither unreasonable nor arbitrary to provide different regulatory schemes for different forms of communication, even though this did not allow for the same secrecy in monitoring the contents of written correspondence as it did for other forms of communication, uniformity in regulation not being required by the equality principle. The Court specified, however, that its judgment did not imply that the legislator would be prevented from making future laws allowing for secret “interception” even of written mail correspondence.

Cross-references:

European Court of Human Rights:

- *Calogero Diana v. Italy*, no. 15211/89, 21.10.1996, *Reports* 1996-V;
- *Domenichini v. Italy*, no. 15943/90, 15.11.1996, *Reports* 1996-V;
- *Labita v. Italy*, no. 26772/95, 06.04.2000, *Reports of Judgments and Decisions* 2000-IV;
- *Ospina Vargas v. Italy*, no. 40750/98, 14.10.2004.

Languages:

Italian.

Identification: ITA-2017-1-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 10.01.2017 / **e)** 43/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 9, 01.03.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts**.
1.5 Constitutional Justice – **Decisions**.
1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect *(ex tunc)***.
1.6.5.4 Constitutional Justice – Effects – Temporal effect – ***Ex nunc* effect**.
2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **European Convention on Human Rights and constitutions**.
2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
3.13 General Principles – **Legality**.

Keywords of the alphabetical index:

Unconstitutionality, effect, final judgment / European Convention on Human Rights law, administrative sanction considered to be substantially criminal / Criminal sanction, notion, principle of legality.

Headnotes:

The case-law of the European Court of Human Rights does not presently provide any statement that may implicitly or explicitly corroborate the interpretation of Article 7 ECHR in the meaning outlined by the referring judge, which would require the member state to sacrifice the principle of the certainty of a final judgment in the case of administrative sanctions imposed on the basis of provisions that were later declared unconstitutional.

The national system may establish further guarantees in addition to those found in Convention law, reserving them only for criminal sanctions as categorised under domestic law.

Summary:

I. In this case, the Constitutional Court considered a referral order from the Ordinary Tribunal of Como with respect to a provision that creates an exception to the finality of judgments in cases where a criminal sentence was imposed on the basis of a law later declared unconstitutional (in such cases, the provision provides that the execution of the sentence and all criminal law effects thereof cease). The referring court alleged that this provision was unconstitutional in that the exception did not include cases in which administrative sanctions (rather than criminal sentences) had been imposed on the basis of a law that was later declared unconstitutional, particularly where the administrative sanctions were primarily punitive in effect (the case at issue involved an extremely high administrative fine for labour law violations). The referring court based its question on the law of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, which applied a test to determine if penalties were criminal in character before classifying them as criminal for purposes of applying the protection found in the Convention.

After overruling an objection of relevance raised by the State Counsel by holding that the referring judge had properly refrained from attempting to interpret the provision in such a way as to extend it to the situation in the present case, the Constitutional Court ruled that the constitutional question was unfounded. The Constitutional Court held that the case-law of the European Court contained no statement that would directly or indirectly support an interpretation of Article 7 ECHR as requiring Member States to create an exception to the finality of judgments for administrative sanctions such as fines imposed on the basis of provisions later declared unconstitutional. The Constitutional Court further held that the referring judge's assumption that the same national legal guarantees that apply to criminal sentencing must also apply to administrative sanctions, was incorrect. The national legal system, the Court pointed out, was free to establish guarantees in addition to the minimum found in Convention law, and to reserve these only to criminal penalties, as that category was understood under domestic law. The Court found no similarities between the present case and previous cases that had extended the scope of the provision at issue to include some administrative sanctions, because the sanctions at issue did not impact on fundamental freedoms or citizens' political rights, and were not to be carried out over an extended time period during which the appointed judge was charged with ensuring the legality of the basis for the ongoing sentence.

Cross-references:

European Court of Human Rights:

- *Streletz, Kessler and Krenz v. Germany*, nos. 34044/96, 35532/97, 44801/98, 22.03.2001, *Reports of Judgments and Decisions* 2001-II;
- *K.-H.W. v. Germany*, no. 37201/97, 22.03.2001, *Reports of Judgments and Decisions* 2001-II;
- *Custers, Deveaux and Turk v. Denmark*, nos. 11843/03, 11847/03, 11849/03, 03.05.2007.

Languages:

Italian.

Identification: ITA-2017-1-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 25.01.2017 / **e)** 35/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 7, 15.02.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members**.
4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system**.
4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting**.
5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.
5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.
5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

Keywords of the alphabetical index:

Election, electoral law, system, voting, first round, majority bonus, run-off ballot, minimum threshold, head of list candidates / Vote, freedom and equality / Proportional representation, right.

Headnotes:

Citing broad legislative discretion with respect to electoral law relating to election procedures for the Chamber of Deputies and the Senate, the Constitutional Court limited its scrutiny to the test of reasonableness and proportionality and to verifying the compatibility of the challenged provisions with the right to vote and the right to proportional representation of the citizenry.

Summary:

In this complex case, the Constitutional Court jointly considered five referral orders challenging various provisions of electoral Law no. 52 of 2015, pertaining to the election procedures for both the Chamber of Deputies and the Senate.

The Court ruled that five of the questions raised were inadmissible and considered seven questions on the merits. Citing broad legislative discretion in this area, the Court limited its scrutiny to the test of reasonableness and proportionality and to verifying the compatibility of the challenged provisions with the right to vote and the right to proportional representation of the citizenry.

Among the seven questions considered on the merits, the Court held that five were unfounded.

First, it held that assigning a majority bonus in the interests of stability and governability, conditioned upon a list's achievement of a fixed percentage of validly cast votes on a national basis, was not manifestly unreasonable and fell within the discretion of the legislator, and that the minimum threshold of 40 % of validly cast votes stipulated by the provisions did not effect a disproportionate distortion of the constitu-tionally mandated representativeness of the elected body. The fact that basing the minimum threshold for the bonus on validly cast votes (rather than total number of voters) could hypothetically distort representativeness dramatically in cases of high voter abstention did not make the legislator's choice on this delicate matter manifestly unreasonable. The Court added that the combination of two mechanisms (a minimum threshold for access to seats and the majority bonus), taken together, were neither manifestly unreasonable nor disproportionate means of pursuing legitimate aims.

Second, the Court rejected the argument that, where two lists obtain more than 40 % of validly cast votes, the assignment of the bonus to the list that took the highest number of votes would unreasonably reduce the number of seats assigned to the list that took second place. The Court held that this was not an unreasonable way of assigning the bonus, and that in a proportional electoral system which envisages such a bonus, all minority lists would see a reduction – not inconsistent with constitutional requirements – in the number of seats compared to those that they would have obtained under a purely proportional system.

Third, with respect to the system of electing the Chamber of Deputies, the Court rejected arguments that the last-resort method for assigning seats, which allowed seats to be removed in some electoral districts and assigned in others, violated constitutional principles, finding that the legislator had provided adequate safeguards and had reasonably pursued constitutionally protected interests. Fourth, the Court rejected a challenge to the system of regulating fixed and preference-based candidates within lists. In particular, the Court rejected the submission that, within this system, minority parties would only be able to return "closed" candidates. In holding that such a system does not violate the right to vote, the Court compares the electoral system currently under review with the previous one, noting that the new law contains safeguards including shorter lists, fewer and knowable fixed candidates, and the ability for voters to express two preferences for candidates of different genders.

The Court also held two questions to be well-founded. First, the Court struck down provisions establishing that, in cases in which no single list had reached the 40 % minimum threshold necessary to receive the majority bonus, there would be a run-off round of voting between the two lists winning the most votes. The Court held that this way of artificially creating a winning list excessively compromised the constitutional principles of the equality of the vote and representativeness of the elected body by radically reducing voter options in the second round of voting through overly strict requirements. The Court pointed out that the striking down of these provisions nevertheless left a system in place capable of governing new elections. Second, the Court struck down provisions allowing head of list candidates elected in more than one multi-member constituency to arbitrarily choose the one in which to be elected, without any stipulation of objective criteria, holding that this allowed for a distortion that compromised the freedom and equality of the vote. The Court pointed out that the striking down of this provision would require legislative intervention, but that it nevertheless left the residual mechanism of drawing lots, making the implementation of the electoral systems possible.

Languages:

Italian.

Identification: ITA-2017-1-005

a) Italy / **b)** Constitutional Court / **c)** / **d)** 21.02.2017 / **e)** 42/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 9, 01.03.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

4.3.2 Institutions – Languages – **National language(s)**.
4.3.4 Institutions – Languages – **Minority language(s)**.
4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities**.
5.2 Fundamental Rights – **Equality**.
5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach**.
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

University education, study programmes, courses in foreign languages, academic freedom / National language, primacy.

Headnotes:

Were universities permitted to offer study programmes exclusively in a language other than Italian, this would have the effect of "entirely and indiscriminately exclud[ing] the official language of the Republic from university teaching in entire branches of learning". In addition, such an arrangement would unfairly prejudice students with no knowledge of any language other than Italian, who would be forced to choose other study programmes or even other universities. Furthermore, construed in this manner, the rule violated academic freedom in that it did not permit teachers to choose to teach in Italian.

Summary:

I. The Sixth Judicial Division of the Council of State raised, with reference to Article 3 of the Constitution (principle of equality), Article 6 of the Constitution (protection of linguistic minorities) and Article 33 of the Constitution (academic freedom and university autonomy), questions concerning the constitutionality of Article 2.2.1 of Law no. 240 of 30 December 2010 (Provisions on the organisation of universities, academic staff and recruitment, and authorisation to the Government to incentivise the quality and efficiency of the university system), "insofar as it enables the general and exclusive putting in place (i.e. to the exclusion of the Italian language) of [university education] courses in foreign languages".

Milan Polytechnic considered that the aforementioned provision would allow universities to teach all of its courses in a language other than the official language of the Republic and thus resolved, with effect from 2014, to create masters and PhD degree programmes exclusively in English. This resolution by Milan Polytechnic resulted in the administrative proceedings that led to the referral of the questions of constitutionality at hand.

II. On the merits, the questions were held to be unfounded, within the limits and in the manner set out below. The objective of internationalisation – which the provision at issue in these proceedings intends to pursue, enabling universities to enhance their own international vocation – must however be achieved without undermining the constitutional principles of the primacy of the Italian language, equal access to university education and academic freedom. Were the provision at issue to be interpreted as permitting universities to draw up a general offer of education including entire study programmes taught exclusively in a language other than Italian, this would result in an illegitimate sacrifice of these principles. In fact, the legitimate goals of internationalisation cannot reduce the Italian language within Italian universities to a marginal and subordinate position by negating the function of conveying the history and identity of the national community along with its inherent status as cultural heritage to be preserved and enhanced. Secondly, it would impose a prerequisite for admission to such study programmes (i.e., the knowledge of a language other than Italian), thereby preventing those who do not know that language from reaching "the highest level of study" other than at the cost of choosing other universities. Thirdly, it could violate academic freedom because it would end up having a significant effect on the manner in which teachers are required to teach, depriving them of the choice over how to communicate with students. Moreover, it would discriminate against teachers, as the courses would necessarily be allocated on the basis of knowledge of a foreign language, which has nothing to do with the skills that were examined during their recruitment.

However, the contested provision may indeed be interpreted in a way that is compatible with the Constitution and in a manner that balances the requirements underpinning internationalisation with the relevant principles laid down in the Constitution. In fact, whilst these constitutional principles are

incompatible with the possibility of entire study programmes being taught exclusively in a language other than Italian, they by no means preclude the possibility to supplement the teaching in Italian with courses taught in a foreign language. This interpretative option avoids the emergence of the normative contradiction with the constitutional principles referred to above.

On those grounds, the Constitutional Court ruled that the questions concerning the constitutionality of Article 2.2.1 of Law no. 240 of 30 December 2010 are unfounded.

Languages:

Italian.

Kazakhstan
Constitutional Council

Important decisions

Identification: KAZ-2017-1-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 09.03.2017 / **e)** 2 / **f)** / **g)** *Kazakhstanskaya pravda* (Official Gazette), 15.03.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
3.4 General Principles – **Separation of powers**.
4.4.3 Institutions – Head of State – **Powers**.
4.5.6 Institutions – Legislative bodies – **Law-making procedure**.
4.6.2 Institutions – Executive bodies – **Powers**.

Keywords of the alphabetical index:

Constitution, amendment / Government, form, presidential.

Headnotes:

Recent legislation making amendments and additions to the Constitution endows the constitutional values and fundamental principles of the Republic with new content. Strengthening parliamentary control over the Government, along with the institution of constitutional control, is an indispensable trend in the development of a democratic state under the rule of law. The redistribution of powers between the branches of power does not affect the basis of the presidential form of government; the legislation is constitutionally compliant.

Summary:

I. The Law on Introducing Amendments and Additions to the Constitution was adopted by Parliament on 6 March 2017 and submitted on the same day to the Head of State for signature.

In accordance with Article 72.1.2 of the Constitution and Article 17.2.1 of the Constitutional Law (hereinafter, the “Law”) on the Constitutional Council,

the President sent this Law to the Constitutional Council for verification of its compliance with the Constitution.

II. The Constitutional Council noted that the legislation in question had introduced several amendments and additions to the Constitution, with a view to ensuring its supremacy within the framework of the existing law and its unconditional execution throughout the country, improving state governance, strengthening the protection of the constitutional rights and freedoms of citizens and ensuring the fulfilment of their constitutional duties.

In view of the accumulated experience of the interaction between national law and international acts, Article 2.2 of the Law amended the wording of Article 4.3 of the Constitution:

> "International treaties ratified by the Republic have priority over its laws. Procedure and conditions of operation in the territory of the Republic of Kazakhstan of International treaties to which Kazakhstan is a party are determined by the legislation of the Republic. "Article 1.1" Article 2 of the Constitution is supplemented with paragraph 3-1 "A special regime in the financial sphere may be established within the city of Astana in accordance with Constitutional law."

Article 1.3 of the Law introduced a new version of Article 10.2 of the Constitution, to the effect that a citizen of the Republic cannot be deprived of citizenship, the right to change his citizenship or be expelled from Kazakhstan. Deprivation of citizenship is allowed by court decision only where terrorist crimes have been committed or only by a court decision for the commission of terrorist crimes or other serious harm has been caused to the national interests. Reference to Article 10 is therefore excluded from Article 39.3 of the Constitution.

To strengthen the constitutional guarantees for the unity of the people of Kazakhstan, Article 1.4 of the Law amended Article 39.2 of the Constitution, which recognises as unconstitutional any actions capable of violating both inter-ethnic and inter-religious harmony.

The President, under Article 1.6.3 of the Law, is empowered in the interests of protecting the rights and freedoms of man and citizen and safeguarding national security, sovereignty and integrity of the state, to request an assessment by the Constitutional Council of the constitutional compliance of a law or another legal act which has come into force (Article 44.10-1 of the Constitution and Article 72.2 of the Constitution).

Article 1.1.2 of the Law is supplemented with Article 91.3 of the Constitution; amendments and additions to the Constitution are to be submitted to a republican referendum or to Parliament in the presence of a conclusion of the Constitutional Council on their compliance with the requirements established by paragraph 2 of this article. The subject of the appeal on this issue is the Head of State (Article 44. 10-1 of the Constitution).

Article 1.18 of the Law excludes Article 73.4 of the Constitution, which sets out the right of the President to object to decisions of the Constitutional Council.

Article 1.25.1 of the Law expands the list of specially protected constitutional values.

The independence of the state, the unity and territorial integrity of the Republic, the form of its governance, as well as the fundamental principles of the Republic, laid down by the Founder of independent Kazakhstan, the First President Elbasy, and his status are unchanged (Article 91.2 of the Constitution). The historical mission of Nursultan Abishevich Nazarbayev is thus constitutionally confirmed as founder of the new independent state of Kazakhstan, ensuring its unity, protection of the Constitution and human and civil rights and freedoms. Due to his constitutional status and personal qualities, he has made a decisive contribution to the formation and development of sovereign Kazakhstan, including its constitutional values and the fundamental principles of the Republic's activities.

The law has implemented democratic modernisation of the presidential form of government by strengthening the role, independence and responsibility of Parliament and Government, the redistribution of individual powers between the President, Parliament and Government, proceeding from the principle of unity and the separation of powers.

Under Article 49.1 of the Constitution (in the wording of Article 1.8 of the Law), Parliament "is the supreme representative body of the Republic exercising legislative power". This fundamental clarification of the purpose of Parliament follows from the rejection of the Head of State from the authority to issue laws and decrees with the force of laws (Article 1.7 and 1.9 of the Law); on the implementation of legislative powers delegated to him by Parliament, as well as the giving of instructions to the Government to submit draft legislation to the *Majilis* (lower chamber of Parliament (Articles 45.2 and 61.2.3) of Article 44 of the Constitution).

The addition to Article 55.1-1 of the Constitution refers to the exclusive competence of the Senate of the Parliament regarding the election on the proposal of the President for a term of five years and the dismissal of the Ombudsman for the Republic (Article 10.1 of the Law). Thus, this institution rises to the constitutional level and the human rights capabilities of the state are enhanced.

Under Article 1.6.1 of the Law, regarding the role of the *Majilis* in the formation of the Government, the Prime Minister, having consulted the *Majilis,* will make a submission to the Head of State on the candidacies of the members of the Government. An exception is provided for the posts of the Ministers for Foreign Affairs, Defence and Internal Affairs. These are appointed and dismissed by the President independently (new edition of Article 44.3 of the Constitution).

The principal innovation is the provision of Article 1.16 of the Law, which establishes the abdication of the Government to the newly elected *Majilis* (amendment to Article 70.1 of the Constitution). This is quite logical as the Government is formed with the active participation of political parties represented in the *Majilis.*

An increase of responsibility and efficiency of functioning of branches of the government strengthens the mechanisms of accountability and control of the Government to Parliament and its Chambers.

For this purpose, pursuant to Article 1.13 of the Law, Article 64.2 of the Constitution establishes that the Government in its activities is responsible both to the President and the Parliament. In accordance with Article 1.15 of the Law, by the wording of Article 67.4 of the Constitution, the Prime Minister is charged with reporting on the main directions of the Government's activity and all its major decisions both to the President and also to the Parliament. The Chambers of Parliament may accept a petition to the President of the Republic on the dismissal of a member of the Government by a majority of at least two-thirds of the total number of deputies of the Chamber, following the results of hearing reports by members of the Government, if he does not comply with the laws. In such cases, the Head of State shall dismiss a member of the Government (changes introduced by Article 1.11 of the Law to Article 57.6 of the Constitution).

The independence and responsibility of the Government are also ensured by excluding Article 1.6.1 of the Law regarding the right of the Head of State to cancel or suspend acts of the Government and the Prime Minister, also at the expense of other powers transferred by the President to the Government. The right of the Head of State is preserved, with the reservation "if necessary," to preside over meetings of the Government on especially important issues (Article 44.3 of the Constitution).

Several changes have been made to the constitutional status and powers of the Head of State.

Article 1.5 of the Law broadens the qualification requirements for candidates for the presidency of the Republic (Article 41.2 of the Constitution). In accordance with Article 1.6.2 of the Law, the following powers were transferred from the President to the Government: approval of state programmes and a unified system of financing and remuneration of employees of all bodies whose expenses are borne by the state budget. They are to be implemented by the Government in agreement with the Head of State (relevant amendments to Articles 44.8, 44.9 and 66 of the Constitution).

Article 1.24 of the Law sets out the authority to determine the procedure for appointing or electing to the post delegated to the Parliament, as well as the dismissal of *akims* other than regions, cities of republican significance and capital, administrative territorial units (Article 87.4 of the Constitution). This order is now determined not by an Act of the President, but by law. Article 86.5 of the Constitution, by the wording of Article 1.23 of the Law, establishes that the powers of the *mashlikhat* can be terminated early by the President of the Republic after consultation with the Prime Minister and the chairmen of the Chambers of Parliament.

At the same time, the functions of the President of the Republic, as the highest official of the state, are to determine the main direction of the domestic and foreign policy of the state, to act as a symbol and guarantor of the unity of the people and state power and the inviolability of the Constitution, to safeguard human rights and freedoms and to ensure the smooth running of all branches of state power (Article 40 of the Constitution).

The law in Article 1.20-1.22 provides clarification of the constitutional basis of the judicial system and the prosecutor's office.

Article 81 of the Constitution determines that the Supreme Court, in cases provided by law, considers cases related to its jurisdiction. Under Article 79.3 of the Constitution, the requirements for judges of the courts of the Republic are determined by constitutional law.

Article 83.1 of the Constitution stipulates that the Prosecutor's Office, on behalf of the State, exercises, in the limits and forms established by law, the highest supervision of the observance of legality in the territory of the Republic of Kazakhstan, represents the interests of the state in court and carries out criminal prosecution on behalf of the State.

The Constitutional Council noted that the Constitution establishes a balanced balance of both universal and Kazakhstani constitutional values. In their totality, they determine the strategic interests of the Republic of Kazakhstan, a democratic, secular, legal and social state, the highest values of which are expressed to be the person, his life, rights and freedoms.

Constitutional values are enshrined in the Preamble of the Constitution, Section I "General Provisions" as the foundations of the constitutional system and in subsequent articles of the Basic Law.

Under Article 1.2 of the Constitution, the fundamental principles of the Republic's activities are public consent and political stability, economic development for the benefit of all, national patriotism and the resolution of the most important issues of state life by democratic methods, including voting at a republican referendum or in Parliament.

The values of the Constitution and the basic principles of the activities of the Republic were set out by the First President – Elbasy. They have primary importance for man and citizen, society and the state, are characterised by unshakable constancy and determine the content of all subsequent norms of the Basic Law and law enforcement practice.

The Constitutional Council was of the view that the whole recent history of the formation and development of Kazakhstan as an independent, strong and successful state with a developed civil society is the confirmation of modern constitutional values, the fundamental principles of the activities of the Republic of Kazakhstan and their subsequent implementation.

The amendments and additions to the Constitution introduced by the Law endow the constitutional values and fundamental principles of the Republic with new content. Strengthening parliamentary control over the Government, along with the institution of constitutional control, is an indispensable trend in the development of a democratic state under the rule of law, testament to the Republic's commitment to the concept of the rule of law.

The redistribution of powers between the branches of power, in the opinion of the Constitutional Council, does not affect the basis of the presidential form of government.

The Constitutional Council accordingly found that the Law did not violate the unity and territorial integrity of the state and the form of government of the Republic, enshrined in Article 91.2 of the Constitution.

Preparation of the draft law with wide public participation and subsequent adoption of the Law of the Republic "On Amendments and Additions to the Constitution" by Parliament were carried out in accordance with the Constitution, the values and basic principles of the Republic's activities.

Languages:

Kazakh, Russian.

Kosovo
Constitutional Court

Important decisions

Identification: KOS-2017-1-001

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 04.04.2017 / **e)** KO 01/17 / **f)** Assembly – Law on Amending and Supplementing the Law no. 04/L-261 on the War Veterans of the Kosovo Liberation Army adopted by the Assembly on 30 December 2016 / **g)** *Gazeta Zyrtare* (Official Gazette), 06.04.2017 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Abstract Review / Discrimination, prohibition / Equality / Law, not yet entered into force, review / Pension, entitlement / Soldier, wounded veterans' pension, entitlement.

Headnotes:

Denial of pension benefits for war veterans living abroad but not in the neighboring countries or Kosovo constitutes a limitation of their right to pension which was neither justified nor grounded on objective reasons and as such is not compatible with the right to equality before the law in conjunction with the right to property.

Categorisations of War Veterans based on their time of mobilisation and service in the Kosovo Liberation Army and providing three different levels of pensions in accordance with the categories is compatible with the right to equality, taken in conjunction with the right to property.

Decrease of the amount of pension below the minimum wage in Kosovo constitutes an interference with the right to property, however, there is a justified interference with the free enjoyment of the right to property on the grounds of serving the public interest and having due regard to the proportionality principle.

Summary:

I. In 2014, the Assembly of the Republic of Kosovo adopted Law no. 04/L-261 on the War Veterans of the Kosovo Liberation Army, which was promulgated on 18 April 2014 (Basic Law). On 30 December 2016, the Assembly adopted the Law on Amending and Supplementing Law no. 04/L-261 (hereinafter, the "challenged law") on the War Veterans of the Kosovo Liberation Army (hereinafter, the "KLA").

Subsequently, on 10 January 2017, before the promulgation and entry into force of the challenged law, twenty four (24) Deputies of the Assembly of the Republic of Kosovo (the Applicants) submitted a Referral to the Constitutional Court challenging the constitutionality of Articles 3.2, 4 and 5 of the challenged law, only as regards its substance. The applicants alleged that the contested provisions were not compatible with Article 24 of the Constitution (equality before the law) and Article 46 of the Constitution (protection of property), in conjunction with Article 14 ECHR (prohibition of discrimination) and Article 1 Protocol 1 ECHR (protection of property) as well as Articles 7 and 22 of the Universal Declaration of Human Rights (concerning the right to equality and economic, social and cultural rights).

Article 3.2 of the challenged law amended Article 16 of the Basic Law, which stipulated that war veterans living abroad but not in the neighboring countries or Kosovo shall be entitled to other benefits according to the Basic Law but shall not be entitled to a pension. The applicants claimed that the war veterans who enjoy the status of a war veteran and live abroad are denied the right to a pension benefit, which was already foreseen by the Basic Law. In this respect, the applicants alleged that denial of entitlement to pensions benefit based solely on their place of residence is discriminatory. The applicants alleged that Article 3 of the challenged law is not compatible with the right to equality, taken in conjunction with the right to property.

Article 4 of the challenged law adds another provision to the Basic Law, which divides war veterans into three categories based on their time of mobilisation and service in the Kosovo Liberation Army. In addition, this added provision provides for three different levels of pensions for war veterans in accordance with the three categories. In this regard, the applicants argued that Article 4 is not compatible with the right to equality, taken in conjunction with the right to property.

Article 5 of the challenged law deleted Article 18 of the Basic Law, which guaranteed a pension benefit for war veterans not lower than the minimum wage. In

this respect, the applicants in substance argued that this contested provision is not compatible with the right to property guaranteed by the Constitution and Article 1 Protocol 1 ECHR.

II. The Court, by unanimity, decided to declare the referral admissible and assessed the substance of the referral.

With regard to Article 3.2 of the challenged law, the Constitutional Court considered that the denial of the right to pension for war veterans living abroad, but not in the neighbouring countries or Kosovo, amounts to violation of their right to equality before the law in conjunction with the rights to property. The Court found that KLA veterans who do not reside in Kosovo or neighbouring countries are in a relatively similar situation to those who do reside in Kosovo or in the neighbouring countries. The Court further concluded that the denials of such pension constitutes a limitation of their right to a pension which was neither justified nor grounded on objective reasons. Thus, the Court found that Article 3.2 of the challenged law, excluding war veterans living abroad but not in the neighbouring countries or Kosovo from benefiting the pension is not compatible with the right to equality before the law and the right to property guaranteed under Articles 24 and 46 of the Constitution.

With regard to Article 4 of the challenged law, the Constitutional Court concluded that all war veterans subject to the Law are in a relatively similar situation, considering their contribution as a war veteran. However, differential treatment, that is categorisation based on time of mobilisation and service, is justified on objective and reasonable grounds and is compatible with the right to equality, taken in conjunction with the right to property.

With regard to Article 5 of the challenged law, the Constitutional Court noted that the entitlement to pension benefit for war veterans constituted a possession under Article 46 of the Constitution and Article 1 Protocol 1 ECHR. The Constitutional Court further considered that the decrease of the amount of pension below the minimum wage in Kosovo, as foreseen by the Basic Law before its amendment, constituted an interference with the right to property. However, there is a justified interference with the free enjoyment of the right to property on the grounds of serving the public interest and having due regard to the proportionality principle. The Court found that decrease of the pension benefit below the minimum wage is compatible with the right to property guaranteed by the Constitution and the European Convention on Human Rights.

Languages:

Albanian, Serbian, English (translation by the Court).

Lithuania
Constitutional Court

Important decisions

Identification: LTU-2017-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.02.2017 / **e)** KT3-N2/2017 / **f)** On the concept of impeachment proceedings that is entrenched in the Statute of the *Seimas* / **g)** *TAR* (Register of Legal Acts), 3068, 24.02.2017, www.tar.lt / **h)** www.lrkt.lt; CODICES (Lithuanian).

Keywords of the systematic thesaurus:

4.4.6.1.2 Institutions – Head of State – Status – Liability – **Political responsibility**.
4.5.9 Institutions – Legislative bodies – **Liability**.
4.6.10.2 Institutions – Executive bodies – Liability – **Political responsibility**.
4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges**.
5.3.13.1.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings**.

Keywords of the alphabetical index:

Impeachment, proceedings / Liability, constitutional / Presumption of innocence / Crime, committing / Highest-state officials.

Headnotes:

The constitutional purpose of impeachment, as one of the measures for the self-protection of civil society, is public and democratic scrutiny of the activity of the highest-state officials, which creates the preconditions for imposing constitutional liability on them, that is to say, removing from office those officials or revoking the mandate of those members of parliament who discredit state power by their actions and, consequently, lose the trust of citizens. The purpose of the constitutional institution of impeachment should be taken into account where certain actions may create the preconditions for impeachment for committing a crime. Impeachment is a procedure that may be applied to cases of both a crime committed by a person before taking up one of the offices specified in Article 74 of the Constitution and a crime committed by a person while holding such an office.

Summary:

I. In this ruling the Constitutional Court declared the provision of the Statute of the *Seimas* (Parliament), which consolidated the concept of impeachment proceedings, to be in conflict with Article 74 of the Constitution, insofar as the Statute provided that the impeachment procedure could be applied only to cases where it transpired that a crime had been committed while an official was holding one of the offices specified in Article 74 of the Constitution. Under Article 74 of the Constitution, constitutional liability may be imposed on the highest-state officials specified in this Article (that is to say, the President of the Republic, the President and Justices of the Constitutional Court, the President and Justices of the Supreme Court, the President and Judges of the Court of Appeal, and Members of the *Seimas*) for, *inter alia,* committing a crime.

II. The Constitutional Court noted that impeachment is a special procedure provided for in the Constitution for determining the constitutional liability of the highest-state officials set out in Article 74 of the Constitution. Impeachment is not the imposition of criminal liability even if the ground for impeachment is a crime. When voting on impeachment, Parliament determines the question of the constitutional liability rather than the criminal liability of a person.

The Constitutional Court noted that, under Article 74 of the Constitution, the impeachment procedure may be applied to various crimes found to have been committed. The Constitutional Court emphasised that the special status of – including the powers vested in – the highest-state officials whose constitutional liability is determined in the impeachment process implies that the preconditions for discrediting state power may be created not only in cases where the persons holding offices specified in Article 74 of the Constitution are found to have committed a crime while holding their respective offices, but also in cases where state power is exercised in discharging certain functions by persons who had committed a crime before taking up office and these circumstances transpire while they are in office.

The Constitutional Court emphasised that, under the Constitution, it is exclusively Parliament that may adopt a decision on instituting impeachment proceedings against a particular person. Therefore, impeachment proceedings against a particular person for committing a crime are instituted only upon a decision of Parliament after the members of parliament formally bring charges against a particular person or after an effective judgment convicting that person is received from a court.

The Constitutional Court held that Parliament may itself establish the circumstances that are important for impeachment for committing a crime only in cases where the fact of committing a crime is obvious (as is the official having committed it), as well as where an impeachment of the President of the Republic is carried out. The fact of committing a crime (and the official having committed it) may be considered obvious only where there is reliable information (submitted to Parliament by the institution authorised to do so) that a particular person holding an office specified in Article 74 of the Constitution was found in the act of committing a crime, and the participation of judicial institutions carrying out pre-trial investigation and considering criminal cases is not required for the circumstances that are important for impeachment on the constitutional grounds of "found to have committed a crime" to be stated, that is to say, for the fact of committing a crime and the official having committed it to be stated. In other cases, among other things, the fact of committing a crime cannot be considered obvious where a crime is committed by a person before taking up office.

Even in the above-mentioned exceptional case where the fact of committing a crime is obvious and may be established by Parliament itself, Parliament may decide, in accordance with the procedure provided for in the Statute of the *Seimas,* whether to give its consent for a particular person holding an office specified in Article 74 of the Constitution (except the President of the Republic) to be held criminally liable. If Parliament does give its consent, the impeachment proceedings may be continued in Parliament against the person for having committed a crime (where the fact of committing the crime is obvious), while judicial institutions may determine the criminal liability of that person.

In all other cases, after Parliament gives its consent for a particular person holding an office set out in Article 74 of the Constitution to be held criminally liable, impeachment for a crime may be carried out only following the establishment by authorised judicial institutions of the circumstances that are important for impeachment on the constitutional grounds of "found to have committed a crime", that is to say, following the establishment of the fact of committing a crime and the official having committed the crime by an effective judgment of conviction by a court. Impeachment on the above-mentioned grounds (except where the fact of committing a crime is obvious) is possible in cases where the circumstances that are important for impeachment are established by an effective judgment of conviction by a court conclusively, i.e. finally.

The Constitutional Court held that, by providing for the possibility of applying the procedure of impeachment on the constitutional grounds of "found to have committed a crime" only to cases where the acts were committed by a person while in office, the impugned legal regulation disregarded the fact that impeachment could be applied to cases irrespective of whether a crime found to have been committed had been committed by a person before taking up office or while holding office. The legal regulation thus narrowed the possibility consolidated in the Constitution of the application of impeachment for committing a crime and disregarded the constitutional concept of impeachment.

Languages:

Lithuanian.

Identification: LTU-2017-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.03.2017 / **e)** KT4-N3/2017 / **f)** On criminal liability for illicit enrichment / **g)** *TAR* (Register of Legal Acts), 4356, 15.03.2017, www.tar.lt / **h)** www.lrkt.lt; CODICES (Lithuanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Enrichment, illicit / Liability, criminal / Policy, criminal / Income, illegitimate / Ownership, right / Presumption of innocence / Retroactive effect, criminal law.

Headnotes:

Under the Constitution, the differentiation of criminal liability is a matter of the criminal policy pursued by the state, which is determined by the legislature by using its wide discretion and taking into account the dangerousness of the acts. The mere existence of doubts as to the expediency of criminalising a certain

act or as to the effectiveness of such a legal regulation does not give grounds for questioning the compliance of this legal regulation with the Constitution.

Summary:

I. The Constitutional Court declared the provision of the Criminal Code that provides for criminal liability for illicit enrichment not to be in conflict with the Constitution. Under the above-mentioned provision, a person who holds by right of ownership property whose value exceeds 500 minimum subsistence levels (MSLs) (18 830 euros), while being aware or having to be and likely to be aware that this property could not have been acquired with income from legitimate sources, may be punished by a fine, detention or the deprivation of liberty for up to four years.

II. The Constitutional Court noted that, under the Constitution, the criminalisation of specific acts is a matter of criminal policy, which is determined by the legislature taking into account the dangerousness and scale of the said acts, the priorities of crime prevention, and other important circumstances, while respecting the Constitution and the requirements arising from it.

The Constitutional Court held that, when implementing the criminal policy pursued by the state, the legislature declared illicit enrichment to be a dangerous criminal act and prohibited it in a provision of the Criminal Code, seeking to make economically unviable crimes related to corruption, property, economy, finance, as well as other selfish crimes, and to prevent such acts and damage from being inflicted on the state and society. The legislature thus used its wide discretion to choose the norms of a particular branch of law to define certain violations of law and to impose specific sanctions for those violations. Having assessed the purpose of the impugned legal regulation, the dangerousness of illicit enrichment, and the penalty imposed for this crime by the Criminal Code, the Constitutional Court held that there is no ground for stating that, as a legal measure, the criminal liability established for illicit enrichment is disproportionate.

The Constitutional Court also held that the impugned provision of the Criminal Code does not regulate the procedure for proving the criminal act provided for therein. This procedure is regulated under the rules of the Code of Criminal Procedure, by which the prosecutor must prove the commission of a crime, while the court must comprehensively investigate the case, assess evidence, and substantiate its judgment with this evidence. Thus, the legal regulation laid down in the impugned provision of the Criminal Code does not shift the burden of proof to a person suspected of (or charged with) illicit enrichment: such a person is not compelled to give evidence against himself or herself, and there is no violation of the principle of the presumption of innocence.

Having assessed whether the legal regulation established in the impugned provision of the Criminal Code violates the constitutional prohibition on the retroactive effect of a criminal law, the Constitutional Court noted that this regulation applies only in cases where a person acquired ownership of certain property not earlier than on the day (11 December 2010) on which the impugned provision of the Criminal Code came into force. The acquisition by a person of the above-mentioned property before the specified date where this person holds (or held) it after the entry into force of the impugned provision means that he or she may not be held liable under that provision. Since the impugned and related legal regulation is to be understood exclusively in this way, there are no legal grounds for stating that the impugned legal regulation established a retroactive effect of a criminal law.

The Constitutional Court held that the legal regulation laid down in the impugned provision of the Criminal Code does not violate the constitutional prohibition on punishing a person twice for the same offence. It noted that, as such, this legal regulation and the one established in the Law on Tax Administration do not imply that illicit enrichment and a violation of tax laws are identical things; the fact of whether or not they are identical can be established only in the course of specific criminal cases and cases of tax-law violations. Consequently, the establishment of whether or not illicit enrichment and a violation of tax laws are identical things is a matter of the application of law.

Cross-references:

European Court of Human Rights:

- *Kafkaris v. Cyprus,* no. 21906/04, 12.02.2008, *Reports of Judgments and Decisions* 2008;
- *Korbely v. Hungary*, no. 9174/02, 19.09.2008, *Reports of Judgments and Decisions* 2008;
- *Del Rio Prada v. Spain*, no. 42750/09, 21.10.2013, *Reports of Judgments and Decisions* 2013;
- *Rohlena v. Czech Republic,* no. 59552/08, 27.01.2015, *Reports of Judgments and Decisions* 2015;
- *Manasson v. Sweden*, no. 41265/98, 20.07.2004;
- *Lucky Dev v. Sweden*, no. 7356/10, 27.11.2014;
- *A and B v. Norway,* nos. 24130/11 and 29758/11, 15.11.2016, *Reports of Judgments and Decisions* 2016;

- *Zolotukhin v. Russia,* no. 14939/03, 10.02.2009, *Reports of Judgments and Decisions* 2009;
- *Salabiaku v. France,* no. 10519/83; 07.10.1988, Series A, no. 141-A;
- *Krumpholz v. Austria,* no. 13201/05, 18.03.2010.

Languages:

Lithuanian.

Moldova
Constitutional Court

Important decisions

Identification: MDA-2017-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 09.02.2017 / **e)** 6 / **f)** On the exception of unconstitutionality of Article 16.5 of Law no. 289 of 22 July 2004 on the allowances for temporary labour incapacity and other social payments, as well as Section 49 of the Regulation approved by Government Decision no. 108 of 3 February 2004 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 31.03.2017, 92-10 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
3.23 General Principles – **Equity**.
5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Allowance, amount, right / Maternity, paid leave / Motherhood, protection / Insurance, social, state.

Headnotes:

A differentiation in payment of maternity allowances by the National Social Security Agency to women who had not been employed during the nine months prior to maternity leave and to women who had been partially employed during that period of time infringes the constitutional provisions on equity, the right to social assistance and the protection of family.

Summary:

I. The case was initiated by Chisinau District Court, before which the claimant requested the abolition of the legal provisions instituting a differentiation in the payment of maternity allowances to mothers. Women who had not been employed during the nine months preceding maternity leave were entitled to request the payment of such allowances on the basis of their

status as unemployed persons dependent on their husbands, whereas women who had worked during the aforementioned nine-month period, despite quitting their jobs before commencing maternity leave, were deprived of the right to claim such allowances on the basis of their dependence on their husbands.

II. The Court reiterated that the constitutional duty of a state is to undertake adequate measures to ensure the vital necessities of its citizens, including under exceptional situations. The rationale of social assistance and protection is to provide the necessary conditions for living and to maintain a certain minimum level of living in cases where particular objective circumstances occur.

The Constitution does not guarantee persons a particular level of social security and social guarantees are not provided unconditionally; the legislator is entitled to lay down particular conditions for the exercise of social rights. However, the legal provisions adopted by the Parliament may not contradict the constitutional principles, particularly the principle of equality and the principle of social fairness.

Taking into account that, according to national legislation, the maternity allowance is a particular form of social-security payment for a temporary loss of capacity to a woman expecting a child, this social benefit is provided on the basis of the provisions of Articles 47 and 49 of the Constitution.

The Court considered that the choice of the legislator to provide for maternity allowances to be based on different calculation methods for women who had not been employed during the nine months preceding maternity leave (thus considered dependent on their husbands and the allowance is calculated on the basis of their husbands' salaries) and for women who had partially worked during that nine-month period and had voluntarily quit their jobs (considered not dependent on their husbands and not entitled to the maternity allowance calculated on the basis of their husbands' salaries) creates a discriminatory treatment between wives who never participated in the public social-security system and those who participated as employees who worked partially during the aforementioned nine-month period.

The Court underscored that establishing different treatment for obtaining maternity allowances, with no objective and reasonable justification, is contrary to the Constitutional provisions on equality, the right to social assistance and the protection of family.

The Court reiterated that, although the State enjoys a wide margin of appreciation in the field of social security, and is consequently entitled to extend social protection to a wider range of categories of persons, the State is also under the duty to ensure a reasonable relationship of proportionality and equity between all categories of beneficiaries of maternity allowances.

Supplementary information:

Legal norms referred to:

- Articles 47 and 49 of the Constitution;
- Article 16.5 of Law no. 289, 22.07.2004 on the allowances for temporary labour incapacity and other social payments;
- Section 49 of the Regulation approved by Government Decision no. 108, 03.02.2004.

Languages:

Romanian, Russian (translation by the Court).

Identification: MDA-2017-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 28.03.2017 / **e)** 12 / **f)** On the exception of unconstitutionality of Article 307 of the Criminal Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 31.03.2017, 92-10 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
4.7.3 Institutions – Judicial bodies – **Decisions**.
4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges**.

Keywords of the alphabetical index:

Decision, judicial, criticism / Judge, criminal liability / Judge, independence, impartiality.

Headnotes:

Judicial independence requires the protection of judges against influences of other state powers; each judge shall enjoy professional freedom in interpreting the law, and in assessing facts and evidence, in each individual case.

Criminal liability of a judge may be compatible with the principle of independence of judges only following a strict interpretation and only on the basis of indisputable evidence that would prove the "intention" of a judge to issue a judicial act in "breach of the law".

Summary:

The case originated in an exception of unconstitutionality of Article 307 of the Criminal Code of the Republic of Moldova raised *ex-officio* by the panel of the Supreme Court of Justice, in the context of examining the challenged decisions of the Superior Council of Magistrates regarding the initiation of criminal proceedings against a judge. According to Article 307 of the Criminal Code, a judge may incur criminal liability resulting from a willful rendering of a judgment, sentence, decision or ruling in breach of the law.

The existence of evidence beyond a reasonable doubt is an essential component of the right to a fair trial and places on the prosecution the burden of proving all the elements of guilt in a manner that would remove doubt, including, with respect to Article 307 of the Criminal Code, of the intention of the judges of courts of law, Courts of Appeal and of the Supreme Court of Justice to deliver a judgment, sentence, decision or ruling in breach of the law.

The Court held, with reference to international instruments, that the duty performed by a judge in interpreting the law, examining evidence and assessing facts when determining cases, does not give rise to civil, criminal or disciplinary liability of the judge, save for cases involving bad faith, intentional guilt or proven gross negligence.

The lawmaker shall provide for the use of criminal measures depending upon the protected social value. In doing so, the lawmaker shall consider the principle which provides that the incrimination of an act as an offence shall come into play as a last resort in safeguarding a social value, guided by the principle of *"ultima ratio,"* that is to say, that the criminal law is the only measure capable of achieving the pursued goal, as measures of a civil, administrative, disciplinary nature may be ineffective in achieving the desired goal.

The Court underscored that judges may not be constrained to perform their duties under the threat of a sanction, which may adversely affect the decision to be rendered. While performing their duties, judges shall enjoy unfettered freedom to determine cases impartially, in line with legal provisions in force and on the basis of their personal assessment, without that determination being affected by bad faith. Therefore, the arguments on which a judge relies while rendering a decision, which may be later overturned or reversed, may not serve as a determining ground for sanctioning the judge.

The main remedy for correcting judicial errors is by way of the appeals process. The quashing of a court judgment, sentence, decision or conclusion by the higher courts is not in itself a ground for initiating criminal proceedings against the judge.

The Court held that the existence of evidence beyond a reasonable doubt is an essential component of the right to a fair trial and imposes on the prosecution the burden of proving all the elements of guilt in a manner that would remove doubt, including, with respect to Article 307 of the Criminal Code, of the "intent" of the judges of courts of law, Courts of Appeal and of the Supreme Court of Justice to deliver a judgment, sentence, decision or ruling in breach of the law.

In this respect, the Court noted that, according to legal principles of criminal procedure, the burden of proof is on the prosecution, and a situation of doubt is interpreted according to the principle of *in dubio pro reo*.

Supplementary information:

Legal norms referred to:

- Article 307 of the Criminal Code.

Languages:

Romanian, Russian (translation by the Court).

Montenegro
Constitutional Court

Important decisions

Identification: MNE-2017-1-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 24.02.2017 / **e)** U-II 41/16, 44/16 / **f)** *Službeni list Crne Gore* (*OGM*) (Official Journal), no. 24/17 / **g)** / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts**.
3.9 General Principles – **Rule of law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
3.13 General Principles – **Legality**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Betting games, organisation, facilities.

Headnotes:

The principle of legality represents one of the main constitutional principles and is directly linked to the principle of the rule of law; the state is based on the rule of law and its power is limited by the Constitution and the law. Authorities are accordingly bound by the Constitution and the law, both in terms of normative and other competences. Byelaws are deemed to be adopted in accordance with the normatively determined power of the enacting authority. Under the Constitution, the general authority for adoption of regulations lies with the Government and the administrative authorities, local government or other legal entities only when authorised by the law. The law must create the basis for the adoption of a byelaw; the byelaw may include only what emanates from the legal norm and is not explicitly governed by it.

The Ministry of Finance exceeded its authority when it introduced the regulation under review, which amended the rules on spatial and technical requirements for the organisation of betting games; it had sought to regulate the matter in a different way to the law that already governed the issue.

Summary:

I. Five members of the Montenegrin Parliament requested an assessment of the constitutionality and legality of provisions of Article 6.3 of the Rulebook on spatial and technical requirements for organising betting games (*OGM* no. 10/05 and *OGM* nos. 17/13 and 50/16).

A non-governmental Association for organising games of chance, “Montenegro Bet”, requested an assessment of the provisions of Article 1.1 of the Rulebook amending the Rulebook on spatial and technical requirements for organising betting games (*OGM* no. 50/16) and amending the provision of Article 6.3 of the Rulebook (*OGM* nos. 10/05 and 17/13). The Association indicated in its submission that these provisions run counter to Articles 70, 74 and 145 of the Constitution on economic, social and cultural rights and freedoms because, in an opposite manner to the provisions of Article 51.1 and Articles 49 and 52 of the Law on Games of Chance, they govern the issue of places where betting games may be organised and prevent persons younger than eighteen years of age from entering casinos and premises where betting games are organised.

The Constitutional Court merged the two applications as both proposals and initiatives contested the provisions of the same general legal act.

The Ministry of Finance indicated in its response that the impugned provision of the Rulebook did not contravene Article 145 of the Constitution; Article 56.5 of the Law on Games of Chance had set up a legal framework for organising betting games of chance through betting terminals; comparable experience from Croatia, an EU member state which has regulated the matter in an identical fashion within its legal system, had been used in the process of formulating the provisions of the Rulebook; the impugned provisions of the Rulebook are compliant with the provisions of Articles 70 and 74 of the Constitution and Articles 49 and 52 of the Law on Games of Chance as these stipulate the prohibition of betting to persons younger than 18, both in casinos and in hospitality facilities accommodating the betting terminals.

II. The Constitutional Court noted that the Law on Games of Chance defines games of chance as games where players have equal opportunities of winning through direct or indirect payment of a certain sum and the game result hinges on an uncertain event in the game (Article 2). Betting games are

defined as games where participants bet on the results of different sporting or other events, individual or group sporting competitions or the results of dance, singing or other contests (Article 4.13).

The provisions of Article 51.1 and 51.2 of the Law on Games of Chance are directly applicable; they determine that betting games are held in specially planned premises and that more detailed spatial and technical requirements are laid down by the Ministry. Article 4.19 of the Law on Tourism stipulates that the term "hospitality facilities" means a functionally connected, separately planned and equipped space which meets the minimum prescribed level of technical requirements for the provision of hospitality services. Under these provisions of the Law on Games of Chance, the Ministry of Finance is authorised to prescribe the necessary spatial and technical requirements for holding betting games.

The Constitutional Court noted that the Rulebook, certain legal provisions of which were under dispute, had been adopted by the Ministry of Finance (*OGM* nos. 10/05 and 17/13), with a legal basis contained in the provisions of Article 51.2 of the Law on Games of Chance (*OGM* no. 51/04 and *OGM* nos. 13/07 and 61/13), which, *inter alia*, had prescribed the minimum spatial and technical requirements necessary for the organisation of betting games. Article 6.3 of the Rulebook amending the Rulebook on spatial and technical requirements for organising betting games (*OGM* no. 50/16), which entered into force on 11 August 2016, states that payments for betting on terminals may be received in betting shops or specially planned premises, the area of which may not be smaller than 3 m^2. The amendment further reads that "payments for betting on terminals for betting may be received in betting shops, casino premises, game rooms and hospitality facilities, in accordance with the law".

"Hospitality facilities", under Article 4.19 of the Law on Tourism, are functionally connected, separately planned and equipped spaces meeting the prescribed minimum technical requirements for the provision of hospitality services. The Constitutional Court had concerns over the definition of "hospitality facility" as a "separately planned room" where, under Article 51.1 of the Law, betting games may be organised. The Ministry of Finance, by stipulating in Article 6.3 that betting games are organised in "hospitality facilities" had, in the opinion of the Constitutional Court regulated the matter in an opposite way to the law already governing the issue which had already been *materia legis*.

The Constitutional Court found that the Ministry of Finance exceeded its authorities and breached the principle of legality, by the provision of Article 6.3 of the Rulebook, both in terms of formal legality (a legal act of smaller legal effect must be compliant with legal acts of higher legal effect), and in terms of material legality (contents of the contested provision). It also found that the part of Article 6.3 of the Rulebook stating "and in hospitality facilities" to be out of line with the constitutional principles of the rule of law and compliance of legal regulations referred to in Articles 1.2 and 145 of the Constitution.

Articles 70 and 74 of the Constitution, which define the principles: of consumer protection and child rights, were not, according to the Constitutional Court, relevant in terms of the assessment of the constitutionality of Article 6.3 of the Law; the normative decision prescribing the rooms in which betting payments will be received may not be connected to them.

The Constitutional Court accordingly quashed that part of Article 6.3 of the Rulebook on the spatial and technical requirements for organising betting games (*OGM* no. 10/05 and *OGM* nos. 17/13 and 50/16) which reads "and in hospitality facilities"; it will be superseded on the date of publication of this Decision.

Languages:

Montenegrin, English.

Poland
Constitutional Tribunal

Important decisions

Identification: POL-2017-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16.03.2017 / **e)** Kp 1/17 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2017, item 265 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Assembly, organisation, limitations.

Headnotes:

The right to freedom of peaceful assembly is one of the essential elements of the democratic state in the sphere of fundamental rights and freedoms. Provided the legislator does not exceed the limits of permitting interference in the excercise of constitutional rights and freedoms, the legitimacy of a given legislative solution cannot be undermined.

Summary:

I. On 16 March 2017, the Constitutional Tribunal considered an application loged with the Tribunal by the President, with relation to the Act of 13 December 2016 amending the Act on Assemblies of 24 July 2015. The most important amendment in that act was that the provision by the legislator for a new type of assembly, a cyclic assembly. Under the new law, a cyclic assembly is an assembly organised by the same organiser and held at least 4 times per year within the last three years. The purpose of this assembly is to commemorate events of major importance to the history of the Republic. This kind of assembly will be privileged in comparision with other assemblies as regards obtaining consent for an assembly to be held in the future. If at the same time and at the same place two or more organisers of assemblies applied for consent for their assembly to be held, consent would be granted to the organiser of a cyclic assembly. The President questioned the compatibility of this amendment with the constitutional principle of equality under the law.

II. The Tribunal found the above amendment compatible with the constitutional principle of equality under the law. Freedom of assembly is one of the fundamental human rights. It facilitates the realisation of other constitutional rights and freedoms, including freedom of association, freedom of expression and freedom of religion.

The Tribunal held that provided the legislator does not exceed the limits of permitting interference in the exercising of constitutional rights and freedoms, the legitimacy of a legislative solution cannot be undermined.

The Tribunal stressed that cyclic assemblies, which are planned and scheduled at a certain frequency, must have the certainty that their participants will be able to benefit from the freedom of expression at a given place and/or time, because at other times or places it would be irrelevant for their purpose which is to commemorate events of major importance to the history of the Republic.

The Tribunal noted within the case-law of the European Court of Human Rights the positive obligation imposed on the state to protect those exercising their right to freedom of assembly before intervening in the exercise of this right by a counter-demonstration or counter-assembly. The Tribunal also held that the priority to cyclic assemblies enforces the purpose of their organisation, influencing a good citizen's attitude. It noted too the fact that a decision for a cyclic assembly to be held may be challenged before the court by the organisers of other assemblies.

The new law does not therefore represent a restriction on the right to organise assemblies which are not cyclic (e.g. spontaneous assemblies).

III. The Tribunal issued this judgment in a bench composed of eleven judges, with four dissenting opinions. The judge-rapporteur was M. Muszyński.

Supplementary information:

The Tribunal's judgment has been adopted by the judicial practice of Polish courts, i.e. courts dealing with complaints by organisers of other assemblies about a decision for a cyclic assembly to be held. The right to freedom of peaceful assembly is also excercised in the form of other assemblies, such as spontaneous assemblies.

Cross-references:

Constitutional Tribunal:

- U 1/86, 28.05.1986;
- U 5/86, 05.11.1986;
- K 7/89, 08.11.1989;
- K 5/90, 24.07.1990;
- K 15/91, 29.01.1992;
- K 9/92, 02.03.1993;
- K 18/92, 30.11.1993;
- K 7/93, 07.12.1993;
- K 13/93, 29.03.1994;
- K 1/95, 15.03.1995;
- K 11/94, 26.04.1995;
- K 23/95, 20.11.1995;
- K 9/95, 31.01.1996;
- K 5/96, 15.07.1996;
- K 25/95, 03.12.1996;
- K 19/96, 24.02.1997;
- K 24/97, 31.03.1998;
- K 37/97, 06.05.1998;
- SK 3/98, 13.10.1998;
- K 7/98, 20.10.1998;
- U 2/98, 03.02.1999;
- K 3/99, 28.04.1999;
- K 13/99, 03.11.1999;
- K 6/99, 07.12.1999;
- K 37/98, 30.05.2000;
- K 34/99, 28.06.2000;
- SK 7/00, 24.10.2000;
- P 4/99, 31.01.2001;
- K 27/00, 07.02.2001;
- SK 22/01, 24.10.2001;
- SK 19/01, 20.11.2001;
- K 41/02, 20.11.2002;
- SK 39/03, 10.05.2004;
- Kp 1/04, 10.11.2004;
- SK 14/04, 09.05.2005;
- SK 25/02, 08.11.2005;
- K 21/05, 18.01.2006;
- SK 4/05, 14.03.2006;
- K 11/04, 04.04.2006;
- K 47/05, 19.03.2007;
- SK 19/06, 02.04.2007;
- SK 20/05, 17.04.2007;
- P 21/06, 05.09.2007;
- K 39/07, 28.11.2007;
- P 43/07, 10.12.2007;
- SK 16/06, 24.06.2008;
- P 15/08, 10.07.2008;
- K 50/05, 12.07.2008;
- P 40/07, 20.01.2009;
- P 66/07, 12.05.2009;
- Kp 4/08, 16.07.2009;
- Kp 1/08, 04.11.2009;
- Kp 2/08, 19.11.2008;
- Kp 8/09, 03.12.2009;
- Kp 6/09, 20.01.2010;
- Kp 1/09, 13.10.2010;
- K 2/10, 16.11.2010;
- K 4/09, 07.04.2011;
- Kp 7/09, 20.04.2011;
- Kp 1/11, 14.06.2011;
- K 9/11, 20.07.2011;
- Kp 5/09, 18.01.2012;
- P 44/10, 23.04.2013;
- K 44/12, 18.09.2014;
- SK 40/14, 12.07.2016;
- K 2/15, 23.02.2017.

European Court of Human Rights:

- *Handyside v. the United Kingdom*, no. 5493/72, 07.12.1976, Series A, no. 24;
- *Christians against Fascism and Racism v. the United Kingdom*, no. 8440/78, 16.07.1980;
- *Plattform "Ärzte für das Leben" v. Austria,* no. 10126/82, 21.06.1988, Series A, no. 139;
- *Oya Ataman v. Turkey*, no. 74552/01, 05.12.2006, *Reports of Judgments and Decisions* 2006-XIV;
- *Ezelin v. France*, no. 11800/85, 26.04.1991, Series A, no. 202;
- *Pendragon v. the United Kingdom*, no. 31416/96, 19.10.1998;
- *Cisse v. France*, no. 51346/99, 09.04.2002, *Reports of Judgments and Decisions* 2002-III (extracts);
- *The Gypsy Council and Others v. the United Kingdom*, no. 66336/01, 14.05.2002;
- *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 02.10.2001, *Reports of Judgments and Decisions* 2001-IX;
- *Djavit An v. Turkey*, no. 20652/92, 20.02.2003, *Reports of Judgments and Decisions* 2003-III;
- *Appleby and Others v. the United Kingdom*, no. 44306/98, 06.05.2003, *Reports of Judgments and Decisions* 2003-VI;
- *Van Der Graaf v. the Netherlands*, no. 8704/03, 01.06.2004;
- *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, no. 44079/98, 20.10.2005;
- *Öllinger v. Austria*, no. 76900/01, 29.06.2006, *Reports of Judgments and Decisions* 2006-IX;
- *Members of the Gldani Congregation of Jehovah's Witnesses and others v. Georgia*, no. 71156/01, 03.05.2007;
- *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, 01.12.2011, *Reports of Judgments and Decisions* 2011 (extracts).

Languages:

Polish.

Portugal
Constitutional Court

Important decisions

Identification: POR-2017-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 01.02.2017 / **e)** 32/17 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.
5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Accountability, principle / Assets, declaration, public / Company, board, members / Enterprise, state-owned / Income, declaration by state officials / Public interest / Public office, holder / Transparency, principle.

Headnotes:

The senior managers of state-owned companies are subject to transparency-related duties. The concept of a 'state-owned company' relates to a minimum threshold which the legislature defines and which can include other senior managers who are also involved in the administration of public interests. To see things otherwise would be to introduce an indefensible subversion of values into the part of the Portuguese legal system concerning transparency-related values and requirements. These are constitutional values that: grant citizens a right to participate in public life – concretely in the present case, by being told how public affairs are managed; subject political officeholders to duties which entail responsibilities and accountability; and subordinate the holders of positions on the governing bodies of public-sector organs to the law and to the principles enshrined in the Constitution. Ordinary-law norms, the values they contain and the goals they seek to attain cannot be allowed to conflict with the values of a democratic state based on the rule of law.

Summary:

I. This case concerned declarations of income and assets made by public officeholders. Several members of the state-owned bank *Caixa Geral de Depósitos*, SA (hereinafter, "CGD") were notified that the Law establishing the Regime governing the Public Control of the Wealth of Political Officeholders (hereinafter, "LCPRTCP") required them to make such declarations, and they contested this.

The Court decided that the members of the Board of Directors of *Caixa Geral de Depósitos*, *SA* (hereinafter, "CGD") are under a duty to submit a declaration of assets, income and corporate positions within the time limit stipulated in the Law establishing the Regime governing the Public Control of the Wealth of Political Officeholders (hereinafter, "LCPRTCP") – a limit that counts from the date on which such directors effectively take office. The Court took the view that inasmuch as CGD is an entirely state-owned joint stock company, when it comes to such declarations the members of its Board of Directors are encompassed by the concept of senior public manager.

CGD is a lending institution which, as a state-owned company, is included in the State Business Sector (hereinafter, "SEE"). It is also a 'significant supervised entity', as defined in Regulation (EU) no. 468/2014 of the European Central Bank (hereinafter, "ECB"), and appears on the relevant ECB list.

The Statute governing Senior Public Managers (hereinafter, "EGP") does not apply to the members of CGD's Board of Directors, because the EGP expressly says that it is not applicable to persons who are appointed to governing bodies of entities that are included in the SEE and classified as 'significant supervised entities'. However, the transparency requirements that are the LCPRTCP's *raison d'être* mean that every board director whom the state or other public entities appoint to enterprises in which they hold stakes (regardless of the company's legal nature and whether or not the stakes involve the entirety, a majority or a minority of its capital) is subject to the obligation to declare income and assets. For the purposes of the transparency effects sought by the LCPRTCP, it is irrelevant whether the EGP applies to these individuals or not.

Under the terms of the Organic Law governing the Constitutional Court, the Court is competent to determine whether a duty to submit the declaration of assets, income and corporate positions provided for in the LCPRTCP exists in concrete cases.

The question before the Court was whether members of CGD's Board of Directors should be considered senior public officeholders for the purposes of the LCPRTCP and thus obliged to submit the declaration which that Law says must be made when such officeholders take up their positions. The key aspect of this question was whether amendments to the Statute governing Senior Public Managers (hereinafter, "EGP") made by an Executive Law in 2016 meant that such directors were no longer obliged to present declarations.

II. The Court recalled that a 2017 State Budget Law 2017 (hereinafter, "LOE2017") norm that lays down the terms under which entities are subject to duties of transparency and accountability says that the LCPRTCP applies to members of the boards of directors of lending institutions that form part of the State Business Sector (hereinafter, "SEE") and are classified as 'significant supervised entities', as defined in the applicable EU Regulation, including those in office at the time of LOE 2017's publication. The LCPRTCP states that senior public managers are among the entities deemed to be senior public officeholders.

The SEE includes state-owned companies – i.e. companies that are wholly owned by the public sector ("*empresa pública*", EP). It also includes companies in which the state or any other public-sector entities directly or indirectly hold any permanent stake(s), when such stake(s), taken singly or together, does/do not give rise to any of the situations that would result in a dominant influence over the company in question ("*empresa participada*", EPa).

The 2016 Executive Law removed appointees to boards of directors of lending institutions that form part of the SEE and are classified as 'significant supervised entities' from the scope of the EGP. According to its preamble, it did so with a view to increasing the competitiveness of state-owned lending institutions, without thereby reducing the effective ability to control their board directors. The Court said that the goal behind excepting this particular type of director from the applicability of the EGP had nothing to do with subjecting or not subjecting them to the duties imposed by the LCPRTCP.

The EGP created a number of obligations, but none of them are linked to declarations of assets and income. The decision to include a reference to senior public managers in the LCPRTCP was never related to whether or not they are covered by the EGP. The 'senior public manager' concept is used solely in order to simplify the reference to a series of entities to whom/which those duties are applicable.

The Constitutional Court therefore rejected the arguments presented by the petitioners in the present case and ordered that they be re-notified of the requirement to submit declarations.

III. One Justice concurred with the decision, but additionally referred to an aspect of the case which he considered the majority had not addressed.

Cross-references:

Constitutional Court:

- nos. 455/07, 02.05.2007; 279/10, 05.07.2010; 201/11, 14.04.2011 and 242/11, 07.06.2011.

Languages:

Portuguese.

Identification: POR-2017-1-002

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 01.02.2017 / **e)** 33/17 / **f)** / **g)** *Diário da República* (Official Gazette), 48 (Series I), 08.03.2017, 1277 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.

Keywords of the alphabetical index:

Costs, court, discretion / Cost, payment / Expert, costs / Expert, evidence, duty to give / Proportionality.

Headnotes:

A law setting an unbreakable limit for the payment of court experts (including technical experts, translators, and interpreters) by prohibiting payment of any amount over a defined level, and which precluded the courts themselves from establishing higher amounts for the remuneration of experts, is disproportionate and therefore unconstitutional.

Summary:

I. The Organic Law governing the Constitutional Court (hereinafter, "LOTC") empowers any of the Court's Justices and the Public Prosecutors' Office (hereinafter, "MP") to initiate an abstract *ex post facto* review of the constitutionality of any norm that has been found unconstitutional in three concrete cases.

The MP exercised that power to request the Court to declare the unconstitutionality of a norm in the Regulations governing Procedural Costs (hereinafter, "RCP"). This norm imposed an unbreakable limit of 10 Units of Account (hereinafter, "UC") on the amount that experts could earn in return for their participation in legal proceedings or for their collaboration in any process linked to such proceedings. (*NB:* The value of a Unit of Account is set at a quarter of the Social Support Index value (IAS) in force in December of the previous year, rounded to the nearest Euro. It is updated annually using the same rate as that used to update the IAS (unless the latter updating is suspended, as is the case in 2017), and currently stands at €102.) Even the courts themselves were precluded from establishing higher amounts for the remuneration of experts.

This normative solution, which was derived from the text of the RCP and its Table IV, was designed to ensure and regulate the remuneration of persons who collaborate with the courts on a one-off basis by assisting them in the performance of technical steps in the proceedings. Paying these persons – experts, and other types of agent with special qualifications or know-how, such as translators, interpreters and technical consultants – is one of the three categories of expense included in the overall procedural costs to which court proceedings are subject (the other categories are court fees, and each party's individual legal costs).

The various procedural costs represent the expense normally generated by court proceedings – i.e. here, as part of the process of producing evidence constituted by facts that are relevant to the legal resolution of a dispute. These particular costs and the court fee are two different things. Inasmuch as

paying people for one-off services that happen to be necessary for the proceedings is one of the costs involved in the latter, amount thereof must be taken into account when calculating how much the party that is subsequently ordered to pay costs must actually pay. In other words, the amount of an expert's remuneration has consequences for the amount of procedural costs payable.

II. The question of constitutionality here was linked to the possibility that the limitation imposed by the norm could lead to situations in which the sacrifice required of an expert was not duly compensated, and thus represented a situation that was in breach of constitutional norms.

The Court began by rejecting the argument that the norm was unconstitutional because it violated the rights to the effective submission of evidence, to a fair trial, and for one's work to be remunerated in accordance with its amount, nature and quality.

It also said that while the right to evidence could possibly be restricted by placing this legal limit on expert pay, the normative solution in question could not be said to inevitably and necessarily lead to that outcome, in that experts were supposed to do the work required of them, even if they were not adequately paid for it.

Nor was the norm capable of violating a variety of other constitutional rights: the right to just and fair process, because the issue was the possible material injustice that experts (as opposed to accused persons) might suffer if an absolute ceiling were placed on the remuneration of the services they provided while assisting the courts; or the right to be paid for one's work in accordance with its amount, nature and quality, because the scope of the protection afforded by this right is limited to 'workers', especially those in a subordinate labour relationship, which is not the case of court experts.

Performance of the function of expert represents a duty to collaborate with the courts, and falls within a citizen's overall legal duty to collaborate in the administration of justice. When an expert is required to bear a cost in this way, he or she must be duly compensated, so the expert's right to remuneration constitutes a legal implementation of the general right to compensation for one's sacrifices.

The general right to reparation or compensation for the damages/injuries derived from lawful actions or omissions by the Republic is rooted in the principle of a democratic state based on the rule of law, and has gradually been recognised by the Constitutional Court.

The Court had already found that the constitutional grounds for a liability for lawful acts can be said to be derived from both a principle that there must be equality between citizens when it comes to paying for public costs, and the principle of the rule of law.

When the public interest is made to prevail over a private interest, because this is necessary in order for the former to be viable, and the imposition of such a sacrifice on the private party is indeed legitimate, the legally acceptable solution in a state based on the rule of law is to compensate the party whose interest is sacrificed.

The Court took the view that the legislative solution before it was justified by a public interest – the fact that the costs payable by litigating parties must be controlled if the right of access to justice is not to be denied.

The legislature sought to make the different values and interests that are at stake when experts' fees are determined compatible with one another. It decided that judges should be able to order payment of an amount above or below that actually requested by experts in return for their services, and that that amount should depend on the complexity of the expert's work, but could never exceed 10 UCs.

In most cases that interval was elastic enough to ensure the remuneration took account of the type of service, market practices, the actual service and any travel, and the number of pages or percentage of an expert report or the number of words in a text. However, setting an unbreakable limit prevented payment of any amount over 10 UCs that resulted from a calculation based on exactly the same criteria.

However, while the legislature possesses a constitutional mandate to implement measures that promote and guarantee access to justice by all, it does not possess the legitimacy to ensure that access at the cost of imposing an excessive sacrifice on agents who collaborate in the administration of justice. The legislature must be recognised to enjoy some margin for manoeuvre when it shapes the compensation owed to experts who collaborate with the justice system, but that margin is subject to constitutional limits, among them the principle of proportionality.

The Constitution does not preclude the existence of an upper limit on an expert's remuneration; the need for a harmonious balance between an expert's right to fair compensation for his or her services and the right of access to the courts does imply some restraint when standard fees are established.

Having said this, legally setting an unbreakable maximum limit could lead to situations in which the sacrifice imposed on an expert – particularly with regard to his or her right to material payment for his or her work – was not properly compensated. The courts must be able to take exceptional circumstances into account when they set the fee payable for concrete expert services, but the norm before the Court did not contain any clause that would have offered a satisfactory solution when the sacrifice imposed on an expert exceeded the 10-UC limit. The Constitutional Court concluded that this restriction was capable of leading to situations in which an expert's "sacrifice" – i.e. the cost to him or her of fulfilling his or her legal duty – was not properly compensated.

As such, the Court considered the norm to be in breach of the constitutional requirement for proportionality and declared it to be unconstitutional with generally binding force.

III. The Ruling was unanimous, but one Justice attached a concurring opinion to his vote, because he considered that the decision should be founded on different grounds.

Cross-references:

Constitutional Court:

- nos. 656/14, 14.10.2014; 16/15, 14.01.2015 (included in the selection sent to the Venice Commission with regard to January-April 2015); 250/16, 04.05.2016 and 375/16, 08.06.2016.

Languages:

Portuguese.

Identification: POR-2017-1-003

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 09.02.2017 / **e)** 40/17 / **f)** / **g)** *Diário da República* (Official Gazette), 53 (Series II), 15.03.2017, 4672 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.
4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.
4.8.4.2 Institutions – Federalism, regionalism and local self-government – Basic principles – **Subsidiarity**.
4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods**.
4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae***.
4.8.8.2.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione loci***.
4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision**.
4.8.8.4 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Co-operation**.

Keywords of the alphabetical index:

Competence *ratione materiae* / Competence, shared / Local autonomy, constitutional principle / Local autonomy, right / Regionalism.

Headnotes:

Legal provisions which transitionally render the state the sole competent transport authority for certain municipalities are constitutional. The Constitution provides an institutional guarantee of local autonomy, but one cannot use it to infer that the Constitution reserves certain areas of competence to local authority entities in accordance with a model that imposes a rigid separation between certain spheres of interest and certain powers and responsibilities. The model that is expressly derived from the Constitution is one whereby the competences and powers to act of the various different public entities are interdependent, and those entities are jointly charged with satisfying the population's basic needs – needs whose fulfilment is a fundamental right.

Summary:

I. This *ex post facto* review was requested by a group of Members of the Assembly of the Republic (Parliament) belonging to the Socialist Party. As the originator of the norms in question, the Assembly of

the Republic was the respondent in the case, but declined to make any additional submissions to the Constitutional Court.

The question of constitutionality before the Court was whether the ways in which the norms distributed powers, responsibilities and competences between the state and municipalities was unconstitutional.

The Legal Regime governing Public Passenger Transport Services (hereinafter, "RJSPTP") provides that the various transport authorities with competence in the field of public passenger transport services are the state, municipalities, intermunicipal communities, and the Lisbon and Porto Metropolitan Areas. It also sets out their responsibilities, powers and competences.

The RJSPTP, and its Annexe, makes the state the competent transport authority with regard to: public passenger transport services with a national scope; heavy rail transport; transport operated in the Lisbon and Porto Metropolitan Areas and the Lower Mondego Intermunicipal Community under the terms of concessions between the state and pre-existing internal operators (An 'internal operator' is a public-service operator that is a legal entity which is distinct from the entity with authority over the applicable form of transport, but over which the latter, as part of its local, regional and/or national competences, exercises a control analogous to that which it exercises in relation to its own departments and services), until such time as the latter's public service relationships come to an end; operation of the light metro service on the south bank of the River Tagus, which was established by competitive public call for tenders before the RJSPTP entered into force, until the existing contractual relationship comes to an end; express transport; and transport with an international scope.

In other words, there are a number of situations in which the RJSPTP temporarily and transitionally makes the state the transport authority with competence for the various public passenger transport services identified in the Law, until certain pre-existing public-service relationships and contracts with operators come to an end, after which that authority will pass to other entities (municipalities, etc.).

As such, without prejudice to the temporary effects of the transitional norms, the RJSPTP provides that municipalities are the competent transport authorities when it comes to municipal public passenger transport services – i.e. services that are designed to fulfil needs for travel within a given municipality and take place wholly or mostly within its geographic area. Also without prejudice to the state's transitional competences, intermunicipal communities are the transport authorities with competence for the intermunicipal public passenger transport services that occur entirely or largely within their geographic area – i.e. services which are intended to satisfy needs for travel between different municipalities and all or the majority of which are provided within the geographic area of a given intermunicipal community. Again subject to the transitional nature of the state's competences in this regard, the Lisbon and Porto Metropolitan Areas are the transport authorities with competence in relation to the intermunicipal public passenger transport services that take place wholly or mostly within their respective geographic areas – i.e. the services designed to fulfil travel needs between different municipalities located entirely or largely within a given metropolitan area.

The responsibilities of transport authorities include defining the strategic objectives of the mobility system, and planning, organising, operating, inspecting, publicising, developing, funding, investing in and defining the purposes of the public passenger transport service using road, river, rail and other transportation systems. In the case of certain municipal and intermunicipal public transport services, the legislature transitionally attributed this transport authority role to the state (that is, until the pre-existing public service relationships and contracts come to an end).

The petitioners postulated the existence of a general constitutional principle under which any "unjustified reduction in the powers, responsibilities and competences of local authorities is prohibited", and that the rule is that in this situation there is: a principle of subsidiarity, whereby the only responsibilities, powers and competences that are reserved to the central administration are those that local authorities are not in a position to exercise or undertake; and a principle of universality, whereby local authorities are generally and fully competent with regard to everything that is not attributed to the central administration by law. They considered that these principles meant that local authorities' powers and responsibilities cannot be reduced except in cases of manifest need and in accordance with criteria of proportionality, failing which there would be a violation of both the local autonomy already acquired by such authorities, and the principle that the state must be organised in a decentralised manner. They argued that the RJSPTP norm was in breach of this general principle and rule.

II. The Constitutional Court (hereinafter, "TC") found no unconstitutionality in the challenged legal precepts of the RJSPTP. The Court stated that it was important to determine whether the way in which the norms that confer this transitional authority on the

state and thus share it out among different entities was in breach of the Constitution – i.e. whether they distribute powers, responsibilities and competences between the state and municipalities in a manner that should be deemed unconstitutional.

In past cases the Constitutional Court had already recognised the existence of domains – examples include promoting housing, spatial planning, urban planning and environmental management – that cannot pertain solely to local authorities, inasmuch as they entail matters which must be pursued in connection with the national interest. The inviolable space in which local authorities are autonomous is that occupied by matters which specifically pertain to local affairs. These involve only those tasks whose roots lie in the local community, have a specific relationship with it, and can be autonomously handled by it. Particularly in the densely populated areas that are large cities and their metropolitan areas, the road and river passenger transport domain is indissociably linked to the domains of the promotion of housing, spatial planning, urban planning and the environment. The close connection between these domains is recognised in the Constitution itself, which, in order to ensure fulfilment of the right to housing, charges the state with programming and implementing a housing policy incorporated within general spatial plans and supported by urban plans that ensure the existence of an adequate network of transport and social facilities.

The state possesses sufficient legitimacy to entitle it to act jointly with local authorities in the land and river transport domain. That domain transcends the universe of the specific interests of local communities, because it impacts matters with links to supra-local and general collective interests for whose fulfilment the Constitution holds the state (alone or in conjunction with others) responsible. There is an institutional guarantee of local autonomy, but one cannot use it to infer that the Constitution reserves certain areas of competence to local authority entities in accordance with a model that imposes a rigid separation between certain spheres of interest and certain powers and responsibilities.

The model that is expressly derived from the Constitution is one whereby the competences and powers to act of the various different public entities are interdependent, and those entities are jointly charged with satisfying the population's basic needs – needs whose fulfilment is a fundamental right. The legislature has acknowledged both the need to coordinate national and local policies in the field of the land and river transport of passengers in the country's major urban agglomerations – especially Lisbon and Porto and their metropolitan areas – and that passenger transport systems, spatial planning, urban planning and the environment are closely interlinked.

The particular stage legislation has attained at a given point in its evolution does not imply that a certain solution is forever set in stone as the only one with constitutional validity. There is no constitutional obstacle to withdrawing competences that have already been granted to local authorities, and the legislator is not *a priori* precluded from increasing the extent of the state's interventions. In this context, and inasmuch as the interests at stake in the present case were not specifically and exclusively reserved to local authorities, there was therefore no point in asking whether the norms represented a legislative reduction in the responsibilities, powers or competences pertaining to those authorities.

Regardless of any possible interpretations of the infra-constitutional aspects of the case, when it comes to the question of which entity(ies) is(are) in a position to grant concessions for transport operations the Constitution does not prevent a reduction in municipalities' responsibilities, powers and competences with regard to public transport.

The Court, by unanimous decision, thus denied the existence of a general principle as formulated by the petitioners, rejected their arguments and found no unconstitutionality in the norms before it.

Cross-references:

Constitutional Court:

- nos. 432/93, 13.07.1993; 494/15, 07.10.2015 (included in the selection sent to the Venice Commission with regard to September-December 2015); 296/13, 28.05.2013 and 39/17, 09.02.2017.

Constitutional Commission:

- Opinion no. 3/82 (published in *Pareceres da Comissão Constitucional*, vol. 18, p. 141).

Federal Constitutional Court of Germany:

- no. 15, 30.07.1958, *Entscheidungen des Bundesverfassungsgerichts*, vol. 8, p. 134.

Languages:

Portuguese.

Identification: POR-2017-1-004

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 14.02.2017 / **e)** 62/17 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.10 General Principles – **Certainty of the law**.
3.13 General Principles – **Legality**.
5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.
5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.
5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice**.
5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.
5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle**.
5.3.33.1 Droits fondamentaux – Droits civils et politiques – Droit à la vie familiale – **Filiation**.

Keywords of the alphabetical index:

Adoption / Child, taken into care / Education, right / Family, separation / Minors, protection / Parent, duty / Parents, rights and duties.

Headnotes:

A legal provision is not unconstitutional when interpreted to mean that the adversarial principle is respected if the parents in a case in which a court decides whether to place their minor children in care with a view to their future adoption were able to consult the case file, even though the parents were not personally notified in advance of the inclusion in that file of documents which then served as evidence of the facts on which the court relied in order to reach its decision.

Summary:

I. The appellant in this concrete review case was the biological mother of three minors, who were uterine siblings and whom the court *a quo* removed from her and placed in care with a view to their adoption.

The appellant argued that two norms contained in the Law governing the Protection of Endangered Children and Young Persons (hereinafter, "LPCJP") were unconstitutional when interpreted as they had been by the court *a quo*.

The first norm reads as follows:

> "Children and young persons, their parents, legal representative or whoever has *de facto* care of them shall have the right to ask for legal steps to be taken and to submit evidence".

This provision was interpreted to mean that the fact that it is possible to consult the case file in proceedings involving placing minors in care with a view to their future adoption is sufficient to ensure fulfilment of the adversarial principle, even though the parents are not personally notified in advance of the inclusion in that file of documents which served as evidence of facts on which the court relied in order to reach its decision.

The text of the second norm is as follows:

> "The parents, legal representative and whoever has *de facto* care of a child or young person may consult his or her case file personally or by means of a lawyer".

The appellant contended that the interpretation whereby the parents' lawyers were not entitled to take the whole case file and examine it at their offices when they were drawing up an appeal against the court's decision to place the minors in care was unconstitutional.

II. The Constitutional Court declined to find any unconstitutionality in the relevant provisions of the LPCJP, when interpreted to mean that the adversarial principle is respected if the parents in a case in which a court decides whether to place their minor children in care with a view to their future adoption were able to consult the case file, even though they were not personally notified in advance of the inclusion in that file of documents which then served as evidence of the facts on which the court relied in order to reach its decision.

The Court observed that the Constitution recognises that, as a fundamental element of society, the family has the right to be protected by society and the state and to the effective existence of conditions that enable its members to achieve personal fulfilment. This in turn means that parents' ability to act in relation to their children, namely with regard to raising and educating them, must also be protected. The full and complete development of children is the subject of a range of duties designed to protect that development from potential risks; one such duty requires the state to ensure special protection for children who are deprived of a normal family environment.

The ordinary legislature is under a duty to legislate in such a way as to ensure both the subjective (with regard to entities that occupy subjective legal positions) and objective protection of the family. At the international law level, this protection is also derived from a variety of international instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civic and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the Convention on the Rights of the Child, and the Charter of Fundamental Rights of the European Union.

The right of family members to spend time together is a subjective projection of the protection afforded to family unity, and one of the core constitutional rights, freedoms and guarantees. One of the effects of the 'protection and promotion' measure (a measure designed to protect an endangered child or young person and promote his or her rights) under which a child is placed in the care of the person(s) who has(have) been selected to adopt him or her, or of an institution with a view to his or her future adoption, is to preclude the original parents from exercising their parental responsibilities, which means they are no longer able to spend time with the child. This measure lasts until the actual adoption is ordered and is not subject to revision, so in the meantime it can lead to disrespect for the fundamental right of parents and children to spend time together. Restrictions on the latter right are only possible in cases that are especially provided for by law, and can only be imposed by a court. Separating children from their parents must be an *ultima ratio* intended to safeguard the greater good – here, the defence of the child's physical and psychological integrity and the possibility for him or her to develop his or her personality, when those assets are endangered by actions or omissions on the part of his or her parents. In this respect it is entirely justified to invoke the right to effective jurisdictional protection, which postulates both the ability to access the law and the courts, and the right whereby the proceedings in which a decision to separate parents and children is taken must be truly fair.

In its jurisprudence, the Constitutional Court has taken the position that the right of access to the courts implies the need to guarantee an effective jurisdictional protection that encompasses: the right to act; the right to initiate proceedings; the right to a court decision without undue delays; and the right to fair process.

The Court stated that, abstractly speaking, the present case could theoretically involve the principle that the inability to defend oneself is prohibited, the right to an adversarial process, and the right to know the information in one's case file. In every concrete case of this type one must determine whether, in the process by which the court reached its decision and taking that process as a whole, the parents were able to play a role that was sufficiently relevant in order to ensure them the protection their interests require.

In the actual case before the Court, it was important to determine whether the fact that the appellant was not notified of the existence of a specific document compromised the possibility of defending herself against the potential undesired (by her) outcome of the proceedings. The appellant said nothing in this regard in her appeal to the Court of Appeal, to which she only submitted generic statements.

Per se, absence of notification of the existence of a particular document in the case file does not intolerably harm the right to an adversarial process, which is a dimension of the overall right of defence. The Court stated that the norm might only have been unconstitutional if it had effectively restricted or negated the right to knowledge of the contents of the case file, thereby making it inherently impossible for parents to influence the court's decision or present a reasoned position on those contents.

Nor did the Court find any unconstitutionality in another norm from the same Law, when interpreted such that parents' lawyers are not entitled to take the case file to their offices and examine it there during the period available to them in order to draw up an appeal.

The right to take temporary possession of a case file is not an absolute one, inasmuch as the court *a quo* is entitled to deny it in the light of the need to protect other constitutionally relevant interests.

The case file itself shows that both the appellant and her lawyer had effective access to the file. The Court said that in the absence of concrete elements one way or the other, it was unable to gauge how central

or decisive the document in question had been to the court *a quo* when it formed its opinion on the facts or constructed its decision in the case.

On the question of the constitutionality of the second LPCJP norm, when interpreted to mean that parents' lawyers are not entitled to take the whole case file and study it at their offices when they are compiling an appeal, the Court noted that 'protection and promotion' proceedings are classified as restricted, and that this accords with the provisions of Article 16 of the Convention on the Rights of the Child.

In the present case, the appellant was unable to rely on any express legal norm that would have entitled her counsel to examine the case file away from the court premises. The only situation in which it would be possible to say that the adversarial dimension of the right of defence might be intolerably harmed by an inability to examine the case file away from the court registry would be if there were a difficulty or obstacle that objectively compromised the ability to gain full and timely knowledge of the procedural acts and documented evidence in the file and to duly consider and weigh them up. The legislature possesses a legitimate interest in maintaining the restricted nature of proceedings, and only allowing case files to be consulted at the court registry is one appropriate means of achieving this.

In the concrete case before it, the Constitutional Court took the view that the evidence as to whether the appellant had effectively been able to participate in the proceedings suggested that there had been no obstacles to an adversarial process or to knowledge of the statements and documents included in the proceedings, and that she had had ample and real opportunity to challenge the facts of the case.

The Constitutional Court stated that it was not its place to take a stance on the best interpretation of an infra-constitutional legal norm, but only to determine whether the interpretation which the court *a quo* used as *ratio decidendi* conflicts with any constitutional norms or principles.

The Court had already recognised in the past that the right whereby a party's counsel is entitled to analyse a case file at his or her office is one of the ways in which the right of defence can be implemented. However, the Court has also acknowledged that there are other constitutionally relevant interests in this domain, which must be weighed against that right. The Court's position has been, and was in the present case, that only those norms or their interpretations which imply an inadmissible restriction of the possibilities available to the defence should be considered unconstitutional. This was not so here, and the Court therefore denied the appeal.

III. One Justice dissented from the Ruling on the grounds that in her opinion, the Court had agreed to hear the appeal when the requirements for doing so were not met.

Cross-references:

Constitutional Court:

- nos. 174/93, 17.02.1993; 271/95, 30.05.1995; 695/95, 05.12.1995; 1185/96, 20.11.1996; 133/99, 03.03.1999; 632/99, 17.11.1999; 355/00, 05.07.2000; 110/11, 02.03.2011; 416/11, 28.09.2011; 350/12, 05.07.2012; 243/13, 10.05.2013; 839/13, 05.12.2013; 204/15, 25.03.2015; 510/15, 13.10.2015; 569/15, 28.10.2015; 193/16, 04.04.2016 (included in the selection sent to the Venice Commission with regard to January-April 2016) and 333/16, 19.05.2016.

European Court of Human Rights:

- *Pontes v. Portugal,* no. 19554/09, 10.04.2012 (consulted in the Portuguese version available at http://hudoc.echr.coe.int/eng?i=001-119146).

Languages:

Portuguese.

Identification: POR-2017-1-005

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 26.04.2017 / **e)** 194/17 / **f)** / **g)** *Diário da República* (Official Gazette), 116 (Series II), 19.06.2017, 12376 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

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

Keywords of the alphabetical index:

Penalty, proportionality / Penalty, necessity, principle / Police / Police officer, offence / Police officer, investigation / Police, administrative control / Police, law regulating.

Headnotes:

A legal provision is not unconstitutional for requiring that any police officer or member of staff of the Public Security Police (PSP) who is the object of an indictment order formally charging him or her with a criminal offence punishable by a prison term of more than three years must automatically be suspended from duty. The provision cannot be conclusively deemed unbalanced or disproportionate when one weighs up the imposition on the accused person against the benefits such suspension generates from the point of view of maintaining the community's trust in the work of the police force and how it performs its functions, which must be governed by criteria of impartiality, objectivity and lack of bias when dealing with its own officers and staff.

Summary:

I. This *ex post facto* abstract review case was heard under the terms of the Constitution and the Organic Law governing the Constitutional Court (hereinafter, "LOTC"), whereby any of the Court's own Justices, or the Public Prosecutors' Office, can ask the Court to review any norm which has already been found unconstitutional in at least three concrete cases, and if the unconstitutionality is confirmed, to declare it with generally binding force.

Under a norm in the Public Security Police Disciplinary Regulations (hereinafter, "RDPSP"), a PSP police officer or member of staff who is the object of an indictment order formally charging him or her with a criminal offence punishable by a prison term of more than three years must automatically be suspended from duty.

The Court had already held the PRDPSP norm before it in this case unconstitutional on five occasions, albeit with differences in the precise scope of the findings in each one. All five decisions were based on a breach of the same constitutional parameter: the principle that an accused person must be presumed innocent, taken in conjunction with the principle of proportionality. In at least three concrete cases, the Court found the particular aspect of the norm – whereby police officers or staff who are criminally indicted and charged with an offence for which the maximum penalty exceeds three years in prison – to be unconstitutional.

The starting point for all these decisions was that the automatic suspension from duty possesses an essentially disciplinary nature, which is why the principle of the presumption of innocence is relevant. In addition, there is also an alternative disciplinary measure – preventive suspension – which, unlike the automatic suspension operated by the present norm, allows the appropriate authority to consider the circumstances of the concrete case. Given the existence of this alternative solution, the Court had found the automatic suspension measure unnecessary – the reason why in reaching its earlier decisions, it relied on the principle of the presumption of innocence in conjunction with that of proportionality.

Those decisions were handed down by individual Chambers, but in the present case the Court sat in Plenary, as is mandatory in *ex post facto* abstract reviews.

II. The Constitutional Court said that this legal solution cannot be conclusively deemed unbalanced or disproportionate when one weighs up the imposition on the accused person on the one hand, against the benefits which suspension generates from the point of view of maintaining the community's trust in the work of the police force and how it performs its functions, which must be governed by criteria of impartiality, objectivity and lack of bias when dealing with its own officers and staff, on the other.

The full Court took the view that if the automatic suspension from duty were to possess an essentially disciplinary nature, the fact that the law provided for preventive suspension as part of disciplinary proceedings would make the automatic measure superfluous and it could be dispensed with. However, it considered that this was not the fundamental sense of the measure.

The Plenary stated that the purpose of the preventive suspension, which is a precautionary disciplinary measure, is to ensure the proper internal order of a service or organisation and thereby guarantee that it functions correctly in such a way as to perform the tasks for which it is responsible. The objective is to restore the unit's functional capacity, which was upset by a disciplinary infraction.

The automatic suspension from duty as a necessary effect of indictment, on the other hand, is intended to defend the prestige of a public service – i.e. it seeks to respond to the need to preserve the external reality that is citizens' trust in the police.

The Court recalled the specific missions entrusted to the PSP, both with regard to public safety and security, and in its role as an auxiliary force in the criminal justice field. These missions justify granting the PSP competences that can entail the use of force, and this is why the legislator must concern itself with strengthening disciplinary foundations which generate trust among the community that police officers will act correctly – PSP staff and officers must personify respect for democratic legality.

This is the light in which it is possible to comprehend the objective gravity of a formal accusation of the commission of a serious crime by a member of a police force, with indications which are sufficient to suggest that he or she has perpetrated a crime and that there is a reasonable possibility that as a result, at trial, a court will impose a prison term or other security measure on him or her. This degree of seriousness naturally increases when the indictment order transits *in rem judicatam*.

Suspension from duty until such time as a criminal court either acquits the accused (the acquittal decision does not need to have transited *in rem judicatam*), or hands down his or her final conviction, is designed to preserve citizens' respect for the police force, inasmuch as one can consider it essential for the community not to lose trust in that force's impartiality and lack of bias in its actions.

This is a constitutionally legitimate aim, because it is directly linked to the police's specific function (in both the material and the institutional sense) of defending democratic legality and guaranteeing internal security and citizens' rights.

This constitutionally legitimate aim significantly differs from the objective of a disciplinary suspension, and the Court stated that it was necessary to bear that aim and that legitimacy in mind when evaluating the proportionality of the RDPSP norm before it. Because of this, it took the view that there was no need here to assess this norm against the parameter of the presumption of innocence.

With regard to the possible violation of the principle of proportionality, the Court recalled its established position, which is that such a violation exists when a measure can be considered inappropriate, unnecessary or disproportionate.

Applying the test of appropriateness, it held that suspension from duty is a fit instrument with which to prevent public suspicion – that someone who has been appointed to be the armed protector of criminal-law values and assets has instead disrespected them – from seriously damaging the police force's prestige and thus, inherently, the community's trust in police actions.

In Rulings nos. 62/16, 107/16 and 273/16 the Court considered that the preventive suspension measure available in disciplinary proceedings (provided for by a norm that allows the measure whenever keeping a police officer or member of staff on active duty could be damaging for the police service or impede the discovery of the truth) was an advantageous alternative to automatic suspension as a result of indictment, precisely because it is not automatic and enables the decision-maker to weigh up the circumstances. In the present case, the Plenary took the stance that the Chambers had not considered the specific goal of the disciplinary suspension. Because the decision to suspend in disciplinary proceedings pertains to the police force itself, it does not constitute an alternative mechanism with which to pursue the aims sought by the legislature when it created the automatic suspension upon indictment. Moreover, the preventive suspension lasts for a limited time, at the end of which the accused must obligatorily be returned to duty, however serious the crime with which he or she is charged and however convincing the indications that he or she has committed it may be.

There is no conflict between automatic suspension upon issue of an indictment order and the autonomy of disciplinary proceedings in relation to the same person – the competent entity can either suspend the disciplinary proceedings until the conclusion of the pending criminal proceedings, or decide the outcome of the former without waiting for the latter.

There may perhaps be suitable alternative ways of preserving the community's trust in the impartiality of the actions of the police institution when one of its officers or staff is accused of committing a serious crime, but the Court considered that the norm before it was in fact one such means (and indeed no one had proposed any others).

On the question of proportionality in the strict sense of the term, the Court said it was important to weigh up the disadvantages suffered by the accused against the seriousness of the harm that such a formal accusation can cause to the trust of the community, while also taking into account the measures designed to mitigate the most damaging effects – namely that the automatic suspension from duty while criminal proceedings are on-going does

not prejudice the accused in terms of future promotions or length of service. In addition, the suspension only remains in effect for as long as the formal charges of commission of a crime are themselves extant – the suspension ends immediately upon acquittal, even if the decision to acquit has not yet transited *in rem judicatam*. In other words, as soon as the accused's presence on active duty with the police force can no longer objectively endanger the community's trust in the force's actions, the suspension is lifted as automatically as it was imposed.

As such, and contrary to earlier Rulings handed down by individual Chambers, the Plenary of the Constitutional Court found no unconstitutionality in the norm before it.

III. Six Justices dissented from the Ruling, essentially for the reasons that had led the Court to find the same norm unconstitutional on previous occasions.

Additionally, one Justice concurred with the decision, but disagreed with the majority in relation to the grounds for it.

Cross-references:

Constitutional Court:

- nos. 62/16, 03.02.2016 (included in the selection sent to the Venice Commission with regard to January-April 2016); 107/16, 24.02.2016 and 273/16, 04.05.2016;
- nos. 338/16, 18.06.2016 and 474/16, 27.06.2016.

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2017-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 07.02.2017 / **e)** 62/2017 / **f)** On the objection of unconstitutionality of the provisions of the Law supplementing Government Emergency Ordinance no. 50/2010 on consumer loan contracts / **g)** *Monitorul Oficial al României* (Official Gazette), 161, 03.03.2017 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.23 General Principles – **Equity**.
4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract**.

Keywords of the alphabetical index:

Contract, foreign currency loan / Contract, performance, good faith / *Pacta sunt servanda*.

Headnotes:

New legislative provisions which make it incumbent on a creditor to accept, at the debtor's request, replacement of the balance of the amount due in a particular foreign currency with the equivalent amount in the national currency, rather than the rate of exchange valid at the time of conversion, are out of line with the constitutional principles and the infra-constitutional laws in force. They take effective control away from the Court over the circumstances in which a contract is performed. It is for the courts alone to distinguish between debtors acting in good faith and those acting in bad faith.

Summary:

I. The Constitutional Court was asked to examine the constitutionality of certain provisions of the Law supplementing Government Emergency Ordinance no. 50/2010 on consumer loan contracts. These provisions introduced an obligation for creditors who were parties to a loan contract where the loan was granted in Swiss francs to carry out the conversion in Lei of the balance of the loan expressed in Swiss Francs, at "the exchange rate of the National Bank of Romania valid on the date of conclusion of the loan contract/agreement in Swiss francs."

The applicant claimed that although the Romanian State had undertaken to fulfil in good faith its obligations arising from the treaties to which it is party (Directive 17/2014 of the European Parliament and of the Council, according to which "Member States may further regulate foreign currency loans provided that such regulation is not applied with retrospective effect"), the application of the above provisions to loan contracts in the course of performance at the date of its entry into force contravenes the principle of non-retroactivity of civil law, preventing the applicability of new law to situations which came into existence and have been producing legal effects under the old law.

II. The Court noted that a bank loan is defined as a commitment of making available or granting an amount of money or extending the maturity of a debt, in exchange for an obligation on the debtor's part to repay the amount in question and to pay interest or other costs related to that amount. According to the legal provisions, the main obligation of the borrower is to return "the same quantity and quality of goods borrowed" and "the same amount of money or quantity of goods of the same kind and quality". The provisions of the Civil Code establish the borrower's obligation to repay the same numerical amount stated in the contract. This is the principle of nominalism, under which the amount of loan must be repaid as such, irrespective of its appreciation or depreciation. A contractual clause which states that repayment is to be made in the currency in which the loan was taken out, even if that currency appreciates or depreciates by comparison with the national currency, is a transposition of the law in contractual matters. In such a case, both parties assume the risk that during the performance of the contract the amount repaid by the borrower may be worth less or more when the loan is repaid than at the time it was granted, by comparison to another currency considered standard, or, perhaps more pertinently, in relation to gold. The inherent currency risk is an element of the contract price of a foreign currency loan, as the borrower must repay the loan in the same currency.

Against this background, the Court held that the application of the principle of monetary nominalism to loan contracts in CHF does not stand in the way of the application of the hardship mechanism if the conditions for its application are met. A loan contract entails an inherent risk taken on a voluntary basis by the two parties to the contract, on the basis of their freedom of contract, along with an additional risk, which could not have been forecast by any of the parties, which goes beyond the ability of the contracting parties to foresee it and which is due to elements that could not have been taken into consideration at the inception of the contract. However, once the parties have ascertained that the inherent contract risk has been overrun and an additional one has occurred, intervention becomes compulsory; the contract will either have to be terminated or adapted to the new circumstances.

The various provisions of the Civil Code demonstrate that two inter-dependent principles underlie a civil contract: the legal force of the contract and its binding effect upon the parties to it on the one hand and good faith in its execution on the other. The legal force of a contract does not only concern what is expressly provided for within the contract; it also covers the consequences which equity, custom or law give to the obligation. Equity, as a corollary of good faith, governs a civil contract from its conclusion until the exhaustion of all effects, irrespective of the existence of an express clause in the contract. Therefore, the execution of a civil contract is legitimate provided it is a result of the cumulative application of these two inter-dependent principles. The hardship theory, based on these principles, softens the binding nature of the contract should an unforeseeable circumstance occur during its execution, but none of the Contracting Parties abandons the obligations they have undertaken in accordance with the execution in good faith of the contract; equity, with good faith, provides a foundation for hardship. In case of disagreement between the parties, the assessment of the presence of an unforeseeable circumstance (objective condition) and of its effects on the execution of the contract, of good faith in exercising the parties' contractual rights and obligations (subjective conditions), as well as of equity (implying both objective and subjective aspects) must be completed with the utmost rigour and is a matter for the law courts, the authority of which is covered by the guarantee of independence and impartiality and which plays an important role in determining the conditions of execution of the contract. Judicial review is targeted in such cases at the objective conditions, examining the reason for the change of circumstances or the content of the contract, and the subjective conditions, examining the attitude and conduct of the parties or the impact of the altered circumstances.

In cases involving a general regulation of the hardship principle in terms of the fulfilment of loan contracts, where the parties have failed to reach agreement, in view of the supremacy of the rule of law, courts must apply the hardship clause, by applying conversion only to those debtors who, despite having acted in good faith, can no longer fulfil the obligations stemming from the loan contacts due to an external event they could not have anticipated on the date the contract was signed. The Court is competent and bound to apply the hardship clause if the conditions for its existence are cumulatively fulfilled, and therefore the situation of consumers of Swiss franc loans enjoys, under the legislation in force, a viable judicial remedy likely to discard the effects of a change in the circumstances that led to the signing of the loan contract. The Court can intervene either by ordering the cessation of the fulfilment of the contract or by adapting it to the new conditions, which will produce legal effects only for the future; payments already made will be deemed duly paid under the contract. The contract can also be adapted to the new conditions by converting the payment rates to national currency at an exchange rate the Court can set depending on the circumstances of the case in order to re-balance the obligations. The exchange rate could for example be that which applied on the day the contract was signed, the day when the unpredictable event took place or the day when the conversion was made.

The Court concluded that as the law under review regulated a hardship applicable *ope legis*, by expressly making it incumbent on creditors of Swiss franc loan contracts to convert to lei the remaining sum of the loan expressed in Swiss francs "at the exchange rate of the National Bank applicable on the date the loan contract/convention in Swiss francs was signed", the theory of hardship, which implied effective control by the Court of the factual situation, such as the cause and effects of the change in the circumstances for the fulfilment of the contract, in order to determine the difference between debtors acting in good or in bad faith, was no longer applicable. It found that the law violated the provisions of Article 1.3 of the Constitution (rule of law), Article 21.3 of the Constitution (right to a fair trial), along with those of Article 124 of the Constitution (administration of justice).

III. For all the reasons above, the Court unanimously upheld the objection of unconstitutionality and found that the Law supplementing Government Emergency Ordinance no. 50/2010 on consumer loan contracts was unconstitutional as a whole.

Languages:

Romanian.

Identification: ROM-2017-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 27.02.2017 / **e)** 68/2017 / **f)** Concerning the request to settle the legal conflict of a constitutional nature between the Government and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate, request filed by the President of the Senate / **g)** *Monitorul Oficial al României* (Official Gazette), 181, 14.03.2017 / **h)** CODICES (Romanian, English).

Keywords of the systematic thesaurus:

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities**.
3.4 General Principles – **Separation of powers**.
4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
4.6.10.1.1 Institutions – Executive bodies – Liability – Legal liability – **Immunity**.
4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.

Keywords of the alphabetical index:

Normative act, appropriateness, investigation.

Headnotes:

All public authorities are bound to exercise their powers as set by law in compliance with the constitutional provisions concerning the separation of State powers and, consequently, to refrain from any action that might lead to an interference with the powers of other public authorities. The Public Ministry is not competent to conduct criminal investigation activities regarding the legality and appropriateness of a normative act adopted by the legislator. Such a situation would empty of content the constitutional guarantee concerning the immunity that is inherent to the act of decision-making in the legislative process, which benefits the members of the Government, such

guarantee being specifically intended to protect their mandate against possible pressure or abuse committed against those holding the office of ministers, whereas such immunity ensures their independence, freedom and security in exercising the rights and obligations under the Constitution and laws.

Summary:

I. The President of the Senate asked the Constitutional Court to settle a legal conflict of a constitutional nature between the Government and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate, generated by the surpassing of the power to conduct a criminal investigation in a field exceeding the legal framework, in violation of the Government's power to adopt normative acts.

On 31 January 2017, the Government adopted Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code, which was sent for Parliament's approval and published in the Official Gazette, Part I, no. 92 of 1 February 2017. The declared purpose of this regulation was to bring the criminal legislation in line with the decisions previously issued by the Constitutional Court, one of the effects of which was to redefine certain crimes and decriminalise certain criminal acts. Upon referral by certain natural persons, the Prosecutor's Office with the High Court of Cassation and Justice – the National Anticorruption Directorate had brought criminal proceedings *in rem* with regard to the opportunity of and circumstances in which the draft Emergency Ordinance no. 13/2017 was drawn up by the Government. The prosecution document noted that the Minister of Justice and the Prime Minister were subject to investigation for aiding and abetting, as the purpose of the normative act adopted was to hinder the incurring of criminal liability and enforcement of certain sentences applied to certain fellow party men, friends or political sponsors convicted, indicted or subject to criminal investigations in the last few years, so that it is mandatory to verify the circuit of initiation, assent and issuance of the normative act amending the Criminal Code.

Moreover, an investigation was ordered concerning the presentation, in bad faith, of inaccurate data to the Parliament or President with regard to the activity of the Government or of a ministry, in order to hide the commission of facts likely to affect State interests, because, the Minister of Justice and the Prime Minister have deliberately misinformed the Parliament and President as to their intentions to promote normative acts amending the Criminal Code, through an emergency ordinance. Finally, the criminal proceedings also concerned an investigation into the crime of use of its authority or influence by the person who has a leadership position in a political party for the purpose of obtaining for himself or for somebody else money, goods or other undue advantages. The criminal investigation initiated by the National Anticorruption Directorate for the commission of the three above-mentioned crimes implied the hearing of the people involved in drafting the normative act (counsellors, experts, heads of department, State secretaries and Government ministers, the President of the Legislative Council) and the seizing of documents from the Ministry of Justice.

II. The Court began by determining the framework and the legal and constitutional limits of the powers vested in the conflicting authorities and then proceeded to establish the facts depending on the concrete details of the case. To this end, the Court examined the notifications in case-file no. 46/P/2017, lodged with the Section for Combating the Offences Assimilated to those of Corruption within the National Anticorruption Directorate, as well as the procedural acts in the file issued by the prosecuting authority, namely the prosecutor in charge of the case.

The Court held that the offence of aiding and abetting set out in Article 269 of the Criminal Code, such an offence could not be committed by adopting a normative act. A normative act of clemency (such as a pardon) or the decriminalisation of certain offences will of course be in favour of those who have committed the criminal activity falling within that particular normative act, but this aspect cannot be converted into the "aiding the perpetrator" as the material element of the crime of aiding and abetting. Normative acts of clemency or decriminalisation always represent the will of the legislator, whose choice is justified by certain social, legal, economic needs, in relation to a certain point in the evolution of society.

Clearly, because of their normative character, laws and Government ordinances are of general applicability and their effects extend to indeterminate numbers of persons covered by this hypothesis. Following this logic, their ambit can be expanded to include the people who adopted such acts or their relatives, friends or acquaintances, but this would mean that the legislator, primary or delegated, could never adopt normative acts without being criminally charged and penalised, because of the more lenient norms that would always be in favour of certain perpetrators. The Court held that it was this precise general nature of a normative act, its applicability to an indefinite number of legal subjects, which

distinguishes a normative from an individual act; it is only the latter which is likely to produce benefits, advantages and aid as intended by the criminal law. For the same reasons, the allegation concerning the use of authority or influence, by a person holding a position of leadership within a political party, in order to obtain undue advantages for themselves or somebody else cannot be upheld, as the "advantage" in the incriminating text refers to other situations than a "benefit" that someone might gain as a result of a normative act being adopted; this cannot represent a constitutive element of the objective side of an offence.

With regard to the crime of presenting, in bad faith, inaccurate data to Parliament or to the President on the activity of the Government or a ministry, in order to conceal actions that could harm the interests of the State, the Court held that this norm applied when the presentation, by Government members, of inaccurate data, was the result of fulfilling a legal obligation towards those entitled to request such data, such as parliament or the President. However, when compared to the facts described in the denunciation and retained in the prosecutor's order for the initiation of the prosecution proceedings, the Court noted that "inaccurate data" actually refers to a failure to communicate intentions that, in the view of the denunciators as well the judicial body has been converted into "misinformation". There is no statutory or constitutional norm requiring the Government to inform the President about the "intention" to include normative acts due for adoption on the agenda of Cabinet meetings or to inform parliament about the "intention" to adopt emergency ordinances.

Therefore, the Court concluded that it was unacceptable that the primary or delegated legislative authority (MPs or government ministers) should come under the criminal law by the mere fact of having adopted, or participated in the decision-making process of the adoption of a normative act, whilst fulfilling its constitutional tasks. Because of the immunity attached to the act of decision-making in the legislative process, which is applicable *mutatis mutandis* to members of the Government as well, no MP or minister can be held accountable for their political opinions or actions carried out with a view to the preparation of adoption of a normative act with the force of law. Exemption from legal responsibility for legislative activity is a guarantee in the exercise of the office, against pressure or abuse with which somebody holding office as MP or government minister may be confronted, whereas immunity will ensure his or her independence, freedom and security in the exercise of rights and obligations under the Constitution and laws.

Taking into account the Order of 1 February 2017, by which the National Anticorruption Directorate ordered the initiation of criminal proceedings and procedural acts were carried out with regard to the offences reported in the denunciation, it seems clear that the Public Ministry, as part of the judicial authority, has considered itself competent to check the appropriateness, compliance with the legislative procedure, and implicitly the legality of the Government's adoption of its emergency ordinance. Such conduct amounts to a serious violation of the principle of separation of powers, guaranteed by Article 1.4 of the Constitution; the Public Ministry has not only exceeded its tasks under the Constitution and the law, but has also arrogated to itself powers and duties belonging to the legislator or the Constitutional Court. Moreover, the action of the Public Ministry has put pressure on the members of the Government, which affected the proper functioning of this authority in terms of the law-making process, with the consequence of intimidating the delegated legislator in the exercise of its constitutional powers.

III. Consequently, by a majority vote, the Court ascertained the existence of a legal conflict of a constitutional nature between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate, on the one hand, and the Government on the other.

Languages:

Romanian.

Russia
Constitutional Court

Important decisions

Identification: RUS-2017-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 19.01.2017 / **e)** 1 / **f)** / **g)** *Rossiyskaya Gazeta* (Official gazette), no. 24, 03.02.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **European Convention on Human Rights and constitutions**.

Keywords of the alphabetical index:

Constitution, supremacy / Tax evasion / Enforcement proceedings / Enforcement fee.

Headnotes:

The execution of the decisions of the European Court of Human Rights requires the supremacy of the Constitution in domestic law to be taken into account.

The Constitution has supreme legal force in the Russian legal system and specifically obliges tax payers to pay legally established taxes.

The Constitutional Court maintains that the judgments of the European Court of Human Rights have no consequence on the supremacy of the Constitution in the Russian legal system.

The Russian Federation therefore has the right not to execute, on an exceptional basis, the decisions of any interstate body which has competence to interpret the rules of an international treaty when those decisions impact the fundamental principles and core provisions of the Constitution.

Summary:

The matter submitted to the Constitutional Court concerns the feasibility of executing a judgment of the European Court of Human Rights having found violations of Article 1 Protocol 1 ECHR (protection of property) without violating the Constitution.

The Constitutional Court ruled that it was impossible to execute the judgment of the European Court of Human Rights which found that Russia had violated Article 1 Protocol 1 ECHR following the retroactive application of penalties against the applicant company, applicable to the years 2000 and 2001, of debt enforcement fines in respect of the enforcement proceedings against it, and of an enforcement fee of 7% which the applicant company was ordered to pay and which was judged to be completely disproportionate to that which could have been expected. The total amount of compensation for pecuniary damage was EUR 1 866 104 634 (one billion, eight hundred and sixty-six million, one hundred and four thousand, six hundred and thirty-four euros). This amount was to be paid by the Government to Yukos's shareholders and, if appropriate, to their legal successors and heirs.

The tax evasion performed by the company Yukos on an unprecedented scale directly threatened the principles of a democratic and social state governed by the rule of law, obliging the public authorities to take the most effective measures possible in the context of the enforcement proceedings against the applicant company in order to prevent taxpayers from acting in bad faith. This is why the courts did not decrease the enforcement fee, a penalty in the Russian legal system, to an amount lower than 7% of the sum of tax obligations.

The Constitutional Court therefore ruled that it was impossible to execute the decision of the European Court of Human Rights in the case of *OAO Neftyanaya Kompaniya Yukos v. Russia,* in compliance with the Constitution.

The Constitutional Court, however, did not rule out the possibility that the Russian Federation could exhibit goodwill towards the shareholders of OAO Neftyanaya Kompaniya Yukos, who were the victims of the unlawful actions of the company and its management. In that regard, the Russian government could organise the payment of the sums established under Russian and foreign legislation for the allocation of the assets of a liquidated company. However, the organisation of these payments could not begin before the company's creditors received payment and measures to identify all liquefiable assets (such as hidden foreign bank accounts)

were taken. Such payment must, under no circumstances, seriously undermine the budgetary income and expenditure or the property of the Russian Federation.

Cross-references:

European Court of Human Rights:

- *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04.

Languages:

Russian.

Identification: RUS-2017-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 10.02.2017 / **e)** 2 / **f)** / **g)** *Rossiyskaya Gazeta* (Official gazette), no. 41, 28.02.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Public demonstration / Public demonstration, participant, criminal responsibility / Public order, disruption, penalty.

Headnotes:

It is possible to initiate criminal proceedings against a person who has committed repeated public order offences during demonstrations only if those offences are intentional.

Summary:

I. Article 212.1 was introduced into the Criminal Code in July 2014. The Article establishes criminal responsibility for repeated public order offences in connection with the organisation and conduct of a meeting, rally, demonstration, procession, or strike picket.

After facing a number of proceedings for repeated public order offences, the applicant in this case was sentenced by the district court on 7 December 2015 to 3 years' detention in a general regime penal colony, under Article 212.1 of the Criminal Code. The Court of Appeal subsequently reduced this sentence to 2 years and 6 months.

The applicant maintained that Article 212.1 of the Criminal Code established criminal responsibility for public order offences in connection with the organisation and conduct of a peaceful demonstration only if such offences were repeated. Furthermore, this provision made it possible to initiate criminal proceedings before any court rulings on the administrative aspects of such offences became final and legally binding. In addition, the on-going administrative proceedings could be used as evidence in the criminal proceedings. In this connection, the applicant claimed that the provision violated the right to freedom of peaceful assembly, the right to freedom of opinion and expression, the right not to be judged twice for the same offence, the right to a fair hearing and the right to be presumed innocent until proved guilty. For that reason, the applicant believed that Article 212.1 was contrary to the provisions of Articles 1.1, 15.4, 17.1, 18, 19.1, 29.1, 29.3, 31, 48, 49.1, 50.1, 50.3 and 55.3 of the Constitution.

The disputed provisions were closely examined, as they constitute the legal provisions on the basis of which repeated public order offences in connection with the organisation and conduct of a meeting, rally, demonstration, procession or strike picket can be considered as justification to initiate criminal proceedings and, if appropriate, to hand down a custodial sentence.

II. The Constitutional Court ruled that the disputed provisions were compatible with the Constitution because they:

- made it possible to initiate criminal proceedings for public order offences in connection with the organisation and conduct of a meeting, rally, demonstration, procession or strike picket (hereinafter, the "offence") committed by a person who, on at least three occasions during

the preceding 180 days, had faced administrative proceedings such as those established under Article 20.2 of the Code of Administrative Offences and if, during the application period of administrative penalties against that person, he or she once again committed a similar offence;
- laid down that criminal proceedings for the offence described in Article 212.1 could be initiated only if the occurrence of the offence in question had led to the physical injury or entailed a real threat to the health of any citizen, to the property of any natural or legal person, to the environment, to public order, to public security or to any other value protected under the Constitution;
- did not allow for criminal proceedings to be initiated if the courts with jurisdiction to rule on administrative offences, as established under Article 20.2 of the Code of Administrative Offences, had not ruled at least three times during the 180 days preceding the offence;
- allowed for criminal proceedings to be initiated under Article 212.1 only if the offence committed by the person against whom proceedings had been initiated was intentional;
- laid down that the facts established in the courts with jurisdiction to rule on administrative offences did not predetermine the future conclusions of the criminal courts acting under Article 212.1; the guilt of the person against whom proceedings had been initiated must be established by the Court conducting the criminal proceedings based on all available evidence, including any evidence that had not been examined in the course of the administrative proceedings; and
- set out that deprivation of liberty was a possible sanction only if the offence in question had caused the public demonstration to lose its peaceful nature (provided that the offence could not be classified as a "riot", a specific offence established under Article 212 of the Criminal Code) or if it had caused a real threat of serious harm to the health of any citizen or a real threat to the property of any natural or legal person, to the environment, to public order, to public security or to any other values protected under the Constitution (subject to compliance with the principle of proportionality).

Languages:

Russian.

Identification: RUS-2017-1-003

a) Russian / **b)** Constitutional Court / **c)** / **d)** 07.03.2017 / **e)** 5 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 56, 17.03.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

Keywords of the alphabetical index:

Trafficking of cultural assets / Confiscation / Criminal responsibility.

Headnotes:

A court examining an application for civil proceedings in reparation of damages caused by a person subject to criminal proceedings must take all information from the preliminary investigation into account. This includes information contained in the decision to terminate criminal proceedings on account of the expiry of the statute of limitations, which is considered as written evidence.

The court must consider the evidence according to its personal convictions, which must be based on the detailed, full, objective and immediate examination of that evidence.

A party claiming damages maintains the right to submit to the court an application for compensation for the violation of the right to a trial within a reasonable time.

Summary:

I. In 2013, the court of the city of Vyborg, of the Leningrad region, terminated its criminal proceedings against Mr X, who had been accused of trafficking cultural goods, following the expiry of the statute of limitations. In accordance with Article 81.3.1 of the Code of Criminal Procedure (hereinafter, "CCP"), the law enforcement agencies confiscated the painting "Christ in the tomb" by Karl Bryullov from Mr X, which at the time was considered to be incriminating evidence in the case.

The Supreme Court later ruled that the confiscation of the painting was lawful insofar as, by virtue of Article 81.3.1 CCP, the instruments of crime belonging to the accused shall be confiscated and handed over to the corresponding institutions or shall be destroyed.

The Supreme Court did not find that the confiscation of the painting was to the detriment of the applicant's situation, and it therefore did not apply the provisions of Article 401.6 CCP, laying down a one-year limit for submitting an application to the Court of Cassation to reopen civil proceedings for "*reformatio in peius"*.

The applicant maintained that the provision set out in Article 81.3.1 CCP, which allowed the courts to confiscate any goods belonging to the accused which were considered to be incriminating evidence or instruments of crime, gave rise to the illegal seizure of personal property. Furthermore, the ambiguity of the concept of "*reformatio in peius*"*,* used in Article 401.6 CCP, meant that the courts could apply it differently in practice, giving rise to an arbitrary limitation of the right to property and a violation of the constitutional principle of the equality of all persons before the law. In that connection, the applicant considered that the disputed provision was contrary to Articles 15.4, 17.1, 35.1, 35.2 and 35.3, 49.1, 54.2 and 55.3 of the Constitution.

II. The disputed provisions were closely examined, as they are the basis on which a court may authorise the termination of criminal proceedings if the statute of limitations expires.

It was ruled that the provisions in question were compatible with the Constitution insofar as, when criminal proceedings are terminated as a result of the expiry of the statute of limitations, they set out that:

- a party claiming damages, if in reasonable doubt as to the accuracy of the calculated time period, can object to the termination of criminal proceedings and, if a decision had been made, contest that decision as unlawful and unfounded;
- a party claiming damages maintains the right to defend its rights and legitimate interests in the context of civil proceedings, taking into account the applicable rules on the statute of limitations, and the accused is not relieved of his or her obligations deriving from the damage caused by his or her unlawful action. In this case, the competent authorities of the state must provide the party claiming damages with assistance in obtaining proof of the existence of damage; and
- the court dealing with an application for civil proceedings in reparation of damages caused by a person subject to criminal proceedings must take all information from the preliminary investigation into account. This includes information contained in the decision to terminate criminal proceedings on account of the expiry of the statute of limitations, which is considered as written evidence.

The court must consider the evidence according to its personal convictions, which must be based on the detailed, full, objective and immediate examination of that evidence.

A party claiming damages maintains the right to submit to the court an application for compensation for the violation of the right to a trial within a reasonable time.

Languages:

Russian.

Serbia
Constitutional Court

Important decisions

Identification: SRB-2017-1-001

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 16.03.2017 / **e)** Už-4497/2015 / **f)** / **g)** / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal proceedings, costs.

Headnotes:

Obliging a private prosecutor to bear the costs of proceedings is not just in a situation where the acquittal was not the result of his incapacity to prove the defendant's guilt of committing the criminal offence. Neither was the private prosecutor to blame for the accrual of the costs due to failure to act in accordance with his procedural duties.

Summary:

I. The applicant submitted a constitutional appeal against the Basic Court's rulings, alleging a violation of the right to a fair trial under Article 32.1 of the Constitution. The applicant's argument was that he was obliged to reimburse the costs of criminal proceedings to the defendant who was exonerated of the charges for the criminal offence of defamation due to the application of a more lenient law, as during the proceedings the Law on Amendments to the Criminal Code had deleted Article 171 of the Criminal Code. He contended that the infringement was caused by the court's failure, in its judgment, to decide who shall bear the costs of the criminal proceedings. This made it impossible to subsequently decide on the matters of costs in a separate ruling, as a separate ruling decides only on the amount of costs, when in the moment the main hearing is concluded the data on the amount are missing.

II. The Constitutional Court noted that the applicant, in the capacity of a private prosecutor, charged the defendant with the criminal offence of insult under Article 170 of the Criminal Code; that subsequent to the changes made to the Criminal Code by the Law on Amendments to the Criminal Code and erasure of the provision under Article 171, the Basic Court concluded that the factual description of the criminal offence in the private criminal action does not correspond to the legal description of the criminal offence of insult, but to the criminal offence of defamation under Article 171 of the Criminal Code, and acquitted the defendant of the charges, in view of the fact that the incrimination in the instant case ceased to exist. The contested rulings decided on the costs of the criminal proceedings by applying the Law on Criminal Proceedings and the private prosecutor was obliged to pay the costs sustained by the defendant.

The Constitutional Court pointed out the standpoint expressed in several of its decisions, that obliging a private prosecutor to bear the entire costs of proceedings is not just from the standpoint of the guaranteed right to a fair trial in a situation where, as in the instant case, the acquittal was not the result of his incapacity to prove the guilt for committing the offence which at the time the action was filed was envisaged as a criminal offence. Neither was he to blame for the accrual of the costs due to failing to act in accordance with his procedural duties.

In view of the above, the Constitutional Court adopted the constitutional appeal and found that the disputed rulings violated the applicant's right to a fair trial, guaranteed under Article 32.1 of the Constitution, quashed the rulings and ordered that the Basic Court render a new decision on the case.

Languages:

English, Serbian.

Slovakia
Constitutional Court

Important decisions

Identification: SVK-2017-1-001

a) Slovakia / **b)** Constitutional Court / **c)** First Chamber / **d)** 16.03.2016 / **e)** I. ÚS 549/2015 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Good faith / Ownership / Ownership, protection / Ownership, title.

Headnotes:

The mere absence of ownership on the part of the seller does not automatically make the purchase contract invalid if the purchaser acted in good faith that he was buying from the rightful owner and had good reasons to believe so.

Summary:

I. The applicant acquired some real estate in 2000 from a private pharmaceutical company which, in turn, had acquired the property from a state-owned automobile company in the course of privatisation proceedings, i.e. from the state.

However, the acquisition of the real estate by the private company from the state-owned company gave rise to some controversy, since certain procedural requirements had not been observed. Accordingly, it was claimed by several entities that since this first acquisition was invalid, the second acquisition by the complainant was also necessarily invalid with reference to the principle *nemo plus iuris ad alium transferre potest quam ipse habet* ('no one can transfer a greater right than he himself has'). This was despite the fact that the purchase had been approved by another court when that pharmaceutical company was, too, in bankruptcy and was thus so confirmed in the Land Registry at the time the complainant was buying it.

In 2007, the automobile company, now a private joint-stock company, was declared bankrupt and a trustee was appointed by court to handle the bankruptcy proceedings. While listing the assets of the bankrupt company, the trustee included therein the real estate in question since he did not consider the pharmaceutical company the rightful acquirer, and therefore did not consider the complainant to be the rightful owner of the real estate. However, he included a note in the published inventory of the bankrupt company's assets that this inclusion was disputable.

The applicant disputed this inclusion and tried to settle the matter with the trustee.

He filed an unsuccessful lawsuit at the District Court in Trnava seeking to have the real estate in question withdrawn from the bankrupt company's assets. The court rejected the lawsuit in its 2010 judgment, holding that the complainant had failed to prove lawful acquisition of property rights to the real estate in question on the part of his legal predecessor, partly also for procedural reasons. Therefore, the court continued in its reasoning, the complainant could not have become the rightful owner of the real estate in question on the basis of the submitted purchased contract. The applicant appealed the judgment.

The appellate court, the Regional Court in Trnava, rejected the appeal in its 2013 judgment, agreeing with the argumentation of the lower court. The complainant filed an appeal on points of law with the Supreme Court. In 2014, the Supreme Court declared the application inadmissible for being manifestly unfounded.

In 2015, the applicant filed a constitutional complaint with the Constitutional Court. He claimed that the previous courts were unreasonably selective when quoting Czech case law relevant to bona fide acquisition of real estate, omitting those parts of the case law which supported the applicant's position. He further claimed that the courts had imposed an excessive burden of proof on him as regards his predecessors' rights to state assets and accused the courts of undue formalism when assessing procedural questions as well as his quality as a bona fide purchaser.

II. The Constitutional Court had reiterated on many occasions that ordinary courts are obliged to examine and take into account the specific circumstances of each individual case in order to reach a just decision, i.e. so that "overly scrupulous adherence to the exact wording of the law which is in favour of one party to proceedings does not lead to glaring injustice on the part of the other party".

The Court noted at the outset of its argumentation that under Article 20 of the Constitution, the property rights of all owners have the same value and enjoy the same protection and that the state is obliged to protect these rights if they are violated. The Court further recalled that the primary objective and purpose of civil procedure is the protection of violated rights.

The Court conceded that with the exception of acquisition by prescription, the Civil Code does not explicitly allow for acquisition of property solely on the basis of bona fides. However, the Court held that this cannot lead to the immediate conclusion that the mere absence of ownership on the part of the transferor automatically renders the purchase contract invalid. The Court recalled at this point that the transfer of property rights was approved by the competent state authorities and was confirmed in the relevant state-administered registry.

Thus, this was a case of a conflict between two principles – the principle of protecting *bona fide* purchasers and the principle of protecting the property rights of the original owner. Since it was impossible to fully satisfy both principles, it was necessary to perform a balancing exercise, taking into account the principle of universal justice. The Court arrived at the conclusion that it is the negligent owner who is to bear the higher risk here rather than the bona fide purchaser, since the latter had no real chance to find out about how the real estate in question got on the title deed of his seller. The Court recalled this position was shared by the Czechoslovak interwar case law as well as the legislation and case law of other European states, citing especially a similar decision by the Czech Constitutional Court.

Finally, the Court stated that the law does not exist in order to legitimise unreasonable and unjust outcomes, but instead to regulate relationships between individuals in a rational and equitable manner.

The Court found a violation of Article 46.1 of the Constitution (right to fair trial) and of the corresponding right in Article 6.1 ECHR, annulled the decisions of the Regional Court in Trnava and of the Supreme Court and remitted the case back to the Regional Court for further proceedings. The Constitutional Court ordered the lower court to thoroughly examine and take into account good faith on the part of the complainant in deciding on whether to withdraw the real estate in question from the bankrupt company's assets.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 January 2017 – 30 April 2017

During this period, the Constitutional Court held 22 sessions – 12 plenary and 10 in panels: 3 in the civil, 5 in the administrative and 2 in the criminal panel. It received 75 new requests and petitions for the review of constitutionality/legality (U-I cases) and 392 constitutional complaints (Up cases).

During the same period, the Constitutional Court decided 52 cases in the field of the protection of constitutionality and legality, as well as 211 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 made available as follows:

- In an official annual collection (Slovenian full text versions, including dissenting and concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts of decisions issued in the field of the protection of constitutionality and legality, with full-text version of the dissenting and concurring opinions);
- On the website of the Constitutional Court (full text in Slovenian, 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 Slovenian, available at www.ius-software.si;
- In the CODICES database of the Venice Commission (a selection of cases in Slovenian and English).

Important decisions

Identification: SLO-2017-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 21.01.2016 / **e)** U-I-115/14, Up-218/14 / **f)** / **g)** *Uradni list RS* (Official Gazette), 8/16 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction**.
5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.
5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.

Keywords of the alphabetical index:

Confidentiality, professional / Correspondence, secrecy / Lawyer, professional privilege / Lawyer, professional secrecy / Search and seizure / Search, lawyer's office / Secrecy, professional, lawyer.

Headnotes:

The privacy of attorneys must be ensured in order to protect the privacy of their clients as well as the right of their clients to judicial protection, their right to a legal remedy, and the fundamental procedural safeguards comprising fair trial. A statutory regulation of investigative measures in criminal proceedings that fails to provide a special regulation of investigative measures against attorneys in order to protect the privacy of attorneys is inconsistent with the Constitution.

Summary:

I. The petitioners in the case at issue were attorneys, law firms, and the Bar Association of Slovenia. They petitioned the Constitutional Court to review the regulation of investigative measures against attorneys under the Criminal Procedure Act and the Attorneys

Act. They established the requisite legal interest for their petitions by concurrently submitting constitutional complaints against the search orders that authorised searches of their offices and other premises as well as seizures of their documents and electronic devices. The challenged searches and seizures were carried out in the framework of criminal proceedings against third parties, and the attorneys were not suspected of having committed any criminal offences. The attorneys' objections to the searches and seizures were merely recorded, but they had no recourse to a court. The petitioner's main allegation was that the Acts did not regulate investigative measures against attorneys in a manner that ensured respect for their right to privacy and the confidentiality of the relationship between attorneys and their clients.

II. The Constitutional Court first reviewed the challenged Acts from the perspective of the privacy of attorneys. It defined the privacy of attorneys as a collection of entitlements protected by Articles 35, 36.1 and 37.1 of the Constitution, which protect different aspects of privacy. The Court clarified that the privacy of attorneys encompasses facts, relationships, objects, premises, data, and communication that are substantively connected to the exercise of the profession of attorney. The protection of the privacy of attorneys is not intended to privilege attorneys, but to protect the privacy of their clients as well as a number of their rights, including the right to judicial protection, the right to a legal remedy, and the fundamental procedural safeguards comprising fair trial.

The Court acknowledged that ensuring the effective prevention, discovery, and prosecution of criminal offences, and the institution or course of criminal proceedings are constitutionally admissible aims that may justify interference with the privacy of attorneys. It then clarified that particular protection must be accorded to defence attorneys in criminal proceedings. Thus, in order to protect the right of defendants to a defence and the privilege against self-incrimination, investigative measures against an attorney representing a defendant in criminal proceedings are not admissible. This highest level of protection only applies to information concerning the confidential relationship between the defence attorney and the defendant. However, even the confidentiality of such a relationship is not absolute, as a defence attorney who is suspected of having participated in the criminal offence under investigation cannot rely on the privacy of attorneys to prevent the execution of investigative measures.

The Court then proceeded to clarify that other interferences with the privacy of attorneys that pursue constitutionally admissible aims are only admissible if they pass the proportionality test. In this regard, the Constitutional Court found that the challenged regulation of investigative measures went beyond what was necessary to ensure the attainment of the aims pursued. The challenged regulation namely contained no special regulation with regard to investigative measures that are carried out against attorneys and therefore disregarded the need to ensure a higher protection of the privacy of attorneys, dictated by the confidentiality of the attorney-client relationship. The Court explained that the effective prosecution of criminal offences could also be achieved by means of less invasive measures than a completely unrestricted search operation. It clarified that the same result could be attained by a regulation that would require the presence of the attorney whose premises are being searched and the presence of a representative of the Bar Association at searches and seizures carried out against attorneys. The mentioned persons should also be ensured an effective possibility to oppose the seizure of potentially confidential documentation encompassed by the privacy of attorneys and obtain a judicial decision thereon. The Court therefore concluded that the challenged regulation excessively interfered with the privacy of attorneys.

The Court also reviewed the challenged Acts from the perspective of the right to judicial protection guaranteed by Article 23.1 of the Constitution and the right to a legal remedy guaranteed by Article 25 of the Constitution. It held that there existed no constitutionally admissible aim for a statutory regulation that failed to ensure the affected attorney and a representative of the Bar Association the right to appeal a court order authorising an investigative measure. Such regulation was inconsistent with the right to a legal remedy. Furthermore, in instances where the investigating judge delegated the execution of an investigative measure to the police, the fact that the statutory regulation did not determine judicial control of their decisions constituted an interference with the right to judicial protection.

The Constitutional Court thus established an unconstitutional legal gap in the laws regulating investigative measures against attorneys. It required the legislature to remedy the established unconstitutionality within the time period of one year. In order to ensure the protection of the privacy of attorneys in the meantime, the Court determined the manner in which its decision is to be implemented by providing a transitional regulation of investigative measures that are carried out against attorneys.

III. The decision was adopted unanimously. Judge Dr Dunja Jadek Pensa was disqualified from deciding on the case.

Languages:

Slovenian, English (translation by the Court).

Identification: SLO-2017-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.10.2016 / **e)** U-I-295/13 / **f)** / **g)** *Uradni list RS* (Official Gazette), 71/16 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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**.
3.10 General Principles – **Certainty of the law**.
3.12 General Principles – **Clarity and precision of legal provisions**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Bank, rescue by state [State aid, EU, etc., bank failure, financial system].

Headnotes:

In instances of extraordinary measures adopted for the resolution of banks, the affected individuals must be ensured effective judicial protection. The applicable procedural rules must take into account the significantly weaker position of the affected individuals in comparison with the authority that adopted the extraordinary measure at issue and strike a fair balance between their respective positions.

Summary:

I. The case concerned the review of the Banking Act and the Resolution and Compulsory Dissolution of Banks Act. The petitioners and the applicants challenged the constitutionality of the extraordinary measures that the Bank of Slovenia could impose upon banks in order to cover banks' losses. Such measures *inter alia* included the compulsory write-off of the eligible liabilities of banks and the compulsory conversion of those liabilities into bank shares.

II. In this case the Constitutional Court submitted to the Court of Justice of the European Union a number of preliminary questions relating to the validity and interpretation of the Communication from the Commission on the application, from 1 August 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis (hereinafter, the "Banking Communication"), as well as a question relating to the interpretation of the Directive on the reorganisation and winding up of credit institutions. On the basis of Article 3a.3 of the Constitution, the Constitutional Court thus took into account the Judgment of the Court of Justice of the European Union in case no. C-526/14 when interpreting the challenged statutory provisions and the provisions of the Constitution.

The Constitutional Court proceeded from the fact that eligible liabilities were not legally equivalent to a bank's senior debt, as they predominantly formed the capital of the bank, which served to cover any losses of the bank and to protect other creditors, i.e. depositors, in particular. It reviewed the challenged acts from the perspective of several provisions of the Constitution.

The Constitutional Court first noted that the Banking Act allowed the Bank of Slovenia to compulsorily write off or convert (into shares) eligible liabilities that had already existed before its entry into force. However, no obligation of the holders of eligible liabilities to reimburse sums that they had already received could arise on the basis of the challenged regulation. Consequently, the challenged regulation did not have a retroactive effect and hence it did not interfere with Article 155 of the Constitution.

Similarly, the Banking Act was not inconsistent with the principle of trust in the law determined by Article 2 of the Constitution. The challenged extraordinary measure was only admissible where it was possible, by means of state aid, to prevent the bankruptcy of the bank and avoid threats that could affect the financial system as a whole. By its economic logic, it entailed the decision that a certain category of the bank's creditors would not benefit from the bank's

resolution with public funds. The fact that the challenged regulation contained the “no creditor worse off” principle, which means that individual creditors must not sustain a greater loss than they would have sustained had there been no write-off or conversion, was of decisive importance for the assessment of the Constitutional Court.

Furthermore, the Banking Act did not interfere with the right to private property as determined by Article 33 in conjunction with Article 67 of the Constitution. The challenged extraordinary measure was intended to prevent the initiation of a bankruptcy procedure against the bank and had to be carried out in a manner such that the holders of eligible liabilities received, despite the extraordinary measure, at least an amount equal to the amount they would have received in a bankruptcy procedure. The Constitutional Court stressed that the Constitution does not require the state to reimburse creditors, by means of state aid, the money they privately invested where the investment transpired to be economically unsuccessful.

With regard to the review from the perspective of the right to judicial protection, it has to be underlined that the Banking Act did not allow the holders of written-off or converted eligible liabilities to challenge the final decision of the Bank of Slovenia on the write-off or conversion before a court. It did, however, provide them with judicial protection in the form of an action for damages against the Bank of Slovenia. The Constitutional Court clarified that the mere fact that the affected persons only had an action for damages at their disposal, but no possibility to effect the abrogation of the decisions of the Bank of Slovenia, was not inconsistent with their right to judicial protection, as the Constitution does not require precisely determined judicial proceedings to be available. The compensatory protection entailed the manner of exercise of the right to judicial protection within the meaning of Article 15.2 of the Constitution.

However, the Constitutional Court held that the legislature failed to take into account the significantly weaker position of the holders of eligible liabilities in comparison to the Bank of Slovenia and to strike a fair balance between their respective positions. The Constitutional Court highlighted that the holders of eligible liabilities could not access data that they needed in order to draft an action and to engage in a dispute. There were further no procedural rules that would have compensated for the imbalance that existed between an average holder of eligible liabilities and the Bank of Slovenia and the regulation did not provide a possibility of proceedings for collective judicial protection that would have ensured quality and uniform decision-making in disputes between the holders of eligible liabilities and the Bank of Slovenia. The Constitutional Court therefore established that the challenged regulation was inconsistent with the right to effective judicial protection determined by Article 23.1 of the Constitution.

The Constitutional Court required the National Assembly to remedy the established unconstitutionality within six months. It also determined the manner of implementation of its decision by providing a provisional regulation of the statutes of limitation for actions for damages concerning the write-off of eligible liabilities on the basis of the Banking Act.

III. The decision was adopted unanimously. Judge Dr Dunja Jadek Pensa was disqualified from deciding on the case.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2017-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 21.02.2017 / **e)** CCT 87/16 / **f)** Association of Mineworkers and Construction Union and Others v. Chamber of Mines of South Africa and Others / **g)** www.saflii.org/za/cases/ZACC/2017/3.html / **h)** [2017] ZACC 3; (2017) 38 ILJ 831 (CC); 2017 (3) SA 242 (CC); CODICES (English).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike**.
5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions**.

Keywords of the alphabetical index:

Employment, collective labour agreement, legally binding / Place of work, interpretation / Union, right to bargain collectively.

Headnotes:

Permitting a private actor to exercise public power does not inherently violate the rule of law. Non-state organs may and do exercise public power. And safeguards exist to monitor and scrutinise this exercise. The actual exercise of the power the provision confers on private parties can never occur lawlessly. It is subject to review under the principle of legality.

A collective agreement concluded with the majority trade unions can be extended to bind the minority unions, even if the minority trade union has majority representation at certain workplaces.

Summary:

I. In 2013, Chamber of Mines of South Africa (hereinafter, "Chamber") acting on behalf of its corporate members in the gold mining sector, began negotiations with three unions representing the majority of workers in the sector overall.

Association of Mineworkers and Construction Union (hereinafter, "AMCU"), with its dramatically rising membership, joined the negotiations – but rejected the offer in which they culminated. The other unions accepted that offer. The Chamber and these unions concluded a collective agreement. The agreement made itself applicable to all the companies' employees including those not members of the unions party to the agreement.

Because AMCU was not a party to the agreement, it did not regard itself as bound. It notified companies that its members would go on strike. In response, the Chamber urgently applied to the Labour Court to interdict the strike and succeeded. AMCU's appeal to the Labour Appeal Court failed.

AMCU, apart from definitional arguments and contesting the provision the Chamber used to extend the collective agreement to its members, contended that Section 23.1.d of the Labour Relations Act 66 of 1995 unjustifiably limited its members' rights to fair labour practices, including the right to bargain collectively, the right to strike, and the right to freedom of association. AMCU also argued that unsupervised private extensions of collective agreements licensed lawless exercises of power which violated the rule of law.

II. The Court in a unanimous judgment held that the statutory definition of "workplace" applied to Section 23.1.d. Whether a mine constituted a separate "workplace" depended not on the mines' geographic location or where the individual workers worked. Instead it depended on functional factors of independence listed in the definition of "workplace".

The Court also rejected AMCU's constitutional challenge. First, the Court held that any infringement of the right to strike was reasonable and justifiable based on the principle of majoritarianism which, in the context, benefitted orderly collective bargaining. That majoritarianism was functional to enhanced collective bargaining was internationally recognised. Second, the limitation a Section 23.1.d agreement imposed on the right to strike was strictly limited in both scope and time. A collective agreement extended to non-parties did not apply to them indefinitely but only for the duration of the agreement and on the specific issues it covered.

The Court found that AMCU's rule of law challenge was in essence a challenge to the rationality of Section 23.1.d. This was because, amongst other things, it permitted private actors the right to

effectively exercise public power arbitrarily. This was not the effect of Section 23.1.d. Since the provision was a justifiable limitation on the right to strike, it followed that it was also necessarily rational.

The Court found that an agreement under Section 23.1.d constitutes the exercise of public power and is subject to review under the principle of legality. This requires that all exercises of public power – including non-administrative action – conform to minimum standards of lawfulness and non-arbitrariness.

Hence the agreement was validly extended to AMCU members at the five AMCU-majority mines, and the statutory provisions were constitutionally compliant. The appeal was dismissed with no order as to costs.

Supplementary information:

Legal norms referred to:

- Sections 18, 23.2.c and 36 of the Constitution of the Republic of South Africa, 1996;
- Section 23.1.d of the Labour Relations Act 66 of 1995.

Languages:

English.

Identification: RSA-2017-1-002

a) South Africa / **b)** Constitutional Court / **c)** Khampepe J; Jafta J / **d)** 09.03.2017 / **e)** CCT 54/16 / **f)** South African Municipal Workers' Union v. Minister of Co-Operative Governance and Traditional Affairs / **g)** www.saflii.org/za/cases/ZACC/2017/7.html / **h)** [2017] ZACC 7; CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.
4.8.4 Institutions – Federalism, regionalism and local self-government – **Basic principles**.
4.8.8 Institutions – Federalism, regionalism and local self-government – **Distribution of powers**.

Keywords of the alphabetical index:

Court, lower, duty to express opinion / Provinces, legislation, participation, right / Provinces, rights, legislative procedure.

Headnotes:

Bills that promote the values and principles listed in Section 195.1 of the Constitution of the Republic of South Africa are bills that affect the provinces, and must thus be passed in terms of Section 76 of the Constitution.

Where the constitutionality of legislation is challenged on a number of grounds, including process and substantive grounds, lower courts should express their opinions on all of those challenges.

Summary:

I. This application arose from an order of the High Court of South Africa, Gauteng Division, Pretoria (hereinafter, the "High Court"), in which the Court declared the Local Government: Municipal Systems Amendment Act (hereinafter, the "Amendment Act") constitutionally invalid in its entirety but declined to decide applicant's specific challenge, on non-procedural grounds, to the validity of one specific provision of the Amendment Act, Section 56A.

During May 2010, the draft Bill was introduced in the National Assembly and referred to the Joint Tagging Mechanism (hereinafter, the "JTM") for classification and to the Portfolio Committee on Co-operative Governance and Traditional Affairs for consideration. The JTM "tagged" the Bill as an ordinary Bill not affecting the provinces (Section 75 bill) – and therefore not required special procedures to pass through the National Council of Provinces.

On 2 July 2011, the Bill was enacted following the process set out in Section 75 of the Constitution. Among other things, the Amendment Act inserted Section 56A into the Act, which introduced the restriction that municipal managers or managers directly accountable to municipal managers could no longer hold political office in a political party.

The South African Municipal Workers' Union (hereinafter, "SAMWU") challenged the constitutional validity of the Amendment Act. First, it contended that the Amendment Act was wrongly tagged as an ordinary bill, rather than a bill affecting the provinces (Section 76 bill) (procedural challenge). Second, SAMWU submitted that Section 56A, when read together with the definition of "political office" in

Section 1, is an unjustifiable limitation of a number of rights, including the right to make free political choices as enshrined in Section 19.1 of the Constitution (substantive challenge).

The High Court upheld the procedural challenge. It declared the Amendment Act invalid as it failed to comply with the procedures set out in Section 76 of the Constitution. The High Court found it unnecessary to decide the substantive challenge.

SAMWU sought confirmation of the declaration of invalidity; but also direct access to appeal against the High Court's failure to make a determination on the substantive challenge to Section 56A. The Minister did not oppose the confirmation of the declaration of invalidity on the procedural ground, but argued that the substantive issue of Section 56A should not be separately determined if the procedural challenge to the entire statute succeeded. The Speaker of the National Assembly and Chairperson of the National Council of Provinces jointly sought to limit the retrospective effect of the confirmation of the declaration. The Premier of the Western Cape did not oppose, but sought to place further evidence before the Court on the retrospective effect of the declaration of invalidity.

II. The majority judgment, written by Khampepe J (Nkabinde ACJ, Cameron J, Froneman J, Madlanga J, Mbha AJ, Mhlantla J and Musi AJ concurring), upheld the procedural challenge and confirmed the High Court's declaration of invalidity. The majority held that the Bill provided for legislation aimed at promoting the values governing the public administration set out in Section 195.1 of the Constitution. As a result it ought to have been enacted following the Section 76 process. The Amendment Act was accordingly found to be unconstitutional for want of compliance with Section 76 of the Constitution. Having found the Amendment Act to be unconstitutional in its entirety, the majority declined to consider the substantive challenge to Section 56A: the procedural challenge was dispositive of the entire matter.

The majority held that to avoid disruption, the declaration of invalidity should operate prospectively only, and should in addition be suspended for 24 months to allow the Legislature an opportunity to remedy the defect. SAMWU contended that the declaration of invalidity should not be suspended in respect of Section 56A, as the continued operation of this section is not critical to the effective administration of municipalities. The majority rejected this argument, and found that there was no legal basis nor any basis in the Court's previous judgments to make an exception for Section 56A in relation to remedy.

III. The minority judgment, written by Jafta J (Zondo J concurring), agreed with the majority judgment except on whether, during the period of suspension, municipalities may enforce Section 56A. The minority held that since it was conceded that municipalities do not require Section 56A for their day to day administration, the duty to afford SAMWU temporary constitutional relief dictated that the section be singled out and excluded from the provisions that will otherwise remain in force. The minority would have suspended the declaration of invalidity on condition that municipalities are prohibited from enforcing Section 56A during the period of suspension.

Supplementary information:

Legal norms referred to:

- Sections 9, 15, 16, 18, 19, 22, 65, 75, 76, 154, 155, 163, 167, 172, 173, 195 and 197 of the Constitution of the Republic of South Africa, 1996;
- Local Government: Municipal Systems Amendment Act 7 of 2011;
- Public Service Act 103 of 1994.

Cross-references:

- *South African Municipal Workers Union v. Minister of Co-Operative Governance and Traditional Affairs* [2016] *ZAGPPHC* 733;
- *Biowatch Trust v. Registrar Genetic Resources* [2009] *ZACC* 14;
- *Phillips v. National Director of Public Prosecutions* [2005] *ZACC* 15;
- *Phillips v. Director of Public Prosecutions* [2003] *ZACC* 1*;*
- *S. v. Jordan (Sex Workers Education and Advocacy Task Force)* [2002] *ZACC* 22;
- *Tongoane v. National Minister for Agriculture and Land Affairs* [2010] *ZACC* 10*;*
- *Minister of Police v. Kunjana* [2016] *ZACC* 21;
- *Minister of Justice v. Ntuli* [1997] *ZACC* 7;
- *Affordable Medicines Trust v. Minister of Health* [2005] *ZACC* 3.

Languages:

English.

Identification: RSA-2017-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 17.03.2017 / **e)** CCT 48/17 / **f)** Black Sash Trust v. Minister of Social Development and Others / **g)** www.saflii.org/za/cases/ZACC/2017/8.html / **h)** [2017] ZACC 8; CODICES (English).

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**.
1.4.14.3 Constitutional Justice – Procedure – Costs – **Party costs**.
3.18 General Principles – **General interest**.
4.6.10.1.2 Institutions – Executive bodies – Liability – Legal liability – **Civil liability**.
4.15 Institutions – **Exercise of public functions by private bodies**.
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Contract, condition, performance / Contract, obligation, failure to fulfil / Court, order to report / Court, supervisory powers / Social security, grant, payment via private contractor.

Headnotes:

There must be accountability to both the judiciary and the public for supervisory orders of the Court.

Summary:

I. In 2012 the South African Social Security Agency (hereinafter, "SASSA") contracted with Cash Paymaster Services (Pty) Limited (hereinafter, "CPS") to pay social grants on its behalf. This contract was declared invalid by the Constitutional Court for procedural irregularities in its conclusion. But because millions of grant payments to vulnerable citizens were at stake, the order of invalidity was suspended and the Constitutional Court retained supervisory jurisdiction.

On 5 November 2015 SASSA filed a report, stating that it intended to take over the payment function of social grants itself from 1 April 2017 when the suspension of invalidity lapses. On that basis, the Constitutional Court discharged its supervision. It became apparent, following reports from various counsel, that SASSA was not in a position to take over the payment function from CPS on 1 April 2017, and would instead have to seek further assistance from CPS to ensure that 17 million social grants could continue to be paid. As a result, the Black Sash Trust, acting in the public interest, sought direct access on an urgent basis to the Constitutional Court.

Black Sash Trust applied for an order directing SASSA to clarify its interim contract with CPS from 1 April 2017 on, and stipulating that this contract must involve reasonable negotiations by CPS and include safeguards for the privacy, dignity and autonomy of grant beneficiaries. The Trust further sought an order requiring the Minister of Social Development (Minister) and SASSA to file continuing reports on progress taken to ensure social grant payments for this period, as well as a declarator that SASSA is obliged to ensure the payment method contains adequate safeguards for the privacy, dignity and autonomy of beneficiaries. Freedom Under Law NPC applied to intervene as an applicant. Corruption Watch NPC and South African Post Office SOC Limited (hereinafter, "SAPO") both sought admission as *amici curiae*.

II. The majority judgment by Froneman J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring) granted Freedom Under Law, Corruption Watch and SAPO standing. The majority held that SASSA and CPS are constitutionally obligated to ensure payment of social grants from 1 April 2017 onwards, in order to uphold the beneficiaries' constitutional right of access social security. Hence, the Court further suspended its initial declaration of invalidity and directed SASSA and CPS to extend the existing contractual arrangement to ensure 12 months of grant payments from 1 April 2017.

This order was made subject to additional conditions to ensure accountability, transparency and protection of the beneficiaries' personal information, and until an entity other than the CPS is able to take on this function. The Court further ordered that both SASSA and the Minister file quarterly reports on their plans to ensure grant payments, actions taken, and steps contemplated to ensure future payments beyond the expiry of the 12 month period. The Court further issued a rule *nisi* calling on the Minister to give reasons why she should not be ordered to pay costs of the application from her own pocket.

III. A concurring judgment, written by Madlanga J, agreed with Froneman J's finding, barring that order for CPS to extend the original service agreement on an interim basis, since it was previously ruled invalid

in *AllPay Consolidated Investment Holdings (Pty) Ltd v. Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42. The order on CPS should rather arise from the Court's remedial power, and should be justified based on CPS's constitutional obligation as an organ of state to continue payment of social grants.

Supplementary information:

Legal norms referred to:

- Sections 1, 27, 38, 55, 92, 172, 195 and 217 of the Constitution of the Republic of South Africa, 1996;
- Sections 4 and 6 of the South African Social Security Agency Act 9 of 2004;
- South African Post Office SOC Ltd Act 22 of 2011.

Cross-references:

- *AllPay Consolidated Investment Holdings (Pty) Ltd v. Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42;
- *AllPay Consolidated Investment Holdings (Pty) Ltd v. Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12;
- *Economic Freedom Fighters v. Speaker of the National Assembly; Democratic Alliance v. Speaker of the National Assembly* [2016] ZACC 11;
- *Doctors for Life International v. Speaker of the National Assembly* [2006] ZACC 11;
- *President of the Republic of South Africa v. South African Rugby Football Union* [1999] ZACC 11;
- *AAA Investments (Pty) Ltd v. Micro Finance Regulatory Council* [2006] ZACC 9;
- *Zondi v. MEC for Traditional and Local Government Affairs* [2004] ZACC 19;
- *Ramakatsa v. Magashule* [2012] ZACC 31;
- *Freedom Under Law (RF) NPC v. National Director of Public Prosecutions* [2015] ZAGPPHC 759;
- *Electoral Commission v. Mhlope* [2016] ZACC 15.
- *Government of the Republic of South Africa v. Grootboom* [2000] ZACC 19;
- *South African Human Rights Commission v. Minister of Home Affairs: Naledi Pandor* [2014] ZAGPJHC 198;
- *Madzodzo v. Minister of Basic Education* [2014] ZAECMHC 5; 2014 (3) SA 441.

Languages:

English.

Sweden
Supreme Administrative Court

Important decisions

Identification: SWE-2017-1-001

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 20.02.2017 / **e)** 2310-16 / **f)** / **g)** HFD 2017 ref. 4 / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

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**.

Keywords of the alphabetical index:

Civil rights / Freedom of conscience / Right to physical integrity.

Headnotes:

A Swedish government decision rejecting a religious community's application for state funding was reversed. A religious community, calling upon its members to act in a way that is compatible with the right to express opinions and the right to decline medical treatment, cannot be considered to be in conflict with democratic values as long as the religious community does not request that its members disapprove the State's occasional intervention in order to protect children.

Summary:

I. According to the Swedish act on state funding for religious communities (1999:932), a religious community may be granted state funding only if it contributes to maintaining and strengthening the fundamental values upon which society rests.

The case concerned an application for state funding submitted by Jehovah's Witnesses. The government rejected the application on the ground that Jehovah's Witnesses' resistance against blood transfusion, also in relation to minors, puts at risk the life and health of minors and leaves the needs of minors unsatisfied. The government found that Jehovah's Witnesses' posture regarding blood transfusion was incompatible with the fundamental values of society.

II. The Supreme Administrative Court stressed that the government had not alleged that Jehovah's Witnesses' posture regarding blood transfusion had resulted in the suffering of injury of minors. Instead, the government had pointed out that special guidelines had been formulated in the field of health care as regards the handling of such situations and that the social welfare board sometimes decides on the preventive detention of minors. The Supreme Administrative Court established that everyone is protected against forced physical intervention and that this protection can be restricted only by law. According to Swedish law a patient has in principle an unrestricted right to decline medical treatment. As regards children, the guardian normally has the right and the duty to decide in matters relating to the child's personal circumstances. However, the child's viewpoint on the matter shall be taken into account in relation to his or her age and maturity.

The Supreme Administrative Court found that a religious community, calling upon its members to act in a way that is compatible with the right to express opinions and the right to decline medical treatment, cannot be considered to be in conflict with democratic values as long as the religious community does not request that its members disapprove the State's occasional intervention in order to protect children. The Supreme Administrative Court pointed out that the Jehovah's Witnesses religion calls upon its members to collaborate with health care providers if it is decided that a child be given a blood transfusion. Therefore, the Supreme Administrative Court found that the provisions in question could not be interpreted as meaning that a religious community, whose belief causes it to call upon its members to decline blood transfusion, fails to meet the requirements for state funding. The government's decision was deemed to lack a legal basis and was therefore reversed.

Languages:

Swedish.

Identification: SWE-2017-1-002

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 10.03.2017 / **e)** 1171-16 / **f)** / **g)** HFD 2017 ref. 5 / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.

Keywords of the alphabetical index:

Animal cruelty / Animal, protection / Proportionality.

Headnotes:

The imposition of an unlimited ban from holding animals, on a farmer previously fined for an isolated act of animal cruelty, is incompatible with the principle of proportionality.

Summary:

I. According to the Swedish Animal Welfare Act a person who has been convicted of cruelty to animals shall be banned from keeping animals unless it is obvious that the crime will not be repeated.

The case concerned a farmer, A.A., who had been working with large livestock farming for 47 years. According to a summary imposition of a fine A.A. had admitted that he was guilty of causing a bullock suffering by not making sure the bullock got necessary veterinary care for a horn that grew into its forehead. That led the County Administrative board to ban A.A. from keeping or acquiring animals for an unlimited period of time. A.A. was also ordered to dispose the animals he owned.

II. The Supreme Administrative Court stated that the principal of proportionality shall be taken into account when a government agency makes decisions that are onerous for individuals. The Court found that the ban in question would, in the current situation, constitute a very hard measure whereby an owner would be deprived the right to his property and result in an effect similar to a ban on business activity.

In applying the exemption rule, a prospective assessment must be made of the risk that the misbehaviour will be repeated. It must be based on an overall assessment of all relevant circumstances and conditions. If a ban on keeping animals is announced because there has been a crime committed one should take into account the circumstances of the act or acts in questions. When the ban concerns a trader, consideration must also be given to how the business has been managed overall.

The investigation showed that through the years, A.A's livestock farming had been well-managed. The lack of supervision of a single animal of which A.A. had been punished was thus to be considered as an isolated event. The risk that other animals in the stock would suffer from mismanagement was therefore assessed as small. In addition, the ban on keeping animals would have a major impact on A.A. Therefore, the decision was deemed not to be proportionate in relation to the general interests of the applicable rules.

Languages:

Swedish.

Switzerland
Federal Court

Important decisions

Identification: SUI-2017-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Court of Public Law / **d)** 29.09.2016 / **e)** 2C_222/2016 / **f)** X. SA v. Y. and the Chamber of Notaries of the Canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 142 I 172 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.22 General Principles – **Prohibition of arbitrariness**.
5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **"Natural judge"/Tribunal established by law**.
5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

Keywords of the alphabetical index:

Administrative authority / Authority, collegial, composition / Notary, fee, determination**.**

Headnotes:

Article 29.1 of the Federal Constitution; the right to the correct and impartial composition of an administrative authority called upon to give a ruling.

Scope of Article 29.1 of the Constitution (general procedural guarantees) and of Article 30.1 of the Constitution (judicial procedural guarantees) with regard to the composition of an authority required to give a ruling (recital 3.1). Conditions under which Article 29.1 of the Constitution is applicable (recital 3.2). Presentation (recital 3.3) of the provisions of the Vaud notaries law relating to the composition of the Chamber of Notaries, followed by a review confined to the issue of arbitrariness (recital 3.4).

Summary:

X. SA disputed a fee note established by the notary Y. The latter submitted a request for arbitration of the fee note to the Chamber of Notaries of the Canton of Vaud. The notary Y was heard by two delegated notaries. The Chamber of Notaries confirmed the validity of the disputed fee note and awarded costs against X. SA., which appealed the decision. The Cantonal Court dismissed the appeal, considering that the composition of the Chamber of Notaries was correct at the time of ruling; not having allowed X. SA to attend the notary Y.'s hearing was indeed a violation of X. SA's right to be heard, but this violation had been remedied. X. SA then appealed to the Federal Court, which had to decide whether the Chamber of Notaries could validly adopt a delegated ruling.

The Federal Court pointed out that the procedural guarantees of Article 30.1 of the Constitution, invoked by the applicant, only applied to judicial authorities. The Chamber of Notaries is, however, an administrative authority, not a judicial authority. Nevertheless, Article 29.1 of the Constitution, like Article 30 of the Constitution, guarantees complainants that the administrative authority making an initial decision will be properly constituted. Therefore, although the applicant had invoked Article 30 of the Constitution, the Federal Court examined the complaint in the light of Article 29.1 of the Constitution, so as to avoid undue formalism.

Article 29.1 of the Constitution provides that, in legal and administrative proceedings, all persons have the right to have their case heard fairly and judged within a reasonable time. The case-law has derived from this provision a right: where an administrative authority gives a ruling, its composition must be correct and impartial. This does not rule out a degree of freedom in the composition of the authority, for example by allowing substitutes to participate in the decision-making process. The composition must nevertheless be based on objective criteria. The authority is validly constituted when its composition complies with the relevant organisational or procedural law. A decision rendered by an improperly composed authority constitutes a formal denial of justice and must therefore be annulled, with no possibility of remedying the defect, whatever the prospect of success of an appeal on the merits.

When the composition of the authority is established by cantonal law, the Federal Court confines its power of examination to the issue of arbitrariness. However, it examines with full jurisdiction whether the correct composition of the administrative authority, as established by cantonal law, meets the conditions set out in Article 29.1 of the Constitution. This means that the Federal Court must firstly determine whether, in the case before it, the composition of the Chamber of Notaries breaches cantonal law in an arbitrary manner. If no such breach is found, the Federal Court must then verify with full jurisdiction whether the

ordinary composition of the authority, as established by cantonal law, is compatible with the guarantee laid down in Article 29.1 of the Constitution.

In this case, the Chamber of Notaries ruled "by delegation" and not in its ordinary composition. The president and two delegated notaries made the initial decision. The Vaud notaries law (hereinafter, the "LNo") allows authorities to take measures through delegation, but explicitly limits this authority to interviewing witnesses and the seizure of documents. In that connection, the LNo provides that the inquiries and examinations of the Chamber of Notaries may be delegated to one of more of its members, who then report to the Chamber with a view to its decision. However, apart from this case, the LNo does not provide that the Chamber of Notaries may delegate its decision-making power; rather, it specifically states that the Chamber may deliberate only if five of its members are present, a quorum which is not fulfilled when a decision is delegated to a panel of less than five members. Therefore, the Cantonal Court made an arbitrary decision that the LNo contained an adequate legal basis allowing, through a regulation, the delegation of decision-making powers to at least two members of the Chamber of Notaries. X. SA's appeal must consequently be allowed.

Languages:

French.

Identification: SUI-2017-1-002

a) Switzerland / **b)** Federal Court / **c)** First Court of Public Law / **d)** 14.12.2016 / **e)** 1C_455/2016 / **f)** Muster v. The Federal Chancellery / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 143 I 78 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material**.
5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.
5.3.41.3 Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting**.

Keywords of the alphabetical index:

Referendum, government press campaign / Referendum, illegal campaign.

Headnotes:

Article 34 of the Federal Constitution; intervention by an authority in the campaign running up to a vote.

A canton may intervene in the campaign running up to a federal vote if the result of that vote directly and specifically concerns it. In such a case, the canton must remain objective, but can state its position and is not obliged to present all of the arguments for and against the draft law being put to the vote (recital 4).

The Canton of Zurich can claim to be specifically affected by the vote on the federal intelligence law because it is at particular risk of terrorist acts as a result of its many heavily used transport systems and the large demonstrations that take place or are organised within its territory. However, an inter-cantonal organisation such as the Conference of Cantonal Justice and Police Directors of Eastern Switzerland cannot legitimately intervene on behalf of the cantons concerned given the lack of any clear, specific impact in its case (recital 5).

Examination of the objectivity of the contents of a controversial press release by the Government Council of the Canton of Zurich (recital 6).

Summary:

On 25 September 2016 the federal intelligence law (hereinafter, the "LRens") was approved by referendum, with 65.5% of the votes cast in its favour. A few weeks before the date of the federal vote, the government of the Canton of Zurich and the Conference of Cantonal Justice and Police Directors of Eastern Switzerland published two separate press releases expressing their support for the new law.

A citizen of Zurich asked the Federal Court to declare the vote invalid and to rule that the Canton of Zurich and the Conference of Cantonal Justice and Police Directors of Eastern Switzerland had intervened unlawfully in the referendum campaign.

The guarantee of political rights safeguards the free formation of opinion by citizens and the faithful and reliable expression of their will. Voters must not be subject to unacceptable pressure or influence, either

in the formation or the expression of their political opinion. Citizens must be able to come to their decision through a will formation process that is compatible with the law and is as free and full as possible.

A canton may intervene in the campaign running up to a federal vote if it is directly and specifically concerned by the outcome of that vote to a clearly greater extent than the other cantons. The existence of such an interest is most likely to occur with regard to specific projects, such as infrastructure projects. If a canton has grounds to intervene in the campaign before a federal vote, it must remain objective. It can, however, state its position and is not obliged to present all of the arguments for and against the project.

The Federal Court ruled that government of Zurich could not be criticised for acting as it did. It began by pointing out that one of the aims of the LRens was to prevent terrorist acts during mass demonstrations or on busy transport infrastructure. The Court then noted that a large number of demonstrations take place in the Canton of Zurich and a large amount of infrastructure of this kind is located within its territory. The Federal Court concluded that the Canton of Zurich was specifically concerned by the subject of the vote and that the content of the press release did not undermine freedom of voting.

However, the Federal Court ruled that the press release by the Conference of Cantonal Justice and Police Directors of Eastern Switzerland constituted inadmissible interference in a referendum campaign. Unlike the Canton of Zurich, this inter-cantonal body could not claim to be specifically affected by the vote at issue.

The Federal Court completed its analysis by concluding that this irregularity did not, however, constitute grounds for invalidating the vote in question. In the light of the clear result of the ballot, in which around two-thirds of the votes were cast in favour of the LRens, it did not appear possible that the unlawful press release could have had a determining influence on the result of the referendum held on 25 September 2016. The appeal was therefore dismissed.

Languages:

German.

“The former Yugoslav Republic of Macedonia”
Constitutional Court

Important decisions

Identification: MKD-2017-1-001

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 18.01.2017 / **e)** U.br.160/2014 / **f)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 10/2017, 31.01.2017 / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
3.11 General Principles – **Vested and/or acquired rights**.
5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.

Keywords of the alphabetical index:

Civil service, skill, requirement / Transitional legal regimes.

Headnotes:

The introduction of special requirements for persons already employed at the courts (knowledge of foreign languages and computers) which must be proved within two years from the application of the law has a retroactive effect. It is not in conformity with the principles of acquired rights, legitimate expectations and legal certainty that form part of the principle of the rule of law.

Summary:

I. The applicants in this case (Trade Union of Employees in the State Administration and the Judiciary and the Judicial Administration Association) requested the Constitutional Court to consider the constitutionality of Article 144 of the Law on Judicial Service.

Under this provision, judicial officers employed at the court were required to submit evidence of proficiency in foreign languages and computers appropriate to their positions, within one year of the date of the accession of the country to the European Union. Failure to do so could result in assignment to a lower working position. The provision was not applicable to judicial officers who would retire within ten years of the date of application of the law.

The applicants considered that Article 144 violated the constitutionally guaranteed equality of citizens. It placed the older court officers who were not affected by it in a more favourable privileged position by comparison to the judicial officers to whom it applied. The applicants also argued that the measure in question was not proportional as it represented an excessive restriction of their freedoms and rights and by its retroactive effect it violated the principle of legal certainty as an element of the rule of law.

II. The Court reiterated its position from its previous case-law on transitional legal regimes, that the legislator has the right to introduce new, special conditions for work in a particular area, in this specific case the area of judicial service. It noted however, that transition from the old to the new regime should be carried out in a manner that guarantees that the measures chosen are adequate for the objectives and reasons for which they are envisaged, and that they do not jeopardise legal certainty and the already acquired rights and interests of the subjects concerned.

The Court pointed out that the provision in question created the possibility of losing an acquired right – the right of employment of court officers – and endangered the exercise of legitimate expectations the employees had at the time when they were employed under other terms and conditions, before the adoption of the new Law on Judicial Service. This category of employees acquired the rights and obligations of employment under the conditions set out in the then applicable Law on Judicial Service and were already subjected to evaluation in terms of their professional and working competencies for acquiring a specific job and title within the hierarchy of titles.

The Court indicated that Article 144 resulted in previously employed court officers being placed in a position of uncertainty of further enjoyment of their employment rights, acquired in a legal manner, since failure to meet the specific requirements of the new law within the specified deadline could result in negative consequences such as assignment to a lower position, and accordingly a salary decrease. Thus, in the opinion of the Court, the new conditions prescribed by the Law as conditions of employment in the judicial service, with relation to already employed court officers, become conditions for keeping the acquired employment rights. Through this retroactive effect they violated the constitutional principle of the rule of law.

The Court accordingly repealed the contested provision of the Law on Judicial Service.

Languages:

Macedonian, English (translation by the Court).

Identification: MKD-2017-1-002

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 01.02.2017 / **e)** U.br.93/2016 / **f)** *Sluzben vesnik na Republika Makedonija* (Official Gazette) / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.3.1 General Principles – Democracy – **Representative democracy**.
3.9 General Principles – **Rule of law**.
4.5.3.4.2 Institutions – Legislative bodies – Composition – Term of office of members – **Duration**.
4.5.3.4.3 Institutions – Legislative bodies – Composition – Term of office of members – **End**.

Keywords of the alphabetical index:

Members of parliament, mandate, beginning and end.

Headnotes:

A provision of the Law on the Assembly determining the point at which the mandate of a member of parliament begins and the point at which it ends is in accordance with the constitutional provision on this subject.

Summary:

I. The applicant challenged the constitutionality of Article 5.2 of the Law on the Assembly of the Republic of Macedonia which determines that the

term of office of the representatives lasts from the date of its verification until the date of verification of the term of office of newly elected representatives, but no longer than four years.

The applicant considered that the disputed provision was not in accordance with Article 63 of the Constitution and, with reference to the decision of the Constitutional Court in case U no. 87/2006 of 15 November 2006, argued that the term of office of MPs was a constitutionally regulated issue, that the exercise of the legislative function of the Assembly had been determined in time frames that did not allow performance of duties after the expiration of the four years or after the dissolution of the Assembly, as well as after the constitution of the new Assembly prior to the expiration of four years.

II. The Court began by examining Articles 1.1, 2.2, 8.1.3.5, 61 and 63 of the Constitution, noting that the exercise of power through democratically elected representatives is a constitutional principle upon which the organisation of state power is founded.

The Court analysed the relevant provisions of the Law on the Assembly and recalled earlier jurisprudence (Decision U no. 197/2009 of 23 March 2011) in which it had determined that the above law in its entirety was in accordance with the Constitution because it elaborated further constitutional provisions on the organisation and functioning of the Assembly.

In this context, the Court noted that Article 5.2 of the Law on the Assembly also specified and elaborated the constitutional provision of Article 63 which governed the term of office of MPs and determined the moment when the mandate began to run.

The Court also noted that the drafters of the Constitution had not determined in Article 63 of the Constitution the exact moment when the mandate of the representatives from one parliamentary composition terminates. Therefore, starting from the constitutional provision stipulating that the four-year term of representatives begins to run from the constitutive session of the Assembly, the legislator determined in the challenged provision the moment when the mandate of the representatives terminated – this being the moment of verification of the mandate of the newly elected MPs.

In the opinion of the Court, the rationale behind linking the moment of termination of the mandate of the representatives from one parliamentary composition to the moment of verification of the mandates of newly elected representatives is to ensure continuity in the work of the Assembly and to avoid situations of legal vacuum within the legislative power.

The Court concluded that the impugned provision was in accordance with the constitutional provision of Article 63 in terms of the length of the mandate of Representatives in the Assembly. It did not initiate proceedings for its constitutional review.

Languages:

Macedonian, English (translation by the Court).

Turkey
Constitutional Court

Important decisions

Identification: TUR-2017-1-001

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 01.02.2017 / **e)** 2014/19081 / **f)** T.T.A. / **g)** *Resmi Gazete* (Official Gazette), 10.03.2017, 30003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Discrimination, disease, HIV / Dismissal, unfair, discriminatory treatment.

Headnotes:

The balance between the interests of employees suffering from diseases and the interests of others must be observed by considering providing employees suffering from diseases with appropriate workplaces or positions of employment.

Summary:

I. The applicant started working at a pipe manufacturing company on 14 February 2005 and was diagnosed HIV-positive in December 2006.

The applicant was paid a monthly salary for six months but not permitted to enter the workplace and perform his job. The medical report obtained by the occupational physician of the company from Aegean University School of Medicine indicated that the state of health of the applicant constituted neither an impediment to working in any position nor a disability.

The applicant resigned on 26 January 2009 and signed a release of claims form.

On 5 November 2009, the applicant filed a lawsuit against the company with the local labour court. The labour court characterised the claims as a personal action and an action for non-pecuniary damages under Article 5 of Law no. 4857.

The labour court dismissed the action for non-pecuniary damages on the ground that the claims of violation of the right to privacy were not substantiated. The labour court, however, held that the fact that applicant was paid for six months but prevented from performing his job during that time by not being allowed to enter the workplace constituted a violation of the prohibition on discrimination. The court consequently held that the principle of equality was breached by the employer and entered judgment partly in favour of the applicant.

Upon appeal, the judgment was reversed on the ground that "the employer acted with the purpose of protecting other employees" and the case was remanded. The labour court subsequently dismissed the case on 20 March 2014 in accordance with the decision of reversal. This judgment was affirmed by the 9th Chamber of the Court of Appeal.

The applicant stated that:

i. first his removal from the workplace and then his unfair dismissal from work constituted discriminatory treatment; and
ii. the reasoning of the court for dismissing the case would prevent him from finding a new job, and that would cause serious hardships due to the high cost of the medical treatment – which might lead to a violation of the right to life and access to health.

II. The Constitutional Court pointed out that, although it may be considered advantageous that the applicant was paid during the time he was not allowed to work and then given severance pay when dismissed, the applicant – at a time that he most needed to work to cover the expenses of his medical treatment – was dismissed from work, not because of one of the legal reasons set out in Law no. 4857 but because he had been diagnosed HIV-positive. Therefore, the applicant was subjected to discriminatory treatment.

In their judgments, the labour court and the Court of Appeal emphasised the contagious nature of the disease (HIV) and considered that the only solution to eliminate that risk was to remove the applicant from the workplace. However, in those judgments, the issue of whether the employer had the responsibility

of providing the applicant with a workplace or position that does not pose a risk to other employees was not addressed. It must be also noted that:

i. the occupational physician recommended providing the applicant with another position;
ii. the staff manager recommended putting the applicant in an external position such as distributor visits; and
iii. the expert opinion obtained by the court concluded that the employer should put the applicant in a position where his disease would not pose a risk for other employees.

Despite the above, the employer failed to consider whether there was such an appropriate position for the applicant. In addition, the lack of assessment in the judgments of the labour court and appellate court regarding the responsibility of the employer to consider alternative positions for the applicant reveals that a fair balance was not struck between the interests of the employer and the interests of the applicant.

The Constitutional Court found that the first-instance courts failed to properly address the well-founded claims of the applicant on unfair dismissal, as well as the issue of the consideration of alternative positions for the applicant. The Constitutional Court accordingly concluded that there was a failure to fulfil the positive obligations as regards the right to privacy and the right to the protection of material and spiritual existence, and found a violation of both rights.

Languages:

Turkish.

Identification: TUR-2017-1-002

a) Turkey / **b)** Constitutional Court / **c)** First Section / **d)** 02.02.2017 / **e)** 2014/15146 / **f)** Recep Tarhan and Afife Tarhan / **g)** *Resmi Gazete* (Official Gazette), 23.03.2017, 30016 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Safety, public, danger, street closure, loss of income, loss of rent, decrease in value of property.

Headnotes:

When the right to property is interfered with, even for a legitimate purpose such as public safety, the principle of balance of interests must be observed and, if appropriate, there should be compensation for the loss.

Summary:

I. The applicants are owners of a property located on the Brave Woman Street, which is closed to vehicle and pedestrian traffic by a decision taken by the Ankara Transportation Coordination Centre (hereinafter, the "ATCC") on 15 March 2001 in order to ensure the security of the Israeli Embassy. Upon the request of inhabitants of the area, the ATCC took a decision to lift the closure of the street. However, the decision was not implemented.

The applicants filed a petition with the Governorate of Ankara for the implementation of the ATCC's decision. Having received no response from the Governorate, the applicants filed a lawsuit at Ankara Administrative Court, seeking to enforce the ATCC's decision. The case was dismissed, and the judgment was affirmed by the Council of State.

In the meantime, the General Assembly of the ATCC adopted a resolution to enquire of the Governorate whether a security risk exists around the Israeli Embassy. The Governorate replied that the removal of barriers and fences from the street would create security vulnerability. Following this reply, the ATCC took a decision not to remove the barriers and fences from the street.

The applicants stated that they had received a monthly rental of 3000 TL before the street was closed. After the closure, they had to reduce the rent to 1000 TL to reach a compromise with the tenant. They continued to receive 1000 TL per month for 49 months. Even though they did not attempt to raise the rent, the tenant terminated the contract and evacuated the property on 31 December 2008.

The applicants filed a lawsuit at Ankara Administrative Court, seeking to have the decision of the ATCC quashed. The court quashed the decision of the ATCC

on 31 March 2010 on the grounds that it was based on an abstract assumption of the existence of a security risk without carrying out a detailed inquiry and without relying on any concrete determination. Upon appeal by the administration, the Council of State quashed the judgment and remanded the case, stating that the purpose of the closure of the street was to ensure the security of the Embassy, and that it would be neither rational nor compatible with the nature of diplomatic relations to expect the existence of concrete determinations or threats for that purpose. The first-instance court subsequently dismissed the case, and the dismissal was affirmed by the Council of State.

The applicants' lawsuit for compensation of their loss was also dismissed. In that case, the court based its analysis on fault-based liability and did not consider the principle of strict liability.

The applicants alleged that their right to property was violated because of the decrease in the amount of rental income as a result of the closure of the street to pedestrian and vehicle traffic.

II. The Constitutional Court noted that, in this complaint, the interference with the property right must be assessed on the basis of the principle of proportionality. The Court noted that it is obvious that the decrease in the value of the property due to loss of rental income constitutes a burden on the applicants. The principle of proportionality requires compensation for the burden on the applicants resulting from the blocking of the street which is a measure aimed at fulfilling legal responsibilities arising from international law. However, in the present case, the first-instance court dismissed the case finding no fault of the administration, without allowing the applicant to prove the loss and the causal relation between the loss and administrative action/decision. The Constitutional Court noted that the first-instance court's interpretation that fault-based liability is required for compensation prevents the mitigation of the burden that the applicants bear because of the administrative measure.

However, Article 35 of the Constitution requires that means be employed to balance the interests of the owner even where an interference with the property right is based on the law and pursues a legitimate aim. Those means, aimed at protecting the interests of the owner, may, depending on the specific circumstances of a case, also include compensation for loss. Although it is at the discretion of lower courts to decide whether or not compensation is appropriate in a specific case, an analysis based solely on fault-based liability in such cases would not be compatible with the notion of proportionality under Article 35 of the Constitution.

In conclusion, requiring the applicants to bear the whole burden resulting from a measure taken in the interest of the whole society does not strike a fair balance between public interests and the interests of the property owner. Such interference with the property right places a heavy burden on the applicants and therefore may not be considered proportionate.

For the foregoing reasons, the Constitutional Court held that the right to property had been violated.

Languages:

Turkish.

Identification: TUR-2017-1-003

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 15.02.2017 / **e)** 2014/2983 / **f)** Orhan Pala / **g)** *Resmi Gazete* (Official Gazette), 29.03.2017, 30022 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests**.
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.
5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

Keywords of the alphabetical index:

Internet, information, false, dissemination / Media, information, standard of care.

Headnotes:

It suffices that journalists act with due responsibility: imposing a heavy burden on journalists to prove the full accuracy of news is not compatible with freedom of the media.

Summary:

I. The applicant is a journalist and the chief editor of a news website which publishes news and news articles on capital markets.

The website published news regarding two persons who are owners of a stockbroking company and partners of a public company listed on the Istanbul Stock Exchange (IMKB). The news alleged that those two persons had been convicted of the offence of manipulating the market but the sentence was subject to statute of limitations, and that they were charged with the offences of fraud and acting against the Capital Market Law, as well as with offences concerning an armed terror group and organised crime. The rest of the news article provided information regarding the companies acquired by those two persons and claimed that they lived in luxury and the source of their wealth was unknown.

The two persons filed a criminal complaint against the applicant, stating that:

i. the news did not reflect the truth; and
ii. the distorted information damaged their reputation and caused a decline in the stock value of their listed companies.

The applicant responded that the news reflected the truth and presented a copy of the indictment of those persons. In addition, the applicant provided a document allegedly received from the National Judicial Network System (hereinafter, the "NJNS") containing information on the charges pending against those persons. The applicant was subsequently convicted of defamation, and the pronouncement of the judgment was suspended. An appeal against the sentence was denied.

The applicant claimed that there was a violation of the right to fair trial, stating that the source of the news was a copy of a document obtained from the NJNS, and that the first-instance court had failed to take it into consideration. The applicant also claimed that there was a violation of freedom of expression, stating that the news complained of was of public interest because the persons were managers and partners of public companies.

II. The Constitutional Court noted the applicant's statement that the source of information was a document obtained from the NJNS and that it had been presented to the first-instance court in good faith. The first-instance court, however, did not inquire into the authenticity of the document. In other words, that court declined to consider a piece of plausible evidence put forward by the applicant. The Ministry of Justice acknowledged that the document presented was an authentic copy of the NJNS information screen, and that the information ın the System was updated afterwards. Because the applicant had mainly relied on an official document as the source of the news, it cannot be said that the applicant had acted in bad faith or with intention to falsify the truth.

It would be a very heavy burden on journalists to expect them to act like prosecutors and to prove the full accuracy of news stories. Such a heavy burden may result in unfair outcomes in trials of journalists. Therefore, in the present case it must be accepted that the applicant acted with due responsibility.

Furthermore, it is apparent that the imprisonment of journalists for media offences is not compatible with the freedom of expression. Such a punishment may be acceptable only in exceptional circumstances. Although it may be understandable that a person who suffers pecuniary or non-pecuniary damage due to a false news story is entitled to file a personal action against the journalist responsible for this, a sentence of imprisonment for defamation would inevitably have a restrictive effect on the exercise of the freedoms of expression and the press.

In the applicant's case, the pronouncement of the judgment was suspended with a probation period of five years. However, the risk of imprisonment continues to exist during the probation period. The anxiety caused by the mere existence of that risk may have a chilling effect on the applicant with respect to the exercise of the freedoms of thought and the press.

In conclusion, the Constitutional Court found that the freedoms of expression and the media enshrined in Articles 26 and 28 of the Constitution had been violated.

Languages:

Turkish.

United Kingdom
Supreme Court

Important decisions

Identification: GBR-2017-1-001

a) United Kingdom / **b)** Supreme Court / **c)** / **d)** 24.01.2017 / **e)** / **f)** R (on the application of Miller) v. Secretary of State for Exiting the European Union / **g)** [2017] UKSC 5 / **h)** [2010] *Weekly Law Reports* 583; CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities**.
2.1.2.2 Sources – Categories – Unwritten rules – **General Principles of law**.
2.2.2.1 Sources – Hierarchy – Hierarchy as between national Sources – **Hierarchy emerging from the Constitution**.
3.4 General Principles – **Separation of powers**.
4.6.2 Institutions – Executive bodies – **Powers**.

Keywords of the alphabetical index:

Distribution of powers.

Headnotes:

Notice of withdrawal from the European Union through giving notice under Article 50 of the Treaty on the European Union (the Lisbon Treaty), under the United Kingdom's constitution, could not be effected by the Executive relying on the royal prerogative. As withdrawal from the European Union would alter domestic legal rights within the United Kingdom, notice under Article 50 could only be carried out pursuant to power granted by an Act of Parliament.

Summary:

I. On 23 June 2016 a national referendum was held in the United Kingdom on the question of its membership of the European Union. A majority voted in favour of leaving the European Union. The UK government intended to rely upon the royal prerogative power to withdraw from treaties to give effect to the referendum result through giving notice of withdrawal from the European Union under the mechanism provided by Article 50 of the Lisbon Treaty. The validity of the proposed use of the royal prerogative was challenged by Miller and others. A Divisional Court of the Queen's Bench Division of the High Court of England and Wales held that the royal prerogative could not be used to effect the giving of notice. The Supreme Court, by a majority of eight to three, upheld that decision. It further rejected arguments based on the United Kingdom's devolution arrangements that before notice could be given either the devolved legislatures had to be consulted or their consent had to be obtained.

II. Lord Neuberger PSC, Lady Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge gave a joint judgment. Lords Reed, Carnwath and Hughes dissented.

The central thrust of Miller's argument was that it was a well-established principle of UK domestic law that the royal prerogative cannot be relied upon to vary or remove statutory rights. The Executive could not rely upon the prerogative to effect notice of withdrawal as, it was argued; such notice would alter domestic rights created by the European Communities Act 1972. In order to alter domestic law Parliamentary authorisation via an Act of Parliament was required. The main argument advanced on behalf of the Secretary of State was that the 1972 Act did not prevent reliance on the royal prerogative. The 1972 Act, it was argued, gave effect to European Union law only to the extent that that was required by Treaty. As such its effect was contingent on the UK being signatory to such a Treaty or Treaties. Should the UK not be or cease to be signatory to such Treaties, there would be no law for the 1972 Act to give effect to in domestic law. As such, it was argued, "in the 1972 Act, Parliament had effectively stipulated that, or had sanctioned the result whereby, EU law should cease to have domestic effect in the event that ministers decided to withdraw from the EU Treaties".

The majority noted that it was a long-standing principle of the United Kingdom's uncodified constitution that the Executive can only exercise the Crown's administrative powers consistently with legislation and the common law. It was established in the 17th century that the Executive cannot alter the law, except as authorised by Parliament. Furthermore, it was "a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative does not enable ministers to change statute law or common law... Exercise of ministers prerogative powers must therefore be consistent both with the common law as laid down by the courts and with statutes as enacted by Parliament".

The majority further held that as long as the 1972 Act remained in force, it rendered European Union law a source of domestic law, which prevailed over all other sources of UK domestic law. It was common ground between the parties that when the UK ceases to be a member of the European Union its domestic law will change. Withdrawal from the European Union would effect a fundamental change to the United Kingdom's constitutional settlement. In order to effect such a change, one which would remove a source of law-making and of European Union law, can only be effected by Act of Parliament. Moreover, as withdrawal from the EU Treaties would alter existing domestic law, it can only be effected through authority given by an Act of Parliament. The 1972 Act did not itself, as it could have done, provide the necessary authority for the Executive to effect withdrawal.

The majority further held that the UK's domestic constitutional arrangements i.e., devolution of legislative authority to Scotland, Wales and Northern Ireland, did not necessitate the UK's continuing membership of the European Union. Those arrangements, moreover, did not require the devolved legislatures to be consulted or concur with withdrawal. EU membership was solely within the legal competence of the UK Parliament.

Lord Reed, in his dissenting judgment, held that the 1972 Act did not affect the prerogative power to withdraw from treaties. The 1972 Act simply provided that, should the UK remain signatory to EU Treaties, EU law flowing from those treaties were UK law. That requirement was conditional upon continuing membership of the EU. Membership was a matter for the Executive under the prerogative.

Languages:

English.

Inter-American Court of Human Rights

Important decisions

Identification: IAC-2017-1-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 15.02.2017 / **e)** Series C 331 / **f)** Zegarra Marín v. Peru / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.19 General Principles – **Margin of appreciation**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.

Keywords of the alphabetical index:

Burden of proof, reversal / Co-defendant, testimony / Evidence, assessment / Evidence, reliability / Judicial protection, right / Reasonable doubt.

Headnotes:

The principle of presumption of innocence is a guiding principle in criminal trials and a foundational standard in the evaluation of evidence, which establishes boundaries for judicial subjectivity and discretion. In a democratic system, the evaluation of evidence must be rational, objective, and impartial in order to disprove the presumption of innocence and generate certainty with respect to criminal liability.

Statements made by co-defendants are part of the body of circumstantial evidence in a case and, as such, their content should be evaluated in accordance with sound judicial discretion. That is, to reach a conviction, there must be sufficient evidence, which

in turn must be substantial, precise and consistent. Co-defendants are not under any obligation to testify given the significance of the act for the defence, unlike a witness who would incur criminal liability if his testimony included lies or even through omissions or reluctance to answer questions truthfully.

The State bears the burden of proof in a criminal proceeding. The accused is not obligated to affirmatively prove his innocence or provide exculpatory evidence. In other words, the ability to provide counterevidence is a right of defence to disprove the accusation, with counterevidence or evidence for the defence compatible with alternative theories of the case, which the accusing party bears the burden of disproving.

To guarantee the presumption of innocence, especially as regards a criminal conviction, a reasoned judgment is imperative. The judgment must state the sufficiency of the prosecution's evidence in proving its theory of the case, observe the rules of sound judicial discretion in evaluating the evidence, including that which could generate doubt as to criminal liability, and include the final findings derived from the assessment of the evidence. It must further demonstrate the reasons for which a conviction on the charge presented and a finding of criminal liability were appropriate, as well as lay out the evaluation of the evidence to disprove any claim of innocence. Only thus can a judgment sustain or reject a conviction. The foregoing would make rebutting the presumption of innocence and finding criminal liability beyond all reasonable doubt possible. Where there is any doubt, the presumption of innocence and the principle of *in dubio pro reo* should be decisive factors when issuing the judgment.

Summary:

I. On 10 March 1994, Mr Zegarra Marín was Deputy Director of Passports in the Office of Migration and Naturalisation in Peru. Between August and October of 1994, the press revealed that certain passports had been issued improperly. Among these was one for Mr Manrique Carreño, for whom an arrest warrant had been issued for fraud. According to the press, Mr Manrique Carreño's passport was issued with Mr Zegarra Marín's signature.

An *ad hoc* prosecutor was assigned on 12 September 1994 to Mr Manrique Carreño's case. On 21 October 1994, the office of the prosecutor charged several officials within the Office of Migration, including Mr Zegarra Marín, with offences related to the illegal issuance of passports. On that same day, the judge on the Thirty-Seventh Criminal Court of the Lima High Court issued an arrest warrant. This arrest warrant was appealed various times and withdrawn on 22 June 1995, given that the charges against Mr Zegarra Marín had been dropped after it was determined that the signature attributed to him was fake. He was subsequently freed on 30 June 1995, after having been detained for over 8 months.

On 8 November 1996, the Fifth Criminal Chamber of the Supreme Court of Justice found Mr Zegarra Marín guilty of offences against the administration of justice (concealing persons), misconduct in public office (general falsification of documents), and official corruption. He was sentenced to four years in jail, which were conditionally suspended, and ordered to pay civil reparation damages in the amount of S/ 3,000 *Nuevos Soles*. The plausibility of the facts as identified in the testimony of the co-defendants played a decisive role in the judgment, which expressly stated that the defendant did not disprove the charges against him in their totality, "because, the defence did not raise conclusive evidence that would render him totally innocent."

Mr Zegarra Marín subsequently filed a motion to annul the judgment. On 17 December 1997, the First Transitory Criminal Chamber of the Supreme Court of Justice issued a judgment that affirmed the lower court's ruling and imposed additional penalties. On 14 September 1998, Mr Zegarra Marín filed an appeal for review with the Chief Justice of the Supreme Court of Justice of the Republic. The appeal was declared inadmissible.

On 22 August 2014, the Inter-American Commission on Human Rights submitted the case to the Court. In its Merits Report, the Commission alleged the State violated Articles 8.1, 8.2 and 25 ACHR, to the detriment of Mr Zegarra Marín.

The State submitted three preliminary objections, two of which were declared inadmissible, and the third was rejected because it entailed a review of the merits. The State also presented two "procedural aspects" for the Court's consideration:

i. the admissibility of the deprivation of liberty claim; and
ii. the admissibility of certain facts.

II. With respect to the first procedural aspect, the Court decided it would not rule on the merits of the alleged victim's claims on the right to personal liberty given that the alleged victim, after having been freed, did not avail himself of any domestic remedy capable of providing redress. With respect to the second, the Court accepted the State's position because the alleged facts related to Mr Zegarra Marín's discharge and his exclusion from the performance table were not brought within the jurisdiction of the Court.

Regarding the alleged violation of Article 8 ACHR, the dispute turned on whether, in accordance with the standards of due process, the principle of presumption of innocence and the duty to give reasoned decisions were infringed to the detriment of the alleged victim.

On the merits, the Court found that the principle of presumption of innocence was not respected in the case at hand. The judgment reversed the burden of proof, as can be seen in the statement that "the defence did not raise conclusive evidence that would render him totally innocent." The Court noted that in the judgment issued by the Fifth Criminal Chamber, *ex officio* evidence and evidence for the defence that purportedly could have been favourable to the accused was mentioned but not discussed. Thus, the Court determined that the Fifth Criminal Chamber did not comply with its obligation to objectively and rationally evaluate the evidence before it or to disprove the claim of innocence based on such evidence in order to determine whether there was criminal liability.

With respect to the duty to give reasoned decisions, the Court highlighted the significance of reasoning in ensuring the presumption of innocence, especially in a conviction. The Court held that the judgment failed to adequately state reasons, given that the *ex officio* evidence and evidence for the defence was simply listed but not analysed. The judgment also failed to note which evidence or circumstances of the offence formed the basis for the finding of culpability. The Court further noted that the reasons for which the judges considered that the acts attributed to Mr Zegarra Marín fell within the scope of criminal laws were not discernible from the judgment, as the time, manner and place of each of the crimes of which he was accused were not set out therein. Finally, the Court found that the lack of reasoning had a direct impact on the ability to exercise the right of defence and to appeal the judgment.

The Court held that, based on the foregoing, the State violated the principle of presumption of innocence with respect to Mr Zegarra Marín and did not ensure that adequate reasons were given in the judgment. Specifically, the burden of proof was reversed, the co-defendants' statements were neither corroborated nor analysed in light of the corresponding evidence to find culpability beyond a reasonable doubt. This was demonstrated by the failure to state reasons in the judgment, infringing on the right to a duly reasoned judgment, which would ensure the possibility of appeal. The State was thus held internationally responsible for violating Article 8.1 and 8.2 ACHR to the detriment of Mr Zegarra Marín.

Regarding the alleged violation of Articles 8.2.h and 25 ACHR, the dispute required an examination of, on the one hand, the right to appeal the lower court's judgment via the motion to annul, and, on the other hand, the suitability of the appeal for review. The Court stated that in order to resolve the issues raised by the applicant, the First Chamber of the Supreme Court would need to have expressly referred to Mr Zegarra Marín's challenges and have ruled on the main questions presented. This would guarantee the opportunity to carry out a comprehensive review of the contested judgment, bearing in mind the right to appeal the judgment to a higher court. The Court reiterated that for an appeal to be considered valid, the competent authority must carry out an analysis of the issues raised by the applicant and expressly give reasons as to its judgment on these points.

The Court found that the First Transitory Criminal Chamber merely upheld the lower court's findings in its decision on the motion to annul, filed by Mr Zegarra Marín during the hearing held on 8 November 1996, without addressing the main arguments put forth by the applicant. The Court held that the appeal was not effective as the appellate court did not ensure a full revision of the lower court's judgment in practice. The State was therefore found to have violated the right to appeal the judgment to a higher court provided in Article 8.2.h ACHR, as well as in Article 25 ACHR, in that it failed to provide an effective remedy that would protect the rights that were infringed upon.

As regards the appeal for review, the Court found that, at the relevant time, this was not the appropriate remedy under Peruvian law to challenge an ordinary conviction. The appeal for review was an extraordinary remedy and Mr Zegarra Marín's case did not fall under any of the grounds provided by law to resort to such remedy. Therefore, it was not adequate for the instant case. Given the foregoing, it was not necessary to examine the validity of the appeal for review and the State was found not responsible for a violation of Article 25.1 ACHR.

Finally, the Court did not rule on the alleged violation of Article 2 ACHR with respect to the above-mentioned remedies since it found that the Representatives' allegation was not presented in a timely manner.

In light of the above, the Court adopted the following forms of reparation:

i. Restitution: the judgment issued in the criminal trial against Mr Zegarra Marín is not legally valid and the State must therefore adopt all necessary measures to nullify all ensuing consequences, as well as any criminal, administrative, or police records related to the proceedings;

ii. Satisfaction: the State must publish the Court's judgment and official summary; and
iii. Compensation: the State must pay the amount set forth in the judgment of non-pecuniary damages, reimbursement of costs and expenses, and reimbursement of costs to the victims' assistance fund.

Languages:

Spanish.

Identification: IAC-2017-1-002

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 16.02.2017 / **e)** Series C 333 / **f)** Nova Brasilia Favela v. Brazil / **g)** Secretariat of the Court / **h)** CODICES (Spanish, Portuguese).

Keywords of the systematic thesaurus:

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.
5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice**.
5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.
5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime**.

Keywords of the alphabetical index:

Extrajudicial execution and torture, duty to investigate / Due diligence, strict duty / Sexual violence / Judicial protection / Crime, investigation, body responsible, independence.

Headnotes:

The essential element of the criminal investigation of a death caused by police intervention is the guarantee that the investigative body is independent vis-à-vis the public employees involved in the incident. Independence in this instance means the absence of an institutional or hierarchical relationship, as well as independence in practice. In cases of alleged grave crimes in which police personnel are *prima facie* seen as possibly responsible, the investigation must be carried out by an independent body that is also different from the police force involved in the incident, such as a judicial authority or the Office of the Public Prosecutor, assisted by police personnel, criminalistics experts and clerical staff who are also separate from the security force to which the accused belongs to.

If the independence or impartiality of the investigative body are called into question, the Court must apply greater scrutiny in its analysis in order to verify whether the investigation was done in an independent and impartial manner. Furthermore, it must examine whether and to what extent the alleged lack of independence and impartiality impacted the effectiveness of the proceeding carried out to determine what happened and punish those responsible. Some essential criteria, which are interrelated, ought to be observed so as to determine whether the investigation was effective in these cases:

i. adequacy of the investigative measures;
ii. celerity of the investigation;
iii. the participation of the family of the deceased; and
iv. the independence of the investigation.

In cases of death caused by police intervention, in order for the investigation to be effective, it must be able to determine whether the use of force was justified or not given the circumstances of the case. In these types of cases, domestic authorities must apply a particularly rigorous scrutiny with regard to the investigation.

With regard to the intervention of bodies in charge of supervising the investigation or the Judiciary, it is necessary to note that on some occasions, failures in the investigation can be remedied, but in other cases this is impossible due to its advanced stage and the magnitude of the errors of the investigative body.

Summary:

I. The facts of the case took place in 1994 and 1995, when the civil police of Rio de Janeiro carried out two operations in the *Nova Brasilia Favela* (slum). During the public hearing of this case and in its final written allegations, the State recognised that the conduct of public agents during the two police incursions, which resulted in the homicide of 26 people and in acts of sexual violence against three young women, constituted violations of Article 4.1 ACHR (right to life) and Article 5.1 ACHR (right to personal integrity), even if such facts are not under the temporal jurisdiction of the Court.

In the first operation, on 18 October 1994, the police killed thirteen male residents of the *Nova Brasília Favela*, four of whom were children. In addition, police officers perpetrated acts of sexual violence against three young women, two of whom were children of 15 and 16 years of age at the time.

The second incursion, on 8 May 1995, resulted in three wounded police officers and thirteen men of the community killed. Two of them were minors.

As a result of both police operations, investigations were initiated by the Rio de Janeiro Civil Police. Also, a Special Investigation Commission was set up by the Governor of the State of Rio de Janeiro in late 1994, focusing on the events of the first police operation.

During the investigations, all 26 deaths were registered as "resistance to arrest resulting in the death of the opponents" and "drug traffic, armed group and resistance followed by death." Both investigations were archived in 2009, following the application of a statute of limitations.

Subsequently, once the Inter-American Commission served notice of its Merits Report upon Brazil, in May 2013, the Public Prosecution Office of the State of Rio de Janeiro initiated a criminal action against six persons involved in the first operation in the *Nova Brasília Favela*. This criminal action remains pending. Regarding the second operation, the reopening of the investigation was denied by the Judiciary.

The investigations did not clarify the events surrounding the killings and no one was sanctioned therefore. With regard to the acts of sexual violence, the authorities have never conducted an investigation as to these events.

On 19 May 2015, the Inter American Commission on Human Rights submitted the case, alleging violations to Articles 1.1, 4, 5.1, 5.2, 8.1, 19 and 25 ACHR.

The State submitted seven 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. two objections of lack of jurisdiction *ratione temporis* over facts that occurred before the acceptance of the Court's jurisdiction by the State and regarding the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (*Belém do Pará* Convention);
iv. lack of jurisdiction *ratione materiae* regarding the principle of subsidiarity of the Inter-American System;
v. lack of jurisdiction *ratione materiae* over alleged violations of the Inter-American Convention to Prevent and Punish Torture and of the *Belém do Pará* Convention;
vi. non-exhaustion of domestic remedies; and
vii. non-observance of a reasonable period for the submission of a request for criminal investigation to the Court. The Court partially admitted the objections of lack of jurisdiction *ratione temporis* over facts that occurred before the acceptance of its 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 a fair trial and judicial protection established in Articles 8.1 and 25.1 ACHR, in relation to Articles 1.1 and 2 ACHR, to the detriment of 74 relatives of the young men killed during the police incursions into the *Nova Brasilia Favela* in 1994 and 1995.

The Court concluded that the investigations into both police operations were assigned to the same branch responsible for the incursions into the *Favela*, and this constituted a violation of the guarantee of independence and impartiality. In addition, the investigations carried out by other branches of Rio de Janeiro's civil police did not comply with the minimum standards of due diligence in cases of extrajudicial executions and grave human rights violations. Even if the conduct of the police was plagued with omission and negligence, other state bodies had the opportunity to rectify these problems but did not do so.

With regard to the duty of due diligence, the Court held that the investigations into both police operations resulted in undue delays, mainly as a consequence of the lack of action by the authorities, long periods of inactivity and non-fulfillment of investigative measures. The investigations were archived due to the statute of limitations. All of the above were matters attributable

to the State. The length of both investigations, of approximately fifteen years, left the relatives of the deceased victims in a situation of uncertainty with regard to those responsible for their deaths.

In terms of the right to judicial protection, the Court affirmed that the investigative measures implemented in the present case were irrelevant. This situation constituted a denial of justice for the victims, as they were not guaranteed, materially and legally, their right to judicial protection.

With regard to the victims of sexual violence, the Court highlighted that the authorities did not take measures to investigate the facts in a diligent manner, even when they were informed about the facts soon after their occurrence. The victims were only allowed to participate in the legal procedures as witnesses, and never as victims of sexual violence. Nor did they receive any compensation.

Most of the failures regarding the investigation of sexual violence took place before the date on which Brazil accepted the Court's jurisdiction. However, the State did not take any meaningful measures after 10 December 1998 in order to correct, mitigate or compensate those actions and carry out, from that moment onwards, a diligent, serious and impartial investigation to determine criminal responsibility for the acts of sexual violence.

The Court thus held that the complete lack of State action with respect to the sexual violence and possible acts of torture, and the lack of access to justice, constituted a violation of the rights to judicial guarantees and judicial protection, established in Articles 8.1 and 25 ACHR, in relation to Article 1.1 ACHR, and of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, as well as of Article 7 of the *Belém do Pará* Convention, to the detriment of three female victims.

With regard to the right to personal integrity, established in Article 5.1 ACHR, the Court found violations thereof resulting from the lack of investigation, trial and punishment of those responsible for the death of the victims. Fifteen relatives had their psychological and moral integrity affected by the lack of investigation. However, the Court was unable to establish a violation regarding the remaining relatives due to lack of evidence. In addition, the Court established that the personal integrity of the three women who were subjected to sexual violence was violated due to the lack of identification and punishment of the perpetrators, which caused them to feel anguished, unprotected and without any reparation.

The Court concluded that the allegation that the three women had to abandon their homes and the *Favela* fell outside the facts established by the Inter-American Commission in its Merits Report, thus making it impossible to declare a violation of Article 22.1 ACHR.

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. conduct an effective investigation on the facts related to the deaths that occurred in the 1994 incursion, with due diligence and within a reasonable time, to identify, prosecute and, if applicable, punish those responsible;
ii. initiate or restart an effective investigation regarding the deaths of the 1995 incursion;
iii. evaluate whether the facts regarding the incursions of 1994 and 1995 must be object of a request of Incident of Displacement of Competence *(Incidente de Deslocamento de Competência)*;
iv. initiate an effective investigation regarding the sexual violence;
v. provide free medical and psychological or psychiatric treatment to the victims that require it;
vi. publish the Judgment and its official summary;
vii. carry out a public act of recognition of international responsibility in relation to the facts of this case and its investigation, during which two plaques must be inaugurated in memory of the victims of this judgment;
viii. publish annually an official report with data on deaths caused during police operations in all states of the country, with updated information annually on the investigations conducted in respect of each incident resulting in the death of a civilian or a police officer;
ix. set up the mechanisms necessary to ensure that, in cases of deaths, torture or sexual violence resulting from police intervention, in which *prima facie* police officers appear as the accused, from the moment of receipt of *notitia criminis,* the investigation should be delegated to an independent body that is different from the public authority involved in the incident, such as a judicial authority or the Public Prosecutor's Office;
x. adopt the necessary measures for the State of Rio de Janeiro to establish goals and policies to reduce police killings and violence;
xi. implement, within a reasonable time, a permanent and compulsory program or course on how female victims of rape must be attended to;
xii. adopt the legislative or other measures necessary to enable victims of crime or their family members to participate, formally and effectively, in the investigation of crimes conducted by the police or by the Public Prosecutor's Office;

xiii. adopt the necessary measures to standardise the expression “personal injury or homicide resulting from police intervention” in the reports and investigations in cases of death or injuries caused by police action. The concept of “opposition” or “resistance” to police action should be abolished; and
xiv. pay pecuniary and non-pecuniary damages, as well as costs and expenses.

Languages:

Spanish, Portuguese.

Identification: IAC-2017-1-003

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 25.03.2017 / **e)** Series C 334 / **f)** Acosta *et al*. v. Nicaragua / **g)** Secretariat of the Court / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime**.

Keywords of the alphabetical index:

Due diligence, duty / Right to the truth / Human rights defender, access to justice / Investigation, adequate.

Headnotes:

The decisive criteria for determining if a person is acting as a human rights defender is not whether he or she considers herself as such, but in the identification of the activities he or she performs. The defense of human rights can only be freely achieved if the defenders are not subject to threats or to any kind of physical, psychological or moral aggression, or any other kind of harassment. Therefore, in cases of threats or aggression to human rights defenders or their family members, States must provide the resources necessary for them to be protected, as well as access to impartial, timely and *ex officio* justice. States shall investigate in a serious and effective manner, taking into account the context and the activities of the defender, in order to determine the lines of investigation (possible interests affected) and to identify those responsible.

The system of proceedings is a means for achieving justice and justice cannot be sacrificed by mere formalities. A formality has no reason for being when it is demonstrated that judicial remedies and appeals are dismissed without examining their validity, or based on futile reasons, with the effect of hindering certain complaints from being effectively decided, to the detriment of certain individuals. Even though States may and should establish criteria of admissibility for such remedies, they must provide legal security as to the correct and functionally fit administration of justice, as well as the effective protection of the rights of individuals.

Judges, in their role of directors of the proceedings, have a duty to set forth the judicial process without sacrificing justice and fair trial against formalities and impunity.

The right of presumption of innocence obliges the State to not informally condemn a person, nor shape public opinion about any person, while his or her criminal responsibility has not yet been determined by a legal process. This right can be violated either by the judges in charge of the case or by other state authorities; thus, judges and other authorities should be discreet and prudent when giving public declarations concerning an ongoing criminal proceeding.

Summary:

I. María Luisa Acosta Castellón is a renowned lawyer and human rights defender, specifically of indigenous peoples inhabiting the Nicaraguan coast. Between October 2000 and January 2002, she provided legal advice to indigenous communities from la Cuenca de Laguna de Perlas, who lodged several administrative

and judicial complaints, in order to vindicate their right to use and possess ancestral indigenous lands located in the *"Cayos Perlas"* (Perlas Keys). Seven out of twenty-two of these Keys were purchased by "PT," a US-American/Greek real estate investor, and his partner "PMF," a Nicaraguan lawyer who further sold the properties to foreign buyers, by means of alleged illegal transactions. The complaints lodged by the indigenous communities represented by María Luisa Acosta were directed at "PT" and "PMF" (identity reserved on the basis of their right to presumption of innocence).

On 8 April 2002, María Luisa Acosta found her husband, Francisco José García Valle, lying dead in their family home. Between 19:00 and 20:00 he was shot in the chest area, his hands and feet were tied and his mouth was bound. The homicide was perpetrated by Iván Argüello and Wilberth Ochoa, two Nicaraguans who had rented the ground floor of the house the day before.

As a result, authorities began a police investigation which involved several proceedings over the following months. Some days after that, the Criminal Court of Bluefields initiated pre-trial proceedings and received the declarations of María Luisa Acosta, PT and PMF. In her declarations, María Luisa Acosta insisted that PT and PMF were the masterminds or intellectual authors of the homicide. She reasoned that they were actually trying to kill her, instead of her husband, as her legal advice of the indigenous peoples was against the businessmen's personal interests on the indigenous lands. PT and PMF plead not guilty and requested that María Luisa Acosta be investigated as a possible masking agent. This request was immediately accepted by the presiding judge.

María Luisa Acosta and her children moved away from Bluefields out of fear. She also requested that the presiding judge allow her declarations to be taken in her new place of residence, instead of Bluefields. The request was rejected. Therefore, in April 2002, María Luisa's lawyer presented a *general* power of attorney *("poder generalísimo")* so as to intervene in the proceedings in the name of his client and to submit accusations. Nevertheless, the judge decided that the acts of the lawyer were not legally valid, as he needed a *special* power of attorney ("*poder especialísimo*"). María Luisa's lawyer submitted the new power of attorney, but it was not accepted until 13 May 2002, the same day that the judge decided to definitively dismiss the case against those signaled as masterminds of the crime. María Luisa's lawyer appealed the decision three days later, but the appeal was rejected on the basis of non-compliance with a rule of civil procedure establishing that the appeal had to be presented along with extra blank paper. Thus, the judge resolved that the legal dismissal should be made final and binding. This decision was appealed several times by Acosta's layer before superior Courts, but each appeal was dismissed, either for formal reasons or because those superior judges agreed with the decision.

In May 2002, "PT" and "PMF" lodged a complaint before the Civil Court of Bluefields against María Luisa Acosta requesting compensation for damages, as well as the preventive seizure of María Luisa's goods. The seizure was ordered by the judge, but it was subsequently cancelled, after María Luisa's lawyer presented several appeals against the decision. Later on, they also submitted complaints against María Luisa for the crimes of false testimony and false report. The proceedings ended after more than eight months without any of the parties taking part therein.

As to the continuation of the criminal procedure against Ivan Argüello and Wilberth Ochoa, in September and October 2002 – after the legal dismissal of PT and PMF as masterminds – the National Police determined that the gun used in the homicide of María Luisa's husband was property of PMF, and also that Iván Argüello had previously worked for PT. Throughout 2003, María Luisa Acosta lodged several disciplinary complaints against the judges and court members hearing the case, but the relevant judicial authority showed no activity in that regard. Therefore, on 9 April 2003 Acosta submitted a complaint before the office of the Ombudsperson *("Procuraduría para la Defensa de los Derechos Humanos")*, in which she claimed the violation of her right to proper access to timely justice by the Commissioners of the Disciplinary Regime of the Supreme Court of Justice. The Head of the office of the ombudsperson declared that the Commissioners did indeed violate María Luisa's right and that the President of the Supreme Court of Justice disregarded this.

In April 2004, Iván Argüello and Wilberth Ochoa were sentenced to prison as authors of the homicide of María Luisa Acosta's husband. Additionally, the Supreme Court also confirmed the dismissal of PT and PMT as possible intellectual authors of the crime. Acosta's lawyer presented two appeals, which were dismissed by the domestic Court.

On 7 August 2015, the Inter American Commission of Human Rights submitted the case before the Inter American Court, alleging violations to Articles 1.1, 5, 5.1, 8.1, 8.2 and 25 ACHR.

The State submitted three pleadings as "preliminary objections". The first referred to the scope of the facts of the case; the second referred to the admissibility of certain evidence, and the third referred to Nicaragua's disagreement with the Inter-American Commission's characterisation of the facts and with the recommendations contained in its report on the merits.

II. The Court dismissed all the pleadings, as it considered that they were not preliminary objections in nature.

On the merits, the Court found the State internationally responsible for the violation of the rights to a fair trial, access to justice, the right to know the truth and judicial protection, in accordance with Articles 8.1 and 25 ACHR, in relation to Article 1.1 ACHR, to the detriment of María Luisa Acosta and other family members of her husband, because it did not diligently and seriously investigate the hypothesis that the homicide was masterminded by persons whose interests were compromised by Acosta's defense of human rights of the indigenous peoples of the Nicaraguan coastal areas. The presiding judge declared the definitive legal dismissal of the suspects one month after the beginning of the proceedings. This course of action by the judge was against basic rational rules of criminal investigation, as the pre-trial phase had not been concluded and certain relevant evidence (such as the forensic analysis of the gun used in the homicide) was still being gathered by the police. The decision of legally dismissing the suspects was not duly explained or justified. The Court reiterated that the obligations of the State under Articles 8 and 25 ACHR must take into account the context surrounding the facts and the activities of human rights defenders, in order to identify any possible interests that could be affected and to identify the possible authors.

Additionally, the Court found the violation of the aforementioned rights protected in the American Convention of Human Rights because the State denied the victim's access to criminal justice based on mere formalities such as the providing of blank paper, in application of civil procedural rules, without a reasonable justification as to its necessity for the administration of justice. The State did not give proper attention to the appeals concerning possible irregular proceeding by the national courts and, when the Ombudsperson determined disciplinary responsibility for the existence of a violation of Acosta's rights, the courts did not correct or rectify them. Finally, in changing the status of Acosta in the proceedings from victim to possible suspect, as well as hindering the participation of her legal counselor, the State violated Acosta's right to be heard and to a defense.

The Court also found that the judge acted in a partial manner, as his public declarations would leave no doubt as to his motivations in hindering the proceedings. This is especially serious, given the pre-trial proceedings in which the judge was presiding. Additionally, the Court resolved that the appeal and superior judges did not properly guarantee the right to be heard by an impartial judge.

The Court also established that the State violated Articles 8.2 and 25 ACHR, in relation to Article 1.1 ACHR, to the detriment of María Luisa Acosta, because her right to be presumed innocent was violated, as certain public declarations made by the presiding judge revealed possible prejudices against María Luisa Acosta.

The Court also found the State responsible for the violation of the right to personal integrity, contained in Article 5.1 ACHR. In the case of María Luisa Acosta, her personal integrity was seriously affected not only because of the suffering caused by her husband's murder, but as a consequence of the lack of an adequate investigation; the investigations against her for the crimes of false report and false testimony; the stigmatisation resulting from unfounded legal procedures; and the frustration of the partial impunity she had to confront.

Finally, the Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered, among other things, that the State:

i. adopt the measures necessary so that the homicide not to be left in impunity and for the victims' rights to access to justice and to truth to be adequately restituted;
ii. publish the judgment of the Inter-American Court, as well as its summary;
iii. create mechanisms of protection and investigation protocols for cases concerning risks, threats or aggression against human rights defenders; and
iv. pay pecuniary and non-pecuniary damages, as well as costs and expenses.

Languages:

Spanish.

Court of Justice of the European Union

Important decisions

Identification: ECJ-2017-1-001

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 07.03.2017 / **e)** C-638/16 / **f)** X and X v. État belge / **g)** ECLI:EU:C:2017:173 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949**.
5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.
5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum**.

Keywords of the alphabetical index:

Asylum, refusal, procedure / Charter of Fundamental Rights of the European Union / Refugee, Geneva Convention / Foreign national, residence, permit, humanitarian grounds / Residence, authorisation, humanitarian grounds / Visa, denial.

Headnotes:

Article 1 of Regulation (EC) no. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), as amended by Regulation (EU) no. 610/2013 of the European Parliament and of the Council of 26 June 2013, must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the Code, to the representation of the Member State of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that Code but, as European Union law currently stands, solely within that of national law.

It should be added that, to conclude otherwise, when the Visa Code is intended for the issuing of visas for stays on the territories of Member States not exceeding 90 days in any 180-day period, would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Summary:

I. The applicants in the main proceedings, a married couple, and their three young, minor children are Syrian nationals and live in Aleppo (Syria). On 12 October 2016 they submitted, at the Belgian Embassy in Beirut (Lebanon), applications for visas with limited territorial validity, before returning to Syria on the following day.

In support of their visa applications, the applicants in the main proceedings emphasised, in particular that, being Orthodox Christians, they were at risk of persecution on account of their religious beliefs.

Those applications were rejected by decisions of the *Office des étrangers* (Immigration Office) (Belgium) of 18 October 2016. According to the Immigration Office, the applicants in the main proceedings clearly intended to stay more than 90 days in Belgium. Article 3 ECHR cannot be interpreted as requiring signatory States to admit to their territory all persons experiencing a catastrophic situation and, according to Belgian legislation, Belgian diplomatic posts are not one of the authorities with which a foreign national may submit an application for asylum. Authorising the issue of an entry visa to the applicants in the main proceedings in order to permit them to make their applications for asylum in Belgium would amount to authorising the submission of their applications in a diplomatic post.

By its first question, the referring court asks, in essence, whether Article 25.1.a of the Visa Code must be interpreted as meaning that the international obligations referred to in that Article include compliance by a Member State with all the rights guaranteed by the Charter of Fundamental Rights of

the European Union (hereinafter, the “Charter”), in particular, in Articles 4 and 18 as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by Article 33 of the Convention relating to the Status of Refugees (the Geneva Convention). By its second question it asks, in essence, whether, depending on the answer given to its first question, Article 25.1.a of the Visa Code must be interpreted as meaning that the Member State to which an application for a visa with limited territorial validity was made is required to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established. If necessary, the referring court also seeks to ascertain whether the existence of links between the applicant and the Member State to which the visa application was made has any bearing in that regard.

II. Firstly, the Court has found that, in accordance with Article 1 of the Visa Code, such applications, even if formally submitted on the basis of Article 25 of that Code, fall outside the scope of that Code, in particular Article 25.1.a thereof, the interpretation of which is sought by the referring court in connection with the concept of ‘international obligations’ mentioned in that provision.

In addition, since no measure has been adopted, to date, by the EU legislature on the basis of Article 79.2.a TFEU, with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds, the applications at issue in the main proceedings fall solely within the scope of national law. The situation at issue in the main proceedings is not, therefore, governed by EU law, the provisions of the Charter, in particular, Articles 4 and 18 thereof, referred to in the questions of the referring court, do not apply to it.

According to the Court, to conclude otherwise would mean that Member States are required, on the basis of the Visa Code, *de facto* to allow third-country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country. Indeed, whereas the Visa Code is not intended to harmonise the laws of Member States on international protection, it should be noted that the measures adopted by the European Union on the basis of Article 78 TFEU that govern the procedures for applications for international protection do not impose such an obligation and, on the contrary, exclude from their scope applications made to the representations of Member States. Accordingly, it is apparent from Article 3.1 and 3.2 of Directive 2013/32 that that directive applies to applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, but not to requests for diplomatic or territorial asylum submitted to the representations of Member States. Similarly, it follows from Articles 1 and 3 of Regulation no. 604/2013 that that regulation only imposes an obligation on Member States to examine any application for international protection made on the territory of a Member State, including at the border or in the transit zones, and that the procedures laid down in that regulation apply exclusively to such applications for international protection.

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-2017-1-002

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 14.03.2017 / **e)** C-157/15 / **f)** Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV / **g)** ECLI:EU:C:2017:203 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.
5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment**.
5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.

Keywords of the alphabetical index:

Discrimination / Headscarf, refusal to move, dismissal / Religion, employment / Religion, headscarf, symbol / Religion, headscarf, symbol, discrimination.

Headnotes:

Article 2.2.a 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 the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive.

By contrast, such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2.2.b of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

Summary:

I. G4S Secure Solutions NV (hereinafter, "G4S") is a private undertaking which provides, *inter alia*, reception services for customers in both the public and private sectors.

On 12 February 2003, Ms Achbita, a Muslim, started to work for G4S as a receptionist. She was employed by G4S under an employment contract of indefinite duration. There was, at that time, an unwritten rule within G4S that workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace.

On 29 May 2006, the G4S works council approved an amendment to the workplace regulations, which came into force on 13 June 2006, according to which "employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs".

On 12 June 2006, Ms Achbita was dismissed on account of her continuing insistence that she wished, as a Muslim, to wear the Islamic headscarf at work.

On 26 April 2007, Ms Achbita brought before the *Arbeidsrechtbank te Antwerpen* an action for damages for wrongful dismissal against G4S, seeking, in the alternative, damages for infringement of the Law to combat discrimination. In 2009, the Belgian *Centrum voor gelijkheid van kansen en voor racismebestrijding* (Centre for Equal Opportunities and Combating Racism) joined the proceedings as an intervener supporting the form of order sought by Ms Achbita.

By judgment of 27 April 2010, the *Arbeidsrechtbank* (Labour Court) dismissed the action brought by Ms Achbita on the ground that no direct or indirect discrimination was present. On appeal, the *Arbeidshof te Antwerpen* also dismissed her claims, by judgment of 23 December 2011, on the ground that, in the light of the lack of consensus in case-law and legal literature, G4S was under no obligation to assume that its internal ban was illegal, and that Ms Achbita's dismissal could not therefore be regarded as manifestly unreasonable or discriminatory.

In those circumstances, the referring court asks, in essence, whether Article 2.2.a of Directive 2000/78 must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking imposing a blanket ban on the visible wearing of any political, philosophical or religious sign in the workplace, constitutes direct discrimination that is prohibited by that directive.

II. Firstly, the Court has concluded that an internal rule such as that at issue in the main proceedings does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of Article 2.2.a of Directive 2000/78.

Concerning the internal rule at issue in the main proceedings introduces a difference of treatment that is indirectly based on religion or belief, for the purposes of Article 2.2.b of Directive 2000/78, the Court noted that, in the first place, as regards the condition relating to the existence of a legitimate aim, it should be stated that the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate.

As regards, in the second place, the appropriateness of an internal rule such as that at issue in the main proceedings, it must be held that the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner.

As regards, in the third place, the question whether the prohibition at issue in the main proceedings was necessary, it must be determined whether the

prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

Identification: ECJ-2017-1-003

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 04.04.2017 / **e)** C-337/15 P / **f)** European Ombudsman v. Claire Staelen / **g)** ECLI:EU:C:2017:256 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.19 General Principles – **Margin of appreciation**.
4.5.2.2 Institutions – Legislative bodies – Powers – **Powers of enquiry**.
5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State**.

Keywords of the alphabetical index:

Confidence, breach, intention / Due diligence, strict duty / Damage, non-pecuniary / Damage, non-pecuniary, compensation / Compensation, past injustice / Compensation, non-pecuniary damage.

Headnotes:

A person who has referred a complaint to the Ombudsman about an act of maladministration in the activities of institutions, has the possibility that may put in issue the European Union's liability because of the way in which that complaint has been handled, a right to reparation is afforded where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation on the author of the act and the damage sustained by the injured party. As to the second condition, the Court has, in the same context, also noted that the decisive test for finding that a breach of EU law is sufficiently serious is whether the EU institution or body concerned manifestly and gravely disregarded the limits on its discretion. In that context, regard must be had to the particular nature of the latter's functions.

Moreover, the damage for which compensation is sought must be actual and certain. It is certainly undeniable that, given the task conferred on the Ombudsman, it is essential that EU citizens have confidence in the capacity of the Ombudsman to conduct thorough and impartial inquiries in alleged cases of maladministration. As is emphasised in recital 2 of Decision 2008/587/EC, Euratom of the European Parliament of 18 June 2008 amending Decision 94/262, such confidence is, moreover, also fundamental to the success of the Ombudsman's action. However, it must be noted, first, that such considerations apply, to a very large extent, equally to any institution, body, office or agency of the European Union called upon to take a decision on an individual application, whether it be a complaint, as in this instance, or an action, or, more generally, any request in respect of which those institutions, bodies, offices or agencies are obliged to take action.

Second, any loss of confidence in the office of the Ombudsman that may result from actions taken in the course of the Ombudsman's inquiries is likely to affect, indiscriminately, everyone entitled to lodge a complaint with the Ombudsman at any time.

Summary:

I. On 14 November 2006, Ms Staelen lodged a complaint with the Ombudsman concerning alleged maladministration by the European Parliament in its management of the list of suitable candidates in Open Competition EUR/A/151/98, on which she appeared as a successful candidate.

At the end of that inquiry, the Ombudsman adopted a decision on 22 October 2007 in which it was concluded that there had been no maladministration on the part of the Parliament.

On 29 June 2010, the Ombudsman decided to launch an inquiry on the Ombudsman's own initiative in order to reassess whether there had been any maladministration by the Parliament. On 31 March 2011, the

Ombudsman issued a decision closing the own-initiative inquiry and finding, again, that there had been no maladministration in the Parliament's activities.

By application lodged at the General Court Registry on 20 April 2011, Ms Staelen brought an action for the Ombudsman to be ordered to compensate her on account of the material and non-material damage she claimed to have suffered as a result of various alleged failures on the part of the Ombudsman in the context of the initial and own-initiative inquiries.

In essence, the General Court has held that breaching the duty of care principle amounts *per se* to a sufficiently serious breach of EU law and that, on four separate occasions, the Ombudsman failed to observe that principle when considering Ms Staelen's complaint or in connection thereto. Moreover, the General Court held that the Ombudsman failed to respond to her letters in reasonable time. As a consequence of those breaches, that Court awarded Ms Staelen EUR 7 000 as damage for her loss of confidence in the office of the Ombudsman and her feeling of wasted time and energy.

By her appeal lodged with the Court on 6 July 2015, the Ombudsman claims that the Court should set aside the judgment under appeal, dismiss the application as unfounded insofar as the judgment under appeal is set aside, in the alternative, refer the case back to the General Court in so far as the judgment under appeal is set aside and make a just and equitable order as to costs.

II. Firstly the Court has found that the Ombudsman is merely under an obligation to use her best endeavours and enjoys wide discretion. Although the Ombudsman enjoys very wide discretion as regards the merits of complaints and the way in which they are to be dealt with, and, in that context, is under no obligation as to the result to be achieved, even if review by the Courts of the European Union must consequently be limited, it is nevertheless possible that in very exceptional circumstances a person may be able to demonstrate that the Ombudsman has committed a sufficiently serious breach of EU law in the performance of her duties that is liable to cause damage to the citizen concerned.

In order for it to be concluded that there is a sufficiently serious breach of the Ombudsman's duty to act diligently, it is therefore necessary to establish that, by failing to act with all the requisite care and caution, the Ombudsman gravely and manifestly disregarded the limits on her discretion in the exercise of her powers of investigation. Whilst having regard to that context, account must, to that end, be taken of all aspects characterising the situation concerned, including, in particular, the obviousness of the lack of care shown by the Ombudsman in the conduct of the investigation, whether it was excusable or inexcusable, or whether the conclusions drawn from the Ombudsman's examination were inappropriate and unreasonable.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.

Systematic thesaurus (V22) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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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16 Horizontal distribution of powers.
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1.4.6.2 Form
1.4.6.3 *Ex-officio* grounds

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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1.5.2 Reasoning

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.

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.).

[38] Including its Protocols.
[39] Presumption of constitutionality, double construction rule.

40 Including the principle of a multi-party system.
41 Includes the principle of social justice.
42 See also 4.8.
43 Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.
44 Including maintaining confidence and legitimate expectations.
45 Principle according to which general sub-statutory acts must be based on and in conformity with the law.
46 Prohibition of punishment without proper legal base.
47 Including compelling public interest.

48 Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).
49 Including questions of treason/high crimes.
50 Including prohibition on monopolies.
51 For sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.
52 Including the body responsible for revising or amending the Constitution.
53 For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.
54 For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.
55 For example, the granting of pardons.

56 For regional and local authorities, see Chapter 4.8.
57 Bicameral, monocameral, special competence of each assembly, etc.
58 Including specialised powers of each legislative body and reserved powers of the legislature.
59 In particular, commissions of enquiry.
60 For delegation of powers to an executive body, see keyword 4.6.3.2.
61 Obligation on the legislative body to use the full scope of its powers.
62 Representative/imperative mandates.
63 Including the convening, duration, publicity and agenda of sessions.
64 Including their creation, composition and terms of reference.
65 State budgetary contribution, other sources, etc.
66 For the publication of laws, see 3.15.

67 For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.
68 For local authorities, see 4.8.
69 Derived directly from the Constitution.
70 See also 4.8.
71 The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.
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.

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.
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*.
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".
111 According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "… with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

112 For example, discrimination between married and single persons.
113 This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.
114 Detention by police.
115 Including questions related to the granting of passports or other travel documents.
116 May include questions of expulsion and extradition.
117 Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.
118 In the meaning of Article 6.1 of the European Convention on Human Rights.
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.

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.

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.