

THE BULLETIN

The Supreme Court of Cyprus, holding the Presidency of the Conference of European Constitutional Courts, asked the Venice Commission to produce a working document on the topic of the 13th Conference (Nicosia, 16-19 May): The Criteria of Limitation of Human Rights in the Practice of Constitutional Justice.

The aim of the present working document is to provide a presentation of the case-law of constitutional courts and equivalent bodies relating to the above-mentioned topic, following the usual design and layout of the Bulletin on Constitutional Case-Law, which is published by the Venice Commission.

At first sight, it may seem incongruous to the reader to speak about the limitation of human rights rather than the human rights themselves. There are indeed some rights which are absolute and non-derogable. The absolute prohibition of torture or the right to life, especially since Protocol no. 13 to the European Convention on Human Rights, spring to mind. For other rights, however, limitations may be necessary because the unrestricted exercise of these rights would conflict with the rights of others or the interests of society as a whole. The establishment of clear criteria for the manner in which the authorities are permitted to interfere with the enjoyment of such rights may thus be as important as the rights themselves. Only when the individual can reasonably foresee such limitations, can he or she fully enjoy the essence of the right. The classical triad of such criteria developed by the European Court of Human Rights – legal basis, legitimate aim and proportionality – is reflected in many of the cases presented in this document.

This edition contains not only judgments which have already appeared in regular editions of the Bulletin on Constitutional Case-Law (classified using identification numbers of the form 1 – 2 – 3), some of which have been reedited by the constitutional courts' liaison officers for this publication, but also those which have not yet been published in the Bulletin but were considered to be relevant by the liaison officers. These additional judgments are indicated by the letter "H".

This Bulletin becomes part of the collection of Special Bulletins on Leading Cases, as it did with the working documents on freedom of religion and beliefs, requested by the Constitutional Tribunal of Poland for the 11th Conference of European Constitutional Courts in Warsaw on 16-20 May 1999, and the document on the relations between constitutional courts and other national courts, including the interference in this area of the action of the European courts, requested by the Belgian Court of Arbitration for the 12th Conference on 13-16 May 2002.

This special issue will also be incorporated into the CODICES database, which is a database of constitutional case-law containing all the regular issues and special editions of the Bulletin on Constitutional Case-Law, full texts of decisions, constitutions and laws on the constitutional courts, comprising about 5000 précis and 6300 full texts.

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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Strasbourg, September 2006

CONTENTS

Albania	5	Liechtenstein	107
Argentina	9	Lithuania	108
Armenia	11	Malta	117
Austria	17	Moldova	121
Azerbaijan	24	Netherlands	123
Belgium	26	Norway	129
Bosnia and Herzegovina	30	Poland	132
Bulgaria	34	Portugal	146
Canada	38	Romania	151
Croatia	41	Russia	157
Cyprus	44	Slovakia	166
Czech Republic	47	Slovenia	171
Denmark	58	South Africa	187
Estonia	59	Spain	197
France	65	Sweden	204
Georgia	67	Switzerland	205
Germany	68	“The former Yugoslav Republic of Macedonia”	215
Greece	78	Turkey	220
Hungary	80	Ukraine	224
Ireland	86	United States of America	228
Israel	89	Court of Justice of the European Communities	231
Italy	95	European Court of Human Rights	249
Japan	97	Systematic thesaurus	263
Kazakhstan	98	Alphabetical index	281
Latvia	100		

Albania

Constitutional Court

Important decisions

Identification: ALB-1999-3-008

a) Albania / b) Constitutional Court / c) / d) 10.12.1999 / e) 65 / f) On the constitutionality of the death penalty / g) *Fletorja Zyrtare* (Official Gazette), 33, 1301 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

- 1.6.9.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.2 **Sources of Constitutional Law** – Categories – Unwritten rules.
- 2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
- 2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – Legality.
- 3.18 **General Principles** – General interest.
- 4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Death penalty, abolition / Human dignity / Human life, intrinsic value / Treaty, ratification, reference for a preliminary ruling / Death penalty, enforcement, prohibition.

Headnotes:

The existence of the death penalty in peacetime, under the Criminal Code and Military Criminal Code,

is unconstitutional. The legal effects of this decision concern all death sentences pronounced by the courts and not yet enforced.

Summary:

The Criminal Chamber of the Supreme Court, hearing an appeal against a decision by lower courts to sentence a defendant to death, referred the case to the Constitutional Court for a preliminary ruling on the grounds that, under the Constitution, the right to life is a fundamental personal right, the essence of which would be violated by the application and enforcement of the death penalty.

Under Article 21 of the Constitution, “The life of a person is protected by law”. This provision expresses the principle of the protection of human life, affirming it as a constitutional right. The concepts of life and human dignity are of key importance in the Constitution and form the basis for all other fundamental and absolute rights. The inviolability of personal rights and freedoms underpins the entire section of the Constitution in which these rights and freedoms are enunciated. Article 15 of the Constitution stipulates that the fundamental human rights and freedoms are inalienable and inviolable and stand at the basis of the entire juridical order. The state therefore has a basic constitutional duty to see that they are respected and protected. The essence of these articles is concerned with ensuring respect for life and human dignity. All other rights are founded on the right to life, the denial of which implies the removal of all other human rights. Human life thus takes precedence over all the other rights protected by the Constitution.

The question raised in the application cannot be decided solely on the basis of Article 21 of the Constitution. For while stipulating that the life of every person is protected by the law, this Article does not explicitly prohibit the death penalty (although that does not imply that it permits it), and it leaves scope for the counter-argument that the protection of individuals’ lives is a matter for statute law rather than the Constitution. The Constitutional Court interpreted this Article on the one hand in conjunction with the rest of the Constitution and its spirit generally, and on the other in relation to the way the question was addressed under Albania’s former Major Constitutional Provisions. It analysed and compared the two sets of provisions, noting a significant difference between them. The new Constitution extends and reinforces the substance of the fundamental personal rights and freedoms, and thus constitutes a clear step forward.

By comparison with Article 1 of Chapter VII of the Major Constitutional Provisions, as amended by Law no. 7692 of 31 March 1993, Article 21 of the current

Constitution represents a significant shift towards abolition of the death penalty, the protection of life and recognition of its inviolability, inasmuch as the death penalty is no longer mentioned even in terms of a possible exception to the general principle contained in Article 1 of Chapter VII of the Major Constitutional Provisions. As a legal affirmation of the principle of the protection of life, it does not simultaneously negate that principle, nor does it leave other alternatives open. Thus it was not the law-makers' intention to retain the death penalty, even in exceptional circumstances. Otherwise (i.e. had they been in favour of the death penalty and its application in Albania), they would have been bound to make provision to that effect, for example by including in Article 21 of the Constitution the words used in Article 1 of Chapter VII of the Major Constitutional Provisions.

The new Constitution makes provision for personal rights and freedoms. But clearly, in accordance with the guiding principles of international law, these cannot be regarded as total and absolute. The Constitution itself explicitly permits restrictions to be placed on certain rights and freedoms, as exceptions to the general principle. There is provision for such restrictions, for example, in Articles 18.3, 26, 27, 29, 34, 35, 37, 41, 43, 45 and 47.2 of the Constitution. On the other hand, certain provisions in the part of the Constitution on fundamental rights and freedoms are framed simply as general rules without any reference to exceptions. The absence of exceptions is notable in a number of Articles, among them Article 21 of the Constitution, which, because it includes no provision for the death penalty, cannot be deemed to permit violation of the right to life through the existence of such a penalty.

The entire Constitution is coloured by the fundamental principles of the protection of human life. Life is a right and a fundamental attribute, and the taking of life arbitrarily or otherwise entails the destruction of the person as an individual with rights and duties. Human life is a basic constitutionally protected value. That is not to say that the level of protection of life is identical at all times and in all circumstances, for it depends on many different factors, and it is therefore up to the law-makers to frame appropriate provisions. Only they are empowered to establish by statute the exceptional circumstances in which a person may be deprived of life in order to protect a more important right. Hence the Constitutional Court found it necessary to study Article 21 in depth in order to grasp its intent.

Article 21 can only be interpreted in the light of Article 2.2 ECHR, which permits deprivation of life. But the taking of life as envisaged by the European

Convention on Human Rights, even though it may be done by the organs of the state, bears no relation to the death penalty; and because it results from exceptional circumstances it cannot be compared with the death penalty, which is a sentence imposed by a court.

The legal provisions for the protection of human life, as required by Article 21 of the Constitution, thus need interpretation. Article 21 merely refers to the law, without any mention of death in particular circumstances where – in the light of Article 2.2 ECHR – the taking of life is permissible. The legal definition of such circumstances is to be found in the general provisions of the Criminal Code, which recognises the legal concept of self-defence, and in the Use of Firearms Act, under which the armed forces are permitted to use firearms in specific situations. Furthermore, under Article 17.1 of the Constitution, it may be lawful to take life in order to protect the rights of others or to defend a vital constitutional principle. The limitations [on the right to life] imposed under Article 17.1 of the Constitution must relate to cases where the law can permit the taking of an individual's life in order to protect the rights of others. The taking of any life in the enforcement of a court decision does not fall into this category, because the death penalty is not one of the exceptions or limitations permitted by the Constitution.

Moreover, several, particularly in the section on fundamental rights and freedoms, refer to the European Convention on Human Rights. That is why it is important to interpret Article 21 of the Constitution in conjunction with Article 17.2, which stipulates: "These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights".

Under Articles 5, 116 and 122 of the Constitution, the Republic of Albania is bound to carry out its obligations under international law by providing for the incorporation of ratified international agreements into its domestic legislation and by giving them precedence over statute law. One such international agreement is the European Convention on Human Rights, which Albania has ratified. Article 1 Protocol 6 ECHR stipulates: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed". Albania has not yet ratified the protocol, but given that Article 17.2 of the Constitution prohibits any limitations of rights and freedoms exceeding those permissible under the Convention, it follows that the death penalty as provided for in the Criminal Code lies outside the intention and spirit of Constitution and of the European Convention on

Human Rights itself, which does not admit this type of limitation.

Considered in the light of the Constitution and the European Convention on Human Rights, the death penalty is essentially incompatible with fundamental rights and freedoms. It negates the right to life and is a cruel and inhuman penalty even when applied by the state in the exercise of its judicial authority. Capital punishment has nothing to do with limiting the right to life, its purpose being to eliminate individuals absolutely, removing them from society. It is a means of killing people with the state in the role of executioner.

Nor can the death penalty be seen as a measure for punishing crime that serves an important function by significantly influencing the sentenced person, which would put it in the same category as general or social rehabilitation or solitary confinement, for example. The other penalties provided for in the Penal Code, such as fines, imprisonment for up to 25 years, or life imprisonment as an alternative to the death penalty, are quite adequate for the purposes of punishing offenders.

The Criminal Code's provisions concerning the death penalty are incompatible with the spirit of the Constitution and infringe the essence of the right to life and human dignity. In particular, when a death sentence is enforced as a result of human error it cannot be undone, and the individual executed becomes the innocent victim of the mistake.

It is clear, on the one hand, from an analysis of Article 17.2 of the Constitution in the light of the application before the court, that the right to life cannot be limited by a measure such as the death penalty, because this penalty constitutes not merely a limitation but the abolition of the right. And on the other hand, the limitations permissible under the European Convention on Human Rights do not extend to the death penalty as a punishment for crime.

The Constitutional Court concluded that a complete understanding of the spirit and substance of Article 21 of the Constitution could be reached under the terms of Article 17.2, which provides, as a matter of principle, for legislation to limit fundamental rights and freedoms.

It found, in particular, that Articles 3, 5, 17.2, 21, 116 and 122 of the Constitution, taken together and in conjunction with the preamble to the Constitution, not only failed to justify the death penalty, but in fact prohibited its application in Albania. It concluded that

the death penalty as provided for in the Criminal Code was unconstitutional.

Since the Supreme Court's application was concerned only with the constitutionality of certain Articles of the Criminal Code, the Constitutional Court, recognising a direct link between these Articles and the Military Criminal Code's provisions concerning the death penalty in peacetime, decided to review the constitutionality of the latter at the same time. Under Article 15 ECHR, the High Contracting Parties may, in time of war or other public emergency, take measures derogating from their obligations under the Convention, and Article 2 Protocol 6 ECHR stipulates that "a state may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war [...]". The European Convention on Human Rights thus permits the application of the death penalty in time of war, so the Military Criminal Code's provisions to that effect, rather than being exceptions, are in fact compatible with the Convention. By contrast, its provisions concerning the death penalty in peacetime (referred to above) cannot be deemed compatible with the Constitution.

In conclusion, the Constitutional Court decided unanimously that the death penalty in peacetime, as provided for in the Criminal Code and Military Criminal Code, was to be abolished on the grounds that it was incompatible with the Albanian Constitution.

This decision is final and irrevocable and its legal effects concern all death sentences not yet enforced.

Languages:

Albanian, French (translation by the Court).



Identification: ALB-2002-H-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 13.02.2002 / **e)** 25 / **f)** Constitutionality of law / **g)** *Fletore Zyrtare* (Official Gazette), 5/02, 107 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
 4.7.4.3.5 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – End of office.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
 5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent.

Keywords of the alphabetical index:

Prosecutor, dismissal, appeal, right / Decree, presidential, right to appeal.

Headnotes:

A legal provision excluding a prosecutor's right to appeal against a decree by the President of the Republic for his/her dismissal from office is unconstitutional. This provision is not in conformity with the Constitution and international instruments ratified by Albania.

A right provided for by the Constitution may be restricted only in cases where there is a public interest or where the rights of other persons should be protected.

Summary:

The Skrapari District Court stayed the case under examination and referred it to the Constitutional Court. Consequently, the district court initiated a constitutional review concerning the provision of the law "On the Public Prosecutor's Office" stating: "No appeal lies against a decree of dismissal issued by the President of the Republic".

The Constitutional Court found that the impugned provision was not in conformity with the Constitution and international instruments ratified by Albania. The Constitution provides for individuals, to access the courts to protect their constitutional rights. The right to appeal has been recognised as a fundamental right even by the European Convention on the Human Rights. Thus, the prosecutors' right to appeal derives

from the Constitution and it should have been provided for in the law "On the Public Prosecutor's Office". The restriction of that right cannot be justified even under Article 17 of the Constitution, which provides that a restriction of certain rights may be imposed only in cases where there is a public interest or where the rights of the other persons have to be protected. Also, a restriction should be in proportion to the situation that has dictated it, should not infringe the essence of the fundamental rights, and should not exceed by any means the restrictions foreseen by the European Convention on Human Rights.

The Constitutional Court found that the impugned law provided for the right to appeal against trivial measures and denied such right against more serious ones. According to that law, decrees of the President of the Republic issued for such cases have the nature of administrative acts as disciplinary measures. For that reason, presidential decrees should be subject to appeal and judicial examination. That can be supported by another argument: why should the public prosecutor's office, which is organised and functions in a similar way as the judicial system, be deprived of the right to appeal, a right that has been conferred upon the judges? Moreover, the provision makes a distinction between prosecutors and civil servants as to the right to appeal, thereby infringing the content and spirit of the Constitution.

For the reasons mentioned above, the Constitutional Court struck down the impugned provision and stressed the need for the legislator to fill the ensuing legal gap.

Languages:

Albanian.



Argentina

Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-1989-R-001

a) Argentina / b) Supreme Court of Justice of the Nation / c) / d) 18.04.1989 / e) / f) Portillo, Alfredo s/infr. art. 44 ley 17.531 / g) *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 312, 496 / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
- 2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
- 3.3 **General Principles** – Democracy.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.25 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Fifth commandment / Weapon, use.

Headnotes:

On the basis of freedom of religion and conscience (Article 14 of the Constitution), citizens enjoy the right to perform compulsory military service (Article 21 of the Constitution) without being personally obliged to use weapons; the scope of this right must be

determined according to the circumstances of each case.

Under the legal provisions referred to above, citizens do not have the right to be exempted from military service.

Summary:

Article 21 of the Constitution provides: “Every Argentine citizen is obliged to bear arms in defence of the fatherland and of this Constitution, in accordance with the laws issued by Congress to this effect and the decrees of the national executive”.

In accordance with the law, the applicant had been called up for compulsory military service, which he had refused to perform, citing Article 14 of the Constitution. Claiming to profess the Roman Catholic and Apostolic faith, he had argued that using arms to cause the death of others violated the biblical sixth commandment (“Thou shalt not kill”) and that it was possible to serve the fatherland in a variety of ways, for example by assisting with health care, social services or spiritual welfare or performing any other service that did not require the use of weapons.

The Court of Appeal had sentenced him to an extra year of military service additional to the standard period for breaking the law on the matter.

He therefore lodged an extraordinary appeal with the Supreme Court.

The Court found as follows:

- first, under the Constitution everyone had the right to “profess freely their religion” (Article 14 of the Constitution, in accordance with the objective, stated in the Preamble to the Constitution, of “secur[ing] the blessings of liberty”); second, the Constitution required that all citizens “bear arms in defence of the fatherland and of this Constitution” (Article 21 of the Constitution, and obligation which referred back to another objective stated in the Preamble, that of “[providing] for the common defence”);
- the purpose of military service was to ensure the defence of the nation by giving citizens military training in peacetime;
- the conflict arising between freedom of conscience and the obligation to perform military service could not be resolved solely on the basis of the case-law position that all rights were relative; for although citizens only enjoyed that

freedom “in accordance with the laws that [regulated its] exercise” (Article 14 of the Constitution), the obligation in question was also relative in so far as the legislature had laid down a large number of exceptions (concerning members of the clergy, members of religious orders and certain family situations, for example).

The conflict must therefore be resolved through the application of two doctrines: the doctrine that, since the Constitution was a coherent structure, care must be taken not to disturb the delicate balance between freedom and security; and the doctrine that laws and regulations must be reasonable – that is, warranted by the facts and circumstances that had prompted them and by the need to safeguard the public interest in question – and proportionate to the ends they set out to achieve, so as to balance private interests with the public interest, and individual rights with those of society. In applying these two doctrines, consideration must also be given to the specific matters at issue and the actual circumstances of the case.

Freedom of religion was a particularly important right that humanity had attained at the cost of considerable effort and tribulation; the use of weapons and what weapons represented were a constant source of concern to human beings, who were deeply committed to their beliefs and the dictates of conscience.

However, the obligation to discharge military duties might harm not only followers of a particular religion but also those whose value systems led them to refuse to endanger the lives of others; state violence affected all value systems – not necessarily religious – forming the basis of individuals’ lives; constitutional freedoms required the state to be impartial towards those it governed, even those of them who practised religions rejected by the majority; civil liberty was the prerogative of all human beings by virtue of their very humanity, and was not dependent on belonging to a particular group or professing being in ideals supposedly shared by the majority; as well as a system of organisation of power democracy was a social order aimed at human self-fulfilment.

Failure to comply strictly with the obligation in question did not entail a serious or imminent threat to the interests upheld by the state, as the service required was to be performed in peacetime and did not necessarily restrict freedom of conscience, provided that there was an alternative which, without exempting the individual from his duties towards the state, did not do violence to his convictions and was not liable to undermine his autonomy.

It was a mistake to present the individual interest and the common good as antithetical, since they depended on one another. The issue was not the legal significance of the religious prohibition “Thou shalt not kill” – it was not the Court’s role to interpret religious rules – but the extent of individual autonomy.

Thus recognition of the right to be exempted from armed service on grounds of conscientious objection required close scrutiny of those grounds; the objector must be sincere and prove that the obligation to bear arms seriously conflicted with his religious or ethical beliefs. It was also important to evaluate the state’s interests in the light of the defence provided for in Article 21 of the Constitution, to assess carefully the effect which not performing the armed service would have on that defence and to consider whether it could be ensured by replacing armed service with other forms of service.

Lastly, there was an issue of fairness and proportionality where a citizen who sincerely claimed to face a dilemma was compelled, in view of the obligation established by Article 21 of the Constitution, to disobey the dictates of religion or conscience, whereas in peacetime he would have been allowed to defend constitutional freedoms in ways other than armed service. In a specific case such as this one, justice could only be ensured by considering the actual circumstances. It was irrelevant that the Act on compulsory military service did not explicitly refer to religious grounds as a reason for exemption, given that it was mandatory for judges to cite individual rights – particularly those which merely called for an act of forbearance on the part of the authorities – in specific cases, regardless of whether they were incorporated into the law. Moreover, great care had been taken to ensure that the Constitution respected the diversity of beliefs, rather than compelling citizens to submit to a uniformity that would be contrary to the liberal philosophy underpinning it.

The Court concluded that although the appellant could not avoid military service, he nonetheless had the right to perform it within the limits established by the judgment.

The judgment was given by a three-judge majority; two judges submitted dissenting opinions (at the time the judgment was given, the Supreme Court was made up of five judges).

Supplementary information:

Military service has been voluntary in Argentina since the passing of Act 24.429 on 14 December 1994.

Cross-references:

The Court cited: Article 9 ECHR; Resolution 337 (1967) of the Parliamentary Assembly of the Council of Europe; the Vatican Council II constitution concerning the church in the modern world (*Gaudium et Spes*, no. 79); and a large number of judgments of the United States Supreme Court concerning cases relating to Amendment I to the American Constitution (for example, *United States v. Lee*, 455 U.S. 252; *Braunfeld v. Brown*, 366 U.S. 599; *Sherbert v. Verner*, 374 U.S. 398; *Wisconsin v. Yoder*, 406 U.S. 205; *Johnson v. Robinson*, 415 U.S. 361, *Thomse v. Review Board*, 450 U.S. 707, etc.).

Languages:

Spanish.



Armenia

Constitutional Court

Important decisions

Identification: ARM-1999-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 27.01.1999 / **e)** DCC-152 / **f)** On the conformity of Article 24 of the Law on telecommunications of the Republic of Armenia with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.2.1.2 **Constitutional Justice** – Types of claim – Claim by a public body – Legislative bodies.
 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
 3.3 **General Principles** – Democracy.
 3.9 **General Principles** – Rule of law.
 3.13 **General Principles** – Legality.
 3.25 **General Principles** – Market economy.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.
 4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.
 4.6.3 **Institutions** – Executive bodies – Application of laws.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Competition, protection / Monopoly, state / Legislation, anti-trust.

Headnotes:

Free economic competition does not exclude activities which are prohibited by the State, activities which are subject to State licensing or activities which

are natural or state monopolies and have as their purpose to provide security or lawful interests of the State and society, public order, health and morality, or rights and freedoms of other persons.

However, clarification of these spheres and possible restrictions of the degree of free economic competition are regulated by the Constitution and by law.

The legislative authority alone is competent to determine the limits and nature of these restrictions.

Summary:

The applicants, a group of 72 deputies of the National Assembly of the Republic of Armenia, claimed that Article 24 of the Law on telecommunications of the Republic of Armenia was not in conformity with the Constitution of the Republic of Armenia, in particular, with the provisions on the State-guaranteed freedom of economic activity and free economic competition contained in Article 8 of the Constitution.

The respondent party argued that the disputed provision of the law did not contradict the Constitution, since it concerned a natural monopoly and the restrictions on free economic activity in the sphere of telecommunications are intended to improve the communication situation on the territory of the Republic and to ensure technical advancement in this field.

Legal analysis of the provision of Article 24 of the law shows that the legislator has not established a compulsory regulation adjusting legal relations, but that in fact, by ratifying the license terms established by the executive authority for a particular legal entity, lent those regulations the force of law.

Article 24 of the Law on telecommunications of the Republic of Armenia states that "The effect of rights established by the said license must be ensured by the legislation of the Republic of Armenia (including the antitrust legislation)". Anti-trust legislation was totally absent at the moment of adopting this Law. By adopting such legislation the legislator, while lending the legal regulation the features proper to a constitutional norm, had actually anticipated the concept of laws to be adopted for regulating this sphere.

According to Article 62.3 of the Constitution, the powers of the legislative body are established by the Constitution, which has not granted the National Assembly of the Republic of Armenia the competence to adopt organic (constitutional) laws containing regulations of a constitutional nature.

Moreover, according to Article 5.2 of the Constitution, State bodies and officials are only competent to perform actions which the legislature entitles them to carry out. The National Assembly of the Republic of Armenia has given the force of law to regulations which the Government or the body empowered by the latter were not authorised to enact.

It was also underlined that according to Article 8.3 of the Constitution, the State guarantees free development and equal legal protection to all forms of property, freedom of economic activity and free economic competition. Moreover, according to Article 4 of the Constitution, the State ensures the protection of human rights and freedoms on the basis of the Constitution and laws, pursuant to the principles and norms of international law. Freedom of economic activity is not an absolute freedom; it can be restricted according to the norms and principles of international law. The type of restriction must however, be substantiated by the legislator, with due consideration given to the fact that it is possible only for ensuring the relevant recognition and respect of rights and freedoms of other persons and for satisfying the rightful requirements of morality, public order and common welfare in a democratic society (Article 29.2 of the Universal Declaration of Human Rights; Article 12.3 of the International Covenant on Civil and Political Rights).

Meanwhile, an analysis of the provisions of the Constitution shows that free economic competition does not exclude activities which are prohibited by the State, subject to State licensing, or activities which are natural or State monopolies or are regulated by exclusive rights and intended to provide for the security or lawful interests of the State and society, public order, health and morality, or rights and freedoms of other persons.

However, clarification of what these spheres are and what are the possible restrictions of the degrees of freedom of economic activities or of free economic competition are regulated by the Constitution and by the laws for implementing the antitrust policies ensuring even-handed competition and economic and social advancement.

The legislative authority alone is competent to determine the limits and nature of these restrictions in the form of regulations. Where individual legal relations are not yet regulated by Law, the Government can provide amendments not only on the basis of legislative initiative, but also based upon Article 78 of the Constitution, whereby for the purpose of legislative support of the Government activity program, the National Assembly can authorise the Government to adopt resolutions that have the effect

of law which are in force within the period established by the National Assembly. These resolutions cannot be contrary to laws.

Thus, the Constitutional Court of the Republic of Armenia ruled that Article 24 of the Law on telecommunications is not in conformity with the requirements of Articles 5 and 8 of the Constitution. Clarification of the types of activities subject to State licensing, whether an activity is a State or natural monopoly, implementation in these spheres of the antitrust policies, security and the lawful interests of the State and society, the purposes of protecting the rights and freedoms of other persons, the possible limitations of the degrees of freedom of economic activities and free economic competition as the norm of compulsory behaviour had been previously established by the executive authority rather than by the law. The legislator, in the form of transitional provisions, gave the force of law to provisions targeted at a particular legal entity, and these provisions contained formulations which were not in conformity with the Constitution.

Languages:

Armenian.



Identification: ARM-2002-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 22.02.2002 / **e)** DCC-350 / **f)** On the conformity of obligations stated in the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950 at Rome, in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 20 March 1952 at Paris, in Protocol no. 4 "On certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended Protocol no. 11", signed on 16 September 1963 at Strasbourg, and Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 22 November 1984 with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.

5.1 **Fundamental Rights** – General questions.

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

Keywords of the alphabetical index:

Treaty, human rights, direct applicability / *Pacta sunt servanda* / Fundamental right, more favourable protection.

Headnotes:

The Constitution, providing for human rights and freedoms itself, does not restrict the right of individuals to also enjoy other rights and freedoms enshrined in international treaties on human rights.

A possible incompatibility of the provisions of the Constitution of Armenia with any international treaty supposes that the Constitution either directly excludes the right guaranteed by an international treaty, or imposes such behaviour, which is categorically prohibited by a treaty. There is no such incompatibility in the field of fundamental rights.

Summary:

The Constitutional Court considered the issue of conformity of obligations stated in the European Convention on Human Rights and its several protocols with the Constitution. The Court's examination ascertained that some of the rights and fundamental freedoms stated in the Convention and its protocols correspond to those guaranteed by the Constitution, while some of the rights and freedoms are stated in the Constitution in a different manner and formulation. Furthermore, some rights established in the Convention and its Protocols are absent from the Constitution.

The essence of the difference between constitutionally guaranteed rights and freedoms and those enshrined in the European Convention on Human Rights, is that the international norms protect human rights and freedoms more extensively.

Although at the first sight it may seem that there is a contradiction of a normative nature between the different legal instruments, such an impression is false if one considers the whole legislative system and the obligations of international treaties: a unique intercommunicated legal system.

In this regard, Article 6 of the Constitution states that, “International treaties that contradict the Constitution may be ratified after making a corresponding amendment to the Constitution”. Furthermore, it should also be adopted as an obligatory initial provision regulating the constitutional relations, as is required by Article 4 of the Constitution, which declares: “The State guarantees protection of human rights and freedoms based on the Constitution and the laws, in accordance with the principles and norms of international law”. This constitutional provision means that Armenia is obliged to conscientiously carry out its obligations arising from principles and norms of international law, including international treaty obligations (*Pacta sunt servanda*).

The International Pact of 16 December 1966 on Civil and Political Rights and the facultative protocol thereto, as well as the International Pact of 16 December 1966 on Economic, Social and Cultural Rights as international, all-encompassing documents providing for human rights and fundamental freedoms, as well as their possible limitation or derogation, are legally binding in Armenia.

Thus, in accordance with Articles 4 and 43 of the Constitution, the provisions of the above-mentioned international instruments do form part of the legal system of norms and principles regulating constitutional-legal relations.

This condition may create the illusion of apparent contradiction between Articles 4 and 6.6 of the Constitution.

However, there is no contradiction as Article 43 of the Constitution provides that “the rights and freedoms set forth in the Constitution are not exhaustive and shall not be construed to exclude other universally accepted human and civil rights and freedoms”. In other words, a citizen of Armenia – or a person being under its jurisdiction – not only has the rights and freedoms guaranteed by the Constitution, but also such rights and freedoms which are the logical continuation of the rights and freedoms stated by the Constitution or an additional guarantee of the implementation of the latter.

The ground for this interpretation is that a possible collision of the provisions of the Constitution and any international treaty supposes that the Constitution either directly excludes the right, which is clearly determined by an international treaty, or imposes such a behaviour, which is categorically prohibited by a treaty. There is no such collision in the view of above-mentioned rights.

The Constitutional Court also considered that regardless of the norms of Public International Law, states are bound by mutual obligations, yet the approach towards the protection of human rights, formed in the system of Public International Law, gives grounds to conclude that the human rights and fundamental freedoms, based on the system of multilateral conventions, are rather the objective standards of the behaviour of states, than their mutual rights and obligations. The obligations of states, stemming from international instruments, are rather directed to individuals under the jurisdiction of these states than to other participating states. In this regard, the Convention of 4 November 1950 is used to protect persons and non-governmental organisations from the organs of state power, which is an important sign of the rule of law, stated by Article 1 of the Constitution. Moreover, the Convention and its Protocols are based on such rights and standards, which conform to the spirit and letter of human rights and fundamental freedoms guaranteed by the Constitution and the international treaties to which Armenia is party.

The whole legal regime of the Convention, including the principles on the possible limitation of the guaranteed rights, is constructed on the initial provision that the obligations adopted by the State are directed to the protection of all individuals, in accordance with the norms and principles of international law. Consequently, taking into account Article 4 of the Constitution obliging the State to guarantee all internationally recognised rights and freedoms; Article 43 of the Constitution stating that the rights and freedoms enumerated by the Constitution are not exhaustive, meaning that a citizen or another person does have other universally recognised rights and freedoms, and accepting the fact that the constitutional provisions on human rights and freedoms do not have a prohibiting, but an authorising nature; it can be said that the norms in the Convention and its Protocols are in conformity with the provisions and the principles on human rights and fundamental freedoms set out in the Constitution.

Languages:

Armenian, English, Russian (translations by the Court).



Identification: ARM-2002-H-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 01.10.2002 / **e)** OCC- 3891 / **f)** On the conformity with the Constitution of Article 14.3 of the Electoral Code of the Republic of Armenia / **g)** *Tegekaguir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.

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

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

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

Keywords of the alphabetical index:

Election, voters list, inaccuracy, right to challenge.

Headnotes:

The recognition of a citizen's right to be included in a voters list has a constitutional significance, as the inclusion in a voters list is a necessary condition for the realisation of the right to vote and people's power through free elections. Taking into account the significance of voters lists for the realisation of the right to vote, it is very important to ensure an opportunity for a voter to challenge inaccuracies in voters lists until the end of the voting process.

While the restriction of the right to challenge inaccuracies in voters lists in an administrative manner may be considered reasonable in order to ensure the proper organisation of elections, the restriction of the right to challenge them in a judicial manner is not permissible and is contrary to Article 38 of the Constitution, which enshrines, without any exception, the right to judicial protection.

Summary:

The case was initiated by the President of Armenia, who questioned the compliance of Article 14.3 of the Electoral Code with the Constitution. The impugned provision provides:

“Disputes on inaccuracies in voters lists may be appealed to court. The court shall adopt a decision within 5 days. The decision is not subject to appeal. The voters lists may not be changed, including by a court decision, during two days before voting, as well as on voting day.”

The appellant considered that the impugned provision deprived citizens of the possibility of bringing before the courts disputes concerning the realisation of their electoral rights and applications for a judicial remedy for infringement of their rights.

According to the Electoral Code, only citizens included in voters lists may participate in elections and thus realise their constitutional right to vote. If a citizen is prevented from realising his/her right to vote because of not being included in the voters lists, such a situation is not compatible with Article 27 of the Constitution, which provides for an exhaustive list of persons, whose electoral right can be restricted (only citizens found to be incompetent by a court decision or duly convicted of a crime and serving a sentence may not vote or be elected).

Nor can such a restriction of electoral rights justified on the basis of Article 44 of the Constitution setting out the conditions for the restriction of several constitutional rights (several constitutional rights may be restricted by law, if necessary for the protection of state and public security, public order, public health and morality, as well as the rights, freedoms, honor and reputation of others).

The Constitutional Court referred also to international treaties ensuring the right of free elections. Particularly, according to Article 25 of the International Covenant on Civil and Political Rights, the right to free elections cannot be subject to unreasonable restrictions.

According to Article 13 ECHR, everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. It derives from the Code of Civil Procedure that in order to have his/her violated electoral right restored, a citizen may apply to court even on voting day. The impugned provision of the Electoral Code excluding the possibility of correcting voters lists by court decision makes the measure of the Code of Civil Procedure protecting violated electoral rights ineffective.

The impugned provision of the Electoral Code, permitting a citizen's exclusion from the voters list, in fact, deprives a voter excluded from the voters list two days before voting day of an opportunity to challenge the action taken by a body.

The impugned provision deprives citizens who have been excluded two days before voting day of an opportunity to make a correction in the voters lists in an administrative or judicial manner and, consequently of the realisation of his/her right to vote. Taking into account the significance of the voters lists for the realisation of the right to vote, it is very important to ensure an opportunity for a voter to challenge the inaccuracies in voters lists until the end of voting process.

The impugned provision of the Electoral Code is also incompatible with Article 1 of the Constitution (the nature of democratic state), Article 2 of the Constitution (the guarantees of existence of democratic state), Article 3 of the Constitution (principles of elections), Article 4 of the Constitution (the state's obligation to ensure protection of human rights) and Article 27 of the Constitution (the right to elect).

Languages:

Armenian.



Identification: ARM-2003-2-004

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 15.07.2003 / **e)** DCC-437 / **f)** On conformity with the Constitution of obligations provided by Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.

4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.

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

5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.

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

Keywords of the alphabetical index:

Death penalty, abolition.

Headnotes:

The Constitution of Armenia permits the death penalty as a “temporary” and “exclusive” punishment and meanwhile leaves the issue of determination or non determination of death penalty for certain serious offenses to the discretion of the National Assembly.

The National Assembly thus has the power to abolish death penalty not only by appropriate amendments in the national legislation, but also by ratification of an international legal instrument, in the given case, by ratification of Protocol no. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.

Summary:

The hearing of the case was prompted by an application by the President of Armenia to the Constitutional Court concerning the conformity with the Constitution of the obligations assumed under the above-mentioned Protocol.

The Constitutional Court stated that when becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols no. 1, 4 and 7, Armenia had assumed an obligation to establish supremacy of law in the country and fulfill reforms of state institutes and continued democratisation of social and political life in order to make them compatible with the standards existing in European countries.

After declaring its independence, Armenia become a party to most important universal and regional international treaties on protection of human rights and fundamental freedoms, recognised a human being, his/her life and health, honor and dignity, personal integrity as a supreme social value.

The highest legal guarantee of protection of human rights is the Constitution. The system of rights guaranteed by the Constitution includes also the right to life. The Constitution, recognising this right as an absolute and unalienable right, provides in Article 45, that this right cannot be restricted in any circumstance. The right to life is enshrined in Article 17 of the Constitution, which provides for only one derogation from the protection of this right, in respect to death penalty. According to this provision, “death penalty, until its abolition, may be prescribed by law

for particular serious offenses, as an exceptional punishment”.

The Constitutional Court held, that a systematic analysis of the Constitution, as well as of the content of international treaties concluded by Armenia, indicated, that the Republic rejected the death penalty as a kind of punishment and provided for the abolition of the death penalty as a goal.

Article 17 of the Constitution permits the death penalty as a "temporary" and "exclusive" punishment, and it provides that this punishment may be prescribed only "for serious offenses" by law as an exclusive punishment.

Taking into account that according to Article 62 of the Constitution, the legislative power is exercised by the National Assembly, the Constitution leaves the issue of determination or non determination of the use of the death penalty for certain serious offences to the discretion of the National Assembly. The latter may abolish the death penalty not only by appropriate amendments in the national legislation, but also by ratification of an international legal instrument, including international treaties which provide for punishments other than those provided by the national legislation.

The Constitutional Court held, that the discussion and solution of the issue of ratification of any international treaty abolishing death penalty is fully within the powers of the National Assembly, as Article 17 of the Constitution conditioned the issue of temporary existence of death penalty with the will of the National Assembly, which has a power to abolish death penalty not only by making amendments in the national legislation, but also by ratification of an international treaty.

The Constitutional Court declared the obligations assumed by Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty compatible with the Constitution.

Languages:

Armenian, French (translation by the Court).



Austria Constitutional Court

Important decisions

Identification: AUT-1927-R-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 16-05-1927 / **e)** B 442/26 et al.; B 399, 437/26; B 392, 438/26; B 41/31; B 229/56; B 146/58; B 122/67; B 13/68; B 205/74; B 213/74; B 55/76; B 248/75; B 438/84; B 714/83; B 460/86; B 1044/86 / **f)** Freedom of conscience (freedom of self-determination in relation to acts reflecting personal beliefs, including religious beliefs) / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 799/1927, 800/1927, 802/1927 of 16.05.1927, 1408/1931 of 23.06.1931, 3220/1957 of 28.06.1957, 3480/1958 of 17.12.1958, 5583/1967 of 09.10.1967, 5809/1968 of 15.10.1968, 7494/1975 of 06.03.1975, 7679/1975 of 28.11.1975, 7907/1976 of 15.10.1976, 8033/1977 of 26.03.1977, 10.674/1985 of 23.11.1985, 10.915/1986 of 19.06.1986, 11.105/1986 of 28.11.1986, 11.253/1987 of 02.03.1987 / **h)**.

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.25 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Church, recognition / Religious activity, freedom / Freedom of religion, negative / Ceremony, religious, participation, freedom / Ideology, national-socialist / Atheist / Agnostic / Tolerance, state / Procession, religious.

Headnotes:

Article 14 of the Basic Law of the State of 1867 (StGG) guarantees each individual the right to choose his/her religion freely without interference from the state and to engage in religious activities (VfSlg. 1408/1931, 10.547/1985) in accordance with his/her beliefs. Essentially, this fundamental right prohibits the state from imposing constraints in relation to religion (VfSlg. 802/1927, 1207, 3220/1957, 1408/1931, 10.547/1985, 13.513/1993,). Every individual must enjoy absolute, unlimited freedom in denominational and religious matters (VfSlg. 799/1927, 800/1927, 10.547/1985, 13.513/1993,). No one may be forced (VfSlg. 802/1927) to perform a religious ritual or to take part in a religious ceremony; this rule encompasses the freedom of choice to believe or not to believe, to change religion or to renounce one's religion (VfSlg. 5583/1967, 5809/1968). Every individual is guaranteed this freedom, regardless of whether the community in which s/he manifests or practises his/her faith, religion or denomination is legally recognised as a church or religious community (VfSlg. 10.915/1986). This freedom is confined to the religious sphere, however, and does not apply to a sense of belonging to a linguistic or ethnic group; on no account can it apply to matters connected with National-socialist ideology (VfSlg. 3480/1958, 7494/1975, 7679/1975, 7907/1976, 8033/1977, 10.674/1985).

The foregoing partly coincides with Article 9 ECHR, but is not as far-reaching. This provision – which ranks as constitutional law in the Austrian domestic legal system – establishes a general freedom of thought, conscience and religion, including a general freedom of non-religious personal belief (without reference to a transcendental being). Atheists, agnostics and those who are indifferent are thus protected. This freedom also covers fundamental non-religious matters, but does not include the right to exemption from military service (VfSlg. 8033/1977, 11.105/1986, 11.253/1987). In addition to the ensuing requirement for state tolerance, it can be inferred that the state has to take measures in respect of third parties such as to allow the holding of religious services (obligation to protect religious values). As part of this obligation, the state may decide that it is bound to protect religious processions. The state might also legitimately consider it necessary to prohibit certain behaviour, including the broadcasting of information and ideas that are incompatible with respect for freedom of thought, conscience and religion (protection of religious beliefs). State interference with freedom of opinion may therefore be warranted. The fundamental right to freedom of religion and conscience is subject to statutory restrictions in Austria. According to Article 14 of the

Basic Law of the State of 1867, adherence to a religion does not affect civil rights (VfSlg. 802/1927) (serving as a juror or lay assistant judge, making a statement as a witness before a court). A person may only be forced to participate in religious activities, particularly religious ceremonies, where s/he is subject to the statutory authority of another (parental authority). Article 9.2 ECHR allows the legislature to limit the fundamental right in question, where this is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. In a democratic society characterised by the coexistence of various religions, it may therefore be both legitimate and necessary to limit this freedom in order to strike a balance between the interests of different groups and to ensure respect for individual beliefs. Restrictions on this freedom are now particularly important, since they make it possible to protect young people from the practices of sects and religions that might interfere with their freedom of self-determination.

The specific right to exemption from military service (conscientious objection – *Waffendienstverweigerung*) is governed by § 2 of the Alternative Civilian Service Act (*Zivildienstgesetz*). This Act applies to people subject to military obligations who refuse to do military service on conscientious grounds: with the exception of personal self-defence or assistance to people at risk, they might face a crisis of conscience if required to take up arms against another human being in the course of their military service. In this case, a person subject to national service simply has to make a statement in which he undertakes to complete twelve months of alternative civilian service.

Languages:

German.

**Identification: AUT-1997-H-001**

a) Austria / **b)** Constitutional Court / **c)** / **d)** 02.12.1997 / **e)** G 217-221/96, B 227/99 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 15027/1997, 16402/2001 / **h)**.

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.10 **General Principles** – Certainty of the law.
- 3.16 **General Principles** – Proportionality.
- 4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
- 5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.
- 5.1.3.3 **Fundamental Rights** – General questions – Limits and restrictions – Subsequent review of limitation.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
- 5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Discretion, limitation / Constitutional Court, judicial self-restraint / Constitution, fundamental principles / Fundamental right, nature / Law, determination, degree / Civil right, scope.

Headnotes:

I. In Austria, constitutional law is primarily enshrined in one central document (the Federal Constitution, *Bundesverfassungsgesetz* / B-VG), but also in separate individual constitutional laws (federal constitutional laws, *Bundesverfassungsgesetze* / BVGs) or in individual constitutional provisions to be found in ordinary laws (*einfache Gesetze*). International treaties may also completely or with regard to some provisions be of constitutional rank and thus part of constitutional law.

The adoption of constitutional law takes place in the first chamber of the Austrian Parliament (*Nationalrat*) and requires a two-third majority of the votes cast with at least half of the delegates being present. Constitutional law must always be specifically designated as such.

Changes of the basic constitutional order or – as it may also be said – essential changes of the fundamental principles require a referendum in addition to the above procedure.

These fundamental principles include the democratic and federal principles and the rule of law. The separation of powers and the liberal principle are also mentioned in this respect, unless they are considered to be covered by the rule of law. The set of fundamental rights secured by the Constitution is the main element of this liberal principle.

If relevant fundamental rights were removed in their entirety or amended to a considerable extent or if the protection of fundamental rights were severely impaired otherwise, this would result in a “total revision” which is possible only by a referendum.

Only those rights guaranteed at the constitutional level are regarded as fundamental rights in Austria. One speaks of rights guaranteed by constitutional law. The idea underlying this concept is that these rights must be enforceable before a court of law.

Most fundamental rights are regarded as human rights in Austria. There are, however, fundamental rights which are not applicable to all human beings but only to nationals, citizens of the European Union and the European Economic Area or, in addition, to that to nationals of countries which have concluded specific international treaties with Austria. Fundamental rights may also be invoked by domestic or foreign legal persons. Many rights, for example, in the social field, are only provided for by ordinary laws. Although considered relevant in substantive terms, they are not referred to as fundamental rights.

II. The European Convention on Human Rights and Protocols nos. 1, 4, 6 and 7 thereto are part of the Austrian legal system and of constitutional rank. Austria has only made a reservation in respect of Articles 5 and 6 of the Convention, which is of increasingly less significance and may soon be withdrawn.

With the 1920 Federal Constitution, a Constitutional Court (*Verfassungsgerichtshof*) was established and entrusted with the task of reviewing the law. It must annul laws, *inter alia*, if they are contrary to the fundamental rights laid down in the Constitution. The fundamental rights thus primarily are of relevance vis-à-vis the legislature. The legislature must draft its rules and regulations in such a way that they are in line with the individual fundamental rights and the system of values created by them. The fundamental rights are of course also binding on the courts and administrative authorities acting in a sovereign capacity on the basis of the laws. Even if the laws are in compliance with the Constitution, there may be violations of fundamental rights in their application, either because the law has been disregarded or because the discretion provided for by law in taking the decision has been exercised in an incorrect manner.

That the legislature is bound by fundamental rights is also to be assumed if it entrusts its activities to a private party (private sector administration) and also if it subsequently acts like a private party. Here, special regard must be made to the equal protection clause, compliance with which is secured by the Constitutional Court for legislation and by the Supreme Court (*Oberster Gerichtshof*) in the field of judicially controlled acts (*Fiskalgeltung der Grundrechte*).

Although it is generally recognised that the legislature must respect the values protected by constitutional law, such as for example, personal freedom, equality, freedom of expression and property, in the relations between the state and its citizens, the question also arises whether it is under an obligation to extend this system of values also to the relations between private parties. Does it have an “obligation to guarantee fundamental right protection also between private parties”?

Under Article 53 ECHR there is without doubt such an obligation. Moreover, that obligation is secured by the Constitutional Court due to the equality principle because the Court reviews all legal provisions, including those which merely regulate relations between private parties, to determine whether they are objectively justified. It annuls not only provisions that are not objectively justified but also those which are incomplete, if their incompleteness makes them unjustified from an objective point of view, for example where a specific group is put at a disadvantage. Only where the legislature has been completely inactive in a broader legal field, will there be difficulties. As regards issues of state liability arising from inactivity of the legislature in the implementation of guidelines, the Constitutional Court does, however, take the view that it is competent.

At the ordinary-law level, there are thus often parallel provisions to fundamental rights regarding the content, such as for example, in the Equal Treatment Act (*Gleichbehandlungsgesetz*), which stipulates that men and women are to be treated in the same manner by private employers. Taking into account the principle of private autonomy, the value system of fundamental rights is also implemented by means of general clauses (prohibition of agreements contrary to public policy (*gegen die guten Sitten*)). In one case, the constitutional legislature even took the view that the fundamental rights shall also directly apply to relations between private parties: in the field of data protection not only the state but also natural persons and legal entities are under an obligation to keep secret personal data warranting protection.

III. Fundamental rights may be restricted in Austria. In order to show the possibilities of such a restriction,

mention must first be made of the existing distinction between fundamental rights that are not subject to statutory reservation, i.e. may not be restricted by statute, and those which are subject to statutory reservation in the formal sense or in substantive terms.

An example of a basic right subject to substantive (specific) statutory reservation is the freedom of expression enshrined in Article 10 of the Convention, which sets out in paragraph 2 the limitations to be adhered to by the legislature in restricting fundamental rights.

An example of a basic right that is only subject to statutory reservations in the formal (general) sense, is the property right guaranteed by Article 5 of the 1867 Basic Law (*Staatsgrundgesetz*): “Property is inviolable. An expropriation against the owner’s will may only occur in those cases and in the manner provided for by law.” The wording of the guarantee does not contain any further restrictions for the legislature, which only has to determine the cases and type of expropriation. Similarly, Article 6 of the 1867 Basic Law provides that every citizen may “practise any gainful activity subject to the conditions of the law” (i.e. as imposed by statute). Here again, the constitutional text merely refers to the requirement of a law for a restriction without any substantive delimitations. The Constitutional Court has, however, developed limitations as to the content by relying on the general requirement of objective justification.

As regards fundamental rights not subject to statutory reservation, it must be pointed out that here again the legislature and no one else is entitled to draw the necessary delimitations resulting from the existing tensions between fundamental rights. Freedom of science is certainly limited, for example, by criminal provisions. Here, we speak of inherent barriers to fundamental rights.

What is true of all fundamental rights is that the “core area” of the respective basic right is in any event also protected against the legislature, and the Constitutional Court has developed further limitations regarding a restriction of fundamental rights primarily on the basis of the general equal protection clause. Hence the following may be said: restrictions may only be made by the legislature. Apart from express barriers contained already in the Constitution (substantive judicial reservation), there is in any event a restriction for the legislature due to the general requirement of objective justification (proportionality principle).

Any limitation of fundamental rights requires a legislative act for which there need not be a pressing need. An interference is, however, admissible only for

reasons that are also based on values laid down in the Constitution.

Even if courts or administrative authorities make use of the possibility provided by the legislature in an abstract manner, i.e. to interfere with a fundamental right, they must once again examine whether the interference is proportionate to the aim pursued.

A proportionality examination is carried out by the Constitutional Court for the legislature and the public administration, and by the Supreme Court for the realm of civil and criminal jurisdiction.

The Austrian legal system does not provide for a suspension of fundamental rights – for example in case of war or crisis. This may only be possible – as provided for in Article 15 of the Convention – by means of a constitutional law. For such a law to become effective, a referendum is required, unless there is only a minor interference with the set of fundamental rights as a result of the suspension.

IV. Austria is a country in which the judiciary and public administration are bound by legal provisions to a degree hardly experienced in other states. This means that all relevant circumstances underlying the conduct of the courts or administrative authorities must already be enshrined in the law. This gives them little discretion, which again must be exercised in accordance with the law.

The execution of a decision following, for example, a criminal conviction leading to a prison sentence, constitutes an interference based on these statutory principles with the convict's personal freedom; an execution of a decision by a court or fiscal authority ordering payment of a specific amount constitutes an interference with the person's property right, and denying someone the right to pursue a gainful activity constitutes an interference with his/her freedom of employment. These interferences may be entirely lawful. In case of unlawful interferences, the Constitutional Court has developed special formula in order to distinguish between simply unlawful acts and those which interfere with a fundamental right. The Court has held, for example, that there has been an interference with the inviolability of property, if the interference had no legal basis, if there was only a *pro forma* reliance on the law or if there had been (inconceivable and) gross mistakes in its application.

V. The prohibition of the death penalty, torture and slavery are fundamental rights for which there are no exceptions. There will, however, always be questions of delimitation regarding the scope of fundamental rights; it may, for example, be difficult to determine when bad detention conditions are to be regarded as

torture. The more relevant and essential a fundamental right, the less justified an interference will be. The core area, which must in no circumstances be violated, will then be larger.

The fundamental right to equality is also not amenable to limitation; an evaluation of what is equal or unequal, is, however, subject to a changing assessment by society, which is recognised by the Constitutional Court.

VI. There are no explicit deadlines for limitations within the framework of statutory reservations. Where specific prerequisites are laid down for a limitation, such as for example, that it is necessary in a democratic society, this may also amount to a time-limit for a restriction. Due to the proportionality principle, a time-limit in any event results from the fact that the law must be annulled or – in case of an application – the restrictive act must be set aside, if the grounds for the limitation no longer exist.

If a statutory limitation lasts for an excessive period, the law becomes invalid and may as of that date be rescinded by the Constitutional Court for being unconstitutional.

If a measure becomes unconstitutional, there is also a legal remedy. To give you one example: after an expropriation for the purpose of establishing dwellings for workers on the expropriated plot of land, no such measure was taken. The purpose of the expropriation had not been fulfilled. After more than 30 years, the Constitutional Court, in response to a request by the heirs of the former owner, held that ownership of the plot had to be retransferred to the heirs due to the basic right of inviolability of property. More frequently, a measure resulting in a deprivation of liberty must be set aside because the prerequisites (for example, risk of collusion) no longer exist. Otherwise there would be an interference with the right to personal freedom against which there is of course a legal remedy.

VII. A certain pre-emptive control lies in the conditions laid down for the legislative procedure, which contains in particular comprehensive consultation procedures. Prior to being submitted by the minister to the Government, a bill is made available to all the competent and politically relevant bodies in Austria for their comments. The draft is then revised on the basis of these statements. The draft is not only passed on to Parliament by the Government but also to a number of bodies whose objections, if any, are now submitted directly to Parliament where experts are often asked to participate in the deliberations.

Even if a law has been published but has not yet entered into force, it may be challenged before the

Constitutional Court. Federal laws may be challenged by the regional governments and one-third of the MPs of the *Nationalrat*. Regional laws may be challenged by the Federal Government and one-third of the delegates of the respective regional parliament.

There are various forms of a “sequential or remedial control of the constitutionality of a law”. Certain courts and other instances providing legal protection may challenge a law before the Constitutional Court, if they are required to apply it in a specific case and consider it to be unconstitutional. Under the same conditions, the Constitutional Court, when reviewing an administrative act, may itself institute proceedings for reviewing the law on which the administrative act is based. Apart from this, an individual may also challenge a law before the Constitutional Court, if that law directly interferes with his/her sphere of rights, that is to say, without an actual decision or a decision that can reasonably be expected to be reached by a court or administrative authority.

If the possibility of challenging laws on the ground of an infringement of fundamental rights and the possibility of obtaining an annulment by the Constitutional Court were removed, this would amount to a total revision of the Constitution.

VIII. Originally, the Constitutional Court adopted a very cautious approach regarding the limitation of fundamental rights, exercising “judicial self-restraint”. Only in a few cases were legal provisions set aside on the ground that they violated a fundamental right. About 30 years ago, the Constitutional Court abandoned its view that statutory reservations gave the legislature considerable leeway in restricting fundamental rights. It adopted interpretation methods already applied by the European Court of Human Rights, which resulted in a stricter control in substantive terms. The far-reaching discretion of the legislature in shaping the law was replaced by the strict proportionality principle which served as a yardstick in assessing whether or not a statutory interference with a fundamental right was admissible.

A good example of this development in the Constitutional Court’s case-law are its decisions relating to the fundamental right of freedom to pursue a gainful activity. Until the early 1980s there were only two cases in which the Constitutional Court annulled legal provisions for an infringement of the freedom of pursuing a gainful activity. In the 1980s, it developed a new scheme of arguments in a number of rulings, on the basis of which there have been more than 50 annulments of statutes to this day, which exclusively or at least in part were held to be due to a violation of that fundamental right. The differentiation between restrictions on taking up employment and restrictions on pursuing a gainful activity plays an important role in this respect.

IX. Article 90.2 of the Constitution stipulates that hearings before a court in civil and criminal cases shall be oral and public. Exceptions are, however, permitted and have always been the case both as regards the restriction of publicity and the total absence of an oral hearing. In order to safeguard these exceptions vis-à-vis Article 6 ECHR, Austria made a reservation to the effect that “the provisions of Article 6 ECHR shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the Constitution ...”.

It subsequently turned out that the term “civil rights” enshrined in Article 6 ECHR is interpreted by the European Court of Human Rights in a broader sense than under the Austrian legal system. This means that matters which in Austria are not classified as belonging to the sphere of “civil law” but to public law (administrative law) are covered by Article 6 ECHR. Proceedings in these matters (e.g. real estate transaction proceedings) were conducted by administrative authorities without holding a public hearing. For quite a long time, this restriction was considered admissible also by the European Court of Human Rights in its case-law since it was covered by the Austrian reservation, although strictly speaking, the reservation merely relates to “judicial” and not administrative proceedings.

Later on, the Court abandoned this view, invoking Article 57 ECHR, which prohibits reservations of a general character and also stipulates that any reservation shall mention – and contain a brief statement of – the law concerned. Since the Austrian reservation does not fulfil this requirement, the Court expressly held (in the case of *Eisenstecken v. Austria* of 3 October 2000, Appl. no. 29477/95) that the Austrian reservation to Article 6 ECHR was invalid.

At the next appropriate opportunity the Constitutional Court abandoned its previous case-law in favour of the view held by the European Court of Human Rights (VfSlg. 16.402). The Austrian Court noted that the invalidity of the reservation made it necessary to hold a public hearing before a tribunal also in administrative proceedings in which a decision is taken on the core area of civil rights. Restrictions are admissible only to the extent permitted by Article 6 ECHR. It can thus be said that the Constitutional Court usually, but not always (VfSlg. 15.27), follows the case-law of the European Court of Human Rights.

X. If the Constitutional Court has annulled an administrative act (*Bescheid*) for violating a fundamental right, the last authority which issued the decree is under an obligation to issue a new one,

being bound by the legal view of the Constitutional Court. If no such an act is issued, a complaint may be filed with the Administrative Court (*Verwaltungsgerichtshof*), challenging the authority's failure to act. Any damage incurred as a result of such dilatoriness may be asserted via an official liability action.

If the Constitutional Court has annulled a statute, the Federal Chancellor in the case of federal laws, or the Regional Governor in the case of regional laws is under an obligation to publish the annulment immediately. If he/she does not comply with this obligation, the Constitutional Court may file a request for execution – publication – with the Federal President. In such a case, all organs would have to comply with the President's orders. Moreover, a statement of no confidence may be made vis-à-vis the Chancellor or Regional Governor and actions brought against them with the Constitutional Court for violating the Constitution.

Apart from the national and regional parliaments, only the Constitutional Court may annul laws for violating fundamental rights. In addition to other persons or bodies entitled to file applications, at least all second-instance courts must file a request with the Constitutional Court for annulling a legal provision, if they have to apply that provision in a specific case and have doubts about its constitutionality. Whether acts by courts of law interfere with fundamental rights is subject to reviewing by the Supreme Court (*Oberster Gerichtshof*), whereas the task of reviewing administrative acts lies with the Constitutional Court.

Languages:

German.



Identification: AUT-1999-1-001

a) Austria / b) Constitutional Court / c) / d) 11-03-1999 / e) B 1159/98 et al. / f) / g) to be published in *Enkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / h) CODICES (German).

Keywords of the systematic thesaurus:

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

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

2.3.1 **Sources of Constitutional Law** – Techniques of review – Concept of manifest error in assessing evidence or exercising discretion.

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

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

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

5.2 **Fundamental Rights** – Equality.

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

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

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

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

Keywords of the alphabetical index:

Detention, international zone / Movement, restriction / Immigration, unlawful.

Headnotes:

Departing from its earlier precedent the Court followed the legal arguments of the European Court of Human Rights, namely that in order to determine whether an individual has been “deprived of his liberty” within the meaning of Article 5 ECHR, it is necessary to examine the actual situation and to take into account a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is merely one of degree or intensity, and not one of nature and substance.

Holding aliens in the international zone involves a restriction of liberty, but one which is not in every respect comparable to that experienced in centers for the detention of aliens who are to be deported. Such confinement, accompanied by suitable safeguards for persons concerned, is acceptable only in order to enable States to prevent unlawful immigration. Such detention should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty into a deprivation of liberty (see the *Amuur v. France* judgment of 25.06.1996, Reports of Judgments and Decisions 1996-III, *Bulletin* 1996/2).

The failure to ascertain the facts in a decisive question of (administrative) proceedings concerning aliens violates the right of equal treatment of aliens among themselves.

Summary:

Three Indian citizens were refused leave to enter Austrian territory at Vienna airport as they could not present travel documents. According to Article 33.1 of the Alien Act (*Fremdengesetz*) they were requested to stay in the airport's transit area until the continuation of their journey. They had to stay 22 days in the airport's transit area and 6 days in a separate transit area (*Sondertransitraum*) which is actually a container-construction outside the airport building and – due to its exposed site close to hangar, runways and airplanes – under strict and constant surveillance.

Complaints were filed with the Court maintaining that amongst the violations of other constitutionally guaranteed rights, holding the complainants in the transit area had violated their right not to be deprived of their liberty (Article 5 ECHR).

Referring to earlier case law the Court adhered to its legal opinion that the complainants were neither restricted in their freedom of movement nor deprived of other constitutionally guaranteed rights when being held in the airport's transit area. Their stay there was not based on the intention to restrict the complainants' liberty but on the intention to hinder them from entering Austria. The complainants were at all times free to leave Austria and to organise the continuation of their journey.

As for the complainants' stay in the separate transit area the Court stated that the authority had failed to ascertain any of those facts essential to determine whether the complainants had been deprived of their liberty according to the European Court of Human Rights' case-law quoted above. This neglect constitutes such a defect of proceedings that it encroaches on the right of equal treatment of aliens among themselves. The Court therefore overruled the impugned administrative decision.

Cross-references:

- Legal norms referred to: Article 5 ECHR.

Languages:

German.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2001-1-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 19.04.2001 / **e)** 08/15-3 / **f)** / **g)** *Azerbaijan* (Official Gazette), *Azerbaijan Respublikasının Konstitusiyası Mehkemesinin Məlumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.

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

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

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

Keywords of the alphabetical index:

Labour Law / Correctional labour / Right to rest / Right to leave / International Labour Organisation, Convention no. 132.

Headnotes:

Article 132.2 of the Labour Code provided that the term of punishment of persons sentenced to correctional labour without deprivation of freedom (e.g. “community service”) shall not be included in the calculation of their seniority for the purposes of determining their right to paid leave.

However, Article 10.2.3 of the Code on the Execution of Punishment (“the Punishment Code”) stipulated that, during the period of punishment, sentenced persons shall have the right to paid leave. Article 96.5 of the Punishment Code provided that persons convicted to imprisonment and occupied by labour activity shall have the right for annual paid leave established by labour legislation. These provisions reflect the constitutional right to rest (Article 37 of the Constitution).

Summary:

In its petition, the Supreme Court asked for an interpretation of Article 132.2 of the Labour Code according to which the term of punishment of persons convicted to correctional labour without deprivation of freedom shall not be included in the calculation of their seniority for the purposes of their right to paid leave.

Persons convicted to correctional labour keep the post and place of employment which they had before conviction. According to Article 40 of the Punishment Code, which sets forth the procedure and conditions of the punishment imposed by the court, punishment as correctional labour shall be served at the principal location of the employment of the convicted person. Nevertheless, some rights of these persons are limited. They may be transferred to other posts or work only via a procedure and based on reasons provided by labour legislation. They should respect the rules regarding the punishment, and once summoned by a court responsible for the execution of this kind of punishment, they should attend the court (Articles 41.1 and 42.2 of the Punishment Code). One of the conditions of the execution of the punishment through correctional labour shall be the deduction of money from 5-25% of the convicted person's salary, as fixed by a court decision, for the benefit of the state (Article 44.1 of the Punishment Code). The Punishment Code does not provide for any other limitations on the rights of persons sentenced to correctional labour. At the same time, Article 132.2 of the Labour Code provides for the exclusion of the period of punishment served by convicted persons in the calculation of their seniority, which determines their right to and duration of paid leave. This provision contradicts Articles 10 and 44.3 of the Punishment Code.

According to Article 10.2.3 of the Punishment Code, during the period of punishment, convicted persons shall have the right for rest. Article 44.3 stipulates that, based on the procedure determined by law, persons sentenced to correctional labour shall have the right for rest provided by labour legislation. It is necessary to note that, in accordance with Article 96.5 of the Punishment Code, persons sentenced to imprisonment and occupied by labour activity have the right for annual paid leave established by labour legislation.

An analysis of the above mentioned provisions of the Punishment Code shows that persons sentenced to correctional labour shall serve the conviction in the place the enterprise where they worked before, based on the same former post or job and according to the labour contract concluded with the employer. The

regulations concerning the working time, rest time, standards of work, as well as the rules, procedures and guarantees of remuneration for labour provided by labour legislation are applied to those persons. As opposed to Article 132.2 of the Labour Code, the Punishment Code does not contain any limitation on the right to rest, which is enshrined in Article 37 of the Constitution, as regards convicted persons. Also the right of citizens to rest is enshrined in Article 24 of the Universal Declaration on Human Rights and Article 3 of the Convention of the International Labour Organisation on Paid Holidays.

The Court thus declared that Article 132.2 of the Labour Code was null and void due to its non-conformity with Article 37 of the Constitution.

Languages:

Azeri, Russian, English (translations by the Court).



Belgium

Court of Arbitration

Important decisions

Identification: BEL-1996-2-005

a) Belgium / b) Court of Arbitration / c) / d) 12.07.1996 / e) 45/96 / f) / g) *Moniteur belge* (Official Gazette), 27.07.1996 / h) *Information et documentation juridiques* (IDJ), 1996, liv. 9, 21; *Revue de Jurisprudence de Liège, Mons et Bruxelles* (J.L.M.B.), 1996, 1068.; CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

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

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.

3.16 **General Principles** – Proportionality.

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

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Genocide / Negationism / Revisionism.

Headnotes:

Freedom of expression is one of the fundamental requisites of a democratic society. It holds good not only for “information” or “ideas” that are received favourably or considered inoffensive or innocuous, but also for opinions that shock, disturb or go against the State or some fraction of the population. Freedom of expression is not, however, absolute. Furthermore, freedom of expression as guaranteed by Article 10 ECHR cannot be used as an argument when it goes against Article 17 ECHR.

The activities established as offences by the Act of 23 March 1995, which was designed to make negation, minimisation, justification or approval of the

genocide committed by the German national socialist regime during the second world war an offence, are similar in that it is hardly conceivable to engage in such activities without wanting, if only indirectly, to rehabilitate a criminal ideology hostile to democracy and to cause serious offence to one or more categories of human beings. The Act challenged can be considered as meeting an imperative need, because the expression of such opinions is dishonourable and offensive to the memory of the victims of genocide, its survivors and in particular the Jewish people themselves. The Act can also be regarded as necessary in a democratic society: it is punitive, does not provide for any preventive measure to hinder the circulation of opinions and only punishes opinions expressed in certain places and certain circumstances, not because of their content but because of their injurious consequences for others and for democratic society as such. The Act at issue certainly does not aim to hinder scientific and critical research into the historical reality of the genocide in question or to obstruct any form of factual information on the subject.

The Act of 23 March 1995 does not violate the constitutional principle of equality and non-discrimination established in Articles 10 and 11 of the Constitution, when read either in isolation or in combination with Articles 10 and 17 ECHR and Article 19.3 of the International Covenant on Civil and Political Rights.

Summary:

Two private individuals requested that the Act of 23 March 1995, designed to make negation, minimisation, justification or approval of the genocide committed by the German national socialist regime during the second world war an offence, be declared void. The petition of the first applicant, who was known to be revisionist and denounced the restriction of the right to freedom of expression, was held to be admissible. However, the petition of the second, who considered that the Act did not go far enough, was inadmissible. The applicant’s disapproval of a law on the basis of a subjective, personal viewpoint or the feelings it evoked in him could not be accepted as evidence of the interest required by law.

With regard to the merits of the case, the Court concluded – after a thorough examination of the provisions of the Act at issue and the Court’s *travaux préparatoires*, and in the light of Articles 10 and 17 ECHR and Article 19.3 of the International Covenant on Civil and Political Rights – that the applicant’s claim that the Act comprised a discriminatory restriction of the right to freedom of expression in that its scope was too widely defined and that the

consequences of the Act were disproportionate to the objectives pursued, could not be admitted. The grounds for the decision summarised here are particularly detailed.

Languages:

French, Dutch, German.



Identification: BEL-2000-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 02.02.2000 / **e)** 13/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.03.2000 / **h)** CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
 2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
 4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2 **Fundamental Rights** – Equality.
 5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Media, broadcasting, freedom / Media, broadcasting, licence / Media, broadcasting, public broadcasting company / Media, broadcasting, monopoly / Media, radio, private, commercial / Media, broadcasting, frequencies / Media, radio, terrestrial transmission / Competition / Free movement of services / Monopoly, broadcasting.

Headnotes:

Regulations under which public broadcasting companies alone are entitled to broadcast over the air at nationwide level and private radio stations may operate only at local level are not incompatible with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), considered separately or in conjunction with the principle of freedom of trade and industry, Articles 82 and 86.1 of the Constitution (formerly Articles 86 and 90.1) EC, and the principles of freedom of expression as enshrined in Article 10 ECHR and Article 19 of the Constitution, freedom of establishment, as enshrined in European Union law (Article 43 EC, formerly Article 52) and the free movement of services (Article 49 EC, formerly Article 59).

Summary:

A public limited company established under Luxembourg law, Radio Flandria, and other parties appealed to the Court of Arbitration to set aside a Flemish Community decree of 7 July 1998 amending the decrees on radio and television broadcasting, which had been co-ordinated on 25 January 1995 (in the federal state of Belgium, the French, Flemish and German-speaking Communities have sole responsibility, by virtue of legally binding decrees, for all aspects of radio and television broadcasting except federal government broadcasts). The applicants complained about the “*Vlaamse Radio en Televisie-omroep’s*” monopoly on terrestrial transmission radio broadcasting for the Flemish Community as a whole.

The Court accepted that a commercial radio station currently broadcasting Dutch-language radio programmes for the Flemish market via cable, using a Luxembourg broadcasting licence, was entitled to bring the action, since it was directly and adversely affected by provisions preventing it from broadcasting over the air to the Flemish Community as a whole. A number of other applicants were also able to show, as required by law, that the action was in their interests; however, two private listeners were not, as they were only indirectly affected by the provisions at issue. The Court also rejected other objections to

admissibility raised by the Flemish government as the respondent.

As to the merits of the case, the Court found that the public broadcasting corporation's monopoly on terrestrial transmission radio broadcasting for the Flemish Community as a whole, and the ensuing difference in treatment between public and private radio stations broadcasting over the air, were not incompatible with Articles 10 and 11 of the Constitution with regard to the transmission range, especially in view of the limited number of frequencies available and the specific public service duties of public radio stations.

The Court also found that the public broadcasting corporation's monopoly on regional radio broadcasts via terrestrial transmitters was not incompatible with Articles 10 and 11 of the Constitution, considered in conjunction with the principle of freedom of trade and industry and Articles 82 and 86.1 EC (formerly 86 and 90.1), which prohibit abuse of a dominant position. The Court held that freedom of trade and industry was not absolute and that, in certain cases, restrictions could be placed on the freedom of business enterprises to act according to their own discretion. With regard to the alleged infringement of Articles 10 and 11 of the Constitution in conjunction with the provisions of European law, the Court pointed out that it had consistently considered the constitutional principles of equality and non-discrimination to apply to all rights and freedoms, including those deriving from international treaties by which Belgium was bound. Having examined Articles 82 and 86 EC and the case-law of the European Court of Justice (Inno, 13/77; Höfner and Elser, C-41/90, ERT, C-260/89, Corbeau, C-320/91, Sacchi, 155/73 and CBEM/CLT and IPB, 311/84), the Court concluded that EU member states, for public service but not economic reasons, could exempt radio and television programmes, including those broadcast via cable, from competition requirements by conferring exclusive rights on one or more broadcasters. In the Court's view, the legislature issuing the relevant decree was not manifestly misguided in considering that if the "*Vlaamse Radio en Televisie-omroep*" was to perform its specific public service duties properly, all competition from national commercial radio stations broadcasting over the air should be excluded. In this connection, the Court referred to Article 16 EC (formerly 7D), and more specifically to Protocol no. 32 of 2 October 1997 on the system of public broadcasting in the member states.

The Court also rejected the third argument, which was the alleged infringement of Articles 10 and 11 of the Constitution, considered in conjunction with the

principle of freedom of expression as enshrined in Article 10 ECHR and Article 19 of the Constitution, finding that freedom of expression could be subject to certain formalities, conditions, restrictions or sanctions provided for by the law as a necessary means, in a democratic society, of safeguarding the aims set out in the above-mentioned provisions. The Court found that, in this particular case, the legislature issuing the decree had established restrictions which pursued a legitimate aim and were necessary in a democratic society, given the limited number of radio frequencies available.

Finally, the Court also rejected the fourth and fifth arguments, concerning the alleged infringements of Articles 10 and 11 of the Constitution, considered in conjunction with the principles of freedom of establishment as enshrined in European Union law (Article 43 EC) and the free movement of services (Article 49 EC).

Languages:

French, Dutch, German.



Identification: BEL-2003-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 08.01.2003 / **e)** 1/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 03.02.2003 / **h)** CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
- 4.6.3 **Institutions** – Executive bodies – Application of laws.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 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:

Education, private, subsidy / Education, teacher, training / Education, authorisation.

Headnotes:

If the principle of freedom of education (Article 24.1 of the Constitution) is to be put into practice, education authorities which are not directly answerable to the Community (the federated entity responsible for educational affairs) must be entitled, under certain conditions, to apply to the Community for subsidies. The right to subsidies is restricted both by the fact that the Community may make subsidies subject to public interest requirements, for example the need for a high standard of education and to observe the rules governing pupil numbers, and by the need for balanced allocation of available financial resources to the Community's different tasks.

Freedom of education therefore has limits, and it is possible for the authority responsible for issuing decrees to impose conditions with regard to funding and subsidies which restrict this freedom. Such measures cannot in themselves be considered a violation of the principle of freedom of education, though this would be the case if the specific limits placed on freedom of education were inappropriate or disproportionate to the objectives pursued.

There is no disproportionate infringement of schools' freedom to dispense education if existing measures give these institutions substantial freedom in applying the rules laid down by the relevant Community body on grounds of public interest.

Summary:

Several Hautes Écoles (teacher training colleges) and the secretariat-general for Catholic education in the French- and German-speaking communities asked the Court of Arbitration to set aside a French Community binding decree which defines the initial training of primary and lower secondary school teachers. They accused the French Community of disregarding several provisions of Article 24 of the Constitution, which sets out the rules governing educational matters, in particular freedom of education and equality between pupils or students, parents, teaching staff and institutions.

The Court observed in the instant case that the legislative body sought to match teaching activities with the required skills, and ensure the homogeneity and logical progression of, and a professional approach to, teacher training, and emphasis on team

work. It also endeavoured to ensure that trainee teachers gained practical experience as soon as possible and that links were forged with other training institutions.

The Court accepted that those objectives were in the public interest because they were aimed at ensuring quality and uniformity in the training of primary and lower secondary school teachers. The measures taken were in keeping with those objectives and were not contrary to the proportionality rule because they allowed for substantial freedom in the application of the rules laid down by the competent authority.

Nor was the decree contrary to the constitutional rules of equality and non-discrimination with regard to education (Article 24.4 of the Constitution) because there were objective differences between institutions responsible for the training of primary and lower secondary school teachers on the one hand and those responsible for training upper secondary school teachers on the other hand. One difference was that the latter training was intended for candidates with a university degree or equivalent qualification. The second difference concerned the type of pupils that these teachers would be qualified to teach: primary and lower secondary school teachers, as a rule, taught children of between six and fifteen years of age (primary education and lower secondary education) whereas upper secondary school teachers as a rule taught adolescents between fifteen and eighteen years of age (upper secondary school education). Owing to these objective differences between trainee primary and lower secondary school teachers on the one hand and trainee upper secondary school teachers on the other and between the institutions which trained the two groups, it did not seem unreasonable that the competent body should not lay down the same legal rules for their training.

Finally, the Court dismissed the claim that the principle of a fair distribution of powers between the legislative body and the government had been infringed (Article 24.5 of the Constitution). The Constitution reflected a commitment to giving the competent authority responsibility for deciding on fundamental aspects of the organisation, recognition and subsidising of education but did not stipulate that other authorities could not be authorised to organise education under certain conditions. Such authorisation could only concern the application of the principles which the legislative body itself had adopted. The government could not, by granting such authorisation, compensate for the lack of clarity in these principles or elaborate on insufficiently detailed rules. Any delegation of power in the case in question remained within limits which were compatible with the provisions of the Constitution.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2004-1-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 30.01.2004 / **e)** U 14/02 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 18/04 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.
- 4.9.9 **Institutions** – Elections and instruments of direct democracy – Voting procedures.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
- 5.3.40.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
- 5.3.40.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, disqualification / Vote, right, municipality of last domicile / Property, illegally occupied.

Headnotes:

A provisional restriction on certain human rights may be imposed if it is in accordance with the law and if necessary in a democratic society for the protection of the rights and freedoms of others.

An act or a regulation is discriminatory if it makes a distinction between persons or groups that are in a similar situation and if there is no objective and reasonable justification for that distinction or if there is no reasonable proportion between the means employed and the aims sought to be achieved.

Summary:

Thirty-three representatives of the People's Assembly of the *Republika Srpska* submitted a request to the Constitutional Court for a review of the constitutionality of Article 19.8.3 of the Election Law of Bosnia and Herzegovina, which reads as follows:

“Where a citizen of Bosnia and Herzegovina occupies a house or an apartment for which he/she does not have an ownership or occupancy right, and where an enforceable order for the restitution of that house or apartment has been issued by a competent court, by administrative authority or by the CRPC, that citizen has no right to vote in the place of current residence, until he/she abandons the other person's property, after which he/she may register for election only in the municipality where he/she had his/her last domicile, as determined on the basis of the last Census in Bosnia and Herzegovina.”

The applicants considered that the impugned provision of the Law was in contravention of the Constitution, which provides that Bosnia and Herzegovina and its Entities shall secure the highest level of internationally recognised human rights and fundamental freedoms (Article II-1 of the Constitution). The applicants claimed that the impugned Article of the Election Law violated the constitutional right to liberty of movement and residence (Article II-3.m of the Constitution), the equal treatment of the citizens of Bosnia and Herzegovina in relation to the right of liberty of movement within the state borders, as well as the right of a citizen of Bosnia and Herzegovina not to be subjected to discrimination in the course of enjoyment of the rights and freedoms provided for in the Constitution or in the international agreements listed in Annex I to the Constitution (Article II-4 of the Constitution).

The Constitutional Court pointed out that pursuant to Article I-2 of the Constitution, Bosnia and Herzegovina is a democratic state, which operates under the rule of law and has free and democratic elections. Pursuant to the Constitution, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms, and the rights and freedoms set out in the European Convention on Human Rights shall apply directly in Bosnia and Herzegovina with priority over all other law (Article II-2 of the Constitution).

As to the issue of liberty of movement and residence, the Constitutional Court referred to the general rule that does not permit restrictions of that right, except

for restrictions that are in accordance with the law and that are, *inter alia*, established for the protection of the rights and freedoms of others.

The Constitutional Court recalled that the purpose of the impugned provision of the Election Law is the protection of the Constitutional right of all refugees and displaced persons to freely return to their homes as well as to have their property restored to them (Article II-5 of the Constitution).

Therefore, the Constitutional Court found that the provision of Article 19.8.3 of the Election Law should be interpreted as a provision fostering a speedier return of refugees and displaced persons to their homes of origin, for two reasons: firstly, that is the main goal of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina; and secondly, it is also set out in Article II-5 of the Constitution. The legislator's decision to enact that provision, taken together with the decision that that provision was to be temporary in nature, was not in contravention of the Constitution. That provision advanced a legitimate goal: to realise the principle of a democratic state based on the rule of law and protection of the rights and freedoms of others as established in Article 2 Protocol 4 ECHR, which forms an integral part of the Constitution.

A limitation of fundamental rights, although justified, must be done in a non-discriminatory manner.

In the particular case, the issue of equal treatment of persons in relation to the right to liberty of movement within the state borders arose.

In the particular case, all citizens of Bosnia and Herzegovina who occupied a house or an apartment without an ownership title or occupancy right and who had received notice of an enforceable order for the restitution of that property issued by a competent court or an administrative authority were treated equally. The Constitutional Court considered that the citizens of Bosnia and Herzegovina with the status of refugees and displaced persons and who had not received an enforceable order by a competent authority indicating that they were illegally occupying another person's property were in a different situation than persons who illegally occupied another person's property. Those two categories of persons could not be taken to be in an analogous situation; therefore, the impugned provision of Article 19.8.3 of the Election Law could not be held to be discriminatory or to violate the right to liberty of movement and residence.

Languages:

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



Identification: BIH-2002-2-005

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 10.05.2002 / **e)** U 18/00 / **f)** K.H. / **g)** / **h)**.

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.6.3 **General Principles** – Structure of the State – Federal State.
- 3.8 **General Principles** – Territorial principles.
- 3.9 **General Principles** – Rule of law.
- 4.6.10.1 **Institutions** – Executive bodies – Liability – Legal liability.
- 4.6.10.1.2 **Institutions** – Executive bodies – Liability – Legal liability – Civil liability.
- 4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.
- 4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 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 – Access to courts.
- 5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Damage, compensation / Powers, implicit / Powers, negative, conflict / Transport, public, accident / State, successor, liability for obligations of former state.

Headnotes:

The State of Bosnia and Herzegovina must assume responsibility for those issues constitutionally assigned to it. It must provide for judicial bodies that adjudicate claims against State bodies. As long as the State does not provide for such judicial bodies, it is responsible for the payment of compensation that the individual is unable to achieve due to deficiencies in the legal order.

Summary:

The appellant requested compensation for damages.

In 1979, the appellant was injured in a traffic accident on a public road when a stone fell on and broke the window of the bus in which the appellant was sitting, and caused him serious injuries. He initiated legal proceedings for compensation for damage. In 1981, the Municipal Court of Visegrad ordered the Republic Fund for Main and Regional Roads of Bosnia and Herzegovina (“the Fund”) to pay compensation for pecuniary and non-pecuniary damage, compensation for the treatment and care that the appellant was given and penalty interest. In later proceedings for compensation for loss of earnings against the same defendant, several judgments were rendered from 1983 to 1991, each of which ordered the payment of compensation for damage, however, in differing amounts and for differing periods of compensation.

In 1998, the appellant initiated proceedings before the Municipal Court of Sarajevo against the Federation of Bosnia and Herzegovina (Federal Ministry of Traffic and Communications). He requested compensation for loss of earnings with penalty interest for the period from 1 January 1998 as a result of the 1979 accident. In 1999, the Municipal Court rejected the appellant’s claim due to the absence of a proper defendant for the claim. This judgment was confirmed by the Cantonal Court of Sarajevo.

The appellant complained that the challenged judgment of the Cantonal Court violated his right to property provided for in Article II.3.k of the Constitution of Bosnia and Herzegovina.

The Federal Ministry of Traffic and Communications declared itself incompetent and requested that the appeal be dismissed as ill founded. The Ministry of Civil Affairs and Communications of Bosnia and Herzegovina declared itself incompetent with respect to the subject of the appeal. The Ministry of Traffic and Communications of the Republika Srpska refused to express an opinion on the appeal due to its non-involvement in the proceedings conducted before the Court of the Federation of Bosnia and Herzegovina.

The Court granted the appeal and quashed the challenged judgments. Moreover, it declared Bosnia and Herzegovina to be responsible for remedying the violation of the appellant’s rights. The Council of Ministers of Bosnia and Herzegovina was ordered to implement the decision of the Court, and to pay the appellant a specified sum.

The Court found that the challenged court decisions violated the appellant’s right of access to the courts

(Article 6.1 ECHR), the right to an effective legal remedy (Article 13 ECHR) and the right to property (Article 1 Protocol 1 ECHR).

With regard to Article 6.1 ECHR, the Court recalled that the right of access to a court embodied not only extensive procedural guarantees and requirements of expeditious and public proceedings, but also required compatibility with the rule of law. If the right of access to the courts could be limited by the State, these limitations were not to restrict or reduce the access in such a way that the very essence of the right was impaired. Furthermore, a limitation would not be compatible with Article 6.1 ECHR if it did not pursue a legitimate aim and if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

The Court found Article 6 ECHR to be applicable. It noted that all three public legal persons that had been addressed by the Court declined their competence regarding the present case. The event had occurred in 1979, on a location within the former territory of Bosnia and Herzegovina which was now within the territory of Republika Srpska. At the time, the responsible party was the Fund.

The Court held that the appellant's appeal fell within the exclusive responsibility of the State of Bosnia and Herzegovina. The Fund had in practical terms ceased to exist without providing for a successor. A new body taking over the Fund's duties and finances had never been established. On the one hand, the Republika Srpska had never taken over the responsibilities or financial means of the Fund and it could not be regarded as responsible for the compensation of damage caused on its territory at the time prior to the date of the entry into force of the Constitution of Bosnia and Herzegovina (14 December 1995). On the other hand, according to the Agreement on Realisation of the Federation of Bosnia and Herzegovina, the government of the Republic of Bosnia and Herzegovina retained the necessary competences to enable it to function as a government of the internationally recognised State of Bosnia and Herzegovina, while all other civil responsibilities were transferred to the government of the Federation of Bosnia and Herzegovina. This kind of transfer also included the transfer of responsibilities for functions that had been transferred by areas of competence and, therefore, included the transfer of obligations not specifically regulated but arising in the performance of duties. The Federation of Bosnia and Herzegovina therefore was intended to take over the responsibilities and financial funds previously belonging to the bodies of the Republic of Bosnia and Herzegovina. Consequently, the obligations of the Republic of Bosnia and Herzegovina, under Article 9 of the Law

on Federal Ministries and other Bodies of the Federal Administration, according to which the Federal Ministry of Traffic and Communications would perform administrative, expert and other duties established by law, fell within the responsibility of the Federation in the field of traffic and communications.

However, the Court held that the State could not evade its obligation to establish bodies that were within its exclusive constitutional responsibilities. Nor could the Entities take over the State's responsibilities assigned to it in the Constitution of Bosnia and Herzegovina. According to Article I of the Constitution of Bosnia and Herzegovina, "the Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina', shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognised borders (...)". Moreover, Article III of the Constitution of Bosnia and Herzegovina regulated the responsibilities of and the relations between the institutions of Bosnia and Herzegovina and the Entities, and according to Article III.1.i of the Constitution, the regulation of inter-Entity transportation fell within the exclusive competence of the State.

The Court further argued that, regardless of whether the State had a *prima facie* legal interest in the present case, it was the legal entity that had the final responsibility with regard to possible violations of human rights under Article II of the Constitution of Bosnia and Herzegovina. The Court found that an individual must not be overburdened in determining the most effective way of realising his rights. One of the main principles of the European Convention on Human Rights was that the legal means available to an individual had to be accessible and understandable. It was the duty of the State to organise its legal system so as to allow the courts to comply with the requirements of Article 6.1 ECHR.

The matter at issue therefore fell within the competence of the State of Bosnia and Herzegovina and it had to comply with its constitutional responsibility. However, since there was, at the time of the decision, no State Court before which the appellant would have been able to defend his civil rights, the appellant had been denied his right of access to court.

Accordingly, the Court found a violation of the appellant's right under Article 13 ECHR. Article 13 ECHR had to be interpreted so as to guarantee an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated. Article 13 ECHR guaranteed the availability within the national legal order of an effective remedy to enforce

Convention rights and freedoms in whatever form they might happen to be secured. The object of this Article was thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant effective relief to the aggrieved party. The remedy required by Article 13 ECHR must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent party.

The Court found that the appellant had a valid claim in the sense of Article 13 ECHR. As a result of constitutional re-organisation, Bosnia and Herzegovina had not established all the bodies necessary to perform its obligations under the Constitution of Bosnia and Herzegovina. It had not established an operative body that would be competent for inter-Entity transport matters or a judicial body that would deal with cases brought by appellants against the decisions of those State bodies that ran counter to the principle of the rule of law.

Finally, the Court found a violation of the appellant’s right to peaceful enjoyment of his possessions. The present case did not fall within the ambit of the application of laws controlling the use of property; but it concerned a failure by the authorities to effectively secure the appellant’s right to property. Despite its positive obligation to do so, the State of Bosnia and Herzegovina had failed to provide a proper legal protection of the appellant’s property right. The Court could not see in what way the State had struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the appellant’s right to property.

The Court concluded that the appellant had a well-founded claim for compensation and that Bosnia and Herzegovina was responsible for honouring that claim. In the absence of a court before which he could have his claim confirmed, the Court argued that the State of Bosnia and Herzegovina had to be directly ordered to pay him compensation based on the average income in the Federation of Bosnia and Herzegovina.

Languages:

Bosnian, Croat, Serb.



Bulgaria Constitutional Court

Important decisions

Identification: BUL-1996-2-004

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 04.06.1996 / **e)** 07/96 / **f)** / **g)** *Darzhaven Vestnik* (Official Gazette), 55, 28.06.1996 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.

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

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

5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Media, law, formal constitutionality.

Headnotes:

Freedom of opinion, freedom of expression and dissemination and the right to seek, obtain and disseminate information are fundamental human rights. Restrictions on these rights fall within the powers of the judiciary and have to comply with the Constitution.

Summary:

The President of the Republic of Bulgaria asked for a binding interpretation of the provisions of Articles 39, 40 and 41 of the Constitution. The three provisions of the Constitution cover one and the same

range: freedom to express and publicise opinions; the right to seek, obtain and disseminate information; and the definition of the restrictions on these rights as laid down in the Constitution.

1. The provisions of Articles 39, 40 and 41 of the Constitution provide that the freedom to express and publicise opinions and the right to seek, obtain and disseminate information shall be fundamental human rights.

These provisions defend the right to free expression and the dignity of the individual as an equal participant in the social community. In addition, they guarantee that everyone be informed about reality and that the public be informed about the conditions of life and development in conformity with public opinion formed as a result of the free exchange of views.

These functions of the rights define them as essential for individual and public development. They underpin the democratic process, and more particularly the democratic manner of institutionalisation of the bodies that the Constitution provides for and the control on their functions.

The proclamation of these rights in the Constitution and their full exercise is related to a number of other fundamental human rights like the dignity of the individual, freedom of thought and freedom of conscience and political pluralism.

2. Together the three provisions defend various aspects of the right to freely express and publicise opinions and to seek, obtain and disseminate information. The three provisions are systematically and functionally related.

In addition to the fundamental right of every individual to freely express and publicise opinions, the Constitution lays down the principle that the press and other mass media shall be free. Censorship is explicitly prohibited.

The right of any physical person or legal entity to seek, obtain and disseminate information defends both the interest of the individual and the interest of the public to be informed. It covers the press and any other media. On the other hand, the Constitution guarantees that citizens should have access to information from State bodies or agencies on any matter of legitimate interest to them.

3. The rights spelled out in Articles 39, 40 and 41 of the Constitution oblige the Government to refrain from interference when these rights are exercised.

Restrictions on these rights are permissible only if other rights and interests laid down in the Constitution are to be defended constitutionally. These shall not be restricted by a law on grounds other than those described in the Constitution.

When such restrictions are imposed, the legislature, the executive and the judiciary shall take into account the high public importance of the right to express opinions, the freedom of the media and the right to information, which require that any restrictions (exceptions) to which these rights are subjected be applied restrictively and only to defend competing interests.

Among these grounds, the possibility of protecting the rights and reputation of another person is the greatest, as in this way the honour, dignity and reputation of the individual are defended. This constitutional restriction is not to be interpreted to the effect that public criticism, particularly of politicians, civil servants and government institutions, is not allowed.

The restriction of statements instigating hostility is based on the values laid down in the Constitution: tolerance, mutual respect, and the prohibition of incitement to hatred on racial, national, ethnic or religious basis. That restriction does not deny a defence to the diversity of opposite opinions. The very nature of the right to freely express and publicise opinions is based on the value attached to the competition of ideas and the opposition of differing viewpoints.

4. Along with the right to freely express and disseminate opinions in various ways, the Constitution proclaims freedom of the press and other media and prohibits censorship.

The categorical prohibition of censorship expresses the principle which rejects any interference in the activities of media by government institutions, whether by resorting to official institutionalisation of the instrument of interference or in informal ways.

For legal and technical reasons it is admissible to regulate by law organisational, structural and financial aspects of the activities of electronic media. The Transitional and Concluding Provisions of the Constitution expressly provide for the passage of such legislation in respect of National Radio and Television. Such legislation should guarantee the independence of these media in terms of organisation, structure, staff, programming and finance. The maintenance of the national electronic media as independent institutions requires the institution of corresponding governing and/or supervising bodies in

a way which will frustrate attempts at undue interference by government institutions, political factors or other stakeholders in a private capacity. Such interference by government institutions would constitute censorship. The guarantee of the right of the public to obtain full, pluralist, balanced and precise information is found in the independence of operational management, editorial independence and responsibility vis-à-vis programme schemes and programme content, the free selection of staff and the mechanisms of funding. The right of the individual and the public to obtain full, pluralist, balanced and precise information determines the limits of legislative competence which Parliament possesses and must exercise within the limits of the Constitution in order to enable the media to perform their functions.

The legislative competence of Parliament includes also the passing of laws to establish the procedure of licensing non-governmental electronic media in compliance with the principle in Article 40.1 of the Constitution, as well as the application of constitutional restrictions while at the same time ensuring transparency and fairness of procedures.

Measures falling within the scope of competence of the judiciary and in the conditions spelled out in the Constitution are the only permissible instruments of direct interference in the activities of the media. In the first place these are motives associated with safeguarding decorum, which is understood as a criterion of public decency established to shield the public. The interest of maintaining the moral integrity of society is a guiding principle.

5. The right to seek and obtain information covers the obligation of government institutions to ensure access to information of public significance. The content of this obligation is subject to definition by the legislature. It includes the obligation of government institutions to release official information and to ensure access to sources of information. The legislature is called upon to name the government institutions that can have free air time in the National Television and Radio, and to say when and how much time is allocated, while taking account of their prerogatives and the principle of the separation of powers, of the freedom of the media and of the right to obtain and disseminate information.

That right is granted to all, the media included. Its restriction requires that the legislature define the relevant circumstances of national security or of public order.

This holds true of the grounds on which citizens may be refused information by government institutions or offices. The right established by these regulations is

personal, being connected to a citizen's legitimate interests, and it may be restricted on the grounds that such information constitutes a State secret or other secret for which the law provides non-disclosure.

Languages:

Bulgarian.



Identification: BUL-1997-3-004

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 21.11.1997 / **e)** 19/97 / **f)** / **g)** *Darzhaven Vestnik* (Official Gazette), 120, 16.12.1997 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Criminal law / Self-defence, limits / Burglary / Violence / Self-defence, excess.

Headnotes:

Self-defence which seeks to defend a right which is assailed and allows for that right to be defended is not to be interpreted as a right to harm the assailant immeasurably.

Summary:

A group of Members of Parliament challenged the constitutionality and consistency of Section 1 of the Law on the Amendment to the Penal Code with the International Covenant of Civil and Political Rights to which Bulgaria is a party.

The Court found the provisions of Articles 12.3.1, 12.3.2 and 12.3.3 – with reference to the words “countryside property or business facility” – and Articles 12.3.4 and 12.3.5 of the Penal Code introduced by Section 1.1 of the Amendment were contrary to the Constitution and struck out the rest of the claim.

According to the text referred to, regardless of the nature and danger of defence there shall be no excess of self-defence providing:

1. The assailants are two or more than two;
2. The assailant is armed;
3. The assailant has resorted to violence or burglary to get into the home, countryside property or business facility;
4. The assault takes place in a vehicle, aircraft, ship or train;
5. The assault takes place during the night;
6. There is no other way to parry the assault.

The Constitutional Court's decision ruled that self-defence in seeking to defend a right which is assailed shall not include the right to harm the assailant immeasurably. The latter's personality and rights continue to be the subject of constitutional protection even when he or she has gone into immediate illicit assault. The provisions that the Court found to be contrary to the Constitution allow an assault to be warded off by harming the assailant and thus go beyond necessary defence. These same provisions do not contain a requirement that defence shall match the nature and danger of the assault. He who defends himself can decide for himself what harm he may cause in order to defend his threatened interests. These provisions allow and in certain circumstances justify homicide committed or homicide attempted for both go beyond defence. Thus they affect and infringe the right to life which is a fundamental constitutional right guaranteed by the State under Article 4.2 of the Constitution.

The Court ruled that the expression “The assailant has resorted to violence or burglary to get into the home” was consistent with Article 6.1 of the International Covenant on Civil and Political Rights. In such cases the assault violates a fundamental constitutional right like the inviolability of the home under Article 33 of the Constitution. When two constitutional rights compete – the assailant's right to life and the inviolability of the home – the assailant's right to life shall not take precedence. Therefore regardless of the nature and danger of defence it is deemed that self-defence has not gone too far when there is violent entry or burglary in the home.

Article 12.3.6 of the Penal Code expresses the very nature of unavoidable defence in cases when offensive advances were impossible to ward off in a way different from the way which the person defending himself or herself has used.

Languages:

Bulgarian.



Canada

Supreme Court

Important decisions

Identification: CAN-1999-3-005

a) Canada / **b)** Supreme Court / **c)** / **d)** 25.11.1999 / **e)** 26358 / **f)** R. v. Mills / **g)** *Canada Supreme Court Reports*, [1999] 3 S.C.R. 668 / **h)** Internet: <http://www.droit.umontreal.ca/doc/csc-scc/en/index.html>; 180 *Dominion Law Reports* (4th) 1; 139 *Canadian Criminal Cases* (3d) 321; [1999] S.C.J. no. 68 (*QuickLaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.
- 5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Equality of arms.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Criminal law / Offence, sexual / Record, production / File, access.

Headnotes:

The Criminal Code restrictions on the production of records relating to the complainant in sexual offence proceedings do not violate the accused's right to full answer and defence as this right must be balanced against the complainant's right to privacy. Both rights must be considered in context and both must be informed by the right to equality.

Summary:

The accused was charged with sexual assault and unlawful sexual touching. His counsel sought, in addition to material produced, the production of records relating to the complainant held by a psychiatrist and a child and adolescent services organisation. Several new Criminal Code provisions, however, restrict the production of records in sexual offence proceedings. They prevent the automatic disclosure of all relevant non-privileged information in the Crown's possession, list a series of assertions that could not on their own establish that a record was likely to be relevant, and require that production be "necessary in the interests of justice". The accused based his challenge to the constitutional validity of these provisions on the right to a fair trial and the right to make full answer and defence under Sections 7 and 11.d of the Canadian Charter of Rights and Freedoms. The trial judge concluded that the impugned Criminal Code provisions infringed these constitutional rights and that they could not be considered as a reasonable limit prescribed by law that could be demonstrably justified in a free and democratic society. The Supreme Court of Canada allowed an appeal from that decision and found the impugned legislation to be constitutionally sound.

A majority of the Supreme Court found that a contextual approach to the interpretation of rights should be adopted as they often inform, and are informed by, other rights at issue in the circumstances. The right to make full answer and defence is crucial to ensuring that the innocent are not convicted but that right, when seen in light of other principles of fundamental justice which may embrace interests and perspectives beyond those of the accused, does not include the right to adduce evidence that would distort the search for truth inherent in the trial process.

An order for the production of records can potentially violate several constitutional protections. The reasonable expectation of privacy is protected not only by the constitutional provision against unreasonable search and seizure (Section 8 of the Charter) but also by the principles of fundamental justice. The complainant's reasonable expectation of privacy includes the ability to control the dissemination of confidential information. The right to privacy, however, may be limited because, given that reasonable searches are constitutionally permissible, it may be inferred that they are consistent with the principles of fundamental justice and can accommodate both the accused's ability to make full answer and defence and the complainant's privacy right. The accused will have no right to records in so far as they contain information that is either irrelevant or would serve to distort the search for truth. Yet, the

accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. Between these extremes lies a spectrum of possibilities regarding where to strike a balance between these competing rights in any particular context. Full answer and defence will be more centrally implicated where the information contained in a record is part of the case to meet or where its potential probative value is high. Privacy rights will be most directly at stake where a record concerns aspects of one's individual identity or where confidentiality is crucial to a therapeutic or trust-like relationship. Equality concerns must also inform the contextual circumstances. An appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence. The majority of the Court found that the mere fact that the Criminal Code prevented the automatic disclosure of all relevant and non-privileged information in the possession of the Crown or third parties did not deprive the accused of the right to full answer and defence.

One judge, dissenting in part, would have found that the disclosure provisions relating to material held by the Crown infringed the constitutional rights to fundamental justice, which includes the right to make full answer and defence and the right to a fair trial.

Languages:

English, French (translation by the Court).



Identification: CAN-2002-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 11.01.2002 / **e)** 27790 / **f)** Suresh v. Canada (Minister of Citizenship and Immigration) / **g)** *Canada Supreme Court Reports* (Official Digest), [2002] 1 S.C.R. / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; 208 *Dominion Law Reports* (4th) 1; 90 *Canadian Rights Reporter* (2d) 1; 18 *Immigration Law Reporter* (3d) 1; [2002] S.C.J. no. 3 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.

Keywords of the alphabetical index:

Refugee, deportation / Fundamental justice, principles / Terrorism, notion.

Headnotes:

Barring exceptional circumstances, Section 7 of the Canadian Charter of Rights and Freedoms generally precludes deportation of a refugee to face a substantial risk of torture.

A refugee facing deportation to torture under Section 53.1.b of the Immigration Act must be informed of the case to be met. Subject to privilege and other valid reasons for reduced disclosure, the material on which the Minister bases his/her decision must be provided to the refugee. The refugee must be provided with an opportunity to respond in writing to the case presented to the Minister, and to challenge the Minister's information. The Minister must provide written reasons for her decision dealing with all relevant issues.

These procedural protections apply where the refugee has met the threshold of establishing a prima facie case that there may be a risk of torture upon deportation.

Summary:

In 1995, the Canadian government commenced deportation against the appellant, a Convention refugee from Sri Lanka, on the basis that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organisation alleged to be engaged in terrorist activity in Sri Lanka, and whose members have been subjected to torture in Sri Lanka. The Minister of Citizenship and Immigration issued an

opinion declaring the appellant to be a danger to the security of Canada under Section 53.1.b of the Immigration Act. The appellant challenged the Minister's decision on the basis that the procedures for deportation under the Immigration Act were unfair and the Immigration Act infringed Sections 7, 2.b and 2.d of the Canadian Charter of Rights and Freedoms. The Federal Court, Trial Division and the Federal Court of Appeal dismissed the appellant's challenge. The Supreme Court of Canada allowed the appellant's appeal and ordered a new deportation hearing.

Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by Section 7 of the Canadian Charter of Rights and Freedoms. Section 7 applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts. In determining whether this deprivation is in accordance with the principles of fundamental justice, Canada's interest in combating terrorism must be balanced against the refugee's interest in not being deported to torture. Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice. The Charter affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in Section 12. Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has ratified. Deportation to torture is prohibited by both the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. International law generally rejects deportation to torture, even where national security interests are at stake.

In exercising the discretion conferred by Section 53.1.b of the Immigration Act, the Minister must conform to the principles of fundamental justice under Section 7. Insofar as the Immigration Act leaves open the possibility of deportation to torture (a possibility which is not here excluded), the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture. Applying these principles, Section 53.1.b does not violate Section 7 of the Charter.

The terms "danger to the security of Canada" and "terrorism" are not unconstitutionally vague. A person

constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm. Properly defined, the term "danger to the security of Canada" gives those who might come within the ambit of Section 53.1.b fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion. While there is no authoritative definition of the term "terrorism" as found in Section 19 of the Immigration Act, it is sufficiently settled to permit legal adjudication. Following the International Convention for the Suppression of the Financing of Terrorism, "terrorism" in Section 19 of the Immigration Act includes any act intended to cause death or bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its very nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act.

Section 19 of the Immigration Act, defining the class of persons who may be deported because they constitute a danger to the security of Canada, as incorporated into Section 53 of the Immigration Act, does not breach the appellant's constitutional rights of free expression and association. The Minister's discretion to deport under Section 53 is confined to persons who pose a threat to the security of Canada and have been engaged in violence or activities directed at violence. Expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter under the Charter. Provided that the Minister exercises her discretion in accordance with the Immigration Act, the guarantees of free expression and free association are not violated.

Section 7 of the Charter does not require the Minister to conduct a full oral hearing or judicial process. However, certain procedural protections must apply where a refugee has met the threshold of establishing a prima facie case that there may be a risk of torture upon deportation.

In the present case, the appellant met this threshold. Since he was denied the required procedural safeguards and the denial could not be justified under Section 1 of the Canadian Charter of Rights and Freedoms, the case was remanded to the Minister for reconsideration.

Supplementary information:

In the companion case *Ahani v. Canada* (Minister of Citizenship and Immigration), the Supreme Court of Canada held that the appellant had not made out a prima facie case that there was a substantial risk of torture upon deportation and the Minister provided the appellant with adequate procedural protections. The appellant's appeal was dismissed.

Languages:

English, French (translation by the Court).



Croatia

Constitutional Court

Important decisions

Identification: CRO-1999-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 21.04.1999 / **e)** U-III-673/1996 and 63 others / **f)** / **g)** *Narodne novine* (Official Gazette), 39/99) / **h)**.

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.

3.20 **General Principles** – Reasonableness.

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

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

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

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

Keywords of the alphabetical index:

Denationalisation / Pre-emptive right.

Headnotes:

The fact that the Law on Compensation for Property taken away during the Yugoslav Communist Rule did not fully re-establish the rights of former owners over that property does not make the law unconstitutional.

In principle it is for the legislator to determine which property shall be returned, what kind of compensation shall be given and the amount thereof, because no provision of the 1990 Constitution deals with restitution of property or compensation for property.

There is no discrimination or violation of the principle of equality in cases of restitution of property if different rights and the unequal position of citizens are justified by constitutionally acceptable political, legal and moral reasons. Such differences are justified in cases of citizens whose property was

confiscated and citizens whose property was taken away on other bases, such as nationalisation.

It is unconstitutional to differentiate between nationals and non-nationals as to the scope of potential rights in property relations.

Expropriated property, for which compensation has already been paid, albeit beneath market value, cannot be compensated for again.

The descendants of the beneficiary of compensation have the right to compensation for the property regardless of the chronological order of the death of the heir and the bequeather.

It is constitutional to enable the tenants in formerly nationalised apartments to acquire ownership of the apartments in which they live by purchasing them.

The pre-emptive right of the former owner, consisting in his prior right to buy the apartment at the price determined by the state law if the present owner decides to dispose of it, if not limited in its duration, is not constitutional from the point of view of protection of ownership which implies the right to sell the property at market price.

Summary:

The Law on Compensation for Property taken away during the Yugoslav Communist Rule (*Narodne novine*, 92/1996) was disputed by 64 claims and requests for review of its constitutionality. The provisions which linked the rights set up by that law to Croatian citizenship were repealed. The Court also repealed the provision according to which, in the case of subsequent property transactions involving the apartment bought by the tenant, the former owner has a pre-emptive right – not because the pre-emptive right was introduced but because it was introduced without reasonable time limitations.

The repealed provisions will cease to be valid with the entry into force of the law by which the Croatian State Parliament shall enact new provisions to replace the repealed ones, but at the latest upon the expiration of one year from the date of the publication of the Court's decision (the decision was published on 23 April 1999).

Languages:

Croatian, English (translation by the Court).



Identification: CRO-1999-3-015

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 13.10.1999 / **e)** U-I-422/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 117/99, 4202-4203 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Mental disturbance, medical examination / Psychiatric disturbance, degree / Psychiatric institution, placement, urgency.

Headnotes:

Placing a mentally disturbed person in a psychiatric institution without a prior medical examination, in a case precisely provided for law, is not unconstitutional.

Summary:

The subject of constitutional review was a provision in the Act on the Protection of Persons with Psychiatric Disturbances, according to which such a person, if there are grounds to believe that he/she may directly imperil his or her own life or health, or the life or health of other persons, may in particularly urgent cases be placed by authorised persons from the Ministry of Internal Affairs in a psychiatric institution without a prior medical examination.

The petitioner claimed that the legislator should differentiate between degrees of psychiatric disturbances and pointed out that police officials have no medical knowledge for judging the behaviour of persons with psychiatric disturbances. The petitioner invoked the constitutional provision according to

which no one shall be deprived of liberty, nor may liberty be restricted, except when specified by law and decided by a court, as well as the provisions of the European Convention on human rights stating that freedom may only be restricted on the basis of a court decision.

The Court held that the situation foreseen in the disputed provision is an exceptional, potentially dangerous, one in which quick action is necessary. Police officials may therefore act when the person in question may endanger his or her own life or health or the life or health of other persons. Placing such a person in a psychiatric institution is not to be equated with imprisonment or detention. The cited constitutional provision is thus not relevant.

The petition was rejected.

Languages:

Croatian.



Identification: CRO-2000-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.01.2000 / **e)** U-I-1156/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 14/2000) / **h)**.

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

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

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

5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

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

Keywords of the alphabetical index:

Tobacco, sale, restrictions.

Headnotes:

A law which prohibits a previously legal economic activity or introduces restrictions on it, without leaving a reasonable period of time during which the affected subjects might adjust to the newly established conditions of business, is unconstitutional.

There is no proportionality between the legitimate aim and the measures undertaken to ensure that aim if constitutional rights are restricted to a greater extent than necessary.

Summary:

In the Law on the Use of Tobacco Products (which came into force on 8 December 1999) the Court repealed a provision according to which the sale of tobacco products from vending machines was prohibited from 1 January 2000. The Court held that the restriction of entrepreneurial freedoms and ownership rights, although undertaken towards a legitimate aim (protection of health), violated constitutional rights when it is obvious that there does not exist reasonable proportionality between the aim and the manner and extent of the restriction of an individual's rights and freedoms. The disputed prohibition meant the withdrawal of vending machines which make it impossible to control whether tobacco products are sold to minors.

Article 17 of the Constitution of the Republic of Croatia deals only indirectly with the principle of proportionality, providing that during a state of war or an immediate threat to the independence and unity of the State, or in the event of severe natural disasters, individual freedoms and rights guaranteed by the Constitution may be restricted, but the extent of such restrictions shall be adequate to the nature of the danger.

The Court ruled that if the Constitution expressly requires the implementation of the principle of proportionality under extraordinary circumstances, then this principle should be even more valid under "ordinary" circumstances in the country. The disputed provisions impose on entrepreneurs an excessive burden which could only be offset by prescribing a reasonable period of time, long enough for the entrepreneurs to adjust to the new conditions of business, or, alternatively, by providing a right to compensation.

Supplementary information:

The grounds for the decision were not only the provisions of Articles 3, 48, 49, 50 and 54 of the Constitution (inviolability of ownership, protection of ownership, entrepreneurial freedom, restrictions of property rights and of the exercise of entrepreneurial freedom, right to work, freedom of work) but also Article 1 Protocol 1 ECHR.

One judge delivered a dissenting opinion, stating that the relationship between human rights and freedoms and other constitutionally protected values, namely public health, are solved by the Constitution itself (Articles 16 and 50 of the Constitution).

According to Article 16 of the Constitution freedoms and rights may be restricted, among other reasons, in order to protect health. According to Article 50 of the Constitution, entrepreneurial freedom and property rights may exceptionally be restricted (by law only) in order to protect health. These provisions lead to the conclusion that the protection of health by the Constitution is valued more highly than the protection of entrepreneurial freedom and property rights and that therefore the Constitution itself establishes an inequitable balance between them in favour of the protection of health. The application of the principle of proportionality in such a case gives an inadmissible relativistic quality to constitutional provisions. Repealing the disputed provisions on the prohibition of the sale of tobacco products from vending machines not only does not establish an "equitable balance" between entrepreneurial freedom and the protection of health but by giving exclusive priority to the protection of entrepreneurial freedom establishes their relationship in a way diametrically opposite to Articles 16 and 50 of the Constitution.

Languages:

Croatian, English (translation by the Court).



Cyprus Supreme Court

Important decisions

Identification: CYP-2001-2-002

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 04.11.1983 / **e)** 4408, 4411 / **f)** Pitsillides and Another v. Republic / **g)** *Cyprus Law Reports* (1983) 2 C.L.R. 374 (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Conscientious objection / State, security, threat / Military service, obligation / Civilian service.

Headnotes:

Permissible limitations may be imposed on the freedom of thought, conscience and religion.

Summary:

Article 18.1 of the Constitution safeguards the right to freedom of thought, conscience and religion. Under Article 18.6 of the Constitution, "freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person".

The appellants were convicted of the offence of not joining the National Guard when called up, contrary to Section 22.a of the National Guard Laws, 1964-1981, and sentenced by the Military Court to 12 months' and 10 months' imprisonment, respectively. The

particulars of the offence were that on 12 January 1983, whilst they were liable for military service and duly called up to join the National Guard, the appellants failed to do so without reasonable cause. On being formally charged in respect of this offence, the appellants replied that the reason for not enlisting was because, being Jehovah witnesses, their conscience did not allow them to take up arms.

Upon appeal against their conviction they contended:

- a. that their religious belief and conscience constitute a reasonable cause that absolves them from criminal liability; and
- b. that compulsory military service is repugnant to Article 18 of the Constitution enshrining and safeguarding freedom of religion and conscience.

The Supreme Court dismissed the appeal. It held that the limitations to be prescribed by law, under Article 18.6 of the Constitution, to which “freedom to manifest one’s religion or belief shall be subject” should be necessary in the interests, *inter alia*, of the security of the Republic. The final arbiter to pronounce on the existence of the necessity are the courts of each state. In order to ascertain whether it was necessary to introduce permissible limitations regard must be had to the national realities at the time of the enactment and subsequent thereto. The Court noted that in the Republic of Cyprus for the last 20 years an insurgence had been going on and that for a decade – from 1964-1974 – the country had been living under the threat and danger of foreign invasion by a neighbouring country. It recalled that in 1974 Cyprus became the victim of that threatened invasion and ever since this invasion a substantial part of the area of the Republic – about 37% – had been under foreign military occupation. Since the very existence of the state continued to be under express or latent danger the Court considered that these circumstances justified the limitation of the right to freedom of religion and conscience by the imposition of compulsory military service. In the preamble to Law 20/64 it is plainly stated that the National Guard was established for the defence of the Republic and so long as the National Guard is used for the defence and security of the country, the law imposing the obligation for military service on the citizens of Cyprus, irrespective of whether the right to religion and conscience is restricted, is not unconstitutional. Accordingly, the contentions of the appellants should fail.

The Supreme Court observed that it trusted that the appropriate Authorities of the Republic would, if and when in the future the circumstances of the country might permit it, consider the exemption of conscientious objectors from compulsory military service and the imposition of alternative service.

Following the above decision the relevant law was amended in 1992 (see Law 2/92) whereby special provisions were enacted exempting conscientious objectors from armed military service.

Languages:

English.



Identification: CYP-2002-1-001

a) Cyprus / **b)** Supreme Court / **c)** Plenary / **d)** 08.05.2001 / **e)** 9931 / **f)** Yiallourous v. Nicolaou / **g)** *Cyprus Law Reports* (Official Digest) / **h)**

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 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.
 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.
 5.3.33.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Compensation, damages, non-economic loss / Compensation, determination / Fundamental right, protection, effectiveness / Telephone tapping / Civil right, notion / Right, notion.

Headnotes:

Violation of the right to a private life and the right to respect for, and to secrecy of, correspondence and other communications, guaranteed by Articles 15 and 17 of the Constitution, entitles the victim of the violation to claim compensation from the wrongdoer although the violation does not rank as a civil wrong under domestic law.

Summary:

Article 15 of the Constitution guarantees the right to a private and family life. Article 17 of the Constitution safeguards the right to respect for, and to secrecy of, correspondence and other communications if such communications are made through means not prohibited by Law. Under Article 35 of the Constitution the legislative, executive and judicial authorities of the Republic “shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of the Constitution” which safeguard the fundamental rights and liberties of the subject.

The appellant was the Director and the respondent a sewage engineer of the Sewage Board of Nicosia. During a period of one year, the appellant tapped the telephone conversations of the respondent. The latter sued the appellant for damages emanating from the violation of the aforesaid two rights. The trial Court held that the violation of the above rights establishes an actionable right and awarded £ 5,000 damages as “equitable compensation”.

The appellant appealed contending that the violations of the fundamental rights of the respondent, which do not constitute civil wrongs under the Torts Law Chapter 148, do not give a right to damages or to protection through the civil jurisdiction of the court.

The Supreme Court dismissed the Appeal. It held that the Constitution safeguards in a special Part – Part II – the Fundamental Rights and Liberties and imposes their respect. These human rights and liberties are of a universal character. Everyone is bound to respect them and to abstain from any act violating them. Restrictions to the guaranteed human rights and freedoms, other than those provided by Article 33.1 of the Constitution, are not allowed. The fundamental rights of the person are not defined by reference to his or her civil rights under domestic law. They are of a universal character and coincide with the nature and autonomy of a person in the social and state area. Article 35 of the Constitution renders the protection of fundamental rights and their efficient application the primary obligation of the State in all its functions. It imposes an obligation on each one of the three powers of the state, within the limits of their respective competence, to secure the efficient application of human rights. The ascertainment of violations of human rights and the granting of a remedy, fall, in view of their nature, within the sphere of judicial competence. The remedies that can be awarded are those provided by national legislation, the organic laws which govern the administration of justice (see *inter alia* the Courts of Justice Law 1960 (14/60) and the Civil Procedure Law, Chapter 6). Access to Courts is regulated by the Rules governing

the Administration of Justice (see also Article 30.1 of the Constitution). The remedies that can be granted in the sphere of Civil Jurisdiction include damages for restoration of the affected rights, restitution of the injury that was caused, prohibitive and mandatory orders and remedies incidental to them. No safeguard of human rights is effective if it does not provide the means for judicial protection by the remedies established by law. Without this protection, the rights would have lost not only their foundations but also their very character as rights, by being altered to declarations of good behaviour. The other dimension of the obligation imposed by Article 35 is the prohibition of every act involving violation or intrusion into the fundamental rights of the person.

The right to a private life is safeguarded by Article 8.1 ECHR, which also constitutes part of domestic law as a result of Ratification Law 39/62.

In Cyprus the provisions of Article 13 ECHR constitute part of the domestic law; they safeguard the right of granting effective remedy for the violation of the rights set forth in the European Convention on Human Rights (which to a great extent coincide with the rights safeguarded by Part II of the Constitution) by a competent court.

The Constitutional Court therefore concluded that the violation of the above two rights gives a right to legal protection through recourse to the judicial process for the granting of remedies provided by Law. This conclusion is consonant with the principle of law that where there is a wrong there is a remedy. Deviation from this principle constitutes an anomaly.

As regards the assessment of damages, the guiding principle is that of equitable compensation. Distress, grief, pain, loss of opportunity of employment, feelings of injustice, pain and suffering constitute acceptable heads of damage. The efficient application of human rights, dictated by Article 35 of the Constitution, imposes the award of compensation to the victim of the violation for any damage caused to his person, as a natural and social being. The amount of £ 5,000 which was awarded to the respondent is considered as just and in all respects equitable compensation for the consequences of the violation of his aforementioned rights.

Languages:

Greek.



Czech Republic

Constitutional Court

Important decisions

Identification: CZE-1992-S-002

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 26.11.1992 / **e)** Pl. US 1/92 / **f)** On the Lustration Statute / **g)** *Sbirka usnesení a nálezu Ústavního soud CSFR* (Official Digest), 14, 56 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.

2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.

3.3 **General Principles** – Democracy.

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

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

3.23 **General Principles** – Equity.

4.6.9.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.

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

5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Totalitarian regime, values / Party, membership, privileges / State, loyalty / Secret service, records / Value system / Lustration.

Headnotes:

In contrast to totalitarian systems, which were founded on the basis of the goals of the moment and were never bound by legal principles, particularly principles of constitutional law, a democratic state proceeds on the basis of entirely different values and criteria.

Every state, particularly one which was compelled for a period of more than 40 years to suffer the violation of fundamental rights and basic freedoms by a

totalitarian regime, has the right to enthrone a democratic order and to apply such legal measures as are calculated to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.

As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist in certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as regards values, may not adopt a criteria which is based on that differing value system. Respect for continuity with the old value system from the preceding legal order would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened, and citizens' faith in the credibility of the democratic system would be shaken.

A democratic state has not only the right but also the duty to assert and protect the principles upon which it is founded. Thus, it must not be inactive in respect of a situation in which the top positions at all levels of state administration, economic management, and so on, were filled in accordance with the now unacceptable criteria of a totalitarian system. A democratic state is entitled to make all efforts to eliminate an unjustified preference enjoyed in the past by a favoured group of citizens in relation to the vast majority of other citizens which was accorded exclusively on the basis of membership of a totalitarian political party and where, as was already inferred earlier, it represented a form of oppression and discrimination in regard to these other citizens.

In a democratic society, it is necessary for employees of state and public bodies (but also workplaces which have some relation to the security of the state) to meet certain criteria of a civic nature, which we can characterise as loyalty to the democratic principles upon which the state is built. Such restrictions may also concern specific groups of persons without those persons being individually judged.

Summary:

Act no. 451/1991, which sets down some additional preconditions to holding certain offices in governmental bodies and organisations of the Czech and Slovak Federal Republic, the Czech Republic, and the Slovak Republic, disqualifies for five years (extended by an additional five in 1996) from certain key positions in the state apparatus (both by election and appointment) any persons who, during the communist regime, held or engaged in certain categories of functions or activities. The currently restricted state

positions include all elective or appointed positions in state administrative bodies, the office of judge, the administrative office of various supreme state bodies, high ranking positions in the army or in universities, and positions in state radio, television, and press. The activities or positions held during the communist regime that disqualify persons include the following: higher Communist Party officials, an officer of the State Security Services or a student training for such a position at Soviet universities, and various types of secret police informants. The police informants included the category of "conscious collaborators", which meant a person registered in the files, who knew he was in contact with the secret police and supplied them information or performed some task for them. Persons elected or nominated to one of the restricted positions are required to submit a certificate from the Ministry of the Interior that they do not fall into any of the enumerated categories. The submission of this certificate is an absolute requirement to the holding of the office, and those who do not or cannot submit one are disqualified from holding the office. Ninety-nine deputies of the Federal Assembly submitted a petition contesting this statute as unconstitutional.

The Court first reviewed the massive purges undertaken during the communist regime and the general personnel policies, pointing out the extent to which they resulted in the state apparatus being thoroughly compromised. The communist hold on power was further buttressed by the activities of state security and secret police, which had an extensive network of collaborators and which, following November 1989, was preparing to carry on and destabilise democratic developments. Accordingly, much compromising file material was disposed of or hidden. On the basis of these facts, it came to the conclusion that "this calculated and malicious conduct created a real and potentially very perilous source of destabilisation and danger, which could easily threaten the developing constitutional order."

The Court drew a general conclusion about the challenged law to the effect that "it cannot deny the state's right ... to lay down in its domestic law conditions or prerequisites crucial for the performance of leadership or other decisive positions if ... its own safety, the safety of its citizens and, most of all, further democratic developments are taken into consideration".

The Court then determined that the challenged law did not violate any of the Czech and Slovak Federal Republic's international legal obligations. Article 26 of the International Covenant on Civil and Political Rights permits restrictions to be placed on the right of access to jobs in the public service if such are

justifiable. In addition, Article 4 of the International Covenant on Economic, Social, and Cultural Rights allows conditions to be placed on the Covenant rights for the common good in a democratic society. The Court determined that the Lustration law satisfied these and other treaty provisions with reference to the fact that, in a democratic society, state positions that might involve a risk to the democratic constitutional system or the security and stability of the state may be made subject to criteria of a civic nature, such as loyalty to the state.

The Court further accepted the argument that the statute does not respect the principle of equality in that exemptions may be made at the request of the Minister of Defence or Interior, hence these exemptions were annulled. The Court also considered, but rejected, the objection that the Lustration law is retroactive.

The Court considered in detail the problem of secret police informants, and it drew a distinction between those that agreed to collaborate and those whom the secret police attempted to recruit, both of whom were affected by the Lustration law. The Court considered that it was justified to apply the prohibition to those who agreed to collaborate but not to those who were merely recruited. The records of the secret police concerning the first group were judged to be accurate and trustworthy evidence of actual collaboration in individual cases so that the reliance on secret police records was considered acceptable. In any case, the possibility of separately proving acts of collaboration was foreclosed when the secret police destroyed the files. On the other hand, the records concerning the second group were not considered reliable, however, because records were kept on such persons without their written commitment (even without their knowledge); hence, the Court annulled the provision concerning them.

Languages:

Czech.



Identification: CZE-2000-1-005

a) Czech Republic / b) Constitutional Court / c) First Chamber / d) 08.02.2000 / e) I. US 156/99 / f) Freedom of expression and right to express one's view / g) / h) CODICES (Czech).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
 5.3.29 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Politician, defamation / Information, accurate, requirement.

Headnotes:

The freedom of expression and the right to express one's views is limited by the rights of others, whether these rights arise from the constitutional order of the republic or from other statutorily protected general societal interests or values. In addition, the right to express one's views may lose its constitutional protection on formal as well as on conceptual grounds, for even the form in which views are expressed is closely tied with the constitutionally guaranteed right. If published opinions deviate from the rules of propriety generally recognised in a democratic society, they lose the character of correct judgment (news report, commentary), and as such generally fall outside of the bounds of constitutional protection. Furthermore the freedom of expression, in principle, stands on an equal footing with the basic right to the protection of personal honour and good reputation, and it is primarily a matter for the ordinary courts, in consideration of the circumstances of each particular case, to weigh whether one of these rights was not given priority over the other.

It is necessary to consider whether published information can in principle be considered as truthful or not and each case of an alleged violation of the freedom of expression must be judged by taking into consideration all specific circumstances. Above all, the complete context in which the information was published cannot be overlooked.

In a particular case it is always necessary to review the degree of the alleged violation of the basic right to the protection of personal honour and reputation, particularly in connection with the freedom of expression and the right to information, and with due consideration of the requirement of proportionality in the assertion of these rights (and their protection).

Whereas an infringement of the right to the protection of personal honour and reputation may occur even without any fault on the part of the perpetrator, nonetheless, not every publication of false information automatically represents an unjustified infringement of the right of personhood; such an infringement is found only if there exists a causal connection between the intrusion into a person's private life and the infringement of their right to personal honour and if in a specific case this intrusion exceeded the degree which can be tolerated in a democratic society.

It is necessary to respect certain specific features of the common periodic press, which is intended to inform the general public (in contrast, for example, with expert or professional publications), and which must in certain cases resort to a degree of simplification. It cannot be said that every simplification (or distortion) must necessarily, without more, lead to an infringement of the rights of personhood of the affected persons. Thus, it is almost impossible to insist upon absolute precision as to the facts and, in consequence, to place upon journalists requirements that they cannot meet. What is always important is that the overall tenor of particular information corresponds to the truth.

As the case law of the European Court of Human Rights indicates, in the case of a politician, due to his status as a public personality, there are broader limits to permissible criticism than those that apply in the case of private persons. In addition, it is necessary to distinguish very carefully between facts and personal assessments. The existence of facts can be proven, whereas the truthfulness of the evaluation made of those facts is not amenable to evidence. In relation to evaluative judgments, then, the requirement that their truthfulness be demonstrated cannot be met, and such a requirement itself violates the freedom of opinion.

Summary:

The complainants had published an Article critical of a former entertainer and politician, PD, concerning a 1977 prosecution of him for the misappropriation of funds, a prosecution which was later dropped. The Article cited statements by PD's former associates that he had close connections with regional

Communist Party leaders and referred to the fact that dismissals of prosecutions at that time were “highly irregular”, undoubtedly to suggest that he had collaborated with the former regime. He brought a court action claiming that the Article was based on false assertions, so that his right to honour and good reputation had been violated. The ordinary courts found that he had suffered an unjustified encroachment upon this right, and ordered the complainants to publish an apology and to pay 25,000 Kc each in damages. The complainants lodged a constitutional complaint, and the Constitutional Court decided it was well founded.

In light of the general criteria concerning freedom of expression which it outlined in the opinion, the Court examined the three allegedly false assertions that the ordinary courts considered had unjustifiably intruded upon PD’s right to personal honour and good reputation:

1. the authors’ claim that they were members of a commission (when they were, in fact, not members) to add to the credibility of the views expressed in their article;
2. the assertion that PD had been charged with gaining 140,000 Kc for his own benefit, when in fact he had gained only 96,673 Kc for the benefit of a group;
3. the assertion that PD had close ties to the former leadership of the Regional Committee of the Communist Party and that the dismissal of his criminal prosecution was highly irregular.

As for the first assertion, the complainants admitted it was a misstatement, but claimed it was not a material one. The Court considered that they had mechanically borrowed from another source, without attribution, an entire sentence, including the introductory phrase, “some of the information we at the commission received”. While such action constitutes a professional error, it was not done for the purpose of misinforming or of adding to the authors’ credibility. Since the commission in question had in fact received the information alluded to and the information was true, in the overall context of the article, the faulty formulation did not reach the degree of intrusion required for a finding of violation of the right to personal honour and good reputation.

Concerning the second assertion, the information contained therein cannot be characterised as false. PD had been prosecuted for the mentioned crime, and the prosecution’s resolution dropping the charges stated that he had obtained funds but that intent to defraud could not be proved. The assertion simply

reproduced this information. In any case, it cannot be justly expected of the general press that they, as a rule, print fuller, more detailed information. Moreover, the Article conditioned the assertion with the term, “roughly”. The Article contained no assertion that the money had been exclusively for PD’s benefit. The named sum does not constitute false, rather inexact, information. Only certain minor details can be designated as inexact, but not the overall tenor of the assertion.

In relation to the third assertion, its precise wording clearly indicates it is an evaluative judgement, not a statement of fact. The statement was to the effect that the authors cannot avoid the feeling that declarations concerning his close ties to the communist party leadership, made by former members of his group of entertainers, have some justification. The authors considered facts (the prosecution, the dismissal, declarations by associates concerning his ties to prominent communists), and on the basis of them they came to their own opinion that the assertions of associates had some justification and that the dismissal of the prosecution had been highly irregular. In such circumstances, the published evaluation cannot be considered incorrect or as deviating from the generally applicable principles of propriety, either as regards form or content.

Finally, the Court concluded that the ordinary courts had failed to respect the principle that constitutionally guaranteed fundamental rights must be balanced. Neither the information nor the personal opinions contained in the Article at issue were of such a nature as to depart from the bounds of the protection of the constitutionally guaranteed freedom of expression and right to disseminate information. Thus, the conditions for placing restrictions on the freedom of expression were not met in this case as such restrictions cannot be considered necessary in a democratic society.

Cross-references:

- *Lingens v. Austria*, 08.07.1986, Series A, no. 103; *Special Bulletin Leading Cases – ECHR* [ECH-1986-S-003].
- *Oberschlick v. Austria* (no. 2), 01.07.1997, *Reports 1997-IV; Bulletin 1997/2* [ECH-1997-2-012].

Languages:

Czech.



Identification: CZE-2001-2-012

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 12.07.2001 / e) Pl. US 11/2000 / f) Protection of Classified Information Act / g) / h) CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
 1.5.4.4 **Constitutional Justice** – Decisions – Types – Annulment.
 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
 3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 3.19 **General Principles** – Margin of appreciation.
 3.22 **General Principles** – Prohibition of arbitrariness.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13.2 **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 – Reasoning.
 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

State, interest / Secret service / Security service / Information, classified, protection / Security clearance.

Headnotes:

It is in the interest of the state to define security risks generally because the importance of specific individual security risks may change over time. The interest of the state cannot legitimise the creation of security risks that would not be constituted by the legislature but by administrative bodies. Legislation which makes it possible for executive administrative bodies never to give reasons for their decisions, whereby the applicant may never learn or even guess

whether and why he was found a personal security risk, is in contradiction with the basic principles of the state governed by the rule of law. For security checks of natural persons, the law stipulates a special modification of administrative proceedings. This is not unconstitutional because the decisive aspect is whether the special proceedings safeguard constitutionally guaranteed fundamental rights of persons investigated.

To be consistent with the Constitution, legislation must exclude the judicial review of public authority decisions which, by their nature, fall beyond the scope of fundamental rights and freedoms as defined in the Charter on Fundamental Rights and Basic Freedoms. The protection of classified information and the conditions that must be met by people who have access to it is a very specific issue and it is not possible to guarantee all procedural rights of the people in question. However, not even the specific characteristics of protecting classified information is sufficient reason for diminishing the constitutional protection of the rights of security-checked persons.

Summary:

As well as making a constitutional complaint, the complainants requested the annulment of certain provisions of the Protection of Classified Information Act. Opinions on the complaints were expressed by the Czech Security Information Service, the Chamber of Deputies, the Senate, the Ministry of the Interior and the National Security Authority. The purpose of the Act was to define which information would be classified in the interests of the Czech Republic, the method by which it will be protected, the jurisdiction and powers of state institutions in the performance of their duties in protecting classified information, the duties of natural persons and legal entities, and the responsibility for the violation of duties under the Act.

Individual fundamental rights need to be assessed in compliance with the principle of proportionality. The interest of the state is a vital interest which legitimises a degree of restriction on individual privacy. The state cannot behave arbitrarily towards its citizens, and it cannot restrict their fundamental rights beyond an absolutely necessary limit. When restraining fundamental rights and freedoms, the state has to respect both formal requirements of restriction, as defined by law, as well as the material requirements (the need to keep in mind the essence and purpose of basic rights). By restricting access to classified information only to people who fulfil statutory requirements, the state tries to protect its own interests, which is a fully legitimate objective. The stipulation of adequate statutory requirements for persons with access to classified information cannot

be considered as unconstitutional, and it is also in accordance with the case law of the European Court of Human Rights. National legislation must provide a degree of protection against arbitrary interventions by state institutions. The law must provide a sufficiently clear definition of the extent of, and conditions for, the execution of such powers with respect to the intended legitimate aim in order to provide individuals with adequate protection against arbitrariness. Not even the relative freedom enjoyed by the law-maker gives him the right to use laws for the violation of the essence and substance of the right to the free choice of profession and training, and to start a business or engage in any other commercial activity.

Only a law whose consequences are clearly predictable fulfils the requirements for the operation of a materially conceived democratic state governed by the rule of law. This, however, was not the case with the issue in hand. The statutory definition of security risks has to be general enough to enable due consideration by the relevant state organ and, above all, a classification of specific cases according to specific security risks. It is therefore necessary to reject legislation which, besides examination of real security risks, would allow for the examination of risks, even fictitious ones, which are not listed in the law. The only definition of security risks that is constitutionally acceptable is a definition which gives relevant authorities a possibility to use their discretion, but not for the creation of new risks not sanctioned by the law. The fact that consequences are unforeseeable opens up a possibility of potentially arbitrary attitudes of relevant authorities. The law-maker may set some statutory limitations for the performance of some professions or activities. This, however, must be done in an unambiguous and foreseeable manner, without any margin being left for any arbitrary attitudes on the part of state organs. The stipulated list of security risks provides room for arbitrary restrictions to the performance of some professions and activities which are not clearly defined in advance; such a practice is not in conformity with the Charter. The guarantee of a free choice of profession is not only a part of the catalogue of national human rights but is also strongly reflected at the level of international law in the European Social Charter.

To fulfil the conditions for clearance at the security classification level of "Restricted", a person must be a citizen of the Czech Republic, must have full legal capacity, must have reached the required age and must not have a criminal record. The requirements for a clearance at the "Confidential", "Secret" and "Top Secret" levels include also a suitable personality profile and reliability from the security point of view. It is therefore clear that currently effective legislation

does not allow a person not meeting any one of the above conditions to be given a security clearance, and that the person will not be given any reasons for the decision. The wording of the contested provision also means that applicants are never given the reasons as to why they were not given the security clearance. It is therefore practically impossible for applicants to remove from their records the reasons for which they were refused the clearance even in cases when this might be possible and when the fact that the reasons were communicated to them would not constitute a threat to the interest of the state or of any third persons. The consequences of the non-issuance of the clearance certification will have a very significant impact on the person in question both from a legal point of view (as a reason for the termination of employment) and as regards his personal situation (for instance, a negative reaction from his colleagues and relatives). The law can stipulate the conditions and restrictions for people entering certain professions or engaging in certain activities. These conditions and restrictions must be transparent and foreseeable. The person whose rights are being restricted should be given an opportunity for an appropriate defence of his rights. It is inexcusable that there exist situations where giving reasons why a person failed in the security clearance procedure is absolutely prohibited. In the new legislation, the law-makers should find an appropriate constitutional way of responding to, and harmonising, the private interests of the applicant with public interests.

The Administrative Code represents general procedural legislation, the nature of which need not be applicable to all forms of administrative proceedings, and some types of administrative proceedings may need to be regulated by a special legislation. It is up to the law-makers to decide what format that will have. The Constitutional Court can only pronounce on its constitutionality. The procedure used in security checks of natural persons is governed by special regulations, and the Administrative Code does not apply to it with the exception of the section on fines. When the appropriate security office carries out a security check on a natural person, it either sends the applicant a clearance certificate or a letter informing him that he does not meet the necessary conditions. This notification is a special type of an administrative decision that may be contested within 15 days by a written complaint to the director of the office. He investigates the matter and either grants the complaint or rejects it. The applicant must be informed about the result in writing. According to the existing case law of the Constitutional Court, the decisive aspect is whether the decision really interferes with the legal sphere of the individual, rather than how it is classified. It is thus clear that the act stipulates a special modification of the administra-

tive proceedings for security checks on natural persons, which differs from the administrative proceedings specified in the Administrative Code. The exclusion of this type of proceedings from the general type of proceedings does not violate constitutional principles.

The failure to pass a security check may be the reason for losing one's job. If an applicant does not successfully pass such a check, he may no longer be able to work in his current position and his employment contract may be terminated. The decision to refuse security clearance for access to classified information may significantly influence the professional status of the applicant and thus also his basic right to the free choice of a profession. In this case, the lawmakers must also guarantee the possibility of the review of administrative decisions by an independent judicial body, even though a special type of procedure to differentiate between individual cases may be necessary. Security checks give considerable powers to a single executive administrative body, and its decision may significantly affect the life of the checked person because the office which carries out security checks also decides on the remedies against the person. Because there are no provisions for a review by an independent and impartial institution, the person being checked is practically at the mercy of the only institution which, in this situation, cannot be considered as independent or impartial.

It is necessary to differentiate carefully between a decision about who will be given a clearance for access to classified information, which rests with the executive branch, and a judicial review of that process, which must be the exclusive right of the independent judiciary. In view of the specific features and the importance of the decision-making process in matters of classified information, it is not always possible to guarantee all standard procedural safeguards of due process, including an open hearing. Even in this type of proceedings, the lawmakers must provide adequate statutory guarantees for judicial protection, even it will be a fairly specialised and differentiated type of protection.

Objections may also be raised against the Act as a whole. This, however, was not the subject of the complaint. The Constitutional Court nevertheless presumed that parliament would deal with the Act in a comprehensive way, rather than only with the contested provisions that were annulled by its decision. The provisions contested were therefore partially annulled by the Constitutional Court, the enforcement of the judgment was postponed until 30 June 2002, and the complaint was partially rejected.

Languages:

Czech.



Identification: CZE-2001-3-015

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 16.10.2001 / **e)** Pl. US 5/01 / **f)** Regulation of agriculture / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
 2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
 3.10 **General Principles** – Certainty of the law.
 3.13 **General Principles** – Legality.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2 **Fundamental Rights** – Equality.
 5.3.36.3 **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:

Agriculture, quota / Agriculture, subsidy / Fundamental right, essence, preservation / Animal, protection.

Headnotes:

Any interference by the state in person's disposal of his or her property has to respect a principle of balance between the interests of society and the protection of individual human rights. There must also be a reasonable relation of proportionality between the means used and the pursued aims. Neither constitutional order nor international treaties on human rights and fundamental freedoms forbid the legislator to introduce restrictions on the amount of

economic production, distribution or consumption of goods.

The individual's right to a free market without any regulation does not represent the fundamental right guaranteed by the Constitution or international treaties. In European Union countries, regulation of agriculture is not understood as a breach of this principle either. The legislator is entitled to introduce price or quantity regulation in specific branches of the economy. This restriction does not represent expropriation as the owner is entitled to dispose of the thing further. The claim to a certain price is not part of the fundamental right to property.

Summary:

A group of deputies lodged a petition to annul a government decree on quantification of milk production quotas for the period of 2001-2005. According to the deputies the Decree was incompatible with the fundamental rights. Their legal representative asserted during the oral hearing that it is not possible to argue on Community law grounds, as the Czech Republic is not an European Union member.

The government, the Ministry of Agriculture and the State Agricultural Intervention Fund gave their comments on the suggestion and requested a rejection of the petition. An entitled subject lodged the petition and the contested decree had been passed and accepted within the competence set up in the Constitution.

The Constitutional Court first noted that there are no legal regulations prohibiting the legislator to introduce a restriction on the amount of economic production, distribution or consumption of goods. A certain restriction of production and distribution of goods is also common by international standards. However, when issuing ordinary laws, the parliament should take into account the public interest in regulating economic relations in a particular activity. At the same time there must be a reasonable relation of proportionality between the means used and the pursued aims.

The introduction of milk production quotas presents an approximation of Czech legal regulation to that in the European Union. The regulation introduced by the contested Regulation basically represents the transposition of the Community model into Czech agriculture both from the legal technical point of view (production quotas and sanction payments for overproduction) and regarding the setting of the amount. The introduced regulation means the accomplishment of programme provisions relating to the approximation of the Czech law with Community

law, as it is set up and demanded (although not expressly) in the Europe Agreement establishing an Association between the European Communities and the Czech Republic from 1993.

The right to free enterprise ranks among the rights that can be claimed only within the limits of the laws implementing them. The legislator is more qualified to establish more precise conditions of this right; at the same time he has to preserve the essence and significance of fundamental rights and the restrictions have to serve the prescribed aim only.

Legal independence of the producer is preserved. The purpose of this restriction is price stabilisation. The legislator defined clear, empowering delegated legislation for issuing the government regulation and the government respected these. The restriction of production does not represent expropriation, and the claim to a certain price is not part of the fundamental right to property. Although making stricter qualitative requirements could also be considered as a disadvantage, such an objection would be considered as unacceptable. The purpose of the system of quotas is to create conditions to secure sales and obtain an appropriate minimum price for every producer. The state can also, on serious grounds, prohibit the production exceeding the given amount. In case of infringement of such a prohibition the state can undoubtedly impose sanctions. A restriction putting milk production over the prescribed production quotas or outside their system at a disadvantage is generally admissible. Imposing fines can be considered as neither expropriation nor as compulsory administration of property. The Court of Justice of the European Communities expressed its opinion on the issue of restriction of the basic property right in connection with the application of the Community rules on agricultural production.

The Constitutional Court also observed that the objection of two different prices of milk is unfounded. The price of milk is the same for all producers and the prescribed payment is the sanction for the infringement of the rules of the quota system. When respecting the rules, all milk producers have an equal position and the law regulates the sanctions for their infringement in order to achieve a stability of the market.

The creation of the production quota system does not discriminate against anyone not participating in it. Differentiation among individual producers is based on the choice of each such producer. He has the opportunity to ask for an individual production quota or not to use this option. Thus the system of quotas corresponds with the principle embodied in the Constitution, according to which "any statutory

limitations upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions". Owing to the factual impossibility of producing milk outside the system of production quotas, the division of production quotas is a mechanism similar to the determination of the quantitative scale of business activities. The quota system rules are general, accessible and foreseeable; therefore, in this respect, the objection of inequality is unsubstantiated.

As far as the producers exclusively using fixed cattle stalls are concerned, the Constitutional Court was of the opinion that the preference for ecological breeding of dairy cattle in the division of new production quotas or increasing the existing ones, cannot be considered as unconstitutional discrimination. The legislator is entitled to use it for reasons of public interest, which, no doubt, includes the need to improve the treatment of animals. This activity is certainly right and acceptable. State aid can be provided in the form of subsidies or in other forms. The legislator is entitled to embody this preference into the law in connection with the division of other production quotas or their reduction. However, the government is not empowered to do it when it issues subordinated legislation.

The Constitutional Court has annulled this provision as it does not respect the reservation of law and is in contradiction with the Constitution.

The dissenting opinion stated that the reasoning contained in the majority opinion did not meet all the requirements of the principle of proportionality. In particular, it did not meet the requirement of subsidiarity in relation to the possible alternative means to achieve the pursued aim.

The judges consider as a key principle the application of Article 1.2 Protocol 1 ECHR, from the interpretative point of view, resulting from the European standards contained in Community law.

Supplementary information:

- See also Pl. ÚS 16/93.

Languages:

Czech.



Identification: CZE-2003-1-005

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 26.03.2003 / **e)** Pl. ÚS 42/02 / **f)** Freedom of conscience / **g)** *Sbírka zákonu* (Official Gazette), no. 106/2003 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.

2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.

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

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

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

5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Conscientious objection, religious grounds / Old law, interpretation.

Headnotes:

Freedom of conscience is manifested in decisions made by an individual in particular situations. Aside from its correlation to the norm, conscience involves the personal experience of an unconditional obligation.

Freedom of conscience is one of the “fundamental absolute rights” that cannot be restricted by ordinary law. Where a legal norm is in conflict with the specific freedom of conscience being asserted, it must be considered whether the assertion of freedom of conscience will not interfere with the fundamental freedoms of third parties, or whether the assertion of freedom of conscience is not precluded by other values of principles contained in the constitutional order of the Czech Republic.

In a democratic legal state, “old law” cannot be interpreted in accordance with current case law. When evaluating the lawfulness of the original decision, the fundamental rights and principles that are entrenched in the Czech constitutional order and

have been interfered with by the contested decision need to be taken into account. If the principle of legal continuity is not to have a destructive effect on the Czech constitutional statehood, one must insist consistently on the discontinuity of values in the application of “old law” and ensure that such approach is reflected in court rulings.

Summary:

The complainant lodged a constitutional complaint challenging a Supreme Court decision dismissing his complaint against a breach of the law.

The complainant was sentenced in 1954 for avoiding mandatory military service: objection to mandatory military service on religious grounds.

The Supreme Court panels hold two different opinions. The first panel was of the opinion that to sentence a person for the criminal act of avoiding mandatory service could not be deemed incompatible with democratic and legal principles. The second panel was of the opinion that that was not a criminal act. When the matter was brought before the grand tribunal, the former opinion prevailed.

According to the Minister of Justice, a violation of the law occurred.

The constitutional complaint satisfies all the formal requirements and was filed in a timely manner.

In proceedings regarding a complaint against a violation of the law, the Supreme Court looks to the factual and legal status at the time when the contested ruling was rendered. New facts and evidence are not allowed.

The interpretation of criminal law norms, where the consequences interfere with the personal sphere of the person concerned, must take into account the current and applicable constitutive values and principles of the legal state, as expressed in the constitutional order of the Czech Republic. Any understanding of continuity with “old law” must be restricted in that way and discontinued in terms of values (Pl. ÚS 19/93).

The Constitutional Court referred to the European Court of Human Rights decision in *Streletz, Kessler, Krenz v. the Federal Republic of Germany*, and the opinion of Judge Levits. The Constitutional Court identified in particular with the following comment made by Judge Levits: “ ... [t]he interpretation and application of the law depend on the general political order, in which law functions as a sub-system. ... [t]he

question whether, after a change of political order from a socialist to a democratic one, it is legitimate to apply the “old” law, set by the previous non-democratic regime, according to the approach to interpretation and application of the law which is inherent in the new democratic order. ... Democratic States can allow their institutions to apply the law – even previous law, ... only in a manner which is inherent in the democratic political order. ... Using any other method of applying the law ... would damage the very core of the “ordre public” of a democratic State. ... [t]he interpretation and application of ... legal norms according to socialist or other non-democratic methodology ... should from the standpoint of a democratic system be considered wrong.”

Freedom of conscience has a constitutive importance for a democratic legal state respecting the idea of respect for the rights of man and citizens. Totalitarian political regimes on the other hand attempt to suppress the freedom of the individual’s conscience, using repressive criminal enforcement policy in the process. This is shown by developments in the Czech Republic – the 1920 Constitution did not presuppose the possibility of limiting by law the freedom of conscience, expressly laid down by the Constitution. The 1948 Constitution declared freedom of conscience. The same did not constitute a ground on which the satisfaction of a civic obligation could be denied. The 1960 Constitution made absolutely no reference to the freedom of conscience.

Freedom of conscience is not interchangeable with the freedom of faith or freedom of religion. A decision dictated by one’s conscience is always specific because it deals with specific behaviour in a specific situation. The situation is individualised by time, place and specific circumstances. What is essential is that a serious, moral decision regarding good and evil is involved that the individual experiences as a binding obligation or an unconditional order to act in a certain fashion.

The specific moral character and its relation to personal moral truthfulness or authenticity that lend the decision its unconditionality, determine the difference between a decision made by reference to political or ideological motivation, and one made by reference to a state of mind.

The freedom of conscience cannot be limited by an ordinary law. Each act of law expresses public interest by formulating the moral conviction of the parliamentary majority. The conflict between an individual’s conscience and a particular legal norm creates no prejudice to its binding effect. Freedom of conscience may affect its enforceability in relation to those who are against it. Where the legal norm is in

conflict with a specific freedom of conscience being asserted, it needs to be considered whether such decision would not interfere with third party fundamental rights, or whether the assertion of such freedom of conscience is not precluded by other values or principles contained in the constitutional order of the Czech Republic as a whole.

Only the Supreme Court decides whether a violation of the law occurred. The Constitutional Court determines whether the interpretation of statutory provisions chosen by the court infringes the complainant's fundamental rights and freedoms.

The constitutional complaint is well-founded because the impugned decision of the Supreme Court neglected to consider, to an appropriate extent, the complainant's fundamental right to the freedom of conscience.

The Constitutional Court has already adjudicated on the conflict of the obligation to report for mandatory military service and fundamental rights, which arises from the conflict of the said duty and freedom of religion (II. ÚS 285/97; II. ÚS 187/2000). The Constitutional Court examined the relationship of the impugned decisions and the freedom of conscience. According to the Court, one may refuse to report for mandatory military service for reasons unrelated to religious faith.

The Supreme Court failed to take into account Article 15.1 of the Charter. The fact that the "9 May Constitution" denied the nature of an absolute right to the freedom of conscience was a result of the very nature of the political regime installed in February 1948. The new restriction of the freedom of conscience disrupted the continuity of perception of the freedom of conscience as an absolute right, as protected by the 1920 Constitution. The constitutional construction of freedom of conscience adopted after the February coup deviates in terms of legal philosophy from the developments in the area of fundamental rights that commenced with the Nuremberg trials and continued by the adoption of the Universal Declaration of Human Rights.

The Supreme Court's interpretation was found to be restrictive. Consequently, the Constitutional Court did not consider the issue of its conflict with other fundamental freedoms. The contested ruling was quashed.

Cross-references:

European Court of Human Rights:

- Case *Streletz, Kessler, Krenz v. the Federal Republic of Germany*, no. 34044/96, 35532/97, 44801/98 of 22.03.2001, *Bulletin* 2001/1 [ECH-2001-1-002].

Languages:

Czech.



Denmark

Supreme Court

Important decisions

Identification: DEN-1999-3-010

a) Denmark / b) Supreme Court / c) / d) 16.08.1999 / e) I 248/1998 / f) / g) / h) *Ugeskrift for Retsvæsen*, 1999, 1798; CODICES (Danish).

Keywords of the systematic thesaurus:

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

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

3.16 **General Principles** – Proportionality.

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

3.18 **General Principles** – General interest.

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

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

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

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

Keywords of the alphabetical index:

Biker group / Violence, risk.

Headnotes:

An Act enabling the police to bar individuals from premises used as a meeting place by a group to which the person in question belonged and which was involved in on-going armed confrontations with other groups did not contravene the principle of freedom of association nor the principle of the separation of powers.

Summary:

Following several violent encounters between two biker groups (Bandidos and Hells Angels), the Danish Parliament in October 1996 passed the Prohibition on Staying on Certain Premises Act in order to protect the people who live near biker group residences.

Pursuant to § 1 of the Act, the police could bar individuals from certain premises which were used as a meeting place by a group to which the person in question belonged, when, because of on-going armed confrontations with other groups, the presence of that person on those premises posed a risk of violence with possible repercussions for persons in the vicinity.

The plaintiff, who had been prohibited from staying in two buildings that served as residences for Hells Angels, brought an action against the Justice Department claiming that the prohibition was invalid.

The plaintiff submitted that § 1 of the Act is in conflict with § 79 of the Constitution, which reads:

“Citizens shall, without previous permission, be at liberty to assemble unarmed. The police shall be entitled to be present at public meetings. Open-air meetings may be prohibited when it is feared that they may constitute a danger to the public peace.”

The plaintiff mainly argued that the Act gave authority to issue a prohibition based on a merely abstract risk of an attack endangering other peoples lives.

The plaintiff further submitted that the Act contravened the principle of the separation of powers enshrined in § 3 of the Constitution since the Parliament, by adopting the Act, had made legislation concerning a specific police matter.

The Supreme Court dismissed the claim. The Supreme Court stated that according to its interpretation of the Act, a prohibition could only be issued when a genuine and actual risk of a dangerous attack was established. The presence of an abstract risk was not enough. Furthermore, the purpose of the Act was to protect neighbours and persons passing by. It was not the purpose of the Act to hinder the groups from meeting nor to restrict their right to express their opinion.

Preventing the groups in question from gathering in buildings used as residences by the groups made these buildings unsuitable targets. The Act was only of little consequence to these groups – which, due to their participation in violent confrontations, had become a possible target of attack – considering the desired protection of other citizens. Finally, it would have required extensive police measures to protect neighbours if the groups continued to stay in their well-known residences and this would have had far more substantial consequences.

The Supreme Court also stated that the Act's interference with the exercise of police authority was not in conflict with the principle of separation of powers.

Languages:

Danish.



Estonia

Supreme Court

Important decisions

Identification: EST-1997-3-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 06.10.1997 / **e)** 3-4-1-3-97 / **f)** Restriction of the freedom of movement of minors / **g)** *Riigi Teataja* / (Official Gazette), 1997, 74, Article 1268 / **h)** CODICES (Estonian).

Keywords of the systematic thesaurus:

- 3.13 **General Principles** – Legality.
- 4.8 **Institutions** – Federalism, regionalism and local self-government.
- 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
- 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
- 4.8.4 **Institutions** – Federalism, regionalism and local self-government – Basic principles.
- 5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.

Keywords of the alphabetical index:

Municipal council / Decree, municipal / Minor, limitation for staying in public places.

Headnotes:

Freedom of movement as a value recognised in a democratic society is protected by Article 34 of the Constitution. The same Article legitimises restriction of the right to freedom of movement in cases and pursuant to procedure provided by law. By the “law”, a law in the formal meaning (an act of parliament) is meant, not just any legislation. In principle, local governments can decide the application of restrictions of movement, but only if there is relevant legislation empowering them to do so.

Summary:

The Valga County Court requested the Constitutional Review Chamber to partially invalidate Article 3.19 of Part I of the Rules of the City of Valga enacted by a Regulation of Valga City Council of 10 January 1996. The contested legislation forbade persons under 16 years of age from staying in public places from 11 p.m. until 6 a.m. when unaccompanied by a grownup.

The Constitutional Review Chamber does not exclude the necessity of restrictions in respect of minors freedom of movement. Due to the psychical and social immaturity of a minor, he or she can under certain circumstances endanger himself or herself and others more easily than grownups. Due to their immaturity, minors, unlike most grownups, also bear limited legal responsibility for their deeds. That justifies the imposition of legal restrictions concerning minors which are usually not applied to grownups. Article 34 of the Constitution allows the restriction of the freedom of movement of minors to prevent minors leaving without supervision. The probability of minors leaving without supervision is without doubt higher at night than during the day. Thus, it can be realised that in order to prevent minors leaving without supervision, it is expedient to restrict their freedom of movement under certain circumstances.

Pursuant to the Constitution the freedom of movement may be lawfully restricted, firstly, if the restriction is necessary to prevent a minor leaving without supervision, it is proportional to the purpose desired and the desired purpose cannot be achieved by other means. The restriction must also be reasonable, enforceable, necessary in a democratic society and it must not distort the nature of the freedom restricted. Secondly, Article 34 of the Constitution allows restriction of the freedom of movement only in cases and pursuant to procedure provided by law. The Constitutional Review Chamber has consistently held the view that constitutional rights and freedoms can be restricted only by laws in the formal meaning. Restrictions set out in other legal acts have been declared invalid.

In his separate opinion the chairman of the Constitutional Review Chamber, Mr Rait Maruste, pointed out that under Article 14 of the Constitution the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments, whereas pursuant to Article 154 of the Constitution local governments shall manage all local issues independently. Legal order is one of the most important local issues. Since the Riigikogu has not regulated the question of the supervision of minors by an act of the rank of law, it must be concluded that this issue has been left temporarily to be decided by

the local governments. The local government has thus been fulfilling its duties substantially consistently with the spirit and purposes of the Constitution, although formally inconsistently.

The European Court of Human Rights has also been of the opinion that the restriction of rights and freedoms by acts which are not laws in the formal sense is permissible if they possess general characteristics of legal acts. In addition, the principle of legality, particularly in its formal meaning, is neither the only one, nor is it a principle of first priority of the Constitution. In order to ensure legal certainty, the contested Regulation should be invalidated not from the promulgation of the Decision, but from 1 January 1998.

Languages:

Estonian.

*Identification:* EST-2001-1-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 05-03-2001 / **e)** 3-4-1-2-01 / **f)** Review of the petition of Tallinn Administrative Court to declare Sections 12.5 and 12.6 of the Aliens Act invalid / **g)** *Riigi Teataja III* (Official Gazette), 2001, 7, Article 75 / **h)** CODICES (English, Estonian).

Keywords of the systematic thesaurus:

- 3.10 **General Principles** – Certainty of the law.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 4.11 **Institutions** – Armed forces, police forces and secret services.
- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Foreigner, residence, permit / National security / Security service.

Headnotes:

Legislation not allowing exceptions to be made for the issue or extension of a residence permit to an alien who has served or there is a good reason to believe that he or she has served in the intelligence or security service of a foreign country does not comply with the constitutional principle of proportionality.

Summary:

J. Grigorjev, a Russian national born in 1955, arrived in Estonia in 1956. From 1982 to 1992 he worked in the National Security Committee [KGB] of the Estonian SSR.

J. Grigorjev had a temporary residence permit in Estonia. The Minister of Interior refused to issue a new residence permit to J. Grigorjev, on the ground that the latter had served as a professional member of the armed forces of a foreign state, as he had been employed by the security service of a foreign state. He had been assigned to the reserve in 1992. His age, rank and other circumstances did not preclude his conscription into service in the security or armed forces of his country of nationality. According to Section 12.6 of the Aliens Act this was considered as a threat to the security of the Estonian state. Under Section 12.4.10 of the Aliens Act the residence permit was refused to J. Grigorjev.

J. Grigorjev submitted a complaint to the Tallinn Administrative Court. He claimed that Section 12.4.10 of the Aliens Act is in conflict with Article 11 of the Constitution, since the law does not enable a choice of legal consequences when it is applied. Section 12.4.10 does not observe the principle of proportionality. The Administrative Court initiated constitutional review proceedings with the Supreme Court, finding that Sections 12.5 and 12.6 of the Aliens Act do not comply with Articles 10 and 11 of the Constitution.

The Constitutional Review Chamber of the Supreme Court observed that according to the principles of international law the state has the right to decide on entry to, stay within and expulsion from its territory of aliens. The Constitution does not give an alien a fundamental right to reside in Estonia. However, the refusal to extend a residence permit of an alien, which involves the obligation of the alien to leave the

state, may interfere with some fundamental rights or freedoms which are protected by the Constitution.

Articles 10 and 11 of the Constitution, which the Administrative Court referred to, do not name any specific fundamental right. Both the complainant and the Administrative Court had been of the opinion that the complainant's right to family life had been infringed. Family life is protected by Articles 26 and 27.1 of the Constitution. Article 26 of the Constitution declares that everyone has the right to the inviolability of private and family life. Article 27.1 of the Constitution provides that the family, being fundamental to the preservation and growth of the nation and the basis of society, shall be protected by the state. The Court chose to review the conformity of Sections 12.4.10, 12.5 and 12.6 of the Aliens Act to Article 27.1 of the Constitution, since it found that the question was about the positive action of the state assisting a person to have genuine family life, and the corresponding right of the person. More specifically, the Court found the main issue to be whether the state has an obligation to guarantee an alien his family life in Estonia and whether the interference with a person's right to positive state action was justified.

The Court stated that the right to positive state action assisting a person to have genuine family life is not an unlimited right. Some other legal value of equal weight may serve as a basis for its restriction. Fundamental rights and freedoms of others and constitutional norms protecting the collective good can be regarded as justifications for restrictions. According to the Aliens Act, security of the state is the value justifying the restrictions to the alien's right to family life in Estonia. On the basis of several constitutional norms, especially of the preamble, it can be concluded that pursuant to the letter and spirit of the Constitution, security of the state is a value which can be recognised as a legitimate aim for restricting fundamental rights.

The Court found that the Aliens Act is disproportionate to the extent that it does not allow those who issue or extend a residence permit to choose the legal consequences in regard to a person who has served or in regard of whom there is good reason to believe that he or she has served in the intelligence or security service of a foreign country. Those who issue or extend residence permits have no possibility to weigh up whether the restriction of rights and freedoms in a concrete case is necessary in a democratic society.

The Court ruled that Sections 12.4.10 and 12.5 of the Aliens Act are unconstitutional to the extent that they do not allow any exceptions concerning the issue or

extension of a residence permit to an alien who has served or there is a good reason to believe has served in the intelligence or security service of a foreign country. The provisions established by the legislator, which restrict the fundamental right established by Article 27.1 of the Constitution are not in conformity with the principle of proportionality enshrined in Article 11 of the Constitution.

The Court found that the legitimate expectation to obtain a residence permit was not violated. An alien who obtains a temporary residence permit is aware that his or her right to stay in the country is limited by the term specified in the residence permit. Nevertheless, the complainant has the right to a legitimate expectation that the executive shall consider issuing a residence permit to him.

Cross-references:

- Decision of 28.04.2000 (3-4-1-6-2000), *Bulletin* 2000/1 [EST-2000-1-004];
- Decision of 22.12.2000 (3-4-1-10-2000), *Bulletin* 2000/3 [EST-2000-3-009].

Languages:

Estonian, English (translation by the Court).



Identification: EST-2001-3-005

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 11.10.2001 / **e)** 3-4-1-7-01 / **f)** Review of the constitutionality of the Weapons Act / **g)** *Riigi Teataja III* (Official Bulletin), 2001, 26, Article 280 / **h)** CODICES (English, Estonian).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.40 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Weapon, permit / Punishment, criminal, consequences / Hunting, self fulfilment / Weapon, self fulfilment.

Headnotes:

A restriction which results from the criminal punishment of a person and which accompanies him for life, irrespective of the nature and gravity of the crime committed, may prove to be disproportional to the purpose of protecting the life and health of others.

Hunting is a form of personal self-realisation.

Summary:

Tallinn Administrative Court initiated constitutional review proceedings, asking the Supreme Court to declare Section 28.1.6 of the Weapons Act invalid. According to that provision, a weapons permit should not be issued to a person who had been punished under criminal procedure for a crime, irrespective of whether his criminal record had expired or had been expunged. That was found to be in conflict with Article 11 of the Constitution.

A person who filed an action in the original Administrative Court proceedings had been punished for robbery in 1971 with an imprisonment of three years. He was 17 years old at that time. Later on, he had been a hunter for years, and had never been in conflict with the law. According to him the restriction of the Weapons Act was unnecessary in a democratic society and distorted the fundamental rights of Articles 19, 29.1 and 32.2 of the Constitution.

The Constitutional Review Chamber of the Supreme Court decided to transfer the case to the Supreme Court *en banc*, due to the importance of the case and because the previous practice of the Chamber was about to be changed.

The Supreme Court *en banc* found that the right to buy and possess a weapon may be covered by the right to free self-realisation guaranteed by Article 19 of the Constitution, and possibly also by other rights (e.g. the right to freely choose one's sphere of activity and profession). Hunting was found to be a form of free personal self-realisation.

While analysing the compliance of the restriction imposed by the Weapons Act with 11 of the Constitution, the Supreme Court found that the restriction met the requirement of having a legitimate

aim (to prevent danger to life and health of individuals) and that the restriction was enacted by an act of parliament (i.e. formally in compliance with the Constitution). With reference to an earlier decision of the Supreme Court (Decision 3-4-1-9-2000, *Bulletin* 2000/3), the Court found, however, that the requirement of proportionality was not met. According to the Supreme Court, a restriction which was related to punishment under criminal procedure and accompanied a person for the whole of his life, disregarding the nature and gravity of the crime committed, might prove to be disproportional to the purpose of protecting the life and health of others. The legislator should have given the executive an opportunity to consider the personality of an applicant for a weapons permit and the circumstances of the crime committed.

The Supreme Court partially invalidated Section 28.1.6 of the Weapons Act.

Supplementary information:

Two of the justices of the Supreme Court submitted a dissenting opinion. They considered the restriction imposed by the Weapons Act to be proportional to the aim of protection of life and health of individuals, taking into account that this restriction applied to persons who had committed a crime.

Cross-references:

- Decision III-4/A-1/94 of 12.01.1994, English full text in CODICES [EST-1994-X-001];
- Decision 3-4-1-9-2000 of 06.10.2000, *Bulletin* 2000/3 [EST-2000-3-008];
- Decision 3-4-1-2-01 of 05.03.2001, *Bulletin* 2001/1 [EST-2001-1-003].

Languages:

Estonian, English (translation by the Court).



Identification: EST-2002-3-010

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 24.12.2002 / **e)** 3-4-1-10-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of the last sentence of Section 8.31 of the Wages Act and of Regulation no. 24 of the Minister of Finance, dated 28 January 2002, entitled "The procedure for and conditions of disclosure of information concerning the wages of officials" / **g)** *Riigi Teataja III* (Official Gazette), 2003, 2, Article 16 / **h)** CODICES (Estonian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Company, management board, member / Information, obligation to provide / Wage / Interest, economic.

Headnotes:

It is for the legislator to decide all issues relevant to the restriction of fundamental rights, and the legislator must not authorise the executive to regulate these matters. The executive may only clarify the restrictions of fundamental rights and liberties provided for by law. It must not impose additional restrictions.

The right to the inviolability of one's private life also protects persons from the collection, holding and disclosure of information concerning their business or professional activities which enables information concerning a person's property and economic interests to be revealed. The disclosure of information concerning the wages of members of supervisory boards representing private interests or of members of management boards of companies in which the state has a controlling interest violates a person's right to the inviolability of his or her private life. The same applies to the obligation imposed on the said individuals to submit declarations of their economic interests.

Summary:

According to Section 8.3 of the Wages Act, information concerning the wages of employees shall be confidential. Pursuant to Section 8.31 of the same Act, the confidentiality requirement shall not apply to information concerning the wages of officials specified in Section 4 of the Anti-Corruption Act. The Minister of Finance was empowered to establish the procedure for and conditions of disclosure of information concerning the wages of these officials. The list of officials laid down by Section 4 of the Anti-Corruption Act included members of the management and supervisory boards of partly publicly owned companies. Information concerning the wages of these persons had to be disclosed, regardless of the share of the company owned by the state, and regardless of whether the individual member of the supervisory board was a representative of the state. According to Section 14.7 of the Anti-Corruption Act, members of the management or supervisory boards of a partly publicly owned company had to submit declarations of their economic interests (including information concerning their property, proprietary obligations and other circumstances enabling their economic interests and financial situation to be determined) to the minister in charge of the ministry exercising the state's shareholder rights in the company.

In 1995 66% of the shares of Estonian Air Ltd were privatised. The state retained 34% of the shares. In 2002 the Minister of Transport and Communications requested information concerning the wages of the members of the management and supervisory boards of Estonian Air Ltd in order to disclose this information. Declarations of economic interests were also requested. Several members of the management and supervisory boards not representing the state filed a complaint with Tallinn Administrative Court, requesting a declaration that the measures taken by the Minister were unlawful and that the relevant provisions of the Wages Act, Anti-Corruption Act and Regulation of the Minister of Finance were unconstitutional. The Administrative Court declared the provisions concerning the disclosure of information concerning wages unconstitutional, but dismissed the application concerning the requirement to submit the declarations of economic interests. The Court initiated constitutional review proceedings with the Supreme Court.

The Constitutional Review Chamber of the Supreme Court held that Article 26 of the Constitution, which protects the inviolability of private and family life, also protects persons from the collection, holding and disclosure of information concerning their business or professional activities which would enable information concerning a person's property and economic interests to be revealed.

The Supreme Court declared the last sentence of Section 8.31 of the Wages Act, empowering the Minister of Finance to establish the procedure for and conditions of disclosure of information concerning wages, as well as the Regulation issued by the Minister on the basis of this delegation of competence, to be unconstitutional and invalid. According to the Supreme Court, the delegating provision of the Wages Act was too broad, and the Regulation of the Minister of Finance imposed additional restrictions compared with those provided for by the Wages Act.

As to the substance, the Supreme Court held that the disclosure of information concerning the wages of members of supervisory boards who represent private interests (i.e. who are not representatives of the state) and members of management boards of companies in which the state has a controlling interest (i.e. companies in which the state holds stocks or shares representing a sufficient number of votes to preclude the adoption of resolutions concerning amendments to the Articles of association or increases in or the reduction of stock capital or share capital, or concerning the dissolution, merger, division or transformation of a company at the general meeting of the company), and the requirement that these persons submit a declaration of economic interests, infringed their right to the inviolability of their private life.

The Court observed that the aim of requiring the disclosure of information concerning wages and the submission of declarations of economic interests – which was to guarantee the transparency of the use of state property and to prevent corruption – could be considered a legitimate aim of protecting public order and preventing criminal offences under Article 26 of the Constitution. The Court found, however, that a fair balance between the rights of individuals and the public interest had not been achieved. The Court considered the disclosure of information concerning wages to be a serious restriction on the right to inviolability of one's private life. Furthermore, the Court observed that the state as a shareholder also had other means of obtaining information about the economic activities of partly publicly owned companies, including information concerning the sums of money paid to members of the supervisory and management boards of such companies. There was no reason to disclose this information to the general public.

The information to be given in declarations of economic interests included information about an official's property, proprietary obligations and other circumstances which allowed the official's economic interests and financial situation to be determined. Information concerning income from abroad and..

property in joint ownership, as well as information about the official's spouse, parents and children also had to be declared. The Supreme Court found that such a serious interference with the right to inviolability of private life of the individuals concerned, and also of their family members, was not justified.

There was no evidence that the submission of such declarations would promote the prevention of corruption or its exposure. The Supreme Court found the restriction to be disproportionate.

Therefore, the Supreme Court declared the relevant provisions of the Wages Act and Anti-Corruption Act unconstitutional and invalid.

Cross-references:

Decisions of the Supreme Court:

- III-4/A-2/94 of 12.01.1994, *Bulletin* 1994/1 [EST-1994-1-001];
- 3-4-1-1-99 of 17.03.1999, *Bulletin* 1999/1 [EST-1999-1-001];
- 3-4-1-1-01 of 08.02.2001, *Bulletin* 2001/1 [EST-2001-1-001];
- 3-4-1-2-01 of 05.03.2001, *Bulletin* 2001/1 [EST-2001-1-003].

Decisions of the European Court of Human Rights:

- *Niemietz v. Germany*, 16.12.1992, *Special Bulletin Leading Cases – ECHR* [ECH-1992-S-007];
- *Rotaru v. Romania*, 04.05.2000.

Languages:

Estonian.



France

Constitutional Council

Important decisions

Identification: FRA-2002-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 12.01.2002 / **e)** 2001-455 DC / **f)** Social Modernisation Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.01.2002, 1053 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
- 4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
- 5.2.3 **Fundamental Rights** – Equality – Affirmative action.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Employment, preservation / Panel, membership, gender equality / Redundancy, definition.

Headnotes:

It is for Parliament to exercise in full the powers conferred on it under Article 34 of the Constitution.

A definition of economic redundancy which clearly leads to excessive interference with free enterprise, regard being had to the objective of preserving jobs, breaches the Constitution.

However, lengthening redundancy procedures as a result of measures aimed at improving employee information and giving greater rights to employees' representative bodies does not amount to excessive interference with free enterprise.

Balanced representation of the sexes on a panel validating occupational experience must not be achieved to the detriment of its members' skills and qualifications.

Summary:

The government's Social Modernisation Bill, which was brought before the National Assembly as early as May 2000, was extensively supplemented through amendments tabled by Members of Parliament, adding over 150 sections to the initial 70. Important provisions on a variety of subjects (economic redundancies, bullying and sexual harassment in the workplace, landlord-tenant relations, etc.) were thus introduced without going through the usual filters of consultation and review by the advisory divisions of the Council of State (Conseil d'État). This led to serious difficulties during discussion of amendments and resulted in referral of the legislation to the Constitutional Council by both members of the National Assembly and members of the Senate.

The Members of Parliament who referred the legislation to the Constitutional Council pointed out that many of the provisions failed to make the law clear and intelligible. In this connection, the Constitutional Council reiterated that it was incumbent on Parliament to ensure compliance with the constitutional principle of intelligibility of the law and to exercise in full its powers under Article 34 of the Constitution. At the same time, it pointed out that the administrative and the judicial authorities were empowered to interpret the law.

Among the many provisions examined, special mention must be made of those amending the definition of economic redundancy (Article L.321-1 of the Labour Code) in very restrictive terms. The Council held that free enterprise could be limited only for constitutional reasons or in the public interest. Such limitation must not be excessive, regard being had to the objective pursued. Here, the Constitutional Council had to reconcile free enterprise, deriving from Article 4 of the Declaration of the Rights of Man and the Citizen of 1789, and the right to work, recognised in the Preamble to the Constitution of 1946. It held

that the proposed provisions defining cases of economic redundancy resulted in interference with free enterprise, which clearly was not counterbalanced by preservation of the right to work and could even, in some circumstances, jeopardise that right.

The Constitutional Council reviewed a number of provisions ex officio. These included two Articles of the Education Code making it possible to obtain qualifications through validation of occupational experience. Apart from lecturers/researchers, the panel taking the decision should include competent persons, in particular in the relevant occupations, who assessed the experience in respect of which validation was sought. On the subject of the panel's membership, concerning which the legislation required "balanced representation of the sexes", the Constitutional Council issued the following interpretative reservation: Although a balance must be sought in the sexes' representation on the panel, it would be contrary to the principle established in Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 ("All citizens... are equally eligible for all dignities and all public positions and occupations, according to their abilities, and without distinction, save that of their virtues and talents") to give gender equality precedence over concerns relating to skills, abilities and qualifications.

Languages:

French.



Georgia

Constitutional Court

Important decisions

Identification: GEO-2004-1-001

a) Georgia / b) Constitutional Court / c) Second Chamber / d) 11.03.2004 / e) N2/1/241 / f) Akaki Gogichaishvili v. the Parliament of Georgia / g) *Adamiani da Konstitutsia* (Official Gazette) / h).

Keywords of the systematic thesaurus:

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

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

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

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

5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

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

Keywords of the alphabetical index:

Media, television / Defamation, facts, allegation, proof.

Headnotes:

Limitations on freedom of speech are permissible where its exercise infringes upon the rights of others. The right of each person ends where the rights of others begin. The requirement to protect the “rights of others” carries more weight than disseminating information, since the right of honour and dignity of an individual is an absolute right.

Summary:

The subject of the dispute was the constitutionality of Article 18.2 of the Civil Code of Georgia and Article 20.1 of the Law of Georgia relating to Other

Means of Mass Communication and Dissemination of Information, which states:

“A person is entitled to demand in court the retraction of information that defames his/her honour, dignity, privacy, personal inviolability or business reputation unless the person who has disseminated such information can prove that it corresponds to the true state of affairs. The same rule applies to the incomplete dissemination of facts, where such dissemination defames the honour, dignity or business reputation of a person”.

The claimant, Akaki Gogichaishvili, is a journalist who was ordered by a judgment of the Supreme Court of Georgia to retract the information broadcast by the television company “Rustavi 2” on 1 April 2001. The Court based its judgment on the above-mentioned article of the Civil Code.

The claimant argued that the impugned articles violated Article 19.2 of the Constitution, which states: “the persecution of a person on account of his/her speech, thought, religion or belief as well as the compulsion to express his/her opinion about them is prohibited”. He pointed out that the right of a person not to be compelled to express his/her opinion was an explicitly protected right.

The respondent, the representative of the parliament, expressed her opinion that the legislation of Georgia regulated the issue in accordance with international instruments. She pointed out that Article 9 ECHR primarily protected the religious beliefs of a person, and moreover, that article did not deal with absolute rights, which were not to be restricted. Limitations must, however, be prescribed by law and be proportionate to the legitimate aim. The respondent considered that although freedom of thought was a fundamental right, it might be restricted, in particular, where it infringes upon the rights of others, or where restriction is permitted within the framework of law. The law in the particular case was Article 19 of the Constitution, setting out: “The restriction of the freedoms enumerated in the present Article shall be impermissible unless their manifestation infringes upon the rights of others.” She, therefore, considered that Article 18 of the Civil Code of Georgia did not contradict Article 19 of the Constitution.

The Second Chamber of the Constitutional Court noted that Article 10 ECHR provides for duties and responsibilities. Responsibilities may lead to restrictions where the statements (facts) are false and the protection of morals can be relied on to justify a restriction of the freedom of expression. Furthermore, facts and value judgments are differentiated by the

case-law of the European Court. The existence of facts may be susceptible to proof, whereas the truth of value judgments is not.

Article 18.2 of the Civil Code of Georgia obliges a person to retract information where the three following conditions exist:

1. where a person has disseminated statements (facts);
2. those statements are false; and
3. the person who has disseminated such statements cannot prove the truth of those statements before the court, and those statements defame the honour and dignity of others.

In light of the above, the Constitutional Court considered that the obligation to retract the disseminated statements met the legitimate aim of the restriction of freedom of speech.

Consequently, the Chamber did not allow the constitutional claim.

Supplementary information:

Upon request by the Constitutional Court of Georgia, the Venice Commission provided an *amicus curiae* opinion on the relationship between the Freedom of Expression and Defamation with respect to unproven defamatory allegations of fact (CDL-AD(2004)011), which was taken into consideration by the Court in its deliberations relating to the present decisions.

Languages:

English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-1999-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 10.11.1998 / **e)** 1 BvR 1531/96 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 99, 185-202 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Respect for the person, general right / Burden of proof / Defamation / Opinion, statement / Human dignity / Personality, right / Scientology / Care, duty to exercise / Injunction action / Sect.

Headnotes:

The general right to respect for the person (Article 2.1 in conjunction with Article 1.1 of the Basic Law) protects individuals also from a false imputation of memberships in associations and groups, if this imputation is of significance to the personality and his/her public image.

It is incompatible with the general right to respect for the person that a person detrimentally affected by an allegation of facts is deprived of the chance to plead the falsity of the statement in court by virtue of the fact that the person who had made the statement had provided facts proving his allegation.

Summary:

The complainant – an artist from Austria – had been involved in the publications and doctrines of the Church of Scientology since 1972 and had also attended its courses. Since 1975, several journals had been calling him a scientologist or suspected him of being connected in some way or another with Scientology.

In 1994, the complainant was commissioned to draft a model for the artistic design of the area of the concentration camp 'Neue Bremm' in Saarbrücken. Two associations that fight against sects wanted to prevent the complainant from participating in the project. To this end, they addressed an open letter to the media and politicians, in which they wrote, among other things:

“Media and politicians are courting an advertiser of a criminal association who has been issuing propaganda for Scientology in innumerable publications and who calls himself a “cleric” (Scientology jargon: “auditor IV”, i.e. he belongs to the group of absolute laymen who, in a compulsory hypnotic process and aided by a lie detector, destroy the psyche of individuals for the sake of controlling them).

The receipts from a limited edition lithography sold, among others, by “Art Gallery 48” in Saarbrücken, Julius-Kiefer-Street 105, have been shown to flow into the scientological secret service (OSA Munich).

Will the criminal, cynic association “Scientology” be allowed to exert influence on the public cultural life in Saarland, too?

We expect to take immediate measures ...”

The complainant objected to the allegations contained in the letter. His action for an injunction regarding these statements was successful in the court of first instance. In the appeal proceedings, however, the judgment of the lower court was reversed on the grounds that a person who makes a disparaging statement concerning third persons that does not originate from the range of his/her own experience and that he/she cannot check for truth, may, in substantiation, refer to uncontradicted press reports.

In his appeal to the Federal Constitutional Court from this decision, the complainant alleged a violation of Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law (general right to respect for the person). The complainant declared that he is

not a scientologist, nor did he ever undergo training to be a cleric, take over such a function or call himself a cleric.

The First Panel of the Federal Constitutional Court considered the challenged judgment of the appellate court to be a violation of the complainant’s general right to respect for the person and therefore reversed the judgment.

In its reasoning, the First Panel held that the general right to respect for the person protects individuals from a false imputation of memberships in associations and groups, if this imputation is of significance to the person and his/her reputation. Also court decisions that allow the publication of statements related to a person which the person concerned calls untrue violate the rights resulting from Article 2 of the Basic Law.

The First Panel pointed out that in the present case, the close connection to Scientology attributed to the complainant may detrimentally affect his reputation. This holds true all the more as the organisation in question has been the subject of heated debate in public and has frequently been the subject of state monitions and critical press reports. Neither can it be excluded that the allegation the complainant is a scientologist in a leading position may interfere with his artistic work, because any damage to his reputation may have prejudicial consequences later for commissions and purchases.

Within the framework of the constitutionally required weighing up of the fundamental rights involved the general right to respect for the person and the freedom of opinion – the principle generally applied is that in value judgments, the protection of personality is usually given priority over the freedom of opinion, if the statement made may be seen as an offence against human dignity, as defamatory criticism or as a defamatory statement. In allegations of facts, however, the result depends on the truthfulness of the statement. True statements must usually be tolerated even if they have prejudicial consequences for the person concerned; untrue statements need not.

According to the case-law of the civil courts on the protection of a person’s honour (which is in accordance with the Constitution), a person making allegations that are detrimental to others has a duty to exercise care which depends on the possibilities of clarifying the circumstances in the individual case and which is stricter for the media than for private persons. In civil proceedings, furthermore, a heavier burden of setting forth the facts is imposed on the person making detrimental statements about a third person, requiring him/her to provide proof of the truth

of the statement. If he/she is unable to provide proof of the truth of his/her statement, it is treated as a false statement.

However, compliance with the burden of setting forth the facts does not mean that one may dispense with the requirement of ascertaining the truth, the Court continued. A statement, even if supported by facts, may be false. The general right to respect for the person requires, therefore, that the person detrimentally affected by an allegation of facts not be deprived of the chance to plead the falsity of the statement in court by virtue of the fact that the burden of setting forth the facts was fulfilled. Only when he/she has nothing to show that contradicts the evidence provided can the controversial statement be assumed to be true. The truthfulness of the contents of the statement, furthermore, have to be clarified if the procedural conditions are to be fulfilled. This applies also when the alleged fact has been taken from press reports.

In the opinion of the First Panel, the decision objected to failed to meet these requirements of the general right to respect for the person.

The Court had to consider the complainant's argument that he had not consented to the publication of the Article according to which he had called himself a cleric. The artist's argument that he had dissociated himself from Scientology in 1992 had to be checked – especially for its seriousness. The same applied also to the complainant's denying having been trained to be an auditor and having exercised such a function; in support, he had presented a declaration by the Church of Scientology of Germany.

Finally, the First Panel held, the rejection of the complainant's action for a preventive injunction regarding the statement that he '.... belongs to a group who in a compulsory hypnotic process and aided by a lie detector, destroy the psyche of individuals for the sake of controlling them' was also a violation of the complainant's general right to respect for the person. In this connection the lower court had not adequately taken into account the fact that in the initial proceedings the complainant had countered the defendants' arguments with that of his withdrawal from Scientology. This omission, too, was due to the lower courts inadequate understanding of the extent of protection provided by and of the scope of the general right to respect for the person.

Languages:

German.



Identification: GER-2002-H-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 26.06.2002 / **e)** 1 BvR 670/91 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 105, 279-312 / **h)** *Neue Juristische Wochenschrift*, 2002, 2626-2632; *Europäische Grundrechte Zeitschrift*; CODICES (German).

Keywords of the systematic thesaurus:

- 1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.
- 3.17 **General Principles** – Weighing of interests.
- 3.21 **General Principles** – Equality.
- 4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.
- 5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Neutrality of the state, religious / Religious community, defamation / Information, dissemination by the government.

Headnotes:

1. The fundamental right to profess a religious or philosophical creed pursuant to Articles 4.1 and 4.2 of the Basic Law does not protect the holders of such rights from having the state and its organs publicly analyse – even critically – them and their goals and activities. This analysis must, however, comply with the requirement that the state be neutral in its treatment of religious or philosophical creeds and must, therefore, be undertaken with caution. The state is forbidden from depicting a religious or philosophical group in a defamatory, discriminatory or distorted manner.

2. Because the federal government has a duty to direct the state, it is justified in providing information wherever it can fulfil its federative responsibility with the help of such information.

3. When providing information as part of its duty to direct the state, the federal government does not require any special statutory authority over and above the allocation of the duty itself as long as its provision of the information does not result indirectly in real infringements of fundamental rights.

Summary:

Since 1960s previously unknown groups have manifested themselves in the Federal Republic of Germany. They immediately attracted public interest and have been described as “sects”, “youth sects”, “youth religions”, “psycho sects”, “psycho groups” or similar names. The groups have quickly become the subject of critical public debate due to the fact that they understand their goals to be predominantly influenced by their religious and philosophical views and due to their methods of treating members and followers. Such groups were accused, in particular, of isolating their members from the outside world, alienating them especially from their own families, manipulating them psychologically and exploiting them financially.

Since 1970s this phenomena and the movements behind the groups have also occupied the federal and *Länder* (state) governments. On many occasions governmental statements have been issued on the problems associated with these groups in reply to parliamentary questions. The federal and *Länder* governments have also informed the public about such groups directly in brochures, press releases and speeches. As part of their public relations work, state agencies have characterised the movement involved in this case as a “sect”, “youth sect”, “youth religion” and “psycho sect”. The attributes “destructive” and “pseudo-religious” have also been used against it, and the accusation has been raised that its members have been manipulated.

The complainants in the present constitutional complaints are meditation societies of what is known as the Shree Rajneesh, Bhagwan or Osho movement. The movement was founded by the Indian mystic Rajneesh Chandra Mohan, who was first called Bhagwan by his followers, and then later Osho.

Members of these societies have demanded in several original proceedings before the administrative courts that the Federal Republic of Germany desist from issuing statements about the religious movement and the societies belonging to it. The feeling was that such statements were incriminating. After the complainants had been unsuccessful in all instances, they lodged a constitutional complaint and essentially alleged that their freedom to profess a religious or philosophical creed under Article 4.1 of the Basic Law had been infringed.

The First Panel allowed the constitutional complaints in part. It overturned the underlying decisions of the administrative courts and remanded the matter.

Having a duty to direct the state, the federal government is justified in providing information wherever it can fulfil its federative responsibility with the help of such information. The government's duty to provide direction for the state includes assisting members of the public in coping with conflicts within the state and society by providing them with information on a timely basis. The government must also face challenges even if they occur at short notice, react quickly and properly to crises and the worries of citizens and help citizens to find their bearings.

The fact that the Basic Law allocates the federal government a duty to direct the state means it is entitled to inform the public even if the provision of information could result indirectly in real infringements of fundamental rights. In view of the special character of this area, no special authorisation of the government by parliament is required apart from the authorisation provided by the Basic Law. The preconditions for providing information cannot be regulated properly by statute. The subjects and modalities of the information provided by the state are so varied that at the most they could only be covered by broadly drafted formulae and general clauses. This would not always lead to an increase in the measurability and predictability of the state's action. If it did lead to an increase, then it would only be in a way which would be insufficient to meet the requirements placed on the state's provision of information. By virtue of the fact that a statute authorising the government to provide information would need to be drafted in wide and unspecific terms, in practice its enactment would not amount to a decision by parliament in the matter itself.

Nevertheless, in its provision of information, the federal government must respect the division of powers between the federation and the *Länder*. It is justified in disseminating information if the information covers events of national importance and the provision of such information nation-wide by the federal government would lead to better handling of the problem. Providing information in such a way does not exclude or impair the powers of the *Länder* governments to provide information nor does it prevent the administrative authorities from fulfilling their administrative duties.

The federal government is bound by the standards inherent in the proportionality principle when it provides information. Statements, which impair the scope of protection contained in Articles 4.1 and 4.2 of the Basic Law, must be appropriate, in particular, in relation to the event which provoked them.

According to these standards, the characterisation of the philosophical groups which are the subject of the proceedings as “sect”, “youth religion”, “youth sect” and “psycho sect” is not from the point of view of constitutional law open to objection. The employment of these terms satisfies the requirement that the state be neutral in religious or philosophical matters. It does not affect the scope of protection under Articles 4.1 and 4.2 of the Basic Law.

On the other hand, labels such as “destructive” and “pseudo-religious” and an accusation of manipulation do not satisfy the requirements of constitutional law.

Even if the employment of such terms could not be criticised on the grounds that it exceeded the powers of the federal government, nonetheless the terms used infringed the neutrality requirement and were thus not justifiable according to the proportionality principle. In particular, no substantiated reasons were advanced, which could justify the statements regarded as defamatory by the complainants, nor were any such reasons otherwise apparent. They also do not arise from the situation in which the assessments by the federal government were made.

Languages:

German.



Identification: GER-2004-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 05.02.2004 / **e)** 2 BvR 2029/01 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 109, 133-190 / **h)** *Neue Juristische Wochenschrift*, 2004, 739-750; *Europäische Grundrechte Zeitschrift*, 2004, 73-89; CODICES (German).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
 3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.

5.1.3.3 **Fundamental Rights** – General questions – Limits and restrictions – Subsequent review of limitation.

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.

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

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

Keywords of the alphabetical index:

Detention, preventive / Criminal, dangerous / Dangerousness, prognosis / Resocialisation, principle / Imprisonment, conditions / Detention, enforcement / Criminal, violent / Guilt, principle.

Headnotes:

1.a. A person's human dignity will not be violated even by long lasting placement in preventive detention if this is necessary because of his or her continued dangerousness. However, it is also necessary in these cases to respect the autonomy of the detainee and honour and protect his or her dignity. Therefore, the aim of preventive detention like the aim of penal detention must be to lay the foundations for a responsible life in freedom.

b. Article 1.1 of the Basic Law does not impose on the institution of preventive detention a constitutional requirement that there be a fixed maximum period for the detention at the time it is imposed or at a later time when it is re-examined. It is not objectionable for the legislature to provide that it is not necessary at the commencement of preventive detention for a binding decision to be made on the expected time of the detainee's release.

2.a. The longer the placement in preventive detention lasts, the stricter the conditions governing its continuation.

b. The provision in § 67.d.3 of the Criminal Code takes into account the increased importance of the right to freedom after ten years in custody by allowing higher demands to be placed on the threatened legal interest and the proof of the detainee's dangerousness and by only allowing the continuation of detention in exceptional cases.

c. Due to the special significance that the relaxation of detention conditions has for the prognosis of future dangerousness, the court responsible for enforcing

the sentence is not permitted to accept without sufficient reason a refusal by prison authorities to relax detention conditions which could prepare the way for the end of the preventive detention measure.

d. The judicial administrations in the *Länder* (states) have to ensure that a detainee is able to have his or her preventive detention conditions improved to the full extent that is compatible with prison requirements.

3. The area of application of Article 103.2 of the Basic Law is restricted to state measures which express sovereign disapproval of illegal and culpable conduct and thus impose suitable and appropriate punishment on it.

4. The abolition of the maximum period of detention where preventive detention is ordered for the first time and the application of the same to criminals who had been placed in preventive detention prior to the pronouncement and coming into force of the new provision and who had not yet finished their sentences is in conformity with the protection of public confidence guaranteed in a state governed by the rule of law (Article 2.2 of the Basic Law in conjunction with Article 20.3 of the Basic Law).

Summary:

I. The complainant had numerous previous convictions for serious criminal offences and had only been free for a few months since the age of 15. Most recently he had been sentenced in 1986 to a prison sentence of five years for attempted murder in connection with robbery. At the same time his (subsequent) placement in preventive detention was ordered. According to the provision in force at this time, a person's first placement in preventive detention could not exceed ten years (§ 67.d.1 of the Criminal Code). This provision was amended in 1998 to the effect that a term of preventive detention would only be considered to have expired within this period of time if there was no danger that the offender would commit other serious crimes (§ 67.d.3 of the Criminal Code). At the time the new provision came into force, the complainant was being held in preventive detention and if it had not been for the new provision he would have had to have been released at the expiration of the ten years. The Penal Execution Division of the responsible court (*Strafvollstreckungskammer*) refused to declare that the complainant had completed his term in preventive detention in 2001.

His appeals were unsuccessful. Therefore, the complainant lodged this constitutional complaint. The complainant alleges, in particular, that the new provision violates the prohibition of retroactivity in Article 103.2 of the Basic Law. According to that

article, an act can only be punished where it constituted a criminal offence under the law before the act was committed.

II. The Second Panel rejected the constitutional complaint as unfounded. The Court's reasoning was as follows:

The placement of a person in preventive detention without there being a statutory maximum time limit for detention does not violate the guarantee of human dignity. A person's human dignity will also not be violated by long lasting placement in preventive detention if this is necessary because of his or her continued dangerousness. An individual's connection and involvement with the community which is provided for in the Basic Law justify the adoption of indispensable measures to protect essential public interests against damage. Nothing prevents a polity from safeguarding itself against dangerous criminals by placing them in detention. However, it is also necessary in these cases to respect the autonomy of the detainee and honour and protect his or her dignity. Therefore, the aim of preventive detention like the aim of penal detention must be to lay the foundations for a responsible life in freedom.

The current form of preventive detention satisfies this standard. The constitutional protection of human dignity does not require that a binding decision be made on the expected time of release at the time when preventive detention is ordered due to a person's continued dangerousness or at a later time when the detention is re-examined. This is because a future danger can only be estimated in the present. How long a danger will continue to exist will depend on future developments which cannot be predicted with certainty. At every stage of preventive detention, the question of whether the person concerned can be freed is considered. The fact that the authorities repeatedly examine whether preventive detention should be suspended or terminated also guarantees the person concerned adequate legal certainty under the law of procedure.

The legal and practical purpose of preventive detention is reintegration into society. This imprisonment goal and the obligation to counteract potential damage caused by detention also apply to detainees in preventive detention. Thus, according to the Prison Act in addition to the general privileges available during preventive detention special privileges should contribute to the detainee's leading a purposeful life. According to information from the governments of the *Länder*, preventive detention is not in practice purely a matter of holding dangerous criminals in custody.

There is also no violation of the fundamental right of freedom of the person under sentence 2 of Article 2.2 of the Basic Law. If one takes into account the following considerations preventive detention is a restriction of fundamental rights in conformity with the Basic Law. It is true that the possibility of lifelong preventive detention constitutes a serious encroachment upon fundamental rights. However, such possibility does not violate the guarantee of the essence of fundamental rights because the new provision only allows the continued preventive detention at the expiration of ten years, if it serves to prevent serious damage to the mental or physical integrity of potential victims.

The new provision satisfies the requirements of the principle of proportionality. The Federal Constitutional Court is only to a limited extent able to examine the exercise of the legislature's discretion in deciding whether detention is necessary and choosing suitable means for it. The same applies to the legislature's assessment and prognosis regarding a detainee's dangerousness that is necessary in this context. The uncertainties associated with placement in preventive detention affect the minimum requirements imposed on the prognosis and its evaluation in connection with the prohibition of excessiveness. However, such uncertainties do not eliminate the requirement for encroachments on freedom to be suitable and necessary. The detention must remain reasonable in order to avoid an excessive burden. The fundamental right to freedom of the person concerned must be safeguarded at the procedural and substantive levels. The legislature satisfies these substantive requirements of the prohibition of excessiveness by making the requirements which have to be satisfied for preventive detention to be continued at the expiration of ten years far more stringent than the original requirements. As a result, a continuation is limited to serious sexual offenders and violent criminals. In addition, there is a statutory presumption that dangerousness will generally no longer exist at the expiration of ten years. Continuation of the preventive detention beyond this time limit can only be considered the *ultima ratio* in the case of those persons whose assumed safeness has been clearly rebutted. From the point of view of the law of procedure, the requirements of the prohibition of excessiveness are also satisfied. The legislature has created a system for regularly examining whether a detainee's sentence should be suspended or terminated and the requirements for carefully defining the foundations of the prognosis. In applying these provisions, judges must, however, satisfy certain standards of diligence in order to conform to the prohibition of excessiveness. In particular, the decision to continue preventive detention must be based on an expert opinion which justifies the

decision's exceptionalness. Repeated, routine evaluations must be avoided. Therefore, judges must carefully choose and check experts. These checks must cover the prognosis results and the quality of the entire prognosis procedure. In addition to being transparent the psychiatric prognosis must have a sufficiently wide prognosis basis. The relaxation of detention conditions has special significance for the basis of the prognosis. Therefore, the court responsible for enforcing the sentence is not permitted to accept without sufficient reason a refusal by prison authorities to relax detention conditions which could prepare the way for the end of the preventive detention. Ultimately, the special character of preventive detention must also be taken into account within the framework of measures of correction and prevention (other than punishment). Solid reasons do justify a partial concordance between preventive detention and the punishment. Nevertheless, the state's justice administrations must make use of their statutory possibilities for allowing a detainee improvements in his or her detention conditions to the extent that such improvements are compatible with prison needs.

The total prohibition of retroactivity in Article 103.2 of the Basic Law is not violated. The prohibition does not extend to the measures of correction and prevention in the Criminal Code. The area of application of the total prohibition of retroactivity is limited to state measures which express sovereign disapproval of illegal and culpable conduct and thus impose suitable and appropriate punishment on it. The total prohibition of retroactivity in Article 103.2 of the Basic Law is anchored in the guarantee of human dignity and the principle of guilt. An accusation of criminal guilt presupposes that the standard for deciding whether or not such guilt exists has already been determined by statute. Only persons who are aware of such standard and can adapt their conduct to its legal consequences can act responsibly. Citizens should clearly recognise the spectrum of human behaviour outside the realm covered by criminal law in order to be able to behave accordingly. Preventive detention does not serve this legislative goal. In contrast to imprisonment, it is not associated with either disapproval of reprehensible conduct nor does it aim to punish criminal guilt. Instead it is aimed exclusively at the prevention of future criminal offences.

The new provision is also compatible with the protection of public confidence in a state governed by the rule of law pursuant to Article 2.2 of the Basic Law in conjunction with Article 20.3 of the Basic Law. It has a permissible retroactive connection to the offence. The reliability of the legal system is a fundamental prerequisite of a free constitution.

Therefore, special justification is needed if the legislature wishes to subsequently amend to the detriment of the persons concerned the legal consequences of conduct which occurred in the past.

The new provision's connection with the past is evident from the fact that it also applies to cases where preventive detention was ordered for the first time prior to its pronouncement. The abolition of the maximum period of detention does not, however, extend back to a point in time prior to the coming into force of the new provision and does not modify any past events. This is because a preventive detention order did not depend even under old law on the circumstances existing at the time of the original offence, but rather on the circumstances prevailing at the time of sentencing. Similarly, the new provision does not change the legal consequences of a final criminal sentence to the person concerned's detriment. The ten-year time limit was not an integral part of the criminal sentence passed under the old law i.e. it was not final and absolute. The new provision only covers persons who were still in preventive detention at the time it came into force. In the case of these persons, the coming into effect of the newly regulated legal consequences also depends on circumstances which only occurred later and, in particular, the person's conduct during imprisonment. A decision on the end of preventive detention thus depends on events which had not occurred at either the time the offence was committed or the sentence was passed or the entry into force of the new provision.

Languages:

German.



Identification: GER-2004-H-001

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 03.03.2004 / e) 1 BvR 2378/98, 1 BvR 1084/99 / f) / g) *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 109, 279-391 / h) *Neue Juristische Wochenschrift*, 2004, 999-1022; CODICES (German).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.13.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
- 5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
- 5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Eavesdropping, residential premises / Information, personal, use in criminal proceedings / Evidence, exclusion.

Headnotes:

1. Article 13.3 of the Basic Law in the version of the Act to Amend the Basic Law (*Gesetz zur Änderung des Grundgesetzes*) (Article 13) of 26 March 1998 (*Federal Law Gazette* – BGBl I p. 610) is in conformity with Article 79.3 of the Basic Law.
2. The inviolability of human dignity pursuant to Article 1.1 of the Basic Law includes the recognition of absolute protection of an individual's inner private sphere. The acoustic monitoring of residential premises for the purpose of criminal prosecution (Article 13.3 of the Basic Law) is not permitted to intrude in this area. To this extent, there is no need to weigh the inviolability of the home (Article 13.1 in conjunction with Article 1.1 of the Basic Law) and the interest in the prosecution of crime in accordance with the proportionality principle.
3. Not every acoustic monitoring of residential premises violates the human dignity aspect of Article 13.1 of the Basic Law.
4. Statutory authority to monitor residential premises must guarantee the inviolability of human dignity and satisfy the constituent elements of Article 13.3 of the Basic Law as well as other constitutional requirements.
5. If the acoustic monitoring of residential premises based on such authority nevertheless leads to the collection of information derived from the individual's inner private sphere which enjoys absolute protection, the monitoring must cease immediately and

recordings must be deleted; no exploitation of such information is permitted.

6. The provisions in the Code of Criminal Procedure (*Strafprozessordnung*) for the implementation of acoustic monitoring of residential premises for the purpose of criminal prosecution do not entirely satisfy the constitutional requirements regarding the protection of human dignity (Article 1.1 of the Basic Law), the proportionality principle incorporated in the principle of a state governed by the rule of law, the guarantee of effective legal protection (Article 19.4 of the Basic Law) and the right to a hearing in court (Article 103.1 of the Basic Law).

Summary:

As the result of an amendment to the Basic Law in 1998, Article 13 of the Basic Law – the fundamental right to the inviolability of the home – was amended by the addition of Sections 3 to 6. The previous Section 3 became Section 7 of Article 13 of the Basic Law. In passing the amendment the legislature was primarily seeking a way to combat organised crime. Pursuant to Article 13.3 of the Basic Law, acoustic monitoring of residential premises for the purposes of criminal prosecution is now permitted. For the operation of Article 13, it is necessary that specific facts lead to the assumption that someone has committed one of a number of explicitly listed grave crimes (so-called “catalogue crimes”), that that person is probably at the private premises and investigation of the facts by other means would be unproportionally obstructed or without chance of success. Article 13.3 of the Basic Law was implemented in an ordinary law, namely the Act to Improve the Suppression of Organised Crime (*Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität*). The main provision is § 100.c.1.3 of the Code of Criminal Procedure (*Strafprozessordnung* – StPO). According to that provision, it is permissible to eavesdrop on and record the words of an accused spoken in private if certain facts justify the suspicion that he or she has committed one of a number of listed offences.

The power to order eavesdropping measures lies with the State Protection Division of the Regional Court (*Staatsschutzkammer des Landgerichts*) and in cases of imminent danger, with the Division’s president. Other provisions regulate, *inter alia* bans on the taking of evidence, the exclusion of evidence improperly obtained and duties to inform the person concerned. The use of the collected data is also now permitted in other contexts.

The complainants argued, in particular, that their fundamental rights under Article 1.1 (inviolability of

human dignity), Article 1.3 (binding effect of the fundamental rights on state authorities) and Article 13.1 in conjunction with Article 19.2 (ban on the violation of the essence of a fundamental right), Article 79.3 (impermissibility of amendments of the fundamental rights), Article 19.4 (effective legal protection) and Article 103.1 (right to a hearing in court) of the Basic Law had been violated.

The First Panel allowed the constitutional complaints in part to the extent that they were admissible.

The Court’s reasoning was essentially as follows.

Article 13.3 of the Basic Law, which allows the legislature to authorise the monitoring of residential premises for the purposes of criminal prosecution, is in conformity with Article 79.3 of the Basic Law. This provision only forbids constitutional amendments which affect the principles laid down in Article 1 and Article 20 of the Basic Law. These include the requirement that human dignity be respected and protected (Article 1.1 of the Basic Law).

Since the amendment of Article 13 of the Basic Law did not alter the guarantee in Article 1.1 of the Basic Law, the Basic Law only authorises monitoring measures which respect human dignity. Therefore, it is necessary to construe Article 13.3 of the Basic Law restrictively and in accordance with human dignity. The inviolability of the home is closely connected with human dignity and the constitutional requirement that it is essential to respect a person’s exclusively private, highly personal sphere of development. A citizen needs a place where he or she can be sure that his or her confidential communications are protected. An individual should have the right to be left in peace, especially at his or her own private residential premises, and should not have to fear that the state authorities are monitoring the development of the inner private sphere of his or her personality. Acoustic monitoring of residential premises may not encroach on this inner sphere, and it may not encroach even if to do so would be in the interests of the effectiveness of the administration of the criminal law and the discovery of the truth. To this extent, there is no need to weigh the inviolability of the home and the interest in the prosecution of crime in accordance with the proportionality principle. Not even predominant interests of the public can justify an encroachment on the [individual’s] freedom to develop himself or herself in highly personal matters.

Nonetheless, not every acoustic monitoring violates human dignity. Thus the content of conversations about past crimes is not part of the inner private sphere which enjoys absolute protection. Statutory authority to monitor residential premises in such cases must contain detailed guarantees of the

inviolability of human dignity while paying due regard to the principle of statutory clarity. In addition, the authority must satisfy the constituent elements of Article 13.3 of the Basic Law and the other constitutional requirements. The conditions imposed on the lawfulness of the monitoring of residential premises are all the more strict, the greater the risk is that they could record conversations of a highly personal nature. There must be no monitoring from the start in situations in which there are reasons for believing that human dignity will be violated by the measure. If the acoustic monitoring unexpectedly leads to the collection of information which enjoys absolute protection, the monitoring must cease immediately and recordings must be deleted; no exploitation of data with absolute protection which is obtained within the framework of criminal prosecution is permitted. The risk of obtaining such data usually occurs in the case of conversations with very close family members, persons very close to the [accused] or with whom he or she has a bond of trust (such as, for example, priests, physicians and defence lawyers). In the case of this circle of persons, monitoring measures may only be taken if there are strong reasons for believing that there is no need to provide absolute protection for the contents of the conversation between the accused and such persons – for example, where the persons carrying on the conversation were involved in the [accused's] offence. Reasons for believing that the content of the expected conversations will show a direct connection with crimes must already exist at the time the monitoring is ordered. It may not first be established through the monitoring of residential premises. There is a presumption that conversations with persons who are very close [to the accused] in his or her home are part of his or her inner private sphere. Conversations which are held at factory and office premises are protected by Article 13.1 of the Basic Law; however, where no connection between a specific conversation and an individual's inner private sphere exists, such conversations will not affect the human dignity aspect of the fundamental right.

Nevertheless, the First Panel declared unconstitutional a number of provisions of the Code of Criminal Procedure, i.e. provisions of non constitutional law, which had been introduced for the monitoring of residential premises on the basis of Article 13.3 of the Basic Law. The Panel gave the following reasons for this.

The legislature did not sufficiently define the constitutionally necessary bans on monitoring and the collection of evidence in § 100.d.3 of the Code of Criminal Procedure by taking into account the inner private sphere of the individual. Monitoring must be impermissible if the accused is at home alone with

very close family members or other persons very close to him or her and if there are no reasons to suspect that they were involved in the accused's offence. There are also insufficient statutory precautions to ensure that monitoring is ceased if suddenly the situation changes so that the inviolable private sphere is affected. In addition, a prohibition on the use of information improperly obtained and a requirement that information improperly obtained be immediately destroyed are missing. Moreover, there needs to be a guarantee that information from the inviolable private sphere is not used in main proceedings or used as a basis for further investigations. Pursuant to Article 13.3 of the Basic Law monitoring may only be considered during the investigation of grave offences individually listed in the statute. Some of the so-called catalogue crimes to which reference is made in Article 100.c.1.3 of the Code of Criminal Procedure do not fulfil these requirements. Thus they do not qualify as grounds for monitoring residential premises.

The fundamental right to the inviolability of the home must also be protected under procedural law, in particular through the involvement of a judge (Articles 100.d.2, 100.d.4.1 and 100.d.4.2 of the Code of Criminal Procedure). Furthermore, the decision defined in a more detailed manner the prerequisites for a court order's content and written substantiation. Thus, the order must specify the type of measure as well as its scope and duration. The public prosecutor's office and the responsible court must examine a case carefully and give detailed reasons if they wish to have the duration of the monitoring period originally fixed extended; such extension is in principle possible. Court involvement is also necessary in order to ensure that the prohibition on using evidence improperly obtained is respected.

Moreover, the provisions on the duty to notify the persons affected (Article 101 of the Code of Criminal Procedure) are only in part compatible with the Basic Law. The subjects of fundamental rights have in principle a right to be informed about measures for monitoring residential premises.

The reasons listed in Article 101.1.1 of the Code of Criminal Procedure for allowing the notification of the parties to be deferred in exceptional circumstances are only partly in conformity with the Basic Law. The threat posed to public security, which is only referred to in a general manner, or to the possibility of later operations by an undercover officer are not sufficient. The right to a hearing in court (Article 103.1 of the Basic Law) will also be violated if after the commencement of public proceedings a court defers notification with the result that it becomes aware of facts to which the accused is not privy.

The provisions regarding the use of personal information in other proceedings (Article 100.d.5.2 and Article 100.f.1 of the Code of Criminal Procedure) are largely in conformity with the Basic Law. However, it is only permissible to use information to solve other similarly important crimes and to eliminate threats, in individual cases, to highly important legal interests. The purpose of use must be compatible with the original purpose of the monitoring. The non-existence of a duty to state how the information was obtained is a violation of the Constitution.

The provisions concerning the destruction of data (Article 100.d.4.3, Article 100.b.6 of the Code of Criminal Procedure) are not in conformity with Article 19.4 of the Basic Law. The legislature failed to balance the interests in the destruction of data and the guarantee of effective legal protection with the monitoring of residential premises. To the extent that data must still be available for examination by the court, it may not be destroyed. However, access to it must be blocked. The information may also not be used for any other purpose than the information of the person concerned and for judicial review.

Two members of the Panel have attached a dissenting opinion to the decision. In their opinion Article 13.3 of the Basic Law is itself not in conformity with the Basic Law and therefore void. They advocated a strict and narrow interpretation of Article 79.3 of the Basic Law. They put forward that the issue in an age in which people seem to have become accustomed to unlimited technical possibilities and in which even a person's privacy within his or her own four walls is no longer a taboo that can deter the [state's] security needs is not only to stop the beginning of a dismantling of fundamental rights positions guaranteed by the constitution. Instead, there is a danger that the concept of the individual that has been generated by such development is no longer reconcilable with the values in a free democratic state governed by the rule of law.

Cross-references:

For the same judgement, see also precis [GER-2004-1-002] for different legal aspects.

Languages:

German.



Greece

Council of State

Important decisions

Identification: GRE-2001-2-001

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 27-06-2001 / **e)** 2283/2001 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

- 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Neutrality of the state, religious / Identity card, content / Religion, demonstrating.

Headnotes:

Compulsory reference to religion on identity cards, imposed by a legislative text, is incompatible with Article 13 of the Constitution.

Religious freedom does not include the right of individuals to indicate their religion or their religious convictions in general via voluntary reference to them on state documents such as identity cards.

Article 13 of the Constitution does not allow for the optional mention of religion or religious convictions on identity cards as a means of demonstrating or proving such beliefs. A contradictory interpretation would result in violation of religious freedom in its negative form, and would be incompatible with the state's religious neutrality, imposed by Article 13 of the Constitution.

Summary:

In an injunction sent to the Head of personal data processing at the Ministry of Public Order, the Authority for the Protection of Personal Data requested that the reference to religion no longer appear on identity cards on the grounds that the reference to religion constituted an infringement of the legislation on personal data protection. By a joint decision, the Ministers of Finance and Public Order subsequently defined the content of identity cards in accordance with the Protection Authority's requirements. These two decisions caused a huge stir within the Orthodox church and among some of its followers. An application for judicial review led to a ruling by the Council of State, based in particular on Article 13 of the Constitution, to the effect that reference to religion on identity cards would violate the principle of religious freedom and the state's religious neutrality. More precisely, Article 13 of the Constitution enshrines the individual's religious freedom. This religious freedom, which is subject only to the restrictions set out in the Constitution itself, includes both freedom of religious conscience (paragraph 1) and freedom for each individual to express his or her religious convictions, which, in turn, includes freedom of worship within any recognised religion (paragraph 2). The provisions in the first paragraph of the article, which enshrine religious equality by guaranteeing freedom of religious conscience and imposing equal treatment in the enjoyment not only of public freedoms, but also of all legally-recognised rights, irrespective of religious convictions, are fundamental provisions since, under Article 110.1 of the Constitution, they may not be revised. In addition, freedom of religious conscience has been declared inviolable and is not subject to any restrictions, whilst the freedom to express one's religious convictions, of which freedom of worship is a particular form, is subject to the restrictions necessitated by public order and public morals. Freedom of religious conscience, which, *inter alia*, protects the individual from any state interference in his or her personal religious convictions, includes the individual's right not to reveal his or her religion or, generally speaking, his or her religious convictions. No-one may be obliged by any means to reveal, directly or indirectly, their religion or religious convictions; consequently, no-one may be obliged to act or refrain from acting in ways that could serve as a basis for presumptions regarding the existence or otherwise of these convictions. Accordingly, no state body is authorised to encroach on this area of the individual's conscience, inviolable under the Constitution, and seek to ascertain his or her religious convictions, still less to oblige the individual to state his or her religious convictions.

The issue of individuals' voluntary declaration of their religious convictions is totally different, where such statements are made on the individuals' own initiative and for the purpose of facilitating the exercise of certain rights recognised by the legal system for the protection of religious freedom [such as the right of conscientious objectors to be exempted from military service, exemption from religious instruction classes or related activities in school (attendance at services, joint prayers), the right to erect buildings for worship, the right to set up religious associations]. Consequently, compulsory reference to religion on identity cards, imposed by Article 2 of Legislative Decree 127/1969, is incompatible with Article 13 of the Constitution.

With regard to the expression of religious convictions, religious freedom in its positive form consists in the right of all individuals to express their religion or, more generally, the most diverse religious convictions without hindrance, individually or in communion with others, privately or publicly, provided that such expression does not disturb public order or public morals. However, this freedom does not include the right of individuals to indicate their religion or general religious convictions via voluntary reference to them on state documents such as identity cards. Not only does Article 13 of the Constitution not grant such a right to those benefiting from religious freedom (indeed, in principle this freedom only guarantees the right of individuals to demand that state bodies refrain from any intervention that might thwart the exercise of this right, not the right to require positive action from the public authorities); it also forbids the optional mention of religion or religious convictions on identity cards as a means of expressing or proving such beliefs. The opposite interpretation would lead to infringement of the negative form of religious freedom for those Greek citizens who do not wish to express their religious convictions in this way, and remove the state's religious neutrality as regards the exercise of this freedom, a neutrality imposed by Article 13 of the Constitution. In practice, Greek citizens who are opposed to a reference to their religion or religious convictions on their identity card would be obliged, indirectly and to all intents and purposes publicly, to reveal an aspect of their personal religious convictions, especially since refusal to have this reference included would be recorded by the public bodies on a state document that is submitted as a means of identification to any authority or department, or to any individual. At the same time, these citizens, unwillingly and via state intervention, would form a category distinct from citizens who profess their religious convictions by allowing these convictions to be mentioned on their identity cards. In addition, the mention of religion on identity cards provides grounds for possible discrimination, favourable or

unfavourable, and thus carries the risk that it may infringe the religious equality enshrined in Article 13.1 of the Constitution, a fundamental provision.

The applicant also refers to Article 3 of the Constitution, which recognises the Orthodox religion as the dominant religion in Greece, and claims that this constitutional provision entitles Orthodox Greek citizens to express, if they so wish, their religious adherence and prove this through state documents, including identity cards. This argument is unfounded. Article 3 of the Constitution, which, moreover, is included in Section B of the first part of the Constitution, governing the relations between church and state, does not influence the exercise of religious freedom as set out in Article 13 of the Constitution, a provision that appears in the second part of the Constitution, which deals with individual and social rights; nor does it provide for privileged treatment of Orthodox Greek citizens in the exercise of this right. Such an approach would also be incompatible with the special provision in Article 13.1 of the Constitution, which imposes equal treatment in respect of the exercise of individual freedoms, irrespective of religious convictions. Accordingly, reference to religion on identity cards, even on an optional basis, i.e. with the interested party's consent, is incompatible with Article 13 of the Constitution.

Languages:

Greek.



Hungary Constitutional Court

Important decisions

Identification: HUN-1998-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 23.11.1998 / **e)** 48/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 105/1998 / **h)**.

Keywords of the systematic thesaurus:

- 3.10 **General Principles** – Certainty of the law.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Abortion / Foetus, legal status / Child, unborn, protection of life.

Headnotes:

It is not unconstitutional if the law makes it possible to terminate a pregnancy when a woman is in a crisis situation. The legislator can give up regulating the monitoring of whether a woman's condition is actually serious enough to qualify as a crisis situation in accordance with the Constitution only if at the same time the legislator protects by its laws the life of fetuses. The legislator should regulate the notion and the possible application of the notion of crisis situation by an act of parliament.

Summary:

A group of petitioners sought to challenge the constitutionality of Act LXXIX of 1992 on the protection of the life of the foetus (henceforth:

Abortion Law). The petitioners contend that some provisions of the Abortion Law and the Law as a whole are unconstitutional. The pro-life petitioners requested the Court to find that the foetus was a legal person from the moment of conception. The Constitutional Court rejected these petitions recalling its previous Decision no. 64/1991 (XII.17), in which the Court had already held that it could not determine whether a foetus was a person within the meaning of the Constitution. It was for Parliament to legislate on the matter. The current decision was based upon the principles and guidelines determined by a previous decision of the Court on the regulation of abortion. In Decision no. 64/1991 (XII.17), the Court struck down the regulation by the Minister of Health which was at that time in force, on formal grounds: fundamental rights, the Constitutional Court held, should have been regulated by an act of parliament, and the Court refrained from making a determination on the merits of the constitutionality of the regulations on abortion. The Court however laid down guiding principles for the future abortion law.

On the basis of these guidelines, Parliament enacted the Abortion Law in 1992, which did not acknowledge that the foetus was a legally protected entity from the moment of conception, and hence permitted abortion for certain reasons and in the early months of pregnancy.

In its current decision, the Court examined the constitutionality of Article 6.1.d of the Abortion Law, which allowed abortion in the first 12 weeks of pregnancy if a woman was in a crisis situation, and the Court also dealt with the petitions concerning the legal status and the right to life of a foetus.

According to Article 12.6 of the Abortion Law, a crisis situation is one as a consequence of which a pregnant woman will be in a desperate mental, physical or social condition and this endangers the healthy development of the foetus. In order to prove there exists a crisis situation, the woman concerned should sign the claim for an abortion.

In the opinion of the petitioners, the foetus is insufficiently protected by this Abortion Law, because no one with the foetus's interest in mind oversees the process through which it is determined whether the pregnant woman meets the conditions laid out in the statute. Nor, in present Hungarian practice, is such a determination open either to the public or to someone guaranteeing the interests of the foetus.

The question the Constitutional Court had to answer was therefore whether the State, by enacting the Abortion Law, had fulfilled the requirements concerning its duty to protect the life of the foetus

against the woman's right to dignity and to choose, when it permitted abortion for women in a crisis situation. The notion of crisis situation is unclear, since this is in fact an argument in favour of the woman's right to choose and against the protection of the life of the unborn, whereas under the Law it seems that abortion is permitted, paradoxically, in the interest of the foetus. According to the Court, this violates the constitutional principle of legal certainty, because the reason for allowing abortions is self-contradictory. The question is therefore whether it is unconstitutional if the reason for the termination of pregnancy is the woman's crisis situation. Under the Abortion Law, the abortion can be based only upon the assertion of the woman that she is in a crisis situation, without her having to prove or be subject to verification of the existence of these reasons. This is in order to protect the woman's right to privacy. The Constitutional Court, however, declared in the instant case, that the Law would not disproportionately restrict the woman's right to choose and to dignity if it requires the woman to provide justification for the abortion. The relevant provisions of the Abortion Law currently in force in practice meet the requirement concerning the woman's right to choose, but do not fulfil the duty of the State to protect human life. In consequence, the constitutional balance between the woman's right to dignity and the State's duty to protect life is upset. This regulation of the Abortion Law is unconstitutional since there is not a balance between the fundamental right of the woman and the constitutional duty of the State.

In its reasoning, the Court also laid down guiding principles for Parliament. The Court argues that there are two possible ways the State could protect the right to life of a foetus. The first possibility is that the legislator does not amend the Abortion Law, but instead counterbalances the regulation of the Abortion Law by making provisions aiming to protect the life of foetuses. (e.g. co-operation with the pregnant woman, providing the pregnant woman with proper psychical, medical, social and financial assistance). The second way would be to define the notion of crisis situation, giving some possible and typical reasons to qualify for an abortion.

Supplementary information:

Two judges attached a dissenting opinion, in which they pointed out that the Constitutional Court should have declared unconstitutional the provision of the Abortion Law under which the abortion was possible when the woman was in a crisis situation. Two justices out of eleven wrote separate concurring opinions. According to one, to define some typical reasons to qualify for an abortion would seriously violate the woman's right to privacy.

Languages:

Hungarian.

*Identification:* HUN-2000-2-004

a) Hungary / b) Constitutional Court / c) / d) 06.06.2000 / e) 18/2000 / f) / g) *Alkotmánybíróság Határozatai* (Official Digest), 6/2000 / h).

Keywords of the systematic thesaurus:

- 3.10 **General Principles** – Certainty of the law.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Information, false, freedom of expression / Public order / Public peace / Society, openness / Society, tolerant.

Headnotes:

It is against the free speech clause to punish a person who, in front of a large public gathering, asserts or distributes untrue facts or true facts in a way that may threaten to disturb the public order, since imposing penalties for such behaviour restricts freedom of expression in an unnecessary and disproportionate way.

Summary:

A judge of a district court initiated proceedings before the Constitutional Court for a preliminary ruling in a pending case on the basis that she considered one of the applicable provisions of the Criminal Code to be unconstitutional.

The petition asserted that Article 270.1 of the Criminal Code, according to which it was a misdemeanour to assert or to distribute untrue information or true facts in a way that may threaten to disturb the public order, violated Article 61 of the Constitution. Moreover, because the wording of the provision in question was too vague, there was a danger of its being interpreted in a subjective way, contrary to the principle of prohibition of arbitrariness.

According to the Court, the behaviour subject to criminal penalties – the assertion or distribution of untrue information or true facts in a certain way – falls within the scope of the freedom expression clause. The value of the freedom of expression would be very low if it did not protect a person who distributed false information. The right to free expression protects opinions irrespective of the value or veracity of their contents.

Since the aim of the challenged criminal provision was to protect the public peace, the Court had to examine whether the mere possibility of the disruption of public peace justified the restriction of the right to freedom of expression. The Court cited its previous Decision no. 30/1992 of 26 May 1992, in which the Court had held that “public peace” itself is not unrelated to the conditions surrounding the exercise of the freedom of expression. Where one may encounter many different opinions, public opinion becomes tolerant, just as in a closed society an unusual voice may instigate much greater disruption of the public peace. In addition, unnecessary and disproportionate restriction of the freedom of expression reduces the openness of a society. On the basis of this, the Court in the instant case held that the legal definition of the misdemeanour amounted to an abstract protection of the public order and peace as an end in itself. A misdemeanour would be committed even if under the given circumstances the assertion of false information did not result in even the threat of violating an individual right. But such an abstract threat to public peace was not sufficient justification to permit, in accordance with the Constitution, the use of criminal law sanctions to restrict the right to freedom of expression, a right whose exercise is indispensable for the functioning of a democratic state under the rule of law.

As far as Article 270.2 of the Criminal Code was concerned, the Court held that the provision had to be examined in the light of Article 8.4 of the Constitution. According to Article 270.2 of the Criminal Code, a person who acted as described by Article 270.1 of the Criminal Code in an emergency situation or during a state of war would commit a criminal offence. Under Article 8.4 of the Constitution, during a state of national crisis, state of emergency or state of danger,

the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights enshrined in Articles 54, 55, 56, 57.2, 57.3, 57.4, 60, 66, 67, 68, 69 and 70/E of the Constitution. That means that Article 8.4 allows the state to suspend or restrict the fundamental right to freedom of expression ensured by Article 61 of the Constitution in an emergency situation. But because subsection 2 of Article 270 was not a free-standing provision, the Court had to annul both subsections of Article 270 of the Criminal Code.

In addition, the Court held that Article 270.1 of the Criminal Code did not meet the standard of legal certainty as applied by the Court in its previous decisions, since when applying the challenged criminal provision an ordinary court judge had to take into account several commentaries and cases that were not legally binding, which could very well may lead to an arbitrary interpretation of the statute.

Supplementary information:

One judge attached a dissenting opinion to the judgment, in which he argued that the Court should have had to uphold the challenged criminal provision, since freedom of expression did not protect the dissemination of false information. It is contrary to the desired peace of society if everyone can say deliberately or publish false information.

Languages:

Hungarian.



Identification: HUN-2001-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 07.12.2001 / **e)** 58/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/138 / **h)**.

Keywords of the systematic thesaurus:

5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.

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

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

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

Keywords of the alphabetical index:

Name, acquired through marriage / Name, right / Name, family, free choice / Name, modification.

Headnotes:

In its Decision no. 8/1990, the Constitutional Court had paired the right to human dignity with the general right to a legal personality. In the present case, the right to one's name was derived from the right to a legal personality.

As the right to one's own name enjoys absolute constitutional protection, it must not be limited by the state. However, society and the state have an interest in regulating the use of names; therefore, the right to choose, change, or modify a name may be restricted by the legislator. When allowing people to choose, change or modify a name, the state should take into account other people's rights and freedoms, and the aim of a coherent and transparent population registration.

Summary:

The Constitutional Court was seized on constitutionality of some provisions of the Family Act.

As regards the provision excluding the possibility of having a double-barrelled name as a family name, the Court considered that everyone has an inalienable right to his own name. This right must not be restricted by the state. Other components of the right to a name, like the right to choose, change and to modify one's name and to take a new name can be limited by the legislator.

Considering the claim that precluding a woman to re-take the surname of her first husband as her family name after the end of her second marriage was unconstitutional, the Court considered that the tradition and the personality rights of the family affected by the changing of the name justify such a legal regulation.

On the other hand, the provision under which, upon the request of the parents the registrar can change the name of the juvenile under 14 only once, was considered unconstitutional insofar as it limited the right of the parents to change the name of their children.

Furthermore, the Court held unconstitutional the provision of the Family Act under which only the wife has the right to take the husband's surname as her family name. In the Hungarian legal system the man's name is always the marital and family name upon marriage. The Court considered that such regulation is inconsistent with the principle of equality. However, it did not annul the provision, but called upon parliament to meet the legislative requirement and to pass an amendment to the Family Act.

Justice Harmathy attached a separate opinion to the judgment. According to the judge, the right to one's name is not a separate basic right. In addition, the judge held that it was unconstitutional that the registrar can change the name of a child based upon the parents' request only once. The reason of the unconstitutionality is that the registrar modifies the name. It is also unconstitutional (since it infringes the right to the child's self-determination) that the law does not require the consent of the child. Under the separate opinion, the Court should not have to state that parliament failed to comply with its legislative task when not making it possible for a husband to take his wife's family name as a marital name. To prove the marital status of women and the family status of children, that traditional custom under which the woman takes the family name of the man as her family name after marriage is justified. In addition, the Court should have declared it unconstitutional that the woman cannot take again the surname of her first husband as her family name after the end of her second marriage. This absolute prohibition could not be justified. Justice Bagi and the Chief Justice Nemeth joined to this opinion.

Justice Vasadi also attached a separate opinion to the judgment. Justice Vasadi did not agree with the majority of the Court in creating a new fundamental right: the right to one's name. According to the judge, the right to one's name is one of the personal rights ensured by the Civil Code. The right to a name is a right which should be protected against another private person and not against the state.

Languages:

Hungarian.



Identification: HUN-2002-3-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 07.10.2002 / **e)** 569/B/1999 / **f)** / **g)** *Alkotmánybíróság Határozatai* (Official Digest), 2002/10 / **h)**.

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
- 5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.
- 5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Prisoner, right of association / Detention, fundamental rights, limited action.

Headnotes:

As a result of striking a balance between the state's duty to punish the perpetrators of crimes and the freedom of association, the Court stated that according to the Constitution, detained persons may exercise their right to freedom of association as long as this does not upset or directly endanger the purpose of the execution of penalties. When making that decision, the legislature has to consider the purpose of the conviction, and by what degrees the convict's sentence is to be served, and also, whether or not within that degree the convicts' exercise of the freedom of association endangers the order of the penal institution. The legislature did not exclude the possibility of forming associations in general (not even within a penal institution), and as a result whether or not restriction of the freedom of association is necessary and proportionate in any particular case can only be decided with knowledge of all circumstances.

Summary:

In a petition presented to the Constitutional Court, the petitioner sought a declaration of unconstitutionality regarding Article 36.5.f of the Legislative decree on the enforcement/execution of penalties (Legislative decree), stating that that provision – read in conjunc-

tion with Article 36.6.b of the Legislative decree – makes it impossible for persons detained in any penal institution to enjoy their right to freedom of association as set out in Article 63 of the Constitution, as well as their right to form or join organisations (trade unions) in order to protect their economic or social interests as set out in Article 70/C of the Constitution.

According to Article 36.5.f of the Legislative decree, the rights of convicted citizens (prisoners) are amended as follows: their freedom of association, right to education, and the duty of national defence are restricted as a result of detention.

On the basis of Article 36.6 of the Legislative decree, during the time of detention the prisoner's freedom of assembly is suspended.

The Constitutional Court has placed freedom of association among the rights of expression. Freedom of association means that everyone has the right to found an association with a cultural, corporate, political or any other purpose, or to take part in the activity of any such group of persons. This freedom also includes the right to found associations, the right to join them and also not to join them. Freedom of association is a basic right, which, like any other basic right, is not unlimited.

Persons detained in a penal institution are in a special situation. They are also entitled to basic rights; however, because of the detention and its legal purpose, legal provisions limit the convicts' right to enjoy their basic rights. In Decision no. 13/2001 (*Bulletin* 2001/2) the Constitutional Court has dealt with the limitation on the exercise of certain basic rights resulting from detention in a penal institution. According to this decision there are certain constitutional basic rights that cannot be affected by the detention of convicts, such as, for example, the right to life and human dignity. As a result of the nature of detention, the full assertion of the right to personal freedom, free movement and free choice of residence are excluded. Liberty of opinion is, however, listed among basic rights that still exist during detention, but its exercise and manifestation is defined by the fact of execution of the penalty and its circumstances.

The constitutionality of limiting the exercise of basic rights has been considered by the Constitutional Court on the basis of the so-called necessity test. In the present case the Constitutional Court had to strike a balance between the state's power to deal successfully with criminal matters and the freedom of association of prisoners. Concerning the fundamental rights of prisoners, the Constitutional Court finds that it is important that detention may be used to justify only that restriction on the exercise of basic rights having an interest closely related to the execution of

the penalty itself. A legal provision relating to constitutional rights of convicts that hinders a convict in his or her exercise of any basic right as a result of detention can only be considered to be constitutional if it serves legitimate penal purposes. In the instant case, the Constitutional Court stated that for the sake of the effective enforcement of the state's criminal laws and for the maintenance of order in the execution of penalties, the restriction of the exercise of freedom of association may be necessary in certain cases.

It is the state's constitutional duty to call the perpetrators of crimes to account. Part of this duty is to enforce penalties in the case of persons sentenced by the court to be held in detention. In executing a penalty the state can only restrict the exercise of the freedom of association to the extent that it is done for the sake of serving the legal purpose of the penalty. The purpose of detention is to promote the resocialisation of the convict by enforcing a legal sanction, and to help a convict avoid committing another crime in the future. Belonging to an association can play an important role in the convicts' keeping in contact with the outside world; after their detention it can help them to reintegrate into society; and, belonging to a smaller community can also promote the preservation of personality and self-esteem.

According to Article 36.5.f of the Legislative decree, freedom of association is limited. This legal norm provides that the proportionality of a legal restriction is not subject to review because the issue of whether the restriction of a convict's freedom of association is proportionate to the aim pursued in a particular case is decided by legal practice. The Legislative decree does not deal with the extent to which the convicts' freedom of association is restricted, which associations may still be formed and which associations prisoners may join.

In general, it can be stated that a restriction of the right of association is not a proportionate one where the convicts are forbidden to form associations that are reconcilable with the purpose of the penalty and do not endanger order and security. It is especially important in a case where the convicts wish to form a corporate association for the protection of their interests as safeguarded by the Legislative decree.

The convicts' exercise of freedom of association is, of course, restricted in the sense that they cannot take part in the everyday life of associations outside the penal institution. This restriction arises from the fact that during the time of detention the convicts' right to free movement and the free choice of residence is "suspended". As a result of the purpose served by the execution of the penalty, the detained person may not

leave the penal institution at any time. However, this restriction does not mean that the convicts cannot be members of an association outside the penal institution, or cannot take part in the association's activity at all. The convicts may keep their membership of an association obtained before the time of detention, or may become members of a new association where this is reconcilable with the execution of penalties. The convicts' membership with an association outside the penal institution is restricted only to the extent that they cannot take part in the association's activity in person, or they may do so only when they may leave the penal institution according to the general rules of the execution of penalties. During that leave the convicts may even form an association, as in this case when their participation in a meeting founding an association did not meet with any difficulty.

The exercise of the freedom of association is possible not only in the case of associations outside the penal institution, but also inside the penal institution where the convicts wish to form associations, for example corporate associations. Article 70/C.1 of the Constitution provides for a special type of freedom of association, that is, associations for the safeguarding of social and economic interests and the right to form and join them. Since the basic right guaranteed by Article 70/C of the Constitution is the expression of the general freedom of association in relation to associations safeguarding interests (trade unions), in the interpretation of that constitutional provision, statements concerning the essence of the freedom of association are normative: the right to form corporate associations, that is, the exercise of this right – together with the freedom of association – is restricted by the fact that a convict is held in detention. In reference to this right it may therefore be said that the convicts' exercise of the right to form associations is restricted only to the extent that is justified by the purpose of the execution of the penalty; and that this right may be restricted only to the extent that is necessary and unavoidable for the maintenance of the order in the penal institution.

Cross-references:

- Decision no. 13/2001 of 14.05.2001, *Bulletin* 2001/2 [HUN-2001-2-005].

Languages:

Hungarian.



Ireland Supreme Court

Important decisions

Identification: IRL-1996-2-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 31.07.1996 / **e)** 272/95 / **f)** Croke v. Smith and Others / **g)** *Irish Reports* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

1.6.8 **Constitutional Justice** – Effects – Influence on everyday life.

2.1.2.1 **Sources of Constitutional Law** – Categories – Unwritten rules – Constitutional custom.

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

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

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

5.1.3.3 **Fundamental Rights** – General questions – Limits and restrictions – Subsequent review of limitation.

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

Keywords of the alphabetical index:

Order, detention, indefinite period / Patient, unsound mind / Presumption, constitutionality.

Headnotes:

Detention orders of persons of unsound mind for an indefinite period under a legislative provision are constitutionally valid having regard to the provisions of the Constitution.

Summary:

This case came before the Supreme Court by means of case stated questioning the constitutional validity of a legislative provision allowing for the indefinite detention of a patient who is of unsound mind.

The Court had first to examine the presumption of constitutionality afforded to an Act of the Oireachtas (parliament) and found that this presumption must be granted unless and until the contrary is clearly established. In addition, a court would not be permitted to declare an impugned legislative provision invalid if it is possible to construe it in accordance with the Constitution. An impugned legislative provision must be construed in the light of its own language and must be construed within the framework of both the legislation in its entirety and within the Constitution.

The Supreme Court had to consider the power given to a mental hospital authority and its officers under the legislation to detain patients for an indefinite period. They found that the Oireachtas had not failed to exercise its constitutional obligation to respect and so far as practicable to defend the applicants right to liberty. The Oireachtas are obliged to ensure that a citizen who is of unsound mind, is not unnecessarily deprived of his liberty, even for a short period of time. Legislation which permits the deprivation of such liberty must contain safeguards against abuse and error.

The Supreme Court were satisfied that no judicial intervention is necessary unless there has been a failure to comply with the requirements of fair procedures and constitutional justice or failure to have regard to the constitutional right to liberty of the citizen.

Languages:

English.

*Identification:* IRL-1998-2-008

a) Ireland / b) Supreme Court / c) / d) 03.04.1998 / e) 260/95 / f) I.O'T. v. B. / g) / h).

Keywords of the systematic thesaurus:

2.1.2 **Sources of Constitutional Law** – Categories – Unwritten rules.

2.2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.

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

3.18 **General Principles** – General interest.

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

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

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

Keywords of the alphabetical index:

Family law / Parent, natural / Confidentiality / Parentage.

Headnotes:

The right to know the identity of one's natural parents is a unenumerated personal right guaranteed under the Constitution, but it must be balanced against the constitutional right of the parents to privilege and privacy, and this weighing of the competing interests must be done according to the circumstances of each individual case.

Summary:

The applicants sought to ascertain the identity of their natural mothers. Both of the applicants brought proceedings in the Circuit Court under the Status of Children Act, 1989. The Circuit Court Judge referred the question of law to the Supreme Court. The issues to be resolved were whether the Circuit Court had jurisdiction to declare the right of the child to be a constitutional right, whether there was such a constitutional right, whether the mother had constitutional rights not to have her identity disclosed, and if so, how these competing rights should be balanced.

Since 1965, the Irish courts have created a category of so-called unenumerated personal rights under Article 40.3 of the Constitution. The question which arose in this case was whether an inferior court, such as the Circuit Court, whose jurisdiction is based upon and defined by legislation, had the power to determine which rights were within this category. The Supreme Court described the jurisdiction of the Superior Courts and that of the Inferior Courts. The Court stated that every court is obliged to uphold the

Constitution. However the Circuit Court has not been vested with jurisdiction to interpret the Constitution. The duty of ascertaining and declaring the personal rights of the citizen, other than those specified in the Constitution, rests solely upon the High Court and the Supreme Court.

The statute pursuant to which the applications were made was the Status of Children Act, 1989. This Act conferred a clear and explicit right to apply for a declaration that a named person is the father or mother of the applicant. In this case, neither applicant could name their natural parents. One of the applications was therefore struck out, while the action for discovery which was brought by the second applicant, was permitted to proceed.

The Supreme Court addressed the question of unenumerated personal rights. The Court stated that when it is declaring rights other than those specified in the Constitution, it must do so in clear and explicit terms. There must be a clear declaration by the Superior Courts before a right can be considered to be protected under the Constitution.

A majority of the Supreme Court stated that the right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child. It was not however an absolute or unqualified right and its exercise could be restricted by the constitutional rights of others and by reference to the common good. In particular, the constitutional right to know the identity of the natural parents, may be restricted by the constitutional right to privacy and confidentiality of the natural mothers. The Court therefore had to decide whether the constitutional rights of the child outweigh the constitutional and legal rights of their natural mothers.

The Court considered the right to privilege and privacy claimed by the natural mothers. A majority of the Court held that it was not permissible to disclose to the applicants the identity of their natural mothers at this stage of the proceedings. However, there should be a procedure whereby the names and addresses of the natural mothers are disclosed to the Court and their claims are heard, without their identities being disclosed to the applicants. In this regard, the Court held that the rights of the natural mothers to privilege and to privacy are not absolute constitutional rights.

The majority of the Supreme Court held that it was not possible to lay down all the criteria to be applied when the constitutional right of the child to know the identity of the natural mother was being balanced with the constitutional right to privacy of the mother. The

Court did describe some of the matters which the Circuit Court should take into account. These included: the circumstances giving rise to the surrender of custody by the mother, the present circumstances of the mother and the child, the ages of both, the attitude of the mother and the child to the disclosure of the identity of the mother, the reasons for these attitudes, the views of the foster parents.

Languages:

English.



Israel

Supreme Court

Important decisions

Identification: ISR-2001-1-005

a) Israel / b) Supreme Court / c) High Court of Justice / d) 13.04.1997 / e) H.C. 50196/96 / f) Horev v. The Minister of Transportation / g) *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 41(4), 1; *Israel Law Reports* / h).

Keywords of the systematic thesaurus:

- 3.13 **General Principles** – Legality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Religion, coercion / Religion, sensibility, protection / Road, closure during prayer times / Tolerance, threshold.

Headnotes:

An administrative authority may take religious sensibilities into account in deciding whether to open or close roads to traffic, so long as such consideration does not amount to religious coercion. Restricting human rights in order to protect religious sensibilities may only be done when the offence to sensibilities exceeds the “threshold of tolerance” that every individual in a democratic society is expected to withstand. Freedom of movement may be restricted to protect religious sensibilities only if the harm to religious sensibilities is severe, grave, and serious, if the probability that such harm will materialise is nearly certain, and if such protection serves a substantial social interest.

The harm to the religious sensibilities of ultra-Orthodox residents caused by vehicular traffic in the heart of their neighbourhood on the Sabbath exceeds the level of tolerance that individuals in a democratic society are expected to endure.

Summary:

A group of citizens, politicians, and political and civic organisations petitioned the Supreme Court, acting as the High Court of Justice, to block an order by the Minister of Transportation to close Bar-Ilan Street, a major Jerusalem road, to vehicular traffic during prayer times on the Jewish Sabbath. The issue had sparked violent clashes between ultra-Orthodox Jewish residents of the area who claimed that the movement of motor vehicles on the Sabbath, in violation of Orthodox Jewish law, offended their religious sensibilities, and secular residents, who claimed the street’s closure would infringe on their freedom of movement. Numerous attempts at compromise, including proposals by governmental committees, failed.

The Court held that the Transportation Ministry may take religious sensibilities into account in exercising its administrative authority to open or close roads to traffic, so long as such consideration does not amount to religious coercion. Such consideration is in accordance with Israel’s values as a Jewish and a democratic state, values that attained constitutional status with the passage of the Basic Law, concerning Human Dignity and Freedom. Restricting human rights, however, can be justified only when the offence to hurt feelings exceeds the “threshold of tolerance” that every individual in a democratic society is expected to withstand.

The Court held that freedom of movement may be restricted to protect religious sensibilities only if the harm to religious feelings is severe, grave, and serious, the probability that the harm will materialise is nearly certain, such protection serves a substantial social interest, and the extent of harm to freedom of movement does not exceed that which is necessary to protect religious sensibilities.

The Court found that the harm to ultra-Orthodox residents from vehicular traffic in the heart of their neighbourhood on the Sabbath is severe, grave, serious, and nearly certain. The prevention of such harm is a proper public purpose. The Court also found that closing the street to through traffic during prayer times did not exceed the measure necessary to protect religious sensibilities, particularly as it would delay drivers forced to use alternate routes by less than two minutes. Thus, the Court concluded, the Minister of Transportation’s decision to close the

street during prayer times was a reasonable restriction on freedom of movement for drivers seeking to use it as a through street. The reasonableness of such closure is subject to three conditions:

1. that alternate routes remain open on the Sabbath;
2. that the street remain open on the Sabbath during non-prayer times; and
3. that the street remain open to security and emergency vehicles even during prayer times.

If the violence were to continue, rendering the street impassable to cars even during non-prayer times, the balance would be undermined, and Bar-Ilan Street would have to be re-opened to traffic during the entire Sabbath.

The Court determined, however, that in deciding to close the street, the Minister of Transportation did not adequately consider the needs of secular residents living near the street who depend on the road to reach their homes. Therefore, the Court quashed the Minister's order closing the street during prayer times until the Minister addressed the plight of secular residents and their guests who would not be able to reach their homes during the closures.

Two justices concurred in the decision, three justices held that the street should be open during the entire Sabbath and one justice held that it should be closed during the entire Sabbath.

Concurring, Justice S. Levin noted that the Court was not asked to decide what arrangement it would choose but rather whether the decision reached by the current Transportation Minister was a reasonable exercise of administrative discretion. Justice E. Mazza noted that closing the street during prayer times depended on the availability of alternative routes, and that if those routes were to be closed, too, it would have to be re-opened.

Dissenting, Justice T. Or held that in determining traffic arrangements, the Minister of Transportation must give primary consideration to facilitating traffic, and only secondary consideration to general interests like the protection of religious sensibilities. The offence to religious sensibilities created by vehicular traffic on the Sabbath does not exceed the level of tolerance that ultra-Orthodox residents are expected to endure. The street should remain open during the entire Sabbath to avoid violating the right to freedom of movement. Justice M. Cheshin held that the Transportation Minister exceeded his authority. An administrative body cannot give religious considerations primary status in making a decision unless

authorised to do so by parliament. In addition, closing the street amounts to confiscating public property, which also requires statutory authorisation. Furthermore, the Transportation Minister interfered with the independence of the Traffic Administrator by co-opting his authority over street closures, rendering the decision to close the street invalid. Justice D. Dorner held that parliament has the authority to restrict human rights in consideration of religious sensibilities, but administrative bodies may do so only if explicitly authorised. The Transportation Minister acted without authorisation, in a random response to violence. His decision should therefore be quashed.

In a separate dissenting opinion, Justice T. Tal argued that a counter-petition requesting closure of the street during the entire Sabbath should have been accepted. Closing the street on the Sabbath did not violate the right to freedom of movement, but rather caused a minor inconvenience to secular residents, in contrast to the religious residents' right to the Sabbath, which is nearly absolute. Closing the street during prayer times did not unreasonably burden secular residents of the area, who could drive to their homes during non-prayer times.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-006

a) Israel / **b)** Supreme Court / **c)** Nine Judge Panel / **d)** 06.09.1999 / **e)** H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99 / **f)** Public Committee Against Torture in Israel et. al. v. State of Israel et. al. / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 53(4), 817 / **h)**.

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – Legality.
- 3.16 **General Principles** – Proportionality.
- 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
- 4.11.3 **Institutions** – Armed forces, police forces and secret services – Secret services.

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

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.

Keywords of the alphabetical index:

Interrogation, methods / Suspect, physical pressure against / Necessity, defence / Terrorism, fight.

Headnotes:

The authority which allows a state security or police officer to conduct an investigation does not allow for torture, cruel, inhuman or degrading treatment. The law does not sanction the use of interrogation methods which infringe on the suspect's dignity for an inappropriate purpose or beyond the necessary means.

The "necessity" defence in Article 34.11 of the Penal Law does not constitute a basis for allowing interrogation methods involving the use of physical pressure against a suspect. The defence is available to an officer facing criminal charges for the use of prohibited interrogation methods. It does not authorise the infringement of human rights.

The fact that an action does not constitute a crime does not in itself authorise police or state security officers to employ it in the course of interrogations.

Summary:

The petitioners brought suit before the Supreme Court (sitting as the High Court of Justice), arguing that certain methods used by the General Security Service ("GSS") – including shaking a suspect, holding him in particular positions for a lengthy period and sleep deprivation – are not legal. An extended panel of nine judges unanimously accepted their application and held that the GSS is not authorised, according to the present state of the law, to employ investigation methods that involve the use of physical pressure against a suspect.

The Court held that GSS investigators are endowed with the same interrogation powers as police investigators. The authority which allows the investigator to conduct a fair investigation does not allow him to torture a person, or to treat him in a cruel, inhuman or degrading manner. The Court recognised that, inherently, even a fair interrogation is likely to cause the suspect discomfort. The law does

not, however, sanction the use of interrogation methods which infringe upon the suspect's dignity, for an inappropriate purpose, or beyond the necessary means. On this basis the Court held that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position, force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation.

Additionally, the Court held that the "necessity" defence, as it appears in Article 34.11 of the Penal Law (which negates criminal liability in certain circumstances), cannot constitute a basis for allowing GSS investigators to employ interrogation methods involving the use of physical pressure against the suspect. A GSS investigator may, however, potentially avail himself of the "necessity" defence, under circumstances provided by the law, if facing criminal charges for the use of prohibited interrogation methods. The Attorney General may instruct himself with respect to the circumstances under which charges will not be brought against GSS investigators, in light of the materialisation of the conditions of "necessity." At the same time, the "necessity" defence does not constitute a basis for authorising the infringement of human rights. The mere fact that a certain action does not constitute a criminal offence does not in itself authorise the GSS to employ this method in the course of its interrogations.

The judgment relates to the unique security problems faced by the State of Israel since its founding and to the requirements for fighting terrorism. The Court highlights the difficulty associated with deciding this matter. Nevertheless, the Court must rule according to the law, and the law does not endow GSS investigators with the authority to apply physical force. If the law, as it stands today, requires amending, this issue is for the legislature (Knesset) to decide, according to democratic principles and jurisprudence. Therefore, the court held that the power to enact rules and to act according to them requires legislative authorisation, by legislation whose object is the power to conduct interrogations. Within the boundaries of this legislation, the legislature may express its views on the social, ethical and political problems connected to authorising the use of physical means in an interrogation. Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects, suspected of involvement in hostile terrorist activities, thereby harming the latter's dignity and liberty, raises basic questions of law and society, of ethics and policy, and of the rule of law and security. The question of whether it is appropriate for Israel to sanction physical means in interrogations, and the scope of these means is an

issue that must be decided by the legislative branch. It is there that various considerations must be weighed. It is there that the required legislation may be passed, provided, of course, that a law infringing upon the suspect's liberty is "befitting the values of the state of Israel", enacted for a proper purpose, and to an extent no greater than is required (Article 8 of the Basic Law concerning Human Dignity and Liberty).

In a partly concurring opinion, Justice Y. Kedmi suggested the judgment be suspended for a period of one year. During that year, the GSS could employ exceptional methods in those rare cases of "ticking time bombs", on the condition that explicit authorisation is given by the Attorney General.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-008

a) Israel / **b)** Supreme Court / **c)** Nine Judge Panel / **d)** 12.04.2000 / **e)** F.H. 7048/97 / **f)** Plonim v. Ministry of Security / **g)** *Piskei Din Shel Beit Hamishpat Ha'Eilon L'Yisrael* (Official Report), 54(1), 721 / **h)**

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
- 5.3.13.2.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – Habeas corpus.

Keywords of the alphabetical index:

Detention, administrative, bargaining chip / Soldier, missing in action, negotiations / National security, threat.

Headnotes:

The principles of human dignity and freedom mandate that a person who does not pose a threat to national security may not be placed in administrative detention for later use as a "bargaining chip" in exchange for soldiers missing in action or prisoners of war. Even if the principles of human dignity and freedom did not so mandate the principle of proportionality would dictate that the state demonstrate detention was likely to lead to the release of soldiers and prisoners of war.

Summary:

Between the years of 1984-1987, a number of Lebanese civilians were detained and tried in a court of law. Each was sentenced to prison for a fixed number of years. After the Lebanese prisoners had served their sentences in an Israeli prison, they were not released. Rather, the Minister of Defence ordered that they be held in administrative detention ("preventive detention"). The reason for the prisoners' detention was the negotiations between Israel and various organisations suspected of holding Israeli soldiers missing in action and prisoners of war, or suspected of having information regarding the soldiers' whereabouts. The prisoners themselves posed no threat to national security. The sole purpose for their detention was for use as "bargaining chips" in the context of those negotiations.

According to the 1979 Law of Emergency Powers (detentions), when the country is in a state of emergency, the Minister of Defence is authorised to hold a person in administrative detention if the Minister is convinced that "the interest of national security or public safety mandates that a person be held in detention" (Article 1079.2 of the Law of Emergency Powers (detentions)). The detention may be for up to six months, after which time it may be continuously extended for six month periods. According to the 1979 Law of Emergency Powers, after 48 hours from the time the person is detained and after every three months of detention, the arrest warrant is reviewed by the President of the District Court. His decision may be appealed to the Supreme Court.

In 1994, after the President of the District Court extended their administrative detention for another six months, a number of Lebanese prisoners submitted an appeal to the Supreme Court. The prisoners argued that the law of emergency powers does not give the Minister of Defence the authority to place a person in administrative detention who does not himself pose any threat and where the sole purpose of his detention is the desire to use him as a “bargaining chip” during negotiations.

The Supreme Court, sitting as a panel of three judges, rejected the prisoners’ appeal by a vote of 2-1. The Court accepted the Minister of Defence’s position, by which the “interest of national security” referred to in the second clause of the 1979 Law of Emergency Powers included the supreme interest of the return of prisoners of war and soldiers missing in action. Therefore, the Minister of Defence is authorised to detain the Lebanese civilians in administrative detention. The dissent argued that the authority granted by law does not include the detention of a person who does not himself pose any threat where the only purpose of his detention is to hold him as a bargaining chip.

The prisoners submitted an application for a further hearing. The case was heard by an extended panel of nine judges. The Supreme Court reversed the District Court’s judgment and its own previous judgment. In a 6-3 vote, the Court held that the Minister of Defence does not have the authority to place a person in administrative detention when the person does not pose a threat to national security and the sole purpose for his detention is to use him as a “bargaining chip”. The majority held that protecting human dignity and freedom and the proper balance between the rights of citizens and national security, is such that the law must be interpreted in such a way that does not give the Minister of Defence the power to place someone in administrative detention when that person does not pose a threat to national security. Such an interpretation is also required by international law. Moreover, the prisoners’ detention was illegal, even if the Minister of Defence had the aforementioned authority. The use of administrative detention was not proportional because it was not based on sufficient evidence to prove that holding the prisoners in administrative detention would lead to the release of prisoners of war and soldiers missing in action. On the basis of these two arguments, the Supreme Court held that the prisoners must be released immediately.

The dissent held that the authority granted by law to the Minister of Defence includes the power to place a person in administrative detention who does not himself pose a threat to national security. This is

because the “interest of national security” referred to in the second clause of the 1979 Law of Emergency Powers includes the return of prisoners of war and soldiers missing in action. As long as there was a chance that the prisoners of war and soldiers missing in action might be returned, there is justification for holding the prisoners in administrative detention. Moreover, the dissent argued that the administrative detention in this particular case was proportional because there was sufficient evidence to prove that holding the prisoners in administrative detention would lead to the release of prisoners of war and soldiers missing in action.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2003-2-007

a) Israel / **b)** Supreme Court / **c)** Panel / **d)** 22.01.2003 / **e)** CrimA 3852/02 / **f)** John Doe v. District Psychiatric / **g)** [2003] IsCR 57(1) 900 / **h)**.

Keywords of the systematic thesaurus:

- 2.1.1.2 **Sources of Constitutional Law** – Categories – Written rules – National rules from other countries.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 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.

Keywords of the alphabetical index:

Psychiatric disturbance, degree / Psychiatric institution, criminal commitment, duration.

Headnotes:

Holding a patient in commitment infringes his or her rights of liberty and dignity, guaranteed under the Israeli Basic Law on Human Dignity and Liberty. Such

an infringement may be justified if it is intended for the protection of the accused as well as for the protection of others.

The law must strike a reasonable balance between Patient no. 8217's rights and the public interest.

Forced criminal commitment becomes unreasonable when its duration exceeds the amount of time a patient would have served in prison had he or she been convicted.

Summary:

The petitioner, Patient no. 8127, after being charged with assault, was found unfit to stand trial. He was criminally committed to a psychiatric institution. Under Israeli law, criminal commitment restricts a patient's liberty more than civil commitment, *inter alia*, in that criminal commitment continues indefinitely until the District Psychiatric Board orders the discharge of the accused. The petitioner remained in criminal commitment in the psychiatric institution for a period longer than his sentence would have been had he actually stood trial and been convicted.

The petitioner asserted, *inter alia*, that that arrangement was unconstitutional. He asserted that he could not be held in commitment indefinitely. The respondent countered that the nature of his mental illness required that the petitioner remain in commitment indefinitely. The respondent also asserted that the petitioner could not be held in civil commitment, as the civil commitment system did not provide for adequate control and supervision.

The Court held for the petitioner. The Court noted that holding the petitioner in commitment for any length of time infringed his rights of liberty and dignity, guaranteed under the Israeli Basic Law: Human Dignity and Liberty. However, the Court noted that such an infringement might be justified where it is intended for the protection of the accused as well as for the protection of others. However, the Court noted that the law must strike a reasonable balance between Patient no. 8217's rights, on the one hand, and the public interest, on the other. The Court held that forced criminal commitment becomes unreasonable when its duration exceeds the amount of time the patient would have served in prison had he been convicted. In reaching its judgment, the Court relied on comparative law from the United States, Canada and Australia.

The Court stated that the court that issues the original criminal commitment order should, when the duration of criminal commitment becomes unreasonable, transfer a patient to civil commitment. The Court

noted that the patient himself might approach the court, assert that the period of criminal commitment has become unreasonable, and ask to be transferred to the civil track. However, the Court added that the Attorney-General might act as proxy for the patient, where the patient does not approach the Court himself.

Languages:

Hebrew, English (translation by the Court).



Italy

Constitutional Court

Important decisions

Identification: ITA-1997-2-005

a) Italy / b) Constitutional Court / c) / d) 19.05.1997 / e) 144/1997 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 22, 28.05.1997 / h) CODICES (Italian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Authority, public security / Football, violence, preventive measure / Hearing of both parties.

Headnotes:

A measure requiring an individual to report to the territorially competent police station during sports competitions has consequences for the individual's personal freedom. It must therefore be examined by a court, as required by Article 13 of the Constitution, in order to guarantee the right to defence in accordance with Article 24 of the Constitution, a right which the lower court considered to have been violated because the measure had been approved by the preliminary inquiry judge without the other party having been heard.

Approval of such a measure does not need to be accompanied by the same guarantees as that of arrest and preliminary detention as it entails less restriction of personal freedom.

Summary:

Preventive measures which may be taken by a public security authority (police superintendent) are intended for use in respect of persons who have been reported for or convicted of playing an active part in violent acts during sports events (e.g. football matches). They consist of a ban on access to specifically designated venues of sports events and to places at which persons participating in or attending sports competitions gather or through which they pass. A superintendent may even order such persons to report to the police station during sports competitions affected by a measure of that kind. The order is notified to the person concerned and communicated to the competent State prosecutor at the district court, who, if he or she deems the measure justified, will request the preliminary inquiry judge to approve it.

Out of concern to allow persons concerned by such a measure to exercise effectively their right to present their reasons to the preliminary inquiry judge required to approve the measure, the provision in question was declared unconstitutional because it did not stipulate that the persons concerned should, at the same time as being notified of the measure, be informed that they may submit observations or arguments to the preliminary inquiry judge either in person or through a legal representative.

Cross-references:

- Cf. judgments nos. 143 and 193 of 1996, which designate the measures referred to in the present decision as measures affecting the personal freedom of the person concerned.
- Cf. Judgment no. 48 of 1994 on the numerous regulations considered relevant for the purpose of implementing defence rights, as well as Judgment no. 160 of 1995 on arrangements for the assistance of defendants.

Languages:

Italian.



Identification: ITA-2003-3-003

a) Italy / b) Constitutional Court / c) / d) 01.10.2003 / e) 309/2003 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 15.10.2003 / h).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Residence, obligation / Religion, collective worship.

Headnotes:

The provision of Law no. 1423 of 1956 (on preventive measures in respect of persons presenting a danger for security or public morals) whereby a person subject to preventive surveillance who is required to stay within the boundaries of a given municipality may be authorised to leave that area by the courts under certain conditions, but solely for health reasons, without the same possibility being open in order to enable that person to participate in ceremonies specific to his or her religion, does not breach Article 19 of the Constitution (on freedom of worship).

This is because, to enable the person under surveillance to take part in religious ceremonies from time to time, permission would probably have to be granted once and for all, covering the entire period of the residence obligation, and it would doubtless prove impossible to allow his or her regular attendance at places of worship in accordance with security requirements.

Summary:

A court made a reference to the Constitutional Court for a ruling on the provision of Law no. 1423 of 1956 (on preventive measures in respect of persons presenting a danger for security or public morals) because, while acknowledging that it was for parliament to determine the exceptional circumstances in which a person subject to a residence obligation might leave his or her place of residence,

it deemed that failure to include among those circumstances the situation of an individual unable to practise his or her religion for lack of a community of believers in his or her place of residence breached Article 19 of the Constitution. That article guaranteed everyone the right to “freely profess religious beliefs in any form, individually or with others, to promote them and to celebrate rites in public or in private, provided they are not offensive to public morality.”

The aim of a surveillance measure combined with a residence obligation was to prevent crime. Preventing, and punishing, crime was one of the most important tasks incumbent on the public authorities. The prevention measures permitted by law could include, as in the case before the Court, restrictions on the freedom of movement and of residence of a person considered to be dangerous. Such restrictions inevitably affected rights which could not possibly be exercised without enjoying those freedoms. In the case under consideration, the restriction on the right to practise one’s religion was a possible indirect consequence of applying the surveillance measure combined with a compulsory residence order: it followed from the lack of an organised community of believers of the relevant religion in the municipality where the person concerned was required to reside.

In general, it was nonetheless necessary for parliament to ensure that restrictions on such freedoms were kept to a minimum, so that rights depending on them would be less affected. For instance, with regard to prevention measures, parliament had allowed the possibility of making exceptions on health grounds from the rules specific to surveillance with a compulsory residence order, in which case a person concerned by such measures might be given permission by the courts to leave the area of the municipality in question under circumstances taking account of the relevant security requirements. This possibility apparently did not exist with a view to satisfying needs linked to the right to practice one’s religion through collective worship.

The challenged provision’s application could not be extended to departure from the municipality of compulsory residence for religious reasons – as requested by the referring court – without disregarding the security considerations on which the compulsory residence order was based. No compromise was possible, and the safety of all members of the population would have to be sacrificed to requirements linked to a single individual’s religious freedom.

However, a practical solution might be found by assigning the person concerned by the preventive measure a place of residence where the religious organisation to which he or she belonged was represented.

The Court rejected the question as, in this particular case, weighing the interests at stake proved impossible.

Languages:

Italian.



Japan Supreme Court

Important decisions

Identification: JPN-1969-S-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 26.11.1969 / **e)** (Shi), 68/1969 / **f)** Hakata Railway Station Case / **g)** *Keiji-Saiban Shu (Keishu)* (Official Collection of the Decisions of the Supreme Court of Japan on criminal cases), 23-11, 1490; *Series of prominent judgments of the Supreme Court upon questions of constitutionality*, no. 12 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, news reporting, freedom / Evidence, obligation to produce / Media, television station, obligation to produce evidence.

Headnotes:

The freedom to report news is guaranteed under Article 21 of the Constitution, which protects freedom of expression. The freedom of news-gathering activity is to be sufficiently respected in the light of Article 21 of the Constitution.

To decide whether a court order to hand over films collected for a news report may be issued, the character, manner and gravity of the charge involved, the evidential value of the data and its necessity in the interests of a fair criminal trial should be balanced

against restrictions caused to the freedom of news-gathering activity, when news media are obliged to submit collected data as evidence and against the consequential influence upon the freedom of reporting news.

Even when the use of such data as evidence in a criminal trial is considered permissible, it should not inflict upon the news media more damage than is necessary.

Summary:

The origin of this case goes back to 16 January 1968, when about 300 radical university students, on their way to Sasebo Port to demonstrate against the arrival of a US aircraft carrier, got off a train at Hakata Station. They clashed with the police, and one student was charged with obstructing the performance of official duty. However, the Fukuoka District Court acquitted the student while placing the blame for the clash on the excessive reaction of the police.

Thereupon the Japan Socialist Party and the National Federation for the Protection of the Constitution filed charges with the Fukuoka District Prosecutor's Office against the alleged violence and brutality of 870 police officers. The Prosecutor's Office decided not to indict them. The dissatisfied plaintiffs then petitioned the Fukuoka District Court to investigate whether or not there were sufficient grounds to indict them in accordance with Code of Criminal Procedure. In the process of the hearing for the petition, the Fukuoka District Court issued orders obliging 4 television stations to submit their news-films recording the Hakata incident. An appeal was lodged with the Supreme Court against the ruling of the Fukuoka District Court affirming the order of the Fukuoka District Court. The Supreme Court dismissed the appeal.

Languages:

Japanese, English (translation by the Court).



Kazakhstan Constitutional Council

Important decisions

Identification: KAZ-2004-H-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 21.04.2004 / **e)** 4 / **f)** Concerning the Conformity of the Mass Media Law of the Republic Kazakhstan with the Constitution of the Republic Kazakhstan. Resolution (decision) of the Constitutional Council of the Republic of Kazakhstan no. 4 of 21 April 2004 / **g)** *Kazhkhstanskaya pravda* (Official Gazette) / **h)** CODICES (Kazakh, Russian).

Keywords of the systematic thesaurus:

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

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

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

5.3.25 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.

Keywords of the alphabetical index:

Human right, scope of application / Citizen, non-citizen, constitutional rights and guarantees.

Headnotes:

The Constitution of Kazakhstan differentiates the legal status of persons by using the terms “citizen”, “everyone”, “all”, “foreigners” and “persons without citizenship”. The constitutional terms “everyone” and “all” therefore mean citizens of Kazakhstan as well as persons who do not possess citizenship of the Republic.

The expression “citizen” used in the Mass Media Law narrows the scope of the application of the Law and leads to the lack of conformity of its preamble with Article 20.2 of the Constitution.

Summary:

The Constitutional Council of Kazakhstan considered in a public session a matter referred to it by the President concerning the conformity of the Mass Media Law with the Constitution.

The Constitutional Council recalled that in accordance with Article 20.2 of the Constitution: "everyone shall have the right to freely receive and disseminate information by any means not prohibited by law". Furthermore, in its decision no. 12 of 1 December 2003, the Council stated that "the Constitution of Kazakhstan differentiates the legal status of persons by using the terms "a citizen of Kazakhstan", "everyone", "all", "foreigners" and "persons without citizenship". It therefore underlined that the constitutional terms "everyone" and "all" mean citizens of Kazakhstan as well as persons who do not possess the citizenship of the Republic.

The Preamble of the Mass Media Law establishes: "the Law... is aimed at the realisation of the right to freedom of speech and the right to freely receive and disseminate information, which are established and guaranteed by Constitution of the Republic Kazakhstan".

The Constitutional Council considered that the use of the term "citizen" narrowed the scope of the application of the Law and led to the discrepancy between the contents of its preamble and Article 20.2 of the Constitution.

The provisions of Article 29.1, 29.4 and 29.5 of the Law giving the right of reply only to citizens do not correspond to the above mentioned positions and requirements of Article 18.1 of the Constitution ("everyone shall have the right to inviolability of private life, personal and family secrets, protection of honour and dignity").

Article 50.1 of the Law sets out that the freedom of speech and the right to freely receive and disseminate information by any means not prohibited by law form one of main principles of mass media activity. The specified norms of the Law provide for the restriction of the freedom of speech and the right to freely receive and disseminate the information not only by law, but also by normative legal acts of lesser validity, thereby conflicting with Article 20.2 ("everyone shall have the right to freely receive and disseminate information by any means not prohibited by law") and Article 39.1 of the Constitution ("rights and freedoms of an individual and citizen may be limited only by laws"), providing guarantees from illegitimate rule-making.

In the appropriate case, the Law permits the withdrawal of a Television Radio Broadcasting License, the invalidation of Mass Media Registration Certificate (Articles 24.4 and 12.11), and the withdrawal of the Mass Media Registration Certificate (Article 8.4) by a decision of the authorised body in the field of mass media. Under the Constitution, those measures should only be ordered by courts since Article 76.2 of the Constitution states "judicial power shall be extended to all cases and disputes arising on the basis of the Constitution, laws...". That is the legal position set out in the normative decision of the Constitutional Council no. 7/2 of 29 March, 1999 "the right is given to a court on the basis of the Law to pronounce judgment... admitting restrictions of some constitutional rights of individual and citizen".

Consequently, Article 8.4 of the Law, allowing an authorised body to withdraw the Mass Media Registration Certificate, is in conflict with general provisions, principles and norms of the Constitution, from which the guarantees of the constitutional rights on the freedom of speech arise (Article 1.1, 12.1, 13.2, 20.1, 75.1 and 76.2).

Accordingly, the Constitutional Council considered that the Mass Media Law accepted by the Parliament on 18 March 2004 and submitted to the President for signature on 25 March 2004 contains a number of provisions and norms that are not in accordance with the Constitution.

The Constitutional Council also noted that the Law has some flaws relating to the legal techniques used in the Law.

On the basis of the aforesaid and relying on Article 72.1.2 of the Constitution, as well as Articles 17.2.1, 31-33 and 37, and 41.1.2 of the Decree of the President of the Republic of Kazakhstan, having the Effect of a Constitutional Law "Concerning the Constitutional Council of the Republic Kazakhstan", the Constitutional Council decided as follows:

The Mass Media Law accepted by the Parliament on 18 March 2004 and submitted to the President on 25 March 2004 was not in accordance with the Constitution.

According to Article 74.1 of the Constitution, the Mass Media Law shall not be signed and promulgated.

In accordance with Article 74.4 of the Constitution, the decision shall enter into force from the day it is adopted, shall not be subject to appeal and shall be binding upon every person within the territory of

Kazakhstan, and shall be final, with allowance made for the case provided for by Article 73.4 of the Constitution.

Languages:

English, Russian.



Latvia Constitutional Court

Important decisions

Identification: LAT-2000-3-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 30.08.2000 / **e)** 2000-03-01 / **f)** On Compliance of the *Saeima* Election Law and the City Dome, Region Dome and Rural Council Election Law with the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 307/309, 01.09.2000 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
 2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
 2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
 2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.
 3.3 **General Principles** – Democracy.
 3.13 **General Principles** – Legality.
 3.16 **General Principles** – Proportionality.
 3.19 **General Principles** – Margin of appreciation.
 4.6.9.2.1 **Institutions** – Executive bodies – The civil service – Reasons for exclusion – Lustration.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
 5.3.38.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Election, candidacy, restriction / Organisation, anti-constitutional, participation / Social need, pressing / Morality, democracy, protection.

Headnotes:

The right to be elected may be restricted for persons who have been active in organisations that tried to destroy the new democratic state and were recognised as anti-constitutional. Such restrictions are lawful where their aim is to protect the democratic state system, national security and the territorial unity of the state.

However, the legislator should determine the term of the restrictions; such restrictions may last only for a certain period of time.

Summary:

The case was initiated by twenty-three members of Parliament who claimed that provisions of the Parliament (*Saeima*) Election Law and of the City Dome, Regional Dome and Rural Council Election Law establishing various restrictions on the right to be elected contradicted Articles 89 and 101 of the Constitution, Article 14 ECHR, Article 3 Protocol 1 ECHR, and Article 25 of the International Covenant on Civil and Political Rights.

The laws established restrictions on the right of the following to be elected as deputies in Parliament and in the municipalities: those who after 13 January 1991 have been active in the Communist Party of the Soviet Union, the Working People's International Front of the Latvian S.S.R., the United Board of Working Bodies, the Organisation of War and Labour Veterans, the All-Latvia Salvation Committee or its regional committees; those who belong or have belonged to the regular staff of the U.S.S.R., the Latvian S.S.R. or foreign state security, intelligence or counterintelligence services.

Article 101 of the Constitution establishes the right of every citizen of Latvia, prescribed by law, to participate in the activity of the state and local authorities. This right guarantees the democracy and legitimacy of the democratic state system.

However the right is not absolute; Article 101 includes the condition "in the manner prescribed by law". The constitution leaves it for the legislature to make decisions limiting the right. By including the words "in the manner prescribed by the law" the legislature determined that in every case one should interpret

the words "every citizen of Latvia" as including the limitations established by law. Article 101 of the Constitution shall be interpreted together with Article 9 of the Constitution: "Any citizen of Latvia, who enjoys full rights of citizenship and, who is more than twenty-one years of age on the first day of elections may be elected to the parliament." Article 9 of the Constitution authorises Parliament to specify the content of the notion of "a citizen of Latvia, who enjoys full rights of citizenship"; and this is done in the *Saeima* Election Law. The limitations of this right are permissible only if they do not contradict the notion of democracy, mentioned in Article 1 of the Constitution, other and general principles relating to fair elections. Thus the legislature, in passing the disputed norms creating a necessary legal norm to be realised for the right to be elected, implemented the task of Article 101 of the Constitution.

Reasonable restrictions on the right to vote and to be elected at genuine periodic elections, established in Article 25 of the International Covenant on Civil and Political Rights, are permitted. Not all types of different treatment constitute prohibited discrimination. Reasonable and objective prohibitions with an aim that is considered as legitimate by the Covenant cannot be regarded as discrimination.

The restrictions to the election rights established in Article 3 Protocol 1 ECHR shall be established according to the universal procedure: although the states have "a wide margin of appreciation in this sphere", any restrictions must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Rights may be restricted only to the extent the restrictions do not deprive the right of its essence and/or diminish its efficiency. The principle of equality of treatment shall be respected and arbitrary restrictions must not be applied. Article 14 ECHR does not establish a prohibition of all difference in treatment with regard to the realisation of the rights and freedoms provided by the Convention. The principle of equal treatment is considered violated only if the difference of treatment does not have a reasonable and objective justification.

The Court found that the statement of the applicants that the disputed norms discriminated against the citizens just because of their political membership was groundless. The disputed norms do not establish difference in treatment just because of the political opinion of the person, they establish a restriction for activities against the renewed democratic system. The words "to be active", used in the disputed norms mean to continuously perform something, to take an active part, to act, to be engaged in. Thus the legislature has connected the restrictions with the

degree of individual responsibility of every person in the realisation of the aims and programme of the organisations mentioned in the disputed norms. Formal membership of any of the mentioned organisations cannot alone serve as the reason for forbidding a person from being included in the candidate list and being elected. Thus the disputed norms are directed only against those persons who, with their activities after 13 January 1991 and in the presence of the occupation army, tried to renew the former regime, and are not applied just to those with different political opinions.

The norms of human rights included in the Constitution should be interpreted in compliance with the practice of application of international norms of human rights. To establish whether the disputed restrictions comply with Articles 89 and 101 of the Constitution, one has to evaluate whether the restrictions included in the disputed norms are determined by law, adopted under due procedure; justified by a legitimate aim, and necessary in a democratic society. As this case does not contain any dispute on whether the restrictions were determined by law or adopted under the due procedure, the two last issues have to be evaluated.

In 1990, although the democratic state and the first of 1922 were renewed, the Latvian Communist Party was not going to give up the role of the "leading and ruling force". It started anti-state activities. With the efforts of the Latvian Communist Party and its satellite organisations the All-Latvia Salvation Committee was established. The aims of the activities of these organisations were connected with the destruction of the existing state power, and were therefore anti-constitutional. In August 1991 the legislature prohibited these organisations, evaluating them as anti-constitutional. Thus the aim of the restrictions of the election rights is to protect the democratic state system, national security and the territorial unity of Latvia. The disputable norms are not directed against a pluralism of ideas in Latvia or the political opinions of a person, but against persons, who with their activities have tried to destroy the democratic state system. Enjoyment of human rights must not be turned against democracy as such.

The essence and efficiency of rights lies also in morality. To demand loyalty to democracy from its political representatives is within the legitimate interests of a democratic society. The democratic state system has to be protected from persons who are not ethically qualified to become the representatives of a democratic state on the political or administrative level. The state should be protected from persons who have worked in the former

apparatus, implementing occupation and repression, and from persons who after the renewal of independence to the Republic of Latvia tried to renew the anti-democratic totalitarian regime and resisted the legitimate state power. The restrictions to the election right do not refer to all members of the mentioned organisations, but only to those who had been active in the organisations after 13 January 1991. Excluding a person from the candidates list if he has been active in the mentioned organisations is not administrative arbitrariness; it is based on an individual court decision. Thus the principle, requiring an equal attitude to every citizen has not been violated, the protection by a court is guaranteed, and the restrictions are not arbitrary. Consequently the aim of the restrictions is legitimate.

To establish whether the restrictions of the election right is proportional to the aims of protecting the democratic state system, national security and the territorial unity of Latvia, the legislature has repeatedly evaluated the political and historical conditions of the development of democracy in connection with the issues of the election right, adopting or amending the election law just before elections. The Court held that at the present moment there did not exist the necessity to doubt the proportionality of the applied restrictions. However, the legislature, in periodically evaluating the political situation in the state as well as the necessity of the restrictions, should decide on determining the term of the restrictions. Such restrictions to the election rights may last only for a certain period of time.

The Constitutional Court decided by a majority of four votes to three. The dissenting judges disagreed with the majority on several grounds. According to the dissenting opinion, restrictions to human rights in a democratic society were necessary not only if they had a legitimate aim, but also if there was a pressing social need to establish the restrictions and the restrictions were proportionate. Today, ten years after the re-establishment of independence, the election of the persons mentioned in the disputed norms would not threaten democracy in Latvia, and therefore the pressing social need to establish the restrictions does not exist. Restrictions of fundamental rights are proportionate only if there are no other means that are as effective but are less restrictive of the fundamental rights. The election rights are restricted so far that in fact the persons do not enjoy the right at all; the legislature has the possibility of using other "softer" forms, therefore the measure is not proportionate.

Cross-references:

- In the decision the Constitutional Court referred to the following Judgments of the European Court of Human Rights: *Mathieu-Mohin and Clerfayt*, 02.03.1987; *Belgian Linguistic Case*, 23.07.1968; *Karlheinz Schmidt v. Germany*, 18.07.1994; as well as to the decision of the Federal Constitutional Court of Germany in Case 2 BvE 1/95, 21.05.1996, *Bulletin* 1996/2 [GER-1996-2-017].
- In the dissenting opinion, the judges referred to the following Judgments of the European Court of Human Rights: *Dudgeon Case*, 22.10.1981; *Handyside Case*, 07.12.1976; *Barthold Case*, 25.03.1985; *Vogt v. Germany*, 26.09.1995; *Rekvenyi v. Hungary*, 20.05.1999; as well as to the decision of the Constitutional Tribunal of Poland in Case no. K 39/97, 10.11.1998; *Bulletin* 1998/3 [POL-1998-3-018].

Languages:

Latvian, English (translation by the Court).

*Identification:* LAT-2001-3-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 21.12.2001 / **e)** 2001-04-0103 / **f)** On Compliance of Article 19 of the State Language Law and the Cabinet of Ministers, 22 August 2000, Regulation no. 295 on Spelling and Identification of Names and Surnames with Articles 96 and 116 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 187, 22.12.2001 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
- 3.16 **General Principles** – Proportionality.
- 4.3.1 **Institutions** – Languages – Official language(s).
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Name, spelling, approximation / Language, official, use / Language, official, strengthening.

Headnotes:

When evaluating whether the limitation on a person's private life pursue a legitimate aim, the role of the Latvian language has to be taken into consideration.

Spelling of a foreign surname in accordance with the Latvian language is a justified limitation on a person's private life insofar as it is exercised in a legitimate aim: to protect the right of other inhabitants of Latvia to use the Latvian language and to protect the democratic state system, and is proportionate to that aim.

On the contrary, so-called approximation (adjustment of the form of the first name and surname to the current rules of the Latvian language), is a limitation that is disproportional to the legitimate purposes of limitations of private life, and is thus unconstitutional.

Summary:

Mrs Juta Mencena introduced the constitutional complaint questioning the conformity of Article 19 of the State Language Law, the Cabinet of Ministers Regulations On Spelling and Identification of Surnames, and the Regulations On the Citizen of Latvia Passports, with Articles 96 and 116 of the Constitution.

The Constitutional Court established that as the person's name and surname are a consistent part of the private life of the person, they shall be protected by Article 96 of the Constitution, which guarantees the right of everyone to the inviolability of private life.

The applicant acquired in Germany the surname Mentzen, after her marriage with a German citizen. Issuing a new passport to the applicant – a citizen of Latvia – the surname was reproduced as Mencena.

It was pointed out that the fact that the spelling of the surname differs from that of her husband's surname has caused a psychological discomfort and created social inconveniences to the applicant. Taking into account the applicant's psychological attitude to the reproduced surname and complications connected with difficulties of establishing her link with the family in foreign countries, the rule on reproduction of a foreign personal name and its spelling in passports in accordance with the norms of the Latvian language was considered as a limitation of one's private life.

Article 116 of the Constitution establishes that the right to a private life may be limited only in cases prescribed by law in order to protect the rights of others, a democratic state system, and the safety of society, welfare and morals. The limitation of the applicant's private life in the present case has been established by the law, and specified with the Cabinet of Ministers Regulations.

Personal names are one of the elements of language influencing the whole language system. Thus, evaluating whether the limitation on people's private life has a legitimate purpose, the role of the Latvian language has to be taken into consideration. Article 4 of the Constitution fixes the constitutional status of Latvian language as the state language. Taking into account the fact that the number of Latvians in the state territory has decreased during the 20th century (in the biggest cities Latvians are a minority), and that the Latvian language only recently regained its status as the state language, the necessity of protecting the language and strengthening its usage is closely connected with the state democratic system.

Thus, the Constitutional Court considered that the limitation on the private life of the applicant has a legitimate purpose: to protect the right of other inhabitants of Latvia to use the Latvian language and to protect the democratic state system.

Furthermore, it was observed that it is also necessary to check whether the interference of the state in the applicant's private life is proportionate to its legitimate purposes. It is not possible to isolate the spelling of people's names in documents from the other sectors of language. The threat to the functioning of the Latvian language as a unified system, if the spelling of foreign personal names in the documents only in their original form was allowed, is much greater than the discomfort of individuals. Spelling only the original form of a surname at a time when the Latvian language as the state language is just starting to be instituted could negatively influence the process. Thus, the functioning of the Latvian language as a unified system is a social necessity in Latvia, and the limitations are justified.

To diminish the inconvenience caused by the reproduction of the person's name the law establishes that in the person's passport in addition to the name and surname, which are reproduced, the original form of the names of other languages must be indicated, if the person so requires, and is able to provide documents confirming it. The Regulations On Passports specifies that the original form of the name and surname must be entered in the "Special Notes" section of the passport pages.

As the reproduction of foreign personal names is a limitation on people's private lives, application of the limitation should be as careful as possible and respectful to a person and his or her family ties. On the contrary, the Instruction of the Director of the Citizenship and Immigration Department of the Ministry of the Interior On the Passports of the Republic of Latvia Citizens establishes that the original form of the foreign personal name shall be entered only on page 14. Besides, it permits the possibility of entering the original form into the passport if "the form has noticeably changed in comparison with the former documents". Thus, it is possible even to ignore the request of a person to fix the original form of the personal name in the passport. The norm on entering the original form of a foreign personal name and surname under the title "Special Notes" limits the person's private life disproportionately and is contrary to Article 96 of the Constitution and the State Language Law.

The Cabinet of Ministers Regulations on Spelling and Identification of Names and Surnames also establish the so-called approximation of the name and surname and the adjustment of the form of the name and surname to the currently effective rules of the Latvian language. Approximation is applied if the former usage of the name or surname in personal documents contradicts the current norms of the Latvian language. Approximation may be applied if the documents are issued for the first time, e.g. issuing the birth certificate; and, if they are issued repeatedly, for example, in the case of losing one's passport or if its expiry date has passed.

Precision and consequence is needed in usage and spelling of personal names. Approximation creates a certain precariousness as the individual has to take into consideration that his or her identity and ties with the family might be doubted. From the moment the reproduced personal name is entered into the Republic of Latvia passport, the person has the right not only to use it but also to protect it. Errors or inaccuracy on the part of the officials as well as new conclusions of linguistics cannot be a reason to change the spelling of names reproduced and fixed in documents. Therefore approximation of personal names, if they have already been reproduced and if the individual himself or herself does not require it, is disproportionate to the legitimate purposes of limitations on private life.

Cross-references:

European Court of Human Rights:

- *Stjerna v. Finland*, 25.11.1994, Vol. 299-B, Series A, *Bulletin* 1994/3 [ECH-1994-3-019];

- *Burghartz v. Switzerland*, 22.02.1994, Vol. 280-B, *Series A*, *Bulletin* 1994/1 [ECH-1994-1-001];
- Decision of the Constitutional Court of Lithuania of 21.10.1999 On writing of names and family names in passports of citizens of the Republic of Lithuania (14/98), *Bulletin* 1999/3 [LTU-1999-3-011].

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2003-2-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 20.05.2003 / **e)** 2002-21-01 / **f)** On the Compliance of Article 27.4 and the Text of Article 28.2 "... until that person reaches the age of 65" of the Law on Higher Education and Article 29.5 of the Law on Scientific Activity with Articles 91 and 106 of the Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), 75, 21.05.2003 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
- 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Age, limit / University, administrative position / University, professor, age, limit.

Headnotes:

The main criteria set out in the impugned legislative provisions for qualifying for academic and administrative positions shall be ability and qualifications but not age. Consequently, the prohibition in the impugned legislative provisions providing for an age limit in

relation to the fundamental right enshrined in Article 106 of the Constitution (*Satversme*) is incompatible with the principle of proportionality.

Summary:

The impugned legislative provision of the Law on Scientific Activity provides that administrative positions (director, deputy director and manager of a scientific structural unit) in State scientific institutions and positions in elected collegiate scientific institutions may be held by persons only until the age of 65. The impugned provisions of the Law on Higher Education lay down that "the elected positions of professor, associated professor, assistant professor and administrative positions (rector, proctor and dean) in institutions of higher education may be held by a person only until that person reaches the age of 65" and "professors shall be elected for six years according to the provisions of Article 33 of this Law in an open competition, and the rector shall conclude with the person elected either an employment contract for the whole six-year term, or where that person reaches the age of 65 during that six-year term, an employment contract until that person reaches the age of 65".

All claimants have reached the age of 65. They argued that the impugned provisions violated the guarantees set out in Article 106 of the Constitution (*Satversme*) and enacted discriminatory restrictions relating to their right to choose freely their employment and workplace. Their rights had been restricted not because of their ability or qualifications (as permitted under Article 106) but because of their age. They had lost neither their ability nor their qualifications.

The Court pointed out that in Article 106 of the Constitution, the right to freely choose one's employment and workplace means firstly, equal access to the labour market for every person, and secondly, a prohibition on the State to lay down restrictive criteria: it may only lay down requirements relating to the ability and qualifications that are necessary for carrying out the duties of the position.

The Court found that the impugned provisions of the Law on Higher Education and the Law on Scientific Activity denied persons who had reached 65 years of age the possibility of running for the above-mentioned positions on an equal footing with others. Consequently, those persons did not enjoy equal access to the labour market, which is guaranteed by Article 106 of the Constitution.

Restrictions to the rights guaranteed by Article 106 of the Constitution must:

- a. be set out in the law;
- b. be in compliance with the legitimate aim the State wishes to attain when laying down the restriction; and
- c. comply with the principle of proportionality.

As the impugned provisions had been set out in laws adopted by the parliament (*Saeima*), had been proclaimed under the procedure provided for by law and were valid, the Court held that there was no doubt the restrictions had been determined by law.

The Court did not accept the argument that the legitimate aim of the restrictions was to ensure the advancement of science and modernisation in order to protect democratic State structure. However, because an appropriate level of education and science is an inalienable precondition of successful State development, the Court held that the aim of the restrictions in the impugned provisions was to ensure public welfare.

In order to examine the proportionality of the restrictions in the impugned provisions in relation to the defined legitimate aim, those restrictions had to be assessed on the basis of their necessity in a democratic society. In the case in question, it had to be considered whether the legitimate aim could be attained by the means used by the legislator; whether the aim might be attained by other means that would restrict the rights and legal interests of an individual to a lesser degree; and whether the benefit to society would be greater than the loss of the rights and harm to the lawful interests of an individual.

The Court pointed out that it was not possible to achieve the qualitative advancement of higher education and science where the decisive criterion for holding a certain academic or scientific position is age and not professional ability. Restrictions based on the assumption that mental abilities automatically decreased with age should be eliminated. The age limit alone, set out in the impugned provisions, was insufficient as a general criterion for the prohibition of employment in specific professions, positions and activities.

The Court found that it was impossible to further the process of attaining the aim of the State – advancement of higher education and science – by merely limiting the range of persons who might qualify for the positions on the grounds of age, as was done in the impugned provisions. The legislator, in order to ensure the recruitment of young specialists, could use

other less offending means that would not restrict the fundamental rights of persons, such as electing persons who have reached the above-mentioned age for a shorter period of time.

The Court held that legislative acts had to incorporate more precise qualification criteria for administration positions of the State scientific institutions, as well for posts of professors and associated professors, as it would ensure transparency and promote harmonised requirements. Article 106 of the Constitution provides that the main criteria for qualifying for the academic and administrative positions listed in the impugned provisions are ability and qualifications, but not age. Consequently, the prohibition in the impugned provisions providing for an age limit in relation to the fundamental right enshrined in Article 106 of the Constitution was incompatible with the principle of proportionality.

The Court declared that the first sentence of Article 27 of the Law on Higher Education and the text of Article 28.2) “or for the time until that person reaches the age of 65” and the first sentence of Article 29.5 of the Law on Scientific Activity were incompatible with Article 106 of the Constitution and null and void as of the date of the announcement of the Judgment.

Cross-references:

Former decisions of the Court:

- no. 2001-12-01, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2001-16-01 *Bulletin* 2002/1 [LAT-2002-2-005];
- no. 2002-20-0103.

Languages:

Latvian, English (translation by the Court).



Liechtenstein

State Council

Important decisions

Identification: LIE-1998-2-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 18.06.1998 / **e)** StGH 1998/6 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.

Keywords of the alphabetical index:

Co-defendant, consultation of the case-file, restriction / Co-defendant, collusion / Extortion, serious.

Headnotes:

The right to consult case-files may be restricted within the limits of the law and in keeping with the principles of proportionality and the public interest (*Übermaßverbot*). When there is more than one accused, consultation of the case-file during investigation proceedings may be refused until all the accused have been questioned.

Summary:

During an investigation opened against the applicant and two other defendants for serious extortion, the investigating judge rejected a request from the applicant to consult the case-file on the grounds that he was still due to be questioned. The investigating judge accepted a second request to consult the file once this questioning had taken place.

In response to an appeal by the Public Prosecutor's Department, the Appeal Court set aside the investigating judge's decision to allow the applicant's second request on the grounds, *inter alia*, that his co-defendants were still due to be questioned. The applicant appealed to the Supreme Court to overrule this decision. The Supreme Court rejected this application, also relying primarily on the grounds that there was a need to prevent collusion between the defendants. If the public interest inherent in the quest for truth during a criminal hearing is weighed against the interest of the applicant in consulting the case-file, a brief restriction on the right to consult the case-file until all the defendants have been questioned is fully justified.

The applicant lodged a constitutional appeal against this decision, which was rejected by the State Council. In its judgment the State Council found that the fundamental right to consult the case-file can be restricted within the limits of the law and in keeping with the principles of proportionality and the public interest (*Übermaßverbot*). Article 6.3.d ECHR does not offer broader legal protection than the basic domestic law, as the fundamental law of the European Convention on Human Rights is only applicable after indictment, and then only subject to certain restrictions. In the instant case, the refusal to allow the applicant to consult the entire criminal case-file until all the defendants had been questioned seems proportionate. For in the event that there is more than one accused, there is often an obvious risk of collusion between them to prevent the investigation from continuing. However, even in this event, any automatic refusal to allow consultation of the criminal case-file is contrary to the application of the fundamental right to consult the case-file required by the Constitution. Both the decision to restrict the right to consult the case-file in itself and the extent and duration of this restriction must be furnished with detailed reasons.

Languages:

German.



Lithuania

Constitutional Court

Important decisions

Identification: LTU-1998-1-003

a) Lithuania / b) Constitutional Court / c) / d) 10.03.1998 / e) 14/97 / f) The Law on Officials / g) *Valstybės Žinios* (Official Gazette), 25-650, 13.03.1998 / h) CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.3.1 **General Principles** – Democracy – Representative democracy.
 3.3.3 **General Principles** – Democracy – Pluralist democracy.
 3.16 **General Principles** – Proportionality.
 4.6.9 **Institutions** – Executive bodies – The civil service.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Civil servant, dismissal / Civil servant, freedom of expression / Information, right to seek, obtain and disseminate.

Headnotes:

The human right to freedom of convictions and of information is one of the fundamental requirements of a democratic order, as well as a pre-condition for the implementation of other human rights and freedoms. The freedom to form and discuss one's opinions, particularly on issues of public interest, is essential to the functioning of a representative democracy.

The fact that the Constitution consolidates the freedom of convictions and information means that the State is commissioned to guarantee and protect the people's right to have convictions and freely express them, as well as the right to seek, obtain and

disseminate information unhindered. At the same time, the guarantees for an open society and pluralistic democracy are consolidated.

In the practice of the European Court and Commission of Human Rights as regards the application of Article 10 ECHR, the human right to express one's ideas and convictions freely is emphasised as being of exceptional importance for democracy. At the same time, attention is drawn to the fact that the attachment of duties and responsibilities to the exercise of these rights and the resultant dependence of their exercise on a variety of forms of State control mean this Article provides States with more freedom to act than do other articles of the Convention. The State is entitled to restrict the right (consolidated by Article 10 ECHR) of State officials to express their ideas and opinions freely, in so far as this is done in connection with their official duties and functions.

The official is a participant in the implementation of the powers of State or local government institutions. Taking account of the peculiarities of the legal status of officials, certain restrictions of their civil rights are possible. From the legal standpoint it is significant that a person, after he becomes an official, commits himself to performing his duties properly, and agrees to the restriction of certain of his rights and freedoms as provided for by law. It is also important here that, as a rule, the requirements to be satisfied by officials as well as the restrictions applied to them are counterbalanced by rights guaranteed to them, as well as a system of incentives and rewards, together with remuneration and other social guarantees.

Summary:

Article 20 of the Law on Officials provides: "Officials of 'B' level who disagree with the policy implemented by the *Seimas*, the President of the Republic or the Government or with their decisions or actions may resign if their criticism of the above actions, passed through all stages in accordance with the regular course of business, produces no positive results. In the event that the above officials declare their disagreement in the mass media, at political or other public events (except when such declarations are made during the election campaign to the *Seimas*, the office of the President of the Republic or the local government councils), as well as in the cases of non-approval of officials as provided for by Article 17 of this law, they shall tender their resignation no later than within 14 days. Should they refuse to resign, they shall be dismissed from office in accordance with the procedure established by the labour legislation and shall be considered dismissed from the civil service". The petitioner questions whether this norm is in compliance with the Constitution.

The freedom to express convictions as well as the freedom of information are not unrestricted. In particular, Article 25 of the Constitution provides that freedom to express convictions, as well as to obtain and disseminate information, may not be restricted in any way other than as established by law, when it is necessary for the safeguard of the health, honour and dignity, private life or morals of a person, or for the protection of constitutional order.

Thus, it is established in this constitutional norm that any restriction expression of convictions or on the freedom of information must always be conceived as a measure of exceptional nature. The exclusiveness of the restriction means that one may not interpret the constitutionally established bases of the restriction so as to expand them. The criterion of necessity as laid down in the Constitution pre-supposes the fact that in every instance the nature and scope of the restriction must be proportionate to the aim sought.

The requirement for officials to refrain from public criticism of the higher state institutions is usually derived from principles of hierarchical subordination. In democratic states relations of such nature are commonly defined and assessed in accordance with the norms of professional ethics. The requirement to observe professional ethics along with other duties of officials is established by Article 14.4 of the Law on Officials. In Lithuania the regulations for professional ethics, however, have not been laid down systematically, nor has the content of the said legal norm been specified. Due to this, the Law on Officials is not sufficiently clear.

By establishing the restrictions on the civil right of officials of 'B' level to criticise the work of State institutions or officials, the legislator neither took account of the differences between the notions of disagreement and criticism employed therein, nor did he define 'disagreement', while for all cases he established the same legal effects. This contradicts the requirement of proportionality concerning restrictions on people's and citizens' constitutional rights, which is the essential deficiency of the contested legal norm.

Due to the vagueness of the legal regulation, as well as the disproportion between the aim of the provision and the sanction in the civil service, legal vagueness and uncertainty arise, while the protection of the rights of officials is not guaranteed. Such a deficient regulation is not in line with the objectives sought in this case, i.e. those of the lawfulness of State administration, stability, confidence and effectiveness. It also contradicts the constitutional principles of protection of human rights, and one of such principles is that restrictions may be established only by law,

respecting the balance between the objective sought and the restriction of the right.

Taking account of the motives set forth, it must be concluded that the contested norm of Article 20.3 of the Law on Officials conflicts with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-1999-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.09.1998 / **e)** 1/98 / **f)** On property / **g)** *Valstybės Žinios* (Official Gazette), 85-2382, 30.09.1998 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.10 **General Principles** – Certainty of the law.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
- 5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Civil procedure / Court decision, repeal / Employer, employee, relations / Decision, court, stability / Human dignity / Labour law.

Headnotes:

The fundamental protection of labour rights is embodied in the Constitution.

Article 28 of the Constitution indicates that while exercising their rights and freedoms, persons must observe the Constitution and the laws of the Republic of Lithuania and must not infringe the rights and interests of other people. Two notions in civil law are

linked with the seizure of property. These are seizure of property and the establishment of limits on the right of ownership. There are restrictions with regard to limits on the right of ownership (e.g. acquisitive prescription, easements). Certain norms of the Code of Civil Procedure concern the scope of the limits on the right of ownership but not seizure of property. This limitation is conditioned by the necessity to ensure the stability of the position of the weaker party to the pleadings (employee).

In Lithuania there are laws which are intended to ensure the protection of varied and dynamic ownership relations. The objective of such a system of laws is to harmonise the legal norms designed for such protection. The Constitutional norm on the seizure of property and compensation for such seizure is a logical continuation of the aforementioned norms.

Regulation of economic activity must serve the general welfare of the people. Economic and social areas should intermingle in such a way that they complement each other. That is an intentional effort on the part of the legislator.

The protection of the rights of the employee is linked with human dignity. This priority does not create a hindrance for the employer to protect his property interests.

Summary:

Article 476.3 of the Code of Civil Procedure (CCP) states that where a decision in a case concerning recovery of sums of money pursuant to the requirements arising from labour relations has been repealed under cassation procedure, the reversal of the implementation of the said decision shall be permitted only in cases where the repealed decision was based on false evidence given by the plaintiff or forged documents presented by the latter. The petitioner questioned whether this was in conformity with Article 23 of the Constitution, which states that property shall be inviolable, as in the said case the respondent is deprived of the possibility to get back his property.

The Constitutional Court underlined that rights of ownership are not to be treated unconditionally. Unconditional treatment of the rights of ownership could lead to a violation of the rights of other persons. The objective of the legal regulation is to harmonise important interests and to establish sufficient limits on the protection of the rights of ownership.

Court decisions may be repealed in cases and procedure provided for by the law. In such a case the

question of reinstatement of the parties to the legal situation which existed prior to the enforcement of the court decision arises. Article 474.1 of the Code of Civil Procedure provides that where an effective court decision is repealed and, after investigating the case anew, a decision to reject the claim is taken or a ruling is passed to dismiss the case or not to investigate the claim, the respondent must be given back everything that has been recovered from him in favour of the plaintiff. This is referred to as reversal of the enforcement of a court decision. In certain categories of civil cases, however, there are established restrictions on reversal of enforcement of court decisions. Such restrictions are also contained in Article 476.3 of the Code of Civil Procedure, wherein the disputed part of the norm is set forth. The disputed procedural norm concerns the legal regulation of labour relations.

Chapter IV of the Constitution not only consolidates freedom of individual economic activity and the right to private ownership on which the economy is based but also establishes regulation of economic activity so that it may serve the general welfare of the people.

The Constitutional Court noted that it is possible to assert that labour rights constitute an integral group which is part of the constitutional status of an individual. In the Constitution a working individual is understood not as an abstract social, economic or professional category or a participant in the relations of production but as a free personality of whom the human dignity ought to be protected. The constitutional system of values is established so that the legal norms regulating labour relations and related areas not only provide for the protection of the employee in the process of work but also ensure a whole spectrum of guarantees of a working individual in an attempt to avoid domination of one party and dependency of the other party. It is to be noted that it is these aims which determine the legal regulation of labour relations.

Both sufficient protection of the property interests of the employer and protection of the labour rights of the employee are necessary pre-conditions for normal economic activity in a modern society. The legislator must harmonise different interests and ensure the balance of constitutional values. Therefore compliance with the Constitution of the restriction of reversal of enforced decisions in cases concerning recovery of sums of money pursuant to the requirements arising from legal labour relations as established by the Code of Civil Procedure is to be assessed while taking account of the relation of the above-mentioned constitutional values.

The sums of money that are recovered by way of enforcing effective decisions pursuant to the requirements arising from labour relations are, as a rule, used in cases when the respondent is an employee. Remuneration for work is the main and often the only source of subsistence for the employee and his/her dependants. Therefore, the stability of court decisions becomes of utmost importance in this sphere. The part of the disputed norm whereby reversal of decisions in the cases concerning recovery of sums of money pursuant to the requirements arising from legal labour relations is restricted concerns the area of ownership relations. The nature of constitutional values with which property law is confronted determines concrete limits to the protection of the rights of ownership.

The interaction between constitutional labour rights and the rights of ownership not only determine the direct legal regulation of the relations between employer and employee but also condition civil proceedings which are linked with these relations. The disputed part of the norm only reflects the interaction of the said two constitutional values. In this particular case the legislator gave priority to the protection of the rights of the employee, which are linked with human dignity.

The Constitutional Court ruled that the challenged part of Article 476.3 of the Code of Civil Procedure is in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-1999-2-006

a) Lithuania / b) Constitutional Court / c) / d) 04.03.1999 / e) 24/98 / f) On social rights / g) *Valstybės žinios* (Official Gazette), 23-666, 10.03.1999 / h) CODICES (English).

Keywords of the systematic thesaurus:

4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.

4.6.9.2.1 **Institutions** – Executive bodies – The civil service – Reasons for exclusion – Lustration.

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

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

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

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

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

Keywords of the alphabetical index:

State office, nature / Collective responsibility.

Headnotes:

The basis of the protection of labour rights is embodied in the Constitution.

Article 33.1 of the Constitution establishes that “citizens (...) shall have an equal opportunity to serve in a State office of the Republic of Lithuania”. However, this is not absolute. The State cannot and does not burden itself with the obligation to admit every person to serve in a State office. Taking account of the nature of a State office and its importance in the life of every individual, of society and of the State, as well as in an attempt to ensure that institutions of State power, government and other institutions function effectively and well, requirements are established for State officers and officials. The mentioned provision does not prevent the establishment of certain prohibitions on the occupation of these posts. Such prohibitions cannot be treated as criminal punishment because they are of general character, and any criminal penalty is applied individually.

Any person whose constitutional rights or freedoms are violated has a possibility to protect his rights and interests directly by applying to the court (the first Part of Article 30 of the Constitution).

Summary:

On 16 July 1998 the *Seimas* passed the Law on the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of Regular Employees of this Organisation (the Law). The Law provides for restrictions upon present activities of employees of the CSS. The Law also provides for cases when the restrictions are not applied to former employees of the CSS. The procedure for the enforcement of provisions of the Law was established by the Law on the Enforcement

of the Law on the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of Regular Employees of this Organisation, which was adopted on the same day.

After 1990 in the states of central and eastern Europe, a start was made to clarify through legal proceedings whether persons holding influential positions in the economy or in politics or attempting to hold such positions (had) had any ties with secret services of former communist regimes. An attempt was also made to ascertain the loyalty of regular employees of security services (including secret services) to the State and to establish their ability to hold important and responsible positions from the standpoint of the security of each State. When the character and degree of collaboration of present or future State officials or employees with the said secret services had been established the right freely to choose an occupation, as a rule in State services, was either restricted for a certain time or this right was deprived. Quite often this process is referred to as lustration (from Latin *lustratio* – purification, sacrifice of something for atonement), the laws regulating it being lustration laws.

Article 1 of the Law provides: the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) is recognised as a criminal organisation, which committed war crimes, carried out genocide, repression, terror and political persecution in the Republic of Lithuania which was occupied by the USSR.

The petitioner noted that the *Seimas*, having declared the CSS a criminal organisation in Article 1 of the Law, states in the other Articles of the Law that persons who worked at the CSS are guilty and allocates punishment. Thus by means of this Law, the *Seimas* is implementing justice, a function which it has not been given by the Constitution. In addition, the petitioner questioned whether the provision of Article 2 of the Law, which prohibits former regular employees of the CSS from working as officers or officials in State institutions and government, courts and other areas for 10 years, provides for a responsibility of these persons and establishes a criminal punishment for them, is in compliance with the Constitution.

The Constitutional Court emphasised that the Law makes a statement of historical fact but does not set out the grounds formulated by the legislator for criminal responsibility of all employees of the CSS. Article 1 of the Law does not presuppose any collective responsibility for the criminal deeds carried out by the CSS, nor is it linked with the questions of criminal law or those of criminal procedure law. Such a content indicates that the restrictions established by

Article 2 of the same Law are not criminal sanctions. These restrictions do not constitute any responsibility (i.e. neither criminal, nor civil nor any other form of responsibility, and the persons to whom these restrictions are applied are not held responsible). They are restrictions of the right freely to choose an occupation which are determined by the area, nature or specific character of the occupation.

The petitioner questioned whether Article 2 of the Law and Article 1.2 of the Law on the Enforcement of the Law, whereby former regular employees may not be admitted to work as officers or officials in a State office and those who already serve as officers or officials in a State office must be dismissed, contradict Article 33.1 of the Constitution whereby citizens “shall have an equal opportunity to serve in a State office of the Republic of Lithuania”. Moreover, the petitioner challenged the stipulation established by Article 2 of the Law, whereby former regular employees of the CSS are prohibited from working not only in State institutions but also in private enterprises-banks, credit unions, security services, communications, etc., practising as private lawyers or notaries or engaging in the other private occupations enumerated in Article 2 of the Law, and its compliance with Articles 48.1, 46.1 and 23 of the Constitution.

The Constitutional Court indicated that Article 33.1 of the Constitution, which provides for the right of citizens to have an equal opportunity to serve in a State office of the Republic of Lithuania, is not absolute. Taking account of the purpose and activities of the USSR CSS in the occupied Republic of Lithuania, the requirements determining the loyalty and credibility of former regular employees of the CSS who work or wish to work in a State service are urgent. These persons consciously and of their own free will went to work as regular employees of the CSS. By their activities, these persons carried out political persecution of persons and organisations promoting the ideas and aspirations of Lithuanian independence, or contributed to such persecution. The Republic of Lithuania has reason to doubt the former regular employees of the CSS and must make sure that they are loyal and can be trusted. Therefore the effort of the State to restrict the opportunities for the former regular employees of the CSS to serve in a State service is understandable and justified. The restrictions established by Article 2 of the Law do not negate the right freely to choose an occupation or business which is established by Article 48.1. The Law indicates only certain positions or enterprises, institutions, organisations and particular areas of business which, in the opinion of the legislator, are particularly important to society, the State and their security, and there must be no doubts concerning the credibility and loyalty of people working there.

The petitioner challenged whether the provision of Article 3.2 of the Law, whereby a decision concerning non-application of the activity restrictions to the former regular employees of the CSS is adopted by a 3-person commission formed by the President of the Republic and regulation of which is confirmed by the latter, are in compliance with the Constitution.

The Constitutional Court held that the Constitution does not allow the President of the Republic to decide questions restricting human rights and freedoms and that therefore there exist no constitutional pre-conditions for a law permitting the President of the Republic to form a commission which could decide questions of this nature. The Constitutional Court noted that even though the restrictions established by Article 2 of the Law are not any type of punishment, they do restrict certain human rights and freedoms. However, it is only possible to restrict rights and freedoms by law and by necessarily providing a guarantee for an opportunity to appeal to court on the grounds of the violated rights.

The Constitutional Court ruled that the norms of the Law that establish prohibitions and/or restrictions were in compliance with the Constitution. The provisions of Article 3.2 of the Law, whereby decisions concerning non-application of the restrictions to former regular employees of the CSS shall be adopted by a 3-person commission which is formed by and the regulations on the activity of which are confirmed by the President of the Republic and that in reality does not guarantee an opportunity for an individual to appeal to a court against decisions which concern him, and that are adopted by the Centre for Research into People's Genocide and Resistance of Lithuania and the State Security Department as well as by the commission formed by the President of the Republic, were contrary to the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2002-3-014

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.09.2002 / **e)** 34/2000-28/01 / **f)** On the inviolability of telecommunications and on the right to property / **g)** *Valstybės Žinios* (Official Gazette), 93-4000, 25.09.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Telecommunications, duty to provide / Information, obligation to provide.

Headnotes:

In accordance with the Constitution, a procedure for collecting information about the private life of an individual must be established by law. The law must provide that such information may be collected only upon a reasoned court decision.

A statutory provision laying down an on-going duty for non-state owned entities to use their property to fulfil state functions which should be financed by state funds is contrary to the Constitution in so far as it violates the constitutionally guaranteed inviolability and protection of ownership.

That a law or another legislative act is in conflict with the Constitution does not necessarily mean that it is contrary to Article 1 of the Constitution which provides that the State of Lithuania shall be democratic. It is for the Constitutional Court to assess, in each case, whether or not the statutory provision found to be in conflict with the Constitution also violates Article 1 of the Constitution.

Summary:

On 3 October 2000 the petitioner – a group of members of Parliament (*Seimas*) – applied to the Constitutional Court asking it to determine whether Article 1.2 of the Law amending Article 27 of the Law on Telecommunications complied with Article 22 of the Constitution, and whether Articles 1.2 and 2.1 of that law complied with Article 23 of the Constitution. On 8 May 2001 another petitioner – a group members of Parliament – applied to the Constitutional Court asking it determine whether the provisions listed below complied with the principles of an open, just, civil society and the rule of law entrenched in the Preamble and Articles 1, 22 and 23 of

the Constitution: the provision in Article 1 of the Law amending Article 27 of the Law on Telecommunications which reads “telecommunications operators must [...] under the procedure set up by the Government, supply information free of charge as determined by the Government to entities of operational activities, inquiring and investigating bodies for the prevention, investigation and solving of crimes relating to subjects of operational activities, other subscribers and their telecommunications which are necessary for investigation”; the provision in Article 48 of the Code of Criminal Procedure (CCP) which reads “carrying out the preparatory investigations, the investigator shall independently adopt all decisions regarding the investigations and carrying out of investigative acts, except for where the law provides that the authorisation of the prosecutor is necessary”; the provision of Article 75 of the CCP which states “the interrogator, investigator, prosecutor [...] shall have the right, in the cases for which he or she is responsible, [...] to demand that enterprises, establishments, organisations and citizens furnish items and documents which might be important in the case and to demand that audits be carried out. These requirements must be carried out by all citizens, enterprises, establishments and organisations”; and, the provision of paragraph 3.4 of the Law on Operational Activities which reads “that, under the procedure set up by the Government, the entities of operational activities are entitled to use the information which enterprises, establishments and organisations possess”.

The petitioners expressed doubts that some controversial norms were in keeping with the requirement of the Constitution that information concerning the private life of an individual may be collected only upon a reasoned court decision, and submitted that some norms in question violated Article 23 of the Constitution, the principles of an open, just, civil society and the rule of law, as well as Article 1 of the Constitution.

The Constitutional Court emphasised that the legislature had the duty to establish by law a procedure for collecting information about an individual’s private life, the law must provide that such information may be collected upon a reasoned court decision only, and that a statutory provision may not be enacted creating an on-going duty for non-state owned entities to use their property to fulfill the state functions which ought to be financed by state funds.

The Constitutional Court recalled that under the Constitution, restriction of constitutional rights and freedoms of the individual was permitted where the following conditions are met: this is done by law; the restrictions are necessary in a democratic society in to protect the rights and freedoms of other persons and the values entrenched in the Constitution as well

as constitutionally important objectives; the restrictions do not deny the nature and essence of the rights and freedoms; and, the constitutional principle of proportionality is followed.

It was also noted that according to Articles 22.3 and 22.4 of the Constitution, “Information concerning the private life of an individual may be collected only upon a reasoned court decision and in accordance with the law. The law and the Court shall protect individuals from arbitrary or unlawful interference in their private or family life and from encroachment upon their honour and dignity”.

The Constitutional Court ruled that Article 27.2 of the Law on Telecommunications (wording of 11 July 2000) as well as Article 57.4 of the same Law (wording of 5 July 2002) conflicted with Article 22 of the Constitution and the constitutional principle of the rule of law to the extent that the Articles of that Law imposed a duty on telecommunications operators and providers of telecommunications services to trace telecommunications events and their participants more than would have been required to ensure the economic activity of the telecommunications operators, thereby interfering with an individual’s private life, and also to the extent that they granted the Government powers both to determine the scope of information to be furnished about a person’s private life and the procedure as to how such information is to be furnished.

The Court also noted that the inviolability and protection of ownership entrenched in Article 23 of the Constitution meant that the owner had the right to possess, use and dispose of the property that belonged to him, and the right to demand that other persons not violate his rights, while the state had a duty to defend and safeguard ownership from unlawful encroachment.

Therefore, Article 27.2 of the Law on Telecommunications (wording of 11 July 2000) as well as Article 57.4 of that Law (wording of 5 July 2002) to the extent that a duty is imposed on telecommunications operators and providers of telecommunications services that are non-state owned to ensure and constantly maintain at their own expense, the technical ability required to monitor the content of information transmitted via telecommunications networks, but not required for the economic activity of the telecommunications operators, conflict with Article 23 of the Constitution and the constitutional principle of the rule of law. Article 2.1 of the Law amending Article 27 of the Law on Telecommunications conflicts to the extent mentioned above with Article 23 of the Constitution and the constitutional principle of the rule of law.

Article 7.3.4 of the Law on Operational Activities (wording of 22 May 1997) and Article 7.3.6 of that Law (wording of 20 June 2002) to the extent that they provide that information about a person's private life be collected under the procedure laid down by the Government or the institutions empowered by the Government, both conflict with the constitutional principle of the rule of law. The former Article also conflicts with Article 22 of the Constitution.

Article 48.1 of the CCP (wording of 26 June 1961) to the extent that it grants powers to an investigator to adopt decisions regarding investigative acts interfering with a person's private life without a reasoned court decision conflicts with Article 22 of the Constitution and the constitutional principle of the rule of law.

The provision "the interrogator, investigator, prosecutor [...] shall have the right, in the cases for which he or she is responsible, [...] to demand that enterprises, establishments, organisations and citizens furnish items and documents which might be important in a case and to demand that audits be carried out and that "those requirements must be carried out by all citizens, enterprises, establishments and organisations" of Article 75 of the CCP (wording of 29 January 1975) complies with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2003-2-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.03.2003 / **e)** 27/01-5/02-01/03 / **f)** On the restoration of property rights / **g)** *Valstybės Žinios* (Official Gazette), 24-1004, 07.03.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 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 – Limits and restrictions.

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

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

Keywords of the alphabetical index:

Restitution, criteria / Compensation, conditions.

Headnotes:

When regulating the restoration of real property rights, the legislature has the discretion to lay down the conditions and procedure for the restoration of those rights. This discretion is objectively defined by the essential changes in the system of property since the unlawful expropriation of the property. When laying down such conditions and procedure with respect to existing real property, the legislature is bound by the Constitution and must therefore take into consideration the constitutional principle of the protection of the rights of ownership; the constitutional endeavour to achieve an open, the principle of a just and harmonious civil society and other constitutional values.

There is no conflict between the State's duty to the owners and its duty to the tenants of the houses, parts thereof or flats subject to being returned (or already returned) to the owners. The State's guarantees to the tenants are, at the same time, its guarantees to the owners, since only upon the fulfillment of the guarantees to the tenants, may the owners fully implement their rights of ownership, i.e. to possess, use and dispose of the houses, parts thereof and flats returned to them in kind. Thus, from a legal point of view, there is no conflict between the legal expectations of the owners and the tenants.

The seizure of property (with adequate compensation) is permitted only for public needs that cannot be objectively met if that particular property were not seized. A person whose property is seized for the needs of society has a right to demand compensation equivalent to the value of the property seized.

The question of whether property is seized for the needs of society is not determined by the person or entity (the State, municipality, legal or natural person) owning that property after the seizure but by whether the seizure of that property was in fact necessary to satisfy the needs of society, i.e. socially important objectives, which can only be achieved with the use of the particular property seized.

When considering the socially important objectives sought at the time a particular property was seized, the Court must rule on a case by case basis whether

the needs for which property was seized were, in fact, those of society.

Summary:

The petitioners – the Kaunas Regional Court and a group of members of Parliament (*Seimas*) – applied to the Constitutional Court requesting it to determine whether some provisions of the Law “On the Procedure and Conditions for Restoration of Rights of Ownership of Citizens to Existing Real Property” (the Law) were in conflict with the Constitution of the Republic of Lithuania. The Kaunas Regional Court, one of the petitioners, also requested that the Court determine whether some provisions of the Governmental Resolution no. 27 “On the Compulsory Purchase of Residential Property Necessary for State Needs” of 17 January 1994 were in conflict with the Constitution and the Law.

The Constitutional Court recalled that after the 1940 nationalisation of private property by the occupying power and the subsequent expropriation of private property by other unlawful means, the inherent human right to possess private property had been denied. Residential property had also been nationalised and otherwise unlawfully expropriated, and attributed to the State public housing stock. Lawful State or public property could not and did not exist on the basis of such arbitrary acts by the occupying power, since no right may be founded on unlawfulness. According to the Constitutional Court, any property seized that way was to be considered as being only under de facto management by the State.

The nature of the relations between the State and the owners of the houses, parts thereof and flats subject to being returned was such that the owners had acquired the right to have restored, under the conditions and procedure established by law, their rights to the existing real property mentioned above by having it returned in kind, and where such return was not possible, to be compensated. The State had a duty to further regulate the restoration of the rights of ownership by law so that the rights of ownership to the existing real property would be restored to the owners. The owners had a legitimate expectation that their rights of ownership of the real property would be restored; their legitimate expectation was protected and safeguarded by the Constitution. The nature of the relations between the State and the tenants residing in the houses, parts thereof and flats subject to being returned (or already returned) was such that after the State had laid down the guarantees for the tenants, the tenants acquired a legitimate expectation that the State guarantees laid down and repeatedly reiterated by laws would be fulfilled. The State had a duty to establish a legal regulation and act in such a way so that its guarantees

to the tenants would be fulfilled. The tenants’ expectation was also protected and safeguarded by the Constitution.

The State had chosen limited restitution and not *restitutio in integrum*. Under that system, the citizens’ rights of ownership are not restored as to the entire property that was unlawfully nationalised and expropriated, but as to the existing real property.

Under Article 23 of the Constitution, property may be seized from the owner only where it is necessary for the needs of society, justly compensated and where such seizure and compensation is in accordance with the procedure established by law. According to the Constitutional Court, the needs of society under Article 23.3 of the Constitution are the interests of either the whole or part of society, which the State, while implementing its functions, is under a constitutional obligation to secure and serve. Where property is seized for the needs of society, one must strive for a balance between various legitimate interests of society and its members. The needs of society for which property is seized must always be particular and clearly expressed as to that particular property.

Seizure of property for the needs of society is linked in the Constitution not to the recipient of that property but to the objectives of its seizure: to use the item in the interests of society, for socially important objectives that may only be achieved with the use of the individual features of a particular item seized. It is therefore impossible to construe the term “needs of society” of Article 23.3 of the Constitution as prohibiting in all cases the seizure of property and its transfer into private ownership.

The needs of society are not static. Things that at a certain stage of development of a society and a State are regarded as the needs of society may be considered not in line with the constitutional concept of the needs of a society at a different stage of development of the society and the State, and vice versa.

The Constitutional Court ruled that while the impugned provisions of the Law were in conflict with the Constitution, those of Government of the Republic of Lithuania Resolution no. 27 “On the Compulsory Purchase of Residential Property for State Needs” of 17 January 1994 were not in conflict with the Constitution and the Law.

Languages:

Lithuanian, English (translation by the Court).



Malta

Constitutional Court

Important decisions

Identification: MLT-2000-3-004

a) Malta / b) Constitutional Court / c) / d) 11.08.2000 / e) 700/99 / f) Marthese Azzopardi v. Maltacom plc / g) / h).

Keywords of the systematic thesaurus:

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

4.7 **Institutions** – Judicial bodies.

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

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

Keywords of the alphabetical index:

Employment / Confidentiality, obligation, breach / Promotion, aspiration / Promotion, right.

Headnotes:

The issue referred to disciplinary proceedings held before an Appeals Board. The applicant was accused of breaching her confidentiality obligation under a collective agreement signed between the respondent company and the union which represented the applicant. A decision of a disciplinary board that involves the determination of an employee's civil rights and obligations (for instance a decision ordering dismissal) could not be deemed to be decisive until the merits of the case are considered and determined by a tribunal established by law. The tribunal is to satisfy the conditions imposed by Article 6 ECHR. Article 6 ECHR was not applicable to proceedings that are not decisive for private rights and obligations.

Summary:

Proceedings were filed against the applicant before the Disciplinary Appeals Board, appointed by the

employer to investigate her conduct at the place of work, in particular whether she was in breach of her confidentiality obligation.

A decision was delivered and the applicant was declared to have breached the conditions of her employment. The Board was composed of three directors of the respondent company. The applicant alleged that due to the disciplinary board's decision, she forfeited her right to promotion. This meant a loss of income. The applicant contested the composition of the Appeals Board. The Court held that the proceedings were not decisive for private rights and obligations. The disciplinary proceedings did not necessarily affect the applicant's prospects of promotion. The proceedings were decisive in establishing whether or not the employee was responsible.

The Constitutional Court emphasised that internal appeal procedures in commercial enterprises should not be cramped by impracticable legal requirements. It was almost inevitable that the person who would make the original decision to dismiss would normally be in daily contact with the manager who would hear the appeal and make a final decision. As long as the disciplinary and appeal bodies acted fairly and justly, their decisions were to be supported. However, any overt expression of bias or other indications that a decision is reached prior to the hearing of evidence, must be avoided.

Furthermore, where the decision of a disciplinary board would determine an employee's civil rights and obligations, that decision would not be declared to be binding and conclusive unless it was subject to the scrutiny of a tribunal established by law which satisfied all the requirements of Article 6 ECHR. The Court then considered whether the decision delivered by the disciplinary board, which adversely affected the applicant's aspirations of promotion, could be qualified as one determining the applicant's civil rights and obligations.

The Court held that for Article 6 ECHR to apply:

1. there must be a genuine and serious claim or dispute relating to rights or obligations recognised at least on arguable grounds in domestic law;
2. the outcome of the dispute must be directly decisive of the rights and obligations in question; and
3. those rights or obligations must be civil in character.

The Court did not believe there was a right to promotion in domestic law. Although the applicant was

entitled to aspire to promotion, the ultimate decision was clearly at the employer's discretion. Disciplinary matters which did not involve the dismissal of the employee were not disputes over civil rights. With respect to dismissal from employment, it was established that the law itself prohibited dismissal except for a just cause and for reasons stipulated by law. In such circumstances, the person concerned is entitled to have the matter dealt with by a tribunal. If the administrative or disciplinary body concerned is not itself a tribunal meeting the requirements of Article 6 ECHR, it must be subject to subsequent control by a judicial body which does comply with that article. The judicial body must moreover have full jurisdiction to deal with the dispute, and judicial review of the lawfulness of an administrative body's decision may not be sufficient. The same principle applied where the right to a pension or to social benefits regulated by law were in issue.

Cross-references:

European Court of Human Rights:

- *Le Compte v. Belgium*, 23.06.1981, Series A, no. 43, *Special Bulletin Leading Cases – ECHR* [ECH-1981-S-001];
- *Francesco and Gian Carlo Lombardo v. Italy*, 26.11.1992, Series A, no. 249-B.

Languages:

Maltese.



Identification: MLT-2002-H-001

a) Malta / b) Constitutional Court / c) / d) 15.01.2002 / e) 567/1996 / f) Maurice Mizzi v. Attorney General / g) / h).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.19 **General Principles** – Margin of appreciation.
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

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

Keywords of the alphabetical index:

Child, paternity / DNA, analysis / Family, paternity, contestation / Paternity, contestation, time-limit.

Headnotes:

The statutory time limitation which prevents the father from filing proceedings to contest the paternity of the child is not contrary to Article 8 ECHR. The Court assessed whether such a limitation was legitimate and necessary in a democratic society, for the protection and freedom of others.

Summary:

Applicant alleged that a DNA test had confirmed that he was not the father of the child which his wife gave birth to during their marriage. The test had been carried out approximately a year and a half prior to the commencement of this case, and his daughter had voluntarily submitted herself to such a test.

According to law applicant had to file judicial proceedings to repudiate paternity within three months (subsequently amended to six months in 1993).

The essential object of Article 8 ECHR is to protect the individual against arbitrary action by the public authorities. A fair balance has to be struck between the competing interests, those of the individual and the community as a whole. In this respect the State enjoys a certain margin of appreciation. The Court held that it had to assess whether there was a fair balance between the interest of the husband who had a right to know whether he was the father or not and regulate his family life according to such information, and the interest of the child to enjoy certainty of her civil status as she was known and brought up, whether such was a status of legitimacy or illegitimacy.

The introduction of time-limits for the institution of paternity proceedings by the husband was justified by the desire to ensure legal certainty and most significantly to protect the interests of the child.

Although it is true that the ideal situation is where legal certainty corresponds to factual reality, however a State is justified in protecting the stability of a family nucleus and above all the interests of a child. In the circumstances the State had not transgressed the principle of proportionality. In this case the evidence did not show that the social reality in which the child was brought up did not correspond to what was

stated in her birth certificate. The child had been raised as the daughter of the applicant.

Cross-references:

- *Rasmussen v. Denmark*, 28.11.1984, Series A of the Publications of the Court, no. 87; *Special Bulletin ECHR* [ECH-1984-S-008];
- *Keegan v. Ireland*, 26.05.1994, Series A of the Publications of the Court, no. 290; *Bulletin* 1994/2 [ECH-1994-2-008];
- *Kroon and others v. the Netherlands*, 27.10.1994, Series A of the Publications of the Court, no. 297-C; *Bulletin* 1994/3 [ECH-1994-3-016];
- *Nylynd v. Finland*, ECHR, 29.06.1999;
- *Ibrahim Yildirim v. Austria*, ECHR, 19.10.1999.

Languages:

Maltese.



Identification: MLT-2005-H-001

a) Malta / b) Constitutional Court / c) / d) 25.02.2005 / e) 1033/1996 / f) Joseph John Edwards proprio et nomine v. Director of Social Housing / g) / h).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 3.19 **General Principles** – Margin of appreciation.
 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Compensation, fair / Compensation, right / Competence, *ratione temporis* / Housing / Property, right to enjoyment / Requisition, vacant dwellings / Social policy, aim, legitimate.

Headnotes:

The Court was not competent to deal with claims of breach of fundamental human rights in terms of the European Convention Act (Chapter 319 of the Laws

of Malta), where the breach occurred prior to the 30 April 1987.

The Housing Act (Chapter 125 of the Laws of Malta) aims at establishing a fair balance between social needs of the community and the right of an owner to enjoy his property. The Convention did not guarantee a right to full compensation in all circumstances. Legitimate objectives of public interest, such as measures aimed to achieve greater social justice, may call for less than reimbursement of the full market value.

Summary:

Applicant owned property which the Government requisitioned in September 1975, and allocated to a third party for residential purposes. The premises consisted of a number of rooms, a small back garden and a field adjoining the back garden and accessible only through the back garden.

The applicant claimed that:

- a. The field became part of the requisitioned premises as a result of the requisition order and not because it was so at the time of the issue of the requisition order. In terms of law, property could only be requisitioned for providing accommodation, and the applicant claimed that the field could not qualify as accommodation.

The Constitutional Court held that the evidence showed that the field was at a lower level from the rest of the property, and its only access was through the house. In terms of Article 2 of the Housing Act (Chapter 125 of the Laws of Malta), “building” means a house or other building, or part thereof, used or capable of use for residential purposes, and includes any land or garden forming an integral part, or enclosed within the precincts, of such a house or other building....”.

The Court concluded that at the time of issue of the requisition order, the field was an integral part of the requisitioned premises. Furthermore, it was not apparent that at the time the applicant made a serious objection to the requisition order and in fact he continued to receive rent from the tenant (i.e. the person to whom the Government allocated the property) for a period of twenty years.

The complaint was rejected.

- b. Article 1 Protocol 1 ECHR was applicable to this particular case.

In terms of Article 7 of the European Convention Act (Chapter 319 of the Laws of Malta), the European Convention on Human Rights does not apply with regards to a breach committed prior to the 30 April 1987.

The Constitutional Court held that it was evident that applicant's objection referred to the time when the requisition order was issued (i.e. September 1975), since he was claiming that the order was not issued in the public interest. The Court held that the requisition commenced with the issue of the order, it continued when the owner/applicant was requested to deposit the keys of the premises with the Housing Department, and concluded by the taking over of the premises. Facts which dated prior to the 30 April 1987. Therefore the Court lacked competence *ratione temporis*.

However, applicant also complained that due to the requisition he was not receiving adequate compensation. This was 'a continuing situation' whenever the rent was paid to the applicant. Therefore Article 7 was not applicable with respect to this complaint, and the Court had jurisdiction to deal with this matter.

c. The applicant was not receiving adequate compensation and he was being deprived of his property for an indefinite period of time.

The Court contended that a requisition is a *pro tempore* measure concerning the use and administration of the requisitioned premises. The scope of Act 125 of the Laws of Malta is "To make provision for securing living accommodation to the homeless, for ensuring a fair distribution of living accommodation and for the requisitioning of buildings". It is evident that this particular law has a social aim and intended to create a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The requisition aimed at providing the property in question for habitation purposes.

As to payment of compensation, it was not apparent that the applicant exhausted his ordinary remedies prior to filing this case. In terms of Act 125 of the Laws of Malta, the applicant had every right to request the Rent Regulation Board to establish the fair rent. Applicant failed to make such a request. Notwithstanding, the Court also referred to judgments delivered by the European Court of Human Rights which confirmed that the Convention did not guarantee a right to full compensation in all circumstances. Legitimate objectives of public interest, such as measures aimed to achieve greater social justice, may call for less than reimbursement of the full market value. State intervention in socio-economic matters such as housing is often necessary in

securing social justice and public benefit. This is an area where the legislator's margin of appreciation in implementing social and economic policies is wide.

The Court rejected applicant's complaint.

Cross-references:

- *Rasmussen v. Denmark*, 28.11.1984, Series A of the Publications of the Court, no. 87; *Special Bulletin ECHR* [ECH-1984-S-008];
- *Allan Jacobsson v. Sweden*, 25.10.1998, Series A of the Publications of the Court, no. 163;
- *Pine Valley Developments Ltd and Others v. Ireland* (App. no. 12742/87) – European Commission, Series A of the Publications of the Court, no. 222;
- *Holy Monasteries v. Greece*, 09.12.1994, Series A of the Publications of the Court, no. 301-A; *Bulletin* 1994/3 [ECH-1994-3-020];
- *James & Others v. the United Kingdom*, 21.02.1986, Series A of the Publications of the Court, no. 98;
- *Connie Zammit et v. Malta*, 12.01.1991 – European Commission.

Languages:

Maltese.



Moldova

Constitutional Court

Important decisions

Identification: MDA-2000-2-005

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 08.06.2000 / **e)** 25 / **f)** Constitutional review of Articles 7 and 71 of the Civil Code in the wording of Law no. 564-XIV of 29.07.1999 on the amendment of some legislative acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

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

5.2 **Fundamental Rights** – Equality.

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

5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.

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

5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

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

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

Keywords of the alphabetical index:

Honour and dignity, defence / Prejudice, moral, removal / Compensation / Information, denial.

Headnotes:

By reformulating provisions on “The defence of honour and dignity” and “Compensation for moral prejudice” of the Civil Code, the legislator abided by the general constitutional principles. There were also observed the rights, freedoms and fundamental duties laid down in Article 1 “Equality”, Article 20 “The free access to justice”, Article 28 “Private and family

life”, Article 34.1 and 34.4 “Right of access to information” of the Constitution.

The provisions in question of the Civil Code are in compliance with Articles 12, 19 of the Universal Declaration of Human Rights and Article 10 ECHR.

Summary:

The ground for file's examination was considered the application lodged with the Court by the members of parliament which sought the constitutional review of Articles 7 and 71 of the Civil Code of the Republic of Moldova, in the wording of Law no. 564-XIV of 29 July 1999 on the amendment of some legislative acts.

On 29 July 1999 the parliament adopted the organic Law no. 564-XIV on the amendment of some legislative acts, introducing a new wording to Article 7 “The defence of honour and dignity” and Article 71 “Compensation for moral prejudice” of the Civil Code, endorsed by the Law of the Soviet Republic of Moldova of 26 December 1964.

Article 7 “The defence of honour and dignity” of the Civil Code in the wording of Law no. 564-XIV of 29 July 1999 on the amendment of some legislative acts stipulates:

Any natural and legal person is entitled to request by trial the denial of any kind of information which may harm the honour and dignity, if the person who spread out such information can bring no prove of its corresponding to reality.

In case the information was delivered to the public by one of mass-media means, the ordinary court charges the editorial staff with the obligation to issue in term of 15 days from the date of entrance into force of the court's decision, a denial of information at the same column, on the same page, the same program or series of programs. In case such kind of information is delivered in a document issued by an institution, the court of law coerces the relevant institution to replace the document in question.

Article 71 “Compensation for moral prejudice” of the Civil Code in the same wording stipulates:

The moral prejudice, caused to any person as a follow-up from spreading of some information which do not correspond to the reality and which may harm the honour and dignity of the latter, can be repaired in the plaintiff's benefit by a legal or natural person who spread out the information.

The amount of compensation is established by the court of law in each of the cases, from 75 to 200 subsistence wages, in case the information was spread out by a legal person, and from 10 to 100 subsistence wages, in case the latter was spread out by a natural person.

The operative issuing of the apologies and denials for the improper information, until the delivering of the court of law decision, constitutes the ground for decreasing of the amount of compensation or exoneration from the responsibility to pay for it.

Article 32 of the Constitution lays down that:

All citizens are guaranteed the freedom of opinion as well as the freedom of publicly expressing their thoughts and opinions by way of word, image or any other means possible.

The freedom of expression may not harm the honour, dignity or the rights of other people to have and express their own opinions or judgements.

The law forbids and prosecutes all actions aimed at denying and slandering the state or the people, as well as the instigation to sedition, war, aggression, ethnic, racial or religious hatred, the incitement to discrimination, territorial separatism, public violence, or other actions threatening constitutional order.

The applicants asserted that the questioned rules of the Civil Code, in spite of their delivering in a new wording, continued to regulate with out-of-date notional-judicial instruments the civil relationships in a state governed by the rule of law, as provided for by Article 1.3 of the Constitution, the justice and political pluralism represent supreme values, which are guaranteed.

While considering Articles 7 and 71 of the Civil Code in the wording of Law no. 564-XIV with reference to the constitutional provisions of Articles 1.3, 16, 20, 24.1, 32, 34, 54 and 55 of the Constitution, the Court concluded that the law-making body, by the mentioned articles, did not bring prejudice to the fundamental rights and liberties as guaranteed by the Constitution.

The Court argued that Articles 7 and 71 of the Civil Code in the wording of Law no. 564-XIV are in compliance with the constitutional rules which guarantee the most important social values and which lay down that the foremost duty of the state is to respect and protect the human being (Article 16 of the Constitution), thus, safeguarding the right of citizen to obtain effective protection from competent courts of jurisdiction against actions infringing on his/her

legitimate rights, freedoms and interests (Article 20 of the Constitution).

The Court disagreed with the petitioner's assertion regarding the provisions of Articles 7 and 71 of the Civil Code, by which the application of the freedom of expressing one's thoughts and opinions proclaimed by the Constitution has been prejudiced, on the reason that the contested provisions do not regulate such kind of social relationships with reference to the citizen's right to defence, as guaranteed by Articles 26.1 and 26.2 of the Constitution. According to this constitutional article, every citizen has the right to respond independently by appropriate legitimate means to an infringement of his/her rights and freedoms, the clause which was emphasised in Article 7 "The defence of honour and dignity" of the Civil Code.

As a follow-up to the disputed issues, the Court ruled on the constitutionality of Articles 7 and 71 of the Civil Code of the Republic in the wording of Law no. 564-XIV of 29 July 1999 on the amendment of some legislative acts.

Languages:

Romanian, Russian.



Netherlands

Supreme Court

Important decisions

Identification: NED-1995-1-001

a) Netherlands / b) Supreme Court / c) First Division / d) 06.01.1995 / e) 15.549 / f) / g) / h) *Rechtspraak van de Week*, 1995, 20; *Nederlandse Jurisprudentie*, 1995, 422; CODICES (Dutch).

Keywords of the systematic thesaurus:

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

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

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

5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.

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

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

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

Keywords of the alphabetical index:

Right to be 'left in peace' / Second World War, action during.

Headnotes:

Concerning protection of the rights of a person who had been the victim of defamation, two opposing fundamental rights were balanced: the right to freedom of expression and the right to an unblemished name and reputation, and above all the right to be "left in peace", which latter right prevailed in this case.

The interference with the right to freedom of opinion was permissible, as the requirements of the European Court of Human Rights had been met.

Summary:

The questions to be resolved in this case were whether three Articles that had been published in a national daily newspaper were defamatory, and whether the suit brought by the person offended was admissible, in the light of the right to freedom of expression. The Articles suggested that V. had murdered a Jewish person who was living in hiding during the Second World War. However, a District Court acquitted V. of murder in 1944, and in 1946 he was rehabilitated when it was established that he had been acting in the interests of the resistance to the oppressor.

The Supreme Court began by observing that the suit had been brought against a journalist and a newspaper, so that allowing it would constitute interference with the freedom of expression to which this journalist and this newspaper are entitled. This interference was justifiable, however, as the conditions set out in Article 10.2 ECHR, namely that the interference must be prescribed by law and necessary for the protection of the reputation or rights of the person insulted, had been met.

In this case, it was not only this person's reputation that was at stake, but also – and indeed primarily – his right not to be publicly confronted yet again, over forty years later, with the actions he had taken in the past, in the form of offensive and defamatory accusations. The Supreme Court held that the only way to assess whether allowing the suit was necessary in a democratic society for the protection of the defamed person was by weighing the opposing fundamental rights against each other, taking all the details of the case into account.

The Supreme Court ruled that in this case the right to an unblemished name and reputation and above all the right to be "left in peace" prevailed over the right of the press to freedom of expression. One of the consequences of respect for the private individual is that a person who has been convicted of an offence should not in principle be held to account for his actions after he has paid the penalty for them. This implies that making an accusation of this nature after such a long period of time and giving to this accusation wide publicity would only have a valid justification in special circumstances in which such information would serve a justifiable public interest. Therefore, to justify publication in such a case, compelling reasons related to the public interest must exist, and it is legitimate to require that the accusation be based on extremely meticulous research.

Languages:

Dutch.

*Identification:* NED-1996-1-001

a) Netherlands / b) Supreme Court / c) Second Division / d) 19.12.1995 / e) 101.269 / f) / g) / h) *Delikt en Delinkwent*, 96.152; *Nederlandse Jurisprudentie*, 1996, 249.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.
 5.3.33.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Fundamental right, violation, pro-active stage / Police, power / Garbage bag, search.

Headnotes:

Violations of fundamental rights, in particular the right to privacy, at a stage at which it is unclear, or insufficiently clear, that a criminal offence has been or is being committed (the pro-active stage) and no suspect can be identified, are permissible only if they are allowed under the Constitution or a treaty provision.

Police searches of garbage bags placed outside do not constitute a violation of Article 8 ECHR.

The scanning, monitoring and recording of conversations conducted on mobile telephones in principle constitutes a violation of Article 8 ECHR. However, as telephone conversations of this kind can easily be

monitored, interference of this kind in the right to respect for private life must be accepted up to a point.

Summary:

The central question to be answered in this case is what kinds of interference are permissible when fundamental rights are concerned, such as the right to respect for private life, in the stage preceding that of the investigation within the meaning of the Code of Criminal Procedure, in other words before suspicions have been formulated, when it is unclear, or insufficiently clear, that a criminal offence has been or is in the process of being committed. It is sometimes described as the pro-active phase.

In the case at hand, during the pro-active phase the police used powers which are vested in them by law for the purposes of investigating criminal offenses which have been, or which are suspected of having been committed. The question is whether the police were justified in doing so, and if so, the limits of acceptability that should have been taken into account. The action taken by the police included searching garbage bags that had been placed outside, and using scanners to monitor calls made by mobile telephone.

The Supreme Court considered that in the phase prior to that of investigation within the meaning of the Code of Criminal Procedure, any infringement by police officers of individuals' fundamental rights as enshrined either in the Constitution or in provisions of treaties whose content can be universally binding is unlawful, unless such an infringement is permitted in the conditions and restrictions contained in, or laid down pursuant to, the Constitution or treaty provision concerned. Where the Constitution regards the imposition of restrictions on any fundamental right to be permissible, such restrictions can acquire legitimacy only by or pursuant to an Act of Parliament. The power to commit such an infringement must be defined in the legislation in a sufficiently accessible and foreseeable manner. A provision in general terms such as Section 2 of the 1993 Police Act does not fulfil this requirement. The continuing development of the fundamental right to the protection of privacy combined with the increasing technological sophistication and intensification of investigative methods and techniques make it essential for such infringements to be based on a more precise justification than Section 2 of the 1993 Police Act.

The Supreme Court observed however that the above does not detract from the police's authority, pursuant to Section 2 of the 1993 Police Act, to perform actions in the pro-active phase which properly belong to its

duties as defined in the Section 2, such as, in the interests of public policy, ordering someone to leave a particular location, impounding property, the surveillance and following of individuals and photographing them in public, and that even where actions of this kind amount to a limited infringement of privacy, the general definition of the duties of the police as defined in Section 2 of the 1993 Police Act provides a sufficient basis for this.

The Supreme Court then proceeded to discuss the disputed investigating methods. It endorsed the appeal court's ruling that someone who has put garbage bags out to be collected must be deemed to have relinquished possession of these bags and their contents. Police searches of these bags do not therefore constitute a violation of Article 8 ECHR. For objectively speaking, according to the Supreme Court, it is not reasonable for someone who puts garbage bags out in the street to expect their contents to be subject to rules governing the protection of privacy.

As far as a three-week period of monitoring (by means of a scanner) and recording conversations conducted by mobile telephone is concerned, the Supreme Court held that the confidentiality of telephone conversations is protected by Article 8 ECHR. The Court observed however that it is widely known that conversations conducted by mobile telephone can be monitored by anyone who wishes to do so with the aid of simple and readily available electronic devices. This in itself not only means that persons conducting conversations by mobile telephone should take into account the possibility that a third party may be able to receive and overhear the call, but also that he is up to a point obliged – given that everyone is in principle free to receive radio signals – to resign himself to it. This does not however mean that he forfeits every right to respect for privacy in this regard.

If investigating officers, as in the case at hand, for a long period of time and using specially placed apparatus, deliberately and systematically monitor and record telephone calls that are made from inside or from the immediate vicinity of an individual's home by mobile telephone, the limit of acceptability is exceeded, thus constituting a violation of the right to telephone confidentiality pursuant to Article 8.1 ECHR. In such a case, the interference with the person's right to respect for his private life is of such a nature that it must be provided with a statutory basis, having regard to the provisions of Article 8 ECHR and Article 10 of the Constitution, by or pursuant to an Act of Parliament. This did not occur in the present case. The interference with the right to privacy was not however, in the view of the Supreme Court, so

serious as to constitute grounds for ruling the prosecution's case against the accused inadmissible.

Supplementary information:

Section 2 of the 1993 Police Act states: "The police has the task, acting in a subordinate capacity in relation to the competent authorities and in accordance with the applicable rules of law, to ensure the active enforcement of the law and the provision of assistance to those who require it".

Article 10 of the Constitution concerns respect for, and protection of, privacy.

Cross-references:

- In relation to the removal of garbage bags that have been put out for collection, see also Supreme Court Judgment of 13.02.1996, no. 101.665, *Delikt en Delinkwent*, 96.211, [NED-1996-1-003].
- Supreme Court Judgment of 23.01.1996, no. 101.302, *Delikt en Delinkwent*, 96.178, likewise concerns police scanning of mobile telephone calls. In it, the Supreme Court reiterated its considerations in relation to the judgment given on 19.12.1995.

Languages:

Dutch.



Identification: NED-1996-2-009

a) Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 23.04.1996 / **e)** 101.367 / **f)** / **g)** / **h)** *Delikt en Delinkwent*, 1996, 275.

Keywords of the systematic thesaurus:

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

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.

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

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

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

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

Keywords of the alphabetical index:

Order to move on.

Headnotes:

An order to move on, issued in the interests of preserving public order, does not violate the right to freedom of movement.

Summary:

The accused was ordered to leave an area that the burgomaster of Amsterdam had designated as liable to emergency measures. Some time later, the accused was found within this area once again. The police court convicted the accused of intentional non-compliance with an order issued in accordance with statutory provisions by an officer in the performance of his duties. The Appeal Court upheld the judgment of the police court.

The Supreme Court held that where an alleged violation of Article 6 ECHR was concerned, the statement of grounds for appeal in this case overlooked the fact that the order to leave the area was not issued to the accused on the basis of criminal proceedings against him, but as a public order measure. In accordance with Article 2.3 Protocol 4 ECHR, the exercise of the right to freedom of movement is subject to restrictions which are provided for by law and which are necessary in a democratic society, among other reasons, to preserve public order. The Supreme Court held that the order to leave the area issued to the accused, an order which was based on the Municipalities Act and which was issued on account of disruptive conduct within the area concerned (the use of narcotics in public), was not in violation of Article 2 Protocol 4 ECHR, nor of Article 12 of the International Covenant on Civil and Political Rights.

Languages:

Dutch.



Identification: NED-1997-2-008

a) Netherlands / b) Supreme Court / c) First Division / d) 21.03.1997 / e) 16.214 / f) / g) / h) *Rechtspraak van de Week*, 1997, 74; CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4.5 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Social Charter of 1961.

3.16 **General Principles** – Proportionality.

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

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

5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Collective agreement / Strike, damage / Strike, injunction proceeding / Service, essential.

Headnotes:

Deciding when a strike need no longer be tolerated and may be restricted by order of the court is a question of proportionality that can be answered only by weighing the interests involved in the exercise of the fundamental right – viewing these interests together and as a whole – against the interest that is being violated, while taking account of all the circumstances involved in the parties' dispute that are characteristic of the case. The court must in principle proceed on the assumption that the interest of the relevant union and its members in exercising that fundamental right are compelling.

Summary:

On 1 December 1994 the VSN (as employer) started negotiations with the trade unions FNV and CNV that were to culminate in a new collective labour agreement for the public transport sector for 1995. When these talks failed to produce any agreement between the parties, the two unions wrote to the VSN, in letters dated 17 January 1995, notifying it of imminent strike action. In response to this, further talks were held between the parties on 18 January 1995. As a result of these talks the VSN and the CNV reached agreement, but the FNV found the VSN's

final offer unacceptable and called its members out on strike on 19 and 20 January 1995. From 20 January onwards the FNV repeatedly prolonged the strike by one day at a time, communicating this to the VSN by fax. For the duration and as a result of the strike, regional public transport, and in many places municipal public transport, was severely disrupted; some services had to be suspended altogether. The majority of the passengers – over one million people in total – who rely daily on regional public transport services were affected by this disruption. For many of them it was impossible to reach their work or other destination at all, let alone on time. Many companies and institutions suffered considerable damage or other adverse effects as a result. When the strike had gone on for six days, VSN attempted to end it by instituting interlocutory injunction proceedings.

In cassation proceedings, the Supreme Court ruled first and foremost that a strike that in principle falls within the scope of the provisions of the preamble and point 4 of the Article 6, of the European Social Charter must in principle be tolerated by all parties, including the employer, as a lawful exercise of the fundamental right enshrined in this provision of international law, regardless of the adverse effects for employer and third parties that are the objective of the strike and that are experienced by those concerned. The question of the criteria that must be met before a strike need no longer be tolerated and may be restricted by order of the court has not been answered, as envisaged in Article 31 of the European Social Charter, by the legislature. The criteria developed in case law amount to a requirement that it must be possible to ascertain that, having regard to the care that must be exercised in social conduct in respect of the persons or goods of others pursuant to Article 6162 of the Civil Code, the strike prejudices the rights of third parties defined in Article 31 of the European Social Charter or the public interest to such a degree that restrictions, from the vantage-point of society, are an urgent social necessity. The unrestricted exercise of this fundamental right, in such a case, would be unlawful in relation to all those damaged by it, including the employer. Whether these conditions are met is a question of proportionality that can be answered only by weighing the interests involved in the exercise of the fundamental right – viewing these interests together and as a whole – against the interest that is being violated, while taking account of all the circumstances involved in the parties' dispute that are characteristic of the case. The employer is free to argue that the criteria defined above have been met, and that the strike is hence unlawful, or has become so, in relation to him.

In the weighing of interests referred to above – which is only at issue when it has been established that the strike concerned falls within the scope, in principle, of the fundamental right enshrined in Article 6.4 of the European Social Charter – the court must in principle proceed on the assumption that the interest of the relevant union and its members in exercising that fundamental right are compelling. After all, it is in principle not the court's task to assess the relative merits of the positions underlying the dispute that has led to the strike. Exceptional circumstances may arise that put this in a different light, however.

The Supreme Court also held that there was no need to answer conclusively the question of whether or not it was possible to differentiate sharply between "essential" and "non-essential" services: in any case, the more essential a service, the sooner it will be possible to impose restrictions as referred to in Article 31.1 of the European Social Charter. This is not to say, however, that there would be no place for such restrictions where a service is "non-essential". The same criterion as indicated above would be applicable in such a case.

Languages:

Dutch.



Identification: NED-1998-1-008

a) Netherlands / b) Supreme Court / c) Third Division / d) 12.11.1997 / e) 30.981 / f) / g) / h) *Beslissingen in Belastingzaken*, 1998, 22.

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 3.19 **General Principles** – Margin of appreciation.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.

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

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

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

Keywords of the alphabetical index:

Grounds for justification / Legitimate purpose / Expenditure, exceptional / Tax, deduction.

Headnotes:

When assessing whether a regulation leading to the unequal treatment of equal cases met this criterion has a legitimate goal one must look also at the degree to which equal cases were treated differently. For this reason, quantitative issues – relative as well as absolute – must be taken into account.

Summary:

In this case the unequal treatment of working and unemployed persons in relation to tax deductions for travel expenses for study purposes was justified on objective and reasonable grounds.

The person concerned incurred study costs under the heading of exceptional expenditure, including travel expenses in relation to which she was entitled to a deduction based on NLG 0.28 per kilometre. In cassation proceedings she argued that this constituted a violation of Article 26 ICCPR because employees whose study costs were reimbursed by their employers were allowed to receive a tax-free refund of up to NLG 0.49 per kilometre.

The Supreme Court held that the statutory regulation that laid down the aforementioned deduction did indeed create an inequality. It added, however, that Article 14 ECHR and Article 26 ICCPR prohibited the unequal treatment of equal cases if there was no objective and reasonable justification for it, in other words, if it was not introduced in pursuit of a legitimate goal, or if there was no reasonable correlation between the unequal treatment and the objective pursued. The legislature was allowed a certain margin of discretion in this regard.

According to the Supreme Court, the regulation at issue ensured that employers who wished to award their employees a slightly higher kilometre allowance than the maximum tax-deductible sum (which was NLG 0.28 per kilometre in 1992) were not immediately confronted with an obligation to deduct income tax over this sum. This promoted efficiency, which

was in itself a legitimate goal. In answering the question of whether a regulation leading to the unequal treatment of equal cases met this criterion, however, the Supreme Court was of the opinion that one must look not only at efficiency but also at the degree to which equal cases were treated differently. For this reason, quantitative issues – relative as well as absolute – must be taken into account. In this connection it was important that the exceptional expenditure provisions were not confined to employees, but applied equally to all taxpayers precisely for study costs incurred in a private capacity. In assessing the quantitative aspects of the regulation at issue, the “ordinary” cases should be taken as the point of departure, which meant leaving out of consideration exceptional cases such as the one at hand that involved great distances. Following this approach, there was no reason to assume that the unequal treatment would involve significant sums of money, whether in absolute or relative terms.

Taking all factors into account, the Supreme Court concluded that there was an objective and reasonable justification for the unequal treatment at issue in this case.

Languages:

Dutch.



Norway

Supreme Court

Important decisions

Identification: NOR-1918-S-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 12.03.1918 / **e)** Inr 37/1 1918 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1918, 401 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Waterfall, right, acquisition.

Headnotes:

It rests with the courts to review whether an act is in violation of the Constitution. The provisions of an earlier Act dated 18 September 1909 concerned the acquisition of rights over waterfalls. Sections 1 and 2 of this Act, relating to right of reversion for the government, did not contain intrusion of ownership to the extent that there was violation of Article 105 of the Constitution. The seller of the waterfall could not claim damages from the government for loss resulting from the application of the provisions of the act.

Summary:

A. had sold his property to a limited company and held that he had suffered a loss in that the company, in view of the provisions of the Act dated 18 September 1909 on the acquisition of the rights to waterfalls (and in particular Sections 1 and 2 relating to right of reversion to the government), would not pay as much for the property as the company would otherwise have paid if the provisions of the Act had not been applied to the sale.

In the assignment of waterfall rights to parties other than the government, Norwegian municipalities or Norwegian citizens, sales were subject to licences on specific conditions. A licence could be granted for a minimum of 60 years and a maximum of 80 years. Upon expiry of the licence period, the waterfall with its appurtenant equipment would pass to the government free of charge.

Judgment by the City Court was in favour of the government. The judgment was appealed to the Supreme Court.

The majority of the members of the Supreme Court found that the legislative power has and must have broad authority to impose limits on property rights so that the owner's disposal may only be effected in accordance with any necessary legal provisions as required by developments in society.

The issue was whether the limitation of property rights provided for in the Act was so material that the provisions must be set aside as contravening against Article 105 of the Constitution which provides that when the government's interests demand that a party must relinquish property for public use, he shall receive full compensation from the government.

It was stated that there was no question of forced relinquishment and the case was not therefore directly governed by Article 105 of the Constitution. It was further stated that the provision of the Constitution must be strictly interpreted and must not be given any wider interpretation. The Act governing the acquisition of waterfalls included a prohibition against certain forms of disposal, namely sale to certain classes of buyer. However, this exclusion did not violate the Constitution. Inasmuch as the legislative power had found it necessary to apply the limitations specified in Section 2 of the Act of 1909, it had done so because it was of the opinion or feared that acquisition of the waterfall from the buyers mentioned in Section 2 involved material risk in respect of the social and economic developments of the future.

Three of the seven justices dissented.

Languages:

Norwegian.



Identification: NOR-1997-3-003

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 28.11.1997 / **e)** Inr 75B/1997 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1997, 1821 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.
 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Political party, programme / Racial hatred, incitement.

Headnotes:

Statements in a political party programme concerning sterilisation and compulsorily-induced abortion, addressed to the dark-skinned part of the population, were considered to contain serious violations of the most fundamental human rights, and thus could not be protected by Section 100 of the Constitution which guarantees the right to freedom of expression.

Summary:

A, who was the leader of a political party called “*Hvit Valgallianse*” (White Election Alliance) had distributed a party programme which contained statements such as:

- We offer adopted children continued residence in Norway if they let themselves be sterilised;
- This applies for people living in mixed relationships as well. If they don't separate or leave the country the alien party must be sterilised, as too must possible children of the relationship;
- As long as the person lives in Norway he or she must be sure of being 100% sterile, and if a conception occurs in spite of this, an induced abortion must take place.

The City Court found that the first sentence violated Section 135.a of the Norwegian Penal Code. According to this section a person is liable to fines or imprisonment if he by any utterance or other communication made publicly or otherwise disseminated among the public threatens, insults, or subjects to hatred, persecution or contempt any person or group of persons because of their creed, race, colour or national or ethnic origin.

A. was convicted and given a suspended sentence and a fine. He lodged an appeal, and was granted the right to appeal directly to the Supreme Court. The appeal was heard in plenary session.

The appeal was dismissed by order.

The majority of the Supreme Court – 12 judges – found that all the above-mentioned statements were addressed to the dark-skinned part of the Norwegian population, and that the drastic actions which the party supported obviously expressed strong contempt for this group. The majority stressed that political expressions made as part of a political debate are within the essential area for protection under Section 100 of the Constitution and that the right to limit the freedom of expression in this field is very restricted. This provision, however, had traditionally not been interpreted to mean that every expression in the political field should be unpunishable. This case concerned extreme violations of physical integrity – sterilisation and compulsorily-induced abortion – addressed to the dark-skinned part of the population. Statements which encompassed such serious violations of the most fundamental human rights could not be protected by Section 100 of the Constitution. Section 135.a of the Penal Code was thus applicable.

The minority – 5 judges – agreed with the majority as regards the character of the statements in the party programme. However, the minority held that Section 135.a of the Penal Code was not applicable. The minority attached decisive importance to the fact that freedom to formulate political opinions is the essential content of Section 100 of the Constitution, and that political freedom of expression above all concerns the freedom to form and argue for a political programme aimed at gaining support by election. To apply punishment would thus infringe the freedom of expression guaranteed by Section 100 of the Constitution, which has supremacy over ordinary law.

Languages:

Norwegian.



Identification: NOR-2004-1-002

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.03.2004 / **e)** HR-2004-00586-A (no. 2003/1485) / **f)** / **g)** *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Photo, out of the courthouse, reporting.

Headnotes:

It is prohibited to photograph a person who is accused or convicted of a crime on his or her way to or from a court hearing, or to publish such photographs. The provision also protects the accused or convicted person on his or her way out of the courthouse and into a waiting civil police car. The prohibition does not however apply where there are exceptional circumstances.

Summary:

The issue in the case was whether the editors of two newspapers were guilty of a criminal offence for publishing photographs of C. on her way out of the courtroom following a conviction in the District Court for triple murder. The photographs were published without C.'s consent.

Two photographs of C. crying on her way out of court and into a waiting civil police car were published in one of the newspapers on 22 and 23 June 2001, and one photograph was published in the other newspaper on the 23 June 2001. Summary fines were issued against the editors and the photographers who had taken the pictures for breach of Section 198.3, cf. subsection 131a of the Court of Justice Act. Both the editors and the photographers refused to accept the fines, and the case was referred to the District Court where all of them were acquitted. The Director of Public Prosecutions appealed directly to the Supreme Court against the acquittal of the two editors. The Supreme Court found that the editors should be convicted. The Court stated that the legal position was clear. Section 131a.1 of the Court of Justice Act prohibits the photographing of an accused or convicted person on his or her way to or from a court hearing. The only exception to this rule is where the accused or convicted person gives his or her consent. The provision covered the present situation and protected C. on her way out of the courthouse and into a waiting civil police car. The legal position was unchanged by the fact that C. was arrested immediately after the conviction.

The right to freedom of expression in Article 10 ECHR could not lead to another result. In the decision in *Rt 2003*, page 593, the Supreme Court had found that the prohibition against taking photographs would not apply where exceptional circumstances dictate that there must be a right to take photographs and to publish them. No such exceptional circumstances were present in the case. The admissibility decision of the European Court of Human Rights of 6 May 2003 in the case of *P4 v. Norway*, which concerned the rejection of an application to broadcast the main hearing in this very murder case, shows that that national authorities have a wide margin of appreciation in assessing what amounts to the "fair administration of justice". The Supreme Court found that the prohibition against taking photographs not only protects the individual against being identified and against being depicted in circumstances where his or her self-control is diminished, but also promotes a confidence-inspiring and considerate procedural system. The dignity and reputation of the courts is also an important factor. The murder case was horrifying and the subject of immense interest, and C.'s identity was to a large extent already revealed. Notwithstanding, she was at the very core of what the prohibition was designed to protect, and the Supreme Court found that there were no other factors that entitled the press to take photographs or for the public to see them.

Both editors were given fines of NOK 10 000, alternatively 15 days' imprisonment. C. had claimed compensation for non-pecuniary loss, but the Supreme Court did not find sufficient cause to make an award.

Cross-references:

- *Bulletin* 2003/2 [NOR 2003-2-004].

Languages:

Norwegian.



Poland

Constitutional Tribunal

Important decisions

Identification: POL-2000-H-001

a) Poland / b) Constitutional Tribunal / c) / d) 12.01.2000 / e) P 11/98 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 3, item 46; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 3 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Proportionality.
 3.25 **General Principles** – Market economy.
 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
 5.2.1 **Fundamental Rights** – Equality – Scope of application.
 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Human right, core / Human right, core / Housing, allowance / Lease / Rent, regulated.

Headnotes:

The provision in Article 31.3 of the Constitution lays down the conditions for imposing limitations upon an individual's constitutional rights and freedoms, including the right of ownership. In its formal dimension this provision requires a statute, whereas the material dimension allows such limitation only when it is necessary in a democratic State governed by the rule of law and only with regard to the values indicated in Article 31.3 of the Constitution. Moreover, the legislator may not infringe the essence of rights or freedoms. In relation to the right of ownership, such a prohibition is confirmed in Article 64.3 of the Constitution.

The concept of the essence of rights and freedoms, as specified in Article 31.3 and Article 64.3 of the

Constitution, is based on the assumption that every given right and freedom consists of certain basic elements (core, nucleus), without which such a right or freedom would not exist, together with certain additional elements surrounding the core. Such additional elements may be shaped and modified by the legislator without infringing the identity of a right or freedom. The prohibition of infringing the essence of a right or freedom concerns not only negative actions but also positive actions, meaning that the core should remain intact even if the legislator is protecting values listed in the first sentence of Article 31.3 of the Constitution.

Summary:

The constitutional review in the case was initiated by a question of law (i.e. preliminary question) referred to the Tribunal by the Supreme Court. The Court raised doubts as to the constitutionality of Article 56.2, read in conjunction with Articles 25 and 26 of the Lease of Living Quarters and Housing Allowances Act 1994, introducing a limitation on permissible increases of regulated rents that were compulsory in respect of municipal buildings, and also in respect of lessees in private buildings provided that such leases had been entered into in the past as the result of an administrative allocation. This limit constituted 3% of the annual reconstruction value of the living quarters. The Act was intended to remain in force only during a transitional period, expiring at the end of 2004. At the same time, the Act permitted municipal councils (*radny gmin*) to enact limits for regulated rents that were lower than provided for in the statute, within their territorial jurisdiction.

The Tribunal ruled that the provision under review did not conform to Article 64.3 of the Constitution (limitation of the right to ownership), read in conjunction with Articles 2 of the Constitution (the rule of law) and 31.3 of the Constitution (general clause on the limitation of constitutional rights and freedoms) and Article 1 Protocol no. 1 ECHR (protection of ownership), since it infringed the above-mentioned constitutional provisions by limiting the right of ownership. The provision under review conformed to Article 32 of the Constitution (principle of equality). The Tribunal ruled that the loss of the binding force of that provision would be delayed until 11 July 2001.

The principle of protection against excessive apartment rents, particularly when they amount to an unfair market practice, may be derived from Article 76 of the Constitution. Although this provision is not a direct source for subjective individual rights, it gives rise to obligations imposed upon the State.

In the light of the constitutional principle of equality (Article 32 of the Constitution), it is appropriate to introduce the criterion of the right of ownership as a basis for differentiating the legal position of individuals in the field of housing relations. In particular, according to the principle “the property obliges”, it is permissible to impose certain additional burdens or duties upon owners. However, this does not exclude the assessment of the scope of such burdens and duties from the perspective of the constitutional principle of proportionality (Article 31.3 of the Constitution), whereas the respect for the principle of equality does not need to be reviewed.

Limitation of the fundamental elements of a property right so as to render the performance impossible of functions attributed thereto in the legal system in the provisions set out in Article 20 of the Constitution constitutes interference in the essence of such a property right, as defined in Article 64 of the Constitution.

A lease of living quarters constitutes “another property right” within the meaning of Article 64.1 of the Constitution and is, therefore, protected by the Constitution. However, having regard to the nature of a lease, which is limited in time, it would be difficult to assume that stabilisation of the lease relationship constitutes the essence of this right.

Regulated rents are inadequate for building maintenance expenses, resulting in under-capitalisation of rented properties. This process may be perceived as a gradual deprivation of property with the final outcome similar to expropriation. Moreover, its social dimension should not be ignored, since many multi-flat buildings reach their “technical death”, thereby depriving not only the owner of the property but also the tenants of the possibility to occupy their flats. The latter is unacceptable from the perspective of the tasks of public authorities, as specified in Article 75.1 of the Constitution.

The Act in question shifted the main burden for protecting the rights of lessees, particularly those in a difficult financial situation, onto the owners of the buildings. However, other possible solutions, such as public subsidies for the maintenance and repairs of the buildings, relevant tax regulations taking into account the owner’s losses and expenditures, or differentiation of rents with due regard to a lessee’s income, were not adopted. Since the protection of lessees may be guaranteed by other forms of property limitations, which would be less burdensome for owners, the solution adopted in Article 56.2 of the Act under review is not necessary within the meaning of Article 31.3 of the Constitution.

Although the provisions providing for maximum rent levels are not unconstitutional per se, the solution adopted in the Act, read in conjunction with other provisions concerning private buildings, does not leave the owner even a minimum quantum of the right to ownership. The owner is not only deprived of the right to retain profits, but also prevented from carrying out dispositions of property. The right of ownership is, therefore, illusory, rendering ineffective the role of the State under Article 20 of the Constitution according to which "a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners shall be the basis of the economic system of the Republic of Poland".

Cross-references:

For the same judgment, see also precis POL-2000-1-005 for different legal aspects.

- Judgment P 2/98 of 12.01.1999, *Bulletin* 1999/1 [POL-1999-1-002];
- Judgment K 13/98 of 11.05.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 4, item 74;
- Judgment K 34/98 of 02.06.1999, *Bulletin* 1999/2 [POL-1999-2-019];
- Judgment K 33/99 of 03.10.2000, *Bulletin* 2000/3 [POL-2000-3-020];
- Judgment P 8/99 of 10.10.2000, *Bulletin* 2000/3 [POL-2000-3-022];
- Judgment K 48/01 of 02.10.2002, *Bulletin* 2002/3 [POL-2002-3-031];
- Judgment K 33/03 of 21.04.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 4, item 31; and
- Judgment SK 34/02 of 12.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 42.

Languages:

Polish.



Identification: POL-2001-H-001

a) Poland / b) Constitutional Tribunal / c) / d) 07.05.2001 / e) K 19/2000 / f) Judgment / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 43, item 489; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 82 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.5 **General Principles** – Social State.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.11 **General Principles** – Vested and/or acquired rights.
- 3.16 **General Principles** – Proportionality.
- 3.19 **General Principles** – Margin of appreciation.
- 3.25 **General Principles** – Market economy.
- 4.6.9.3 **Institutions** – Executive bodies – The civil service – Remuneration.
- 5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
- 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
- 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.38.3 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Social law.
- 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Competition, free / Company, public principle, distinction from private company / Company, public, social purpose / Supervisory board, right to be member.

Headnotes:

The freedom of economic activity (including the freedom to contract) does not apply in an equal manner to all subjects conducting business. It refers to individuals and non-public institutions enjoying the freedoms and rights vested in every person and citizen. The rights stemming from the constitutional guarantee of the freedom of economic activity are not directed towards the State, local self-government or other public institutions.

Legal acts regulating the public sector of the economy are not subject to review under Article 31.3 of the Constitution, which specifies the criteria for limiting constitutional rights and freedoms, since such acts do not restrict the fundamental rights of persons who derive them by virtue of their human dignity (Article 30 of the Constitution).

The role of the Constitutional Tribunal is to assess whether the new system of remuneration is just in the light of the principle of the rule of law (Article 2 of the Constitution). It is not, however, its task to consider whether the new system is more just than the previous one. Such an assessment lies within the exclusive competence of the legislator that is, in turn, accountable to the electorate for this assessment.

The State and its institutions shall pursue economic activity only exceptionally and, when doing so, shall not violate the principle of free competition.

The general principle of the rule of law, together with the principles stemming therefrom, and the protection of legal certainty, acquired rights, and citizens' trust in the State and its laws, do not prohibit, in principle, any amendments to the provisions in force. This applies in particular to those aspects of social life which are subject to frequent changes. The aforementioned principles establish, however, conditions which further influence the assessment of admissibility of the modifications in question.

Summary:

The Remuneration of Managers of Certain Legal Entities Act 2000 introduced limitations on the salaries of managers of State or State-owned entities, as well as entities of local self-government, and furthermore restricted the number of supervisory boards of companies owned by the State or local self-government of which any individual may be a member.

The Confederation of Polish Employers challenged the constitutionality of the aforementioned restrictions before the Constitutional Tribunal.

The Tribunal ruled the salary restrictions conformed to Article 2 of the Constitution (rule of law principle), Article 20 of the Constitution (social market economy), Article 21.1 of the Constitution (protection of ownership), Article 22 of the Constitution (limitation of freedom of economic activity), Article 31.3 of the Constitution (general clause on the limitation of constitutional rights and freedoms), Article 32 of the Constitution (principle of equality), Article 64 of the Constitution (right to ownership), and Article 65.4 of the Constitution (minimal remuneration for work).

Furthermore, the Tribunal declared that the restrictions imposed on the right to be a member of a supervisory board were not inconsistent with Article 2 of the Constitution.

In the light of Article 20 of the Constitution, public entities are bound not only to act within the framework of supply and demand, but also to implement social elements in their economy. Consequently, their activity may be subject to limitations which would be classified as an obstacle or a burden from the perspective of competitiveness.

The State may engage in this activity by means of private institutions (companies) or by creating new forms of organisation (public undertakings). However, the status of these "public economic entities" differs significantly in relation to the status of private entities. Constitutional provisions entitle the legislative authority to interfere to a large extent in the economic activity of public entities.

The principle of minimum remuneration for work (Article 65.4 of the Constitution) flows from the principle of social justice (Article 2 of the Constitution), which is of a more general character. Pursuant to Article 65.4 of the Constitution, it is the legislator's duty to specify in the statute the minimum remuneration for satisfying the primary necessities of life. Not only is the legislator entitled to fulfil the duties imposed thereon by the constitutional provisions, but the legislator may also adopt, with due respect for the law, rules governing other spheres of social life including the level of remuneration for work. However, the legislator's discretion is limited by Article 2 of the Constitution establishing the principle of social justice, which requires that the remuneration be decent and satisfy the justified needs of an individual. Furthermore, new provisions may not be enacted.

According to Article 2 of the Constitution, new provisions may not surprise the persons whom they concern. The provisions in question came into force "on the first day of the month following one month after the date of publication". Moreover, three additional months were provided for adaptation of those whose remuneration was reduced. Consequently, such persons were not surprised by the changes, and the principle of citizens' trust in the State and its laws was not violated.

The legal nature of an employment relationship allows for the modification of its conditions. However, new provisions relating to the employment relationship must guarantee a period of adaptation, in order to ensure the preservation of the principle of acquired rights (Article 2 of the Constitution). If the law in force does not guarantee the stability of a particular legal

relationship, new provisions resulting in its premature termination will violate neither this principle nor the principle of citizens' trust in the State and its laws (Article 2 of the Constitution). The legal status of a member of a company's supervisory board does not create any "acquired right" to remain on the board until the end of the term of office.

Cross-references:

For the same judgment, see also precis POL-2000-1-005 for different legal aspects.

- Judgment K 5/01 of 29.05.2001, *Bulletin* 2002/1 [POL-2002-1-002];
- Judgment K 23/01 of 15.04.2002, *Bulletin* 2002/3 [POL-2002-3-026].

Languages:

Polish.



Identification: POL-2002-3-023

a) Poland / b) Constitutional Tribunal / c) / d) 26.03.2002 / e) SK 2/01 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 37, item 353; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 2, item 15 / h) CODICES (Polish, English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.

Keywords of the alphabetical index:

Demolition, restitutionary character / Demolition, unlawful construction / Act, unlawful benefit, deprivation / Construction, illegal, demolition, punitive character.

Headnotes:

Those who breach the law must expect that the rightful state of affairs – depending on the actual situation and the manner of the breach – will be restored; this will be the very minimum consequence of such unlawful actions. It is not a violation of the principle of proportionality (as enshrined in Article 31.3 of the Constitution) to deprive a person who has perpetrated an unlawful act of any benefits arising from such an act.

Summary:

Article 48 of the Building Act 1994, ordering demolition of any unlawful construction, was challenged by means of a constitutional complaint. The applicants (a married couple) prematurely extended the hotel run by them on the basis of planning permission which was at that time not a final decision and was, in fact, later revoked. Consequently, the relevant public authority ordered the demolition of the new construction. The legality of this administrative act was confirmed by a final ruling of the Chief Administrative Court.

The Tribunal ruled that Article 48 of the Act in question conformed to Article 64.2 of the Constitution (equal protection of ownership and other property rights), in conjunction with Article 31.3 of the Constitution (general clause on the limitation of constitutional rights and freedoms).

The concept of "public order", capable of justifying limitation of constitutional rights and freedoms as provided in Article 31.3 of the Constitution, is directed towards ensuring the proper functioning of social life. It is not directly and exclusively linked to the State but rather – in a wider sense than the concept of public security – to the protection of the individual's rights and freedoms from daily interference.

The aforementioned concept of public order presumes, in particular, the maintenance of an orderly system of architectural and urban planning, requiring citizens to comply with appropriate requirements for the use of buildings. This is also of importance for the rights and freedoms of others. For this reason there can be no exceptions to the rule that persons responsible for a building project must have planning permission prior to construction. This permission is granted by the relevant authorities after examining whether the legal requirements have been met (Articles 32-38 of the Building Act 1994).

Article 48 of the Building Act 1994 prescribes that any unlawful construction must be demolished. This duty promotes the effective implementation of the requirement to have permission before beginning construction. For this reason, a demolition order is a legitimate measure taken by the authorities to implement values which are described in Article 31.3 of the Constitution (concerning public order, protection of the environment and protection of the rights and freedoms of others) and which this requirement seeks to safeguard.

The demolition order in question has a restitutionary, as opposed to a punitive, character. It cannot be understood as amounting to an additional punishment (i.e. in addition to sanctions provided for by the criminal law, such as Article 90 of the Building Act 1994).

Cross-references:

- Judgment P 2/98 of 12.01.1999, *Bulletin* 1999/1 [POL-1999-1-002].

Languages:

Polish, English, French.



Identification: POL-2002-H-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16.04.2002 / **e)** SK 23/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 60, item 550; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 3, item 26 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
- 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Certainty, transaction / Right, essence / Notary.

Headnotes:

Public dues are an essential element of the common good, which is guarded mainly by the appropriate authorities. The responsibilities of such authorities for providing public services may lead to restrictions being placed on a tax payer's ability to exercise his or her property rights.

The principle of proportionality established in Article 31.3 of the Constitution requires the legislator, on the one hand, to ascertain whether it is really necessary in the specific situation to interfere with the protection of the individual's rights or freedoms, and on the other hand, it permits only such legal measures as are effective, in the sense that they achieve the legislator's purposes. The relevant measures taken must be necessary, in the sense that they allow realisation of those purposes to such an extent and in such a manner that would not be achievable through other means. At the same time, such measures should cause as minimal a burden as possible for the individual whose rights or freedoms are to be restricted. Therefore, any interference with the ambit of the rights of the individual must be reasonably and appropriately proportionate to the purposes, the protection of which justifies the intended restriction.

The purposes listed in Article 31.3 of the Constitution, which may justify the State's interference with the rights and freedoms guaranteed by the Constitution, can be summarised in the concept of "public interest". They belong to the sphere of tasks within the competence of public authorities and are also clearly set out in Article 1 of the Constitution. The achievement of these tasks requires appropriate financial means from the State budget, which are obtained first and foremost by means of public taxation.

Summary:

A constitutional complaint was brought against Article 19.6 of the Inheritance and Donation Tax Act 1983. According to this provision, a notary may only issue a deed or notarise the signatures on an act of disposition or encumbrance of property, or of other restricted rights *in rem*, where permitted by the tax authorities or where proof is provided that a due tax was paid.

The applicant had inherited real estate and wished to sell it. The notary refused to officially document the

sales contract on the basis of the aforementioned legal provision.

The Tribunal ruled that Article 19.6 of the Inheritance and Donation Tax Act conformed to Article 21 (protection of the ownership), Article 31.3 of the Constitution (general clause on the limitation of constitutional rights and freedoms) and Article 64 of the Constitution (right to ownership and other property rights).

The payment of taxes is one of the citizen's duties towards the State (Article 84 of the Constitution). Everyone – by virtue of benefiting from various forms of public services provided by the State – must contribute to the financing of these services. The payment of tax liabilities contributes to safeguarding constitutionally guaranteed rights and freedoms, including the right to property.

One of the inherent features of a tax, as a legal institution, is that it interferes with the right to property and other rights. Due to their universal character (i.e. their applicability to all subjects) taxes are an almost elemental form of encumbering property rights with specific obligations. As such, they modify these property rights.

The regulation of the restriction of ownership rights in Article 64.3 of the Constitution does not preclude the applicability of the general principle stated in Article 31.3 of the Constitution. Article 64.3 of the Constitution merely affirms both the need for a statutory basis for the restriction of property rights and delineates the maximum permissible scope (i.e. the restriction should not undermine the essence of the right). Therefore Article 64.3 of the Constitution is not *lex specialis* vis-à-vis Article 31.3 of the Constitution, in the sense that the scope of permissible interference indicated by the latter also applies in full to the right to ownership.

Formal requirements determined by the legislator, aimed at providing certainty for legal transactions (e.g. the requirement of a notarial deed for dispositions of real estate), cannot be considered unconstitutional solely for the reason that they restrict the freedom of the owner to make dispositions in regard to his right (*ius disponendi*).

Article 19.6 of the Inheritance and Donation Tax Act 1983, the subject of the constitutional complaint, does not prohibit selling or encumbering property or proprietary rights. That article merely determines the formal prerequisites for carrying out a legal transaction in accordance with the law. This is done by prescribing that the notary must be provided with evidence proving either that the tax obligation has

been fulfilled or that such fulfilment has been adequately secured. In this respect, the payment of tax is not the only way in which the property may be subject to disposition since, as an alternative, the competent tax authorities may grant permission in the absence of such payment. Removing the provision in question from the legal order would jeopardise the fulfilment of inheritance tax requirements at the time the inherited real estate is subject to disposition (for example, if the person making disposition has insufficient funds to pay the tax).

Cross-references:

- Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 6, item 83.

Languages:

Polish, English, French.



Identification: POL-2002-H-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.11.2002 / **e)** K 41/2002 / **f)** / **g)** *Dziennik Urzędowy Rzeczypospolitej Polskiej "Monitor Polski"* (Official Gazette), 2002, no. 56, item 763; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 6, item 83 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.16 **General Principles** – Proportionality.
- 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
- 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
- 5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.
- 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Declaration, property / Informational autonomy / Tax, amnesty / Necessity, requirement.

Headnotes:

Constitutional norms governing the status of the individual and his or her relations with the State in general, such as the principle of the rule of law, proportionality and equality of treatment, are applicable to both rights and freedoms and to the obligation to bear public burdens.

The legislator is required to be especially vigilant in observing the requirements stemming from the rule of law principle when adopting legal provisions limiting the rights and freedoms of citizens or imposing duties on citizens in respect of the State. The requirement of specificity of legal provisions is especially important in two areas – criminal law and tax law.

Where statutory provisions have exceeded a certain level of vagueness, this reason alone may justify finding such provisions incompatible with those provisions of the Constitution requiring statutory specificity and with the principle of the rule of law, as expressed in Article 2 of the Constitution.

Any limits placed on the right to informational autonomy (Article 51 of the Constitution) must be compatible with the requirements specified in Article 31.3 of the Constitution (general clause on the limitation of constitutional rights and freedoms). Consequently, they must be essential to attain the goals indicated in the provisions limiting this right (the prerequisite of necessity). Secondly, the stated goal must be capable of effective realisation (the prerequisite of effectiveness). Thirdly, the extent of the limitation placed by the public authority on the sphere of informational autonomy, e.g. by requiring citizens to submit proprietary declarations, must be proportionate to the stated goal.

Summary:

The President of the Republic refused to sign the Single Taxation of Undisclosed Income and Amendment to Tax Ordinance Act and Fiscal Penal Code Act 2002, a Bill which had been adopted by the Parliament. Having doubts regarding its constitutionality, the President applied for the Bill to be reviewed by the Constitutional Tribunal. The Tribunal exercised a preventive control of the constitutionality of the Bill in question.

The Bill was comprised of two parts. The first part (Articles 1-17) envisaged a temporary solution based on the concept of a “tax amnesty”. The normal fiscal sanctions imposed on taxpayers for concealment of personal income would not be imposed on those who disclosed such income to the tax office and paid a lump-sum amount of tax, determined in accordance with a prescribed tax rate. The Bill covered concealed income obtained between 1996 and 2001 and fixed the prescribed tax rate at 12% (i.e. less than the normal tax rate).

In its second part (Article 18), the Bill was to introduce – on permanent basis – an obligation for personal income taxpayers to submit “proprietary declarations” to tax offices. Such declarations were to include all of the most important elements of the taxpayer’s property. The cost of the valuation of the property would be borne by the taxpayer. Owners of farms would be exempted from the obligation to submit such proprietary declarations.

The Tribunal decided that the amnesty provisions (Articles 1-17) would introduce an unjustified distinction between the legal position of persons who paid their tax on time and persons benefiting from the tax amnesty. In fact, the benefits to the latter category of persons would grow correspondingly with the amount of undisclosed income. Persons benefiting from the amnesty would thereby be placed in an especially privileged position in comparison to those who paid their tax on time. The effect of the amnesty would not only be to relieve persons who concealed their income of criminal responsibility but also to limit their tax liability to a level of 12%.

The individual’s right to legal protection of his private life, guaranteed in Article 47 of the Constitution, also comprises informational autonomy (Article 51 of the Constitution), meaning that the individual has the right to decide whether to disclose personal information to others and also has the right to review such information when it comes into another’s possession. The importance of the right to privacy (Article 47 of the Constitution) in the constitutional protection of rights and freedoms is made clear, *inter alia*, by the fact that pursuant to Article 233.1 of the Constitution, this right may not be limited even by statutes passed during times of martial law or states of emergency, whereas other rights may.

The system for disclosing and valuing property adopted in the impugned Bill would constitute a “trap” for the citizen. The preparing of declarations, pursuant to requirements of the Bill, would lead to the imminent risk that such a declaration was incorrect and, when assessed by the competent tax authorities, could expose the citizen to severe sanctions.

Conversely, the current form of proprietary declarations would not be an adequate instrument to allow the tax authorities to ensure that the legislator's intended goal was fulfilled, since the collection by tax authorities of great quantities of information regarding property is not equivalent to those authorities being in possession of sufficient information allowing them to reliably assess an individual's tax liability. Since tax is paid on income, and the proprietary declarations would have the character of a detailed list of items of property acquired over many years, the need to determine time-functionality relations between the property, the income and its source would always require additional explanatory proceedings in each individual case, rather than merely in case of doubt. Meanwhile, the Polish tax system has different instruments for acquiring appropriate information and for taxing persons whose property ownership indicates a failure to submit full information regarding their taxable personal income. For these reasons, the legislative interference with the individual's rights and freedoms, as guaranteed by Articles 47 and 51, fails to effectively meet the criteria arising from Article 31.3.

Public burdens, in the form of properly established taxes, cannot be considered an unconstitutional interference with the right to ownership and other property rights.

Cross-references:

For the same judgment, see also precis POL-2003-1-006 for different legal aspects.

- Judgment K 15/98 of 11.04.2000, *Bulletin* 2000/2 [POL-2000-2-011];
- Judgment K 19/99 of 13.02.2001, *Bulletin* 2001/1 [POL-2001-1-008];
- Judgment U 3/01 of 19.02.2002, *Bulletin* 2002/2 [POL-2002-2-014];
- Judgment SK 23/01 of 16.04.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 3, item 26;
- Judgment K 6/02 of 22.05.2002, *Bulletin* 2002/3 [POL-2002-3-028];
- Judgment K 4/03 of 11.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 41.

Languages:

Polish, English, French.



Identification: POL-2003-H-001

a) Poland / b) Constitutional Tribunal / c) / d) 29.04.2003 / e) SK 24/02 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 83, item 773; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 4, item 33 / h) CODICES (English).

Keywords of the systematic thesaurus:

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

5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.

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

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

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

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

Keywords of the alphabetical index:

Public reasons, important, limitation, constitutional rights and freedoms / Lease, termination.

Headnotes:

Article 31.3 of the Constitution cannot constitute an independent (exclusive) basis for a “constitutional complaint”. It does not express rights or freedoms in a comprehensive and independent manner, but rather in a manner which is partial and complementary in respect of other constitutional provisions. This provision expresses a general principle referring to “limitations upon the exercise of constitutional rights and freedoms”. A breach of Article 31.3 will only arise in situations involving an interference with any of the human and civil rights and freedoms contained in other provisions of the Constitution.

Since the freedom of economic activity (Article 22 of the Constitution) is merely one of many rights and freedoms guaranteed by the Constitution, Article 22 constitutes *lex specialis* in relation to Article 31.3. All

of the interests listed in Article 31.3 as justifying the limitation of rights and freedoms are inherent in the scope of the “important public reasons” mentioned in Article 22, whereas the scope of the “important public reasons” in the latter is wider than the interests listed in Article 31.3. The substantive grounds (prerequisites) for the legality of limitations imposed on the freedom of economic activity are, therefore, much broader in Article 22 than the scope of permissible limitations of rights and freedoms allowed under Article 31.3.

The principle of freedom of contract, expressed at a statutory level by Article 353¹ of the Civil Code, is closely connected with the constitutional protection of freedom of the person (Article 31.1 of the Constitution) and the obligation to respect others’ freedoms, a constitutional obligation imposed on all parties to legal relations, including those relating to the conduct of civil law transactions (as arising from Article 31.2). The freedom of contract, as a principle of private law, may not, however, be considered as deriving from the “classic” fundamental rights having the nature of a “freedom” (e.g. freedom of the person and citizens), which govern relations between public authorities and individuals. In particular, it is not derived from the freedom of economic activity, despite functional connections between them (a similar relationship arises in respect of the freedom of contract and the constitutional right to ownership, or the constitutional freedom to choose and practise one’s profession).

Summary:

Article 673.3 of the Civil Code states that, where a lease has been concluded for a specified period of time, both the lessor and the lessee may give notice of termination of the lease “in cases specified in the contract”, that is to say, in the lease.

The applicant, who lodged the constitutional complaint, wished to give notice terminating a usufruct contract concluded for a specified period of time. The contract allowed for such a possibility, but a court had ruled that the clause permitting notice to be given was legally invalid where the parties to the contract were not required to give specific reasons for their decision to terminate.

The Tribunal ruled that Article 673.3 of the Civil Code was not inconsistent with Article 22 (limitation of freedom of economic activity) and Article 31.3 (general clause on the limitation of constitutional rights and freedoms) of the Constitution.

The status of the person and the citizen of the Republic of Poland is determined, first and foremost, by norms contained in Chapter II of the Constitution, through the rights and freedoms which stem from the inherent and inalienable dignity of the person (Article 30). The principles of the system of government, especially those expressed in Chapter I of the Constitution, may also impact on an individual’s legal situation, in particular, by expanding the sphere of these freedoms, influencing the scope of defined rights or the legality of any restrictions thereon. Nevertheless, the source of the binding nature of these principles is the constitutional legislator’s assumption that these are norms that primarily contribute to the realisation of the common good of all citizens, as referred to in Article 1 of the Constitution. The constitutional provisions contained in Chapter I may only constitute complementary grounds for defining the rights and freedoms of the individual: they are applicable only to the extent that such matters are not regulated in Chapter II or where they provide more detail of a particular right’s scope or any limitations thereon (e.g. Article 21.2 providing for conditions of expropriation).

In Article 20 and 22 of the Constitution, the constitutional legislator used the term “freedom of economic activity”, which proves that those provisions also constitute the basis of a constitutional right, and not solely a legal norm in the objective meaning and the principle of the system of government.

Article 22 of the Constitution does not create the freedom of economic activity. This is done predominantly by Article 20, complemented by other constitutional norms including Article 64.1 and Article 65.1. In contrast, Article 22 concerns solely the legality of limitations imposed on the freedom of economic activity.

The impugned provision, Article 673.3 of the Civil Code (stating that notice of termination of a lease concluded for a specified period may only be given in circumstances expressly included in the contract), was introduced into the Civil Code in 2001. This provision was construed as an exception to the principle recognised by the Supreme Court and most civil law theorists, by virtue of which (prior to the entry into force of this provision) a lease or usufruct agreement concluded for a specified period of time could not be unilaterally terminated by notice from either party. A finding that the impugned provision was unconstitutional would, thus, have an effect opposite to that which the applicant seeks to achieve, since the doctrine of freedom of contract should allow contracting parties to arrange the contents of a contract so as to express their will. This idea is realised by the introductory part of the impugned

provision, which has not been challenged by the complainant. The part of the provision challenged in the proceedings was, in fact, the requirement contained in the provision *in fine*, stating that a lease or usufruct contract concluded for a specified period should state the circumstances under which notice of termination is permissible.

Article 673.3 of the Civil Code constitutes an interference with the aspect of the freedom of contract that allows the contracting parties to arrange contractual terms so as to reflect their will. Any provision contained in a lease or usufruct contract concluded for a specified period, stating that notice of termination may be given by one of the parties without defining the reasons for giving such notice, would contravene the impugned provision (read in conjunction with Article 694 of the Civil Code) and would thus be invalid, under Article 58.1 of the Civil Code. If circumstances indicated that a contract would not have been concluded without the inclusion of such a clause, the contract would be invalid in its entirety (Article 58.3 of the Civil Code).

Cross-references:

- Procedural decision SK 10/01 of 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 225;
- Judgment SK 21/03 of 14.06.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 6, item 56;
- Judgment SK 9/03 of 27.07.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 7, item 71.

Languages:

Polish, English.



Identification: POL-2004-H-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.02.2004 / **e)** P 21/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 34, item 303; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 2, item 9 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 3.5 **General Principles** – Social State.
- 3.16 **General Principles** – Proportionality.
- 3.21 **General Principles** – Equality.
- 4.7.15.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar.
- 4.7.15.2.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar – Legal advisers.
- 5.1 **Fundamental Rights** – General questions.
- 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
- 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
- 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Lawyer, traineeship / Confidence, profession / Legal adviser, traineeship.

Headnotes:

Self-regulating professional societies of persons practising professions in which the public repose confidence (Article 17.1 of the Constitution), unlike “other forms” of self-government (as referred to in Article 17.2 of the Constitution), may, and sometimes even should, restrict to a certain degree the freedom to practise a profession or engage in an economic activity with regard to the purposes for the fulfilment of which they were created. They may, however, only do this within the bounds of the public interest and for the protection of the public, on the basis of a statute and with regard to the conditions laid down in Article 31.3 of the Constitution (principle of proportionality).

The rules and criteria relating to the qualification and selection of candidates for advocate and legal adviser traineeships should be consistent with the conditions stemming from Article 65.1 of the Constitution guaranteeing the freedom to choose and engage in one's occupation and to choose a place of work. Such rules and criteria should also be consistent with constitutional provisions limiting the extent to which an individual's ability to exercise his or her rights and freedoms may be restricted (Article 31.1 of the Constitution). In particular, the Constitution lays down that any limitations upon the exercise of constitutional freedoms may only be imposed by statute.

Summary:

In order to obtain the right to practise the profession of advocate or legal adviser in Poland, it is not sufficient merely to complete legal studies. It is also a legal requirement for those wishing to join those professions to have completed several years of professional training known as the legal adviser or advocate “traineeship” and to subsequently pass a professional qualification examination. The organisation of traineeships and professional examinations is conducted by the organs of the relevant self-regulating legal societies.

Admission to the professional traineeship is based on the results of competitive examinations conducted by district Advocate or Legal Adviser Councils. The provisions challenged in the proceedings stipulate that the decision as to the number of traineeships available in any given year, and the rules for holding the competitive examinations on the basis of which such traineeships are allocated, rests with the appropriate organs of the advocate and legal adviser self-regulating societies. In their previous form, these provisions left the organs of the self-regulating societies a wide discretion as to the manner they chose to regulate those matters. This had attracted criticism that advocates and legal advisers already practising those professions were restricting young lawyers from entering those professions.

The review of the constitutionality of the relevant statutes was initiated by two adjudicating benches of the Chief Administrative Court, which each referred a legal question to the Tribunal in the course of examining the legality of decisions refusing admission to the traineeships.

The Tribunal decided that the ability of self-regulating professional societies to “concern themselves with the proper practice of a profession in which the public repose confidence”, within the meaning of Article 17.1 of the Constitution, did not entail the right to impose any restrictions whatsoever on the freedom to choose a given occupation, especially as regards persons not belonging to the professional body in question and wishing to obtain the necessary qualifications to enable them to choose that profession.

Internal regulatory rules governing the competitive examination of the relevant professional organisation have a restrictive effect on the ability of a candidate, who is not a member of the relevant professional organisation, to enjoy his or her right to choose his or her occupation or profession in accordance with Article 65.1 of the Constitution. In contravention of the constitutional requirement resulting from Article 31.3 of the Constitution, the provisions of the law under

constitutional review failed to indicate the constitutional value in justifying the limitation of a constitutional right in such a way as to make the restrictions transparent and to allow an assessment of their proportionality. Those provisions cede regulatory powers, unfettered by any statutory limitations, to the organs of a self-regulating professional society. The regulations adopted by such bodies by virtue of those statutory provisions have a *de facto* legal effect which is indistinguishable from provisions contained in universally binding legal acts (e.g. statutes), despite the fact that those kinds of regulations are not included in the exhaustive list of legal measures which may have such effect (Article 87 of the Constitution).

The mere fact of determining a maximum number of advocate traineeships within the district of a given Advocate Chamber does not, in itself, eliminate the freedom to choose and practise the profession of advocate, although it does reduce the chances for practical enjoyment of that freedom and, furthermore, it has that effect for reasons which are at least partly unrelated to the personal qualities of individual candidates. The number of members of an Advocate Chamber, including the number of trainee advocates, is of significance to the proper practice of the profession, including the adequate training of advocate apprentices. The competence to determine the aforementioned limit on the number of trainees need not contradict the principles of equality and justice (Articles 32 and 2 of the Constitution) provided that such limits are set, and subsequently applied, in accordance with rules which are defined in advance, adequately published and transparent, based on objective criteria and applied in a uniform manner. The principal elements of the conditions for determining that limit should be laid down by statute, given their effect on the scope of enjoyment of the freedom to engage in an occupation and to choose the place in which the occupation is engaged.

The function of the legislator in regulating an individual's freedoms (“freedom rights”) is not to enact a norm permitting certain behaviour, but above all to enact prohibitions which prevent taking action that would hinder the beneficiary of a particular right from basing his or her behaviour in a given sphere on his or her choice. In regulating a personal right which has the character of a “freedom”, the legislator must, in particular:

- define the beneficiaries of the right; indicate the subjects having any obligations in respect of this right;
- define the scope of the given freedom, thereby indicating the sphere of behaviour which is subject to legal protection and with which other subjects may not interfere;

- set out the conditions, procedure and character of any interference which may be permitted, in exceptional circumstances, for the protection of values of special importance and the State organs authorised to undertake such interference;
- create legal measures safeguarding against unlawful interference by a State organ or other entities; and
- ensure, at least to a minimal extent, the conditions for the practical enjoyment of the particular freedom.

Cross-references:

- Judgment K 32/00 of 19.03.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 50;
- Judgment K 37/00 of 22.05.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 86;
- Judgment K 25/99 of 28.06.2000, *Bulletin* 2000/2 [POL-2000-2-017];
- Procedural decision P 21/02 of 22.10.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 8, item 90;
- Judgment U 16/02 of 26.07.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 7, item 70.

Languages:

Polish, English, French.



Identification: POL-2004-H-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.04.2004 / **e)** K 33/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 109, item 1160; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 4, item 31 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.2.1.6.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and constitutions.

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

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

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

5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

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

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

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

Keywords of the alphabetical index:

Bio-component / Free movement of goods / Import, measure having equivalent effect / Quantitative restriction / Market, unfair, practice / European Union, national, reverse discrimination.

Headnotes:

The criterion of the “necessity” for imposing restrictions on constitutional rights and freedoms with regard to the values enshrined in Article 31.3 of the Constitution (State security, public order, protection of the environment, public health and morality, as well as the protection of the rights and freedoms of others) is inherent in the principle of proportionality. It implies that the legislator should always choose the least burdensome measures to achieve the stated aims. Where the aim may be achieved by means that are less restrictive on rights and freedoms, the adoption of a more burdensome measure constitutes a breach of the requirement of necessity contained in the aforementioned constitutional provision.

The principle of interpreting national law in a manner favourable to European law, based on Article 91.1 of the Constitution, relates in particular to interpretation of the constitutional basis of review performed by the Constitutional Tribunal (in this case – the principles of economic freedom and the protection of consumers).

The scope of the freedom enjoyed by the legislator in enacting regulations concerning restrictions on economic freedom, its delimitation and the interpretation of the concept of “important public reasons”, contained in Article 22 of the Constitution, must be assessed in the light of Poland’s participation in the European Common Market. This has particular consequences in relation to the constitutional assessment of reverse discrimination – enacting restrictions on economic freedom which apply only to nationals, since their application to other EU citizens

is prohibited by Community law. Whilst discrimination against national entities is irrelevant in the light of Community law, it is the constitutional duty of national authorities to protect against such discrimination.

Summary:

The use of Bio-Components in Liquid Fuels and Liquid Bio-Fuels Act 2003 aims at inducing producers and distributors of liquid fuels to manufacture and offer gasoline and diesel containing additives of biological origin (bio-components), obtained by processing rape-seed, cereal grain or other agricultural resources. The stated rationale for the solutions adopted in the Act was primarily the objective of creating new jobs in agriculture and the agribusiness, of increasing farmers' incomes by increasing demand for non-foodstuff agricultural products and of improving the quality of the environment.

The Commissioner for Citizens' Rights challenged three individual provisions of the Act which, in his opinion, amounted to substantial restrictions on economic freedom or were unfavourable from the perspective of consumer protection.

Article 12.1 makes it obligatory for manufacturers to market in any given year the amount of bio-components specified in a Council of Ministers' Regulation issued yearly under section 6 of that article. According to Article 14.1 of the Act, "normal" liquid fuels with bio-component additives may be sold through unmarked pumps. The obligation to sell from separate pumps marked in such a manner so as to enable identification of the bio-component content relates only to bio-fuels in the strict sense. Finally, Article 17.1.3 prescribes an administrative fiscal penalty for undertakings failing to market bio-components or marketing them in lower quantities than those prescribed by the aforementioned Regulation. The penalty amounts to 50% of the value of marketed liquid fuels, bio-fuels and pure bio-components.

The Tribunal was of the opinion that applying the impugned provisions to all manufacturers (sellers) – not only national, but also foreign, including those established in other EU Member States – would constitute a restriction on the free movement of goods between Member States in contravention of European Community law. From the perspective of Community law, such a situation would be treated as an example of the national legislator imposing restrictions by means of "a measure having equivalent effect" to quantitative restrictions on imports, which is expressly forbidden by Article 28 EC. Although such restrictions are allowed in

exceptional circumstances, they are only permissible for reasons laid down in Article 30 EC. That possibility, which requires a special procedure for establishing the derogation, does not permit arbitrary discrimination or disguised restrictions on trade. In light of the case-law of the Court of Justice of the European Communities, it is unlawful to enact restrictions in the internal legal order which hinder access to the national market of goods failing to comply with quality or content specifications in national legislation for protectionist purposes. Conversely, limiting the applicability of the impugned provisions to Polish manufacturers (sellers) – since legislators in other EU Member States have not imposed similar obligations – would lead to reverse discrimination. Since it is impossible for the impugned provisions to apply to fuels produced abroad and placed on the Polish market, by reason of the country of origin (a consequence of Articles 28 and 30 EC), it is impossible to deem the obligations imposed thereby as consistent with the "important public reasons" referred to in Article 22 of the Constitution.

The creation of jobs must constitute an element of State policy, as provided for by Article 65.5 of the Constitution. There is however no constitutional subjective individual right to employment which would justify, on the grounds of the principle of proportionality, the restriction of manufacturers' and consumers' rights as being necessary to "protect the rights and freedom of others", as specified in Article 31.3. Furthermore, in the light of Article 65.5, State policy must not lead to a decrease in the number of jobs as a result of excessive restraints on economic activity and the hindrance of flexible employment in the private sector.

The Constitutional Tribunal was not competent to deliver a verdict in the dispute as to the effect of the production and use of bio-components on the natural environment. Having regard, however, to the fact that a variety of opinions had been expressed on that unclear issue, it was impossible to conclude that the restrictions on the freedom of economic activity imposed by the impugned provisions were necessary in a democratic State in order to protect the environment.

Among the founding principles of the modern protection of consumers, implemented within the framework of the European Common Market, are: transparency; openness; and the availability of clear, full and comprehensible product information. Consumers need not seek the necessary information in any particular way – it must, rather, be made available to them. A cornerstone of the consumer's constitutional right to be informed is Article 54.1 of the Constitution. It would be wrong to limit this provision, especially as regards the scope of "obtaining

information”, to the traditionally perceived right to be involved in political discourse. Individuals occupy a variety of social roles in any given society and one of these is the role of consumer. From this perspective, Article 54 of the Constitution is a guarantee of the realisation of Article 76 of the Constitution in the scope of protecting consumers from unfair market practices. Whilst Article 76 does not in itself give rise to a subjective individual right, it does impose specific duties on the State that must be implemented by way of ordinary legislation.

Cross-references:

- Judgment K 28/97 of 09.06.1998, *Bulletin* 1998/2 [POL-1998-2-013];
- Judgment K 33/98 of 26.04.1999, *Bulletin* 1999/2 [POL-1999-2-010];
- Judgment P 11/98 of 12.01.2000, *Bulletin* 2000/1 [POL-2000-1-005];
- Judgment K 27/99 of 28.03.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 62; *Bulletin* 2000/2 [POL-2000-2-010];
- Judgment K 12/00 of 24.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7, item 255; *Bulletin* 2000/3 [POL-2000-3-024];
- Judgment K 2/02 of 28.01.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 1, item 4.

Languages:

Polish, English, French.



Portugal Constitutional Court

Important decisions

Identification: POR-1994-1-005

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 18.01.1994 / **e)** 17/94 / **f)** Fascist organisation / **g)** *Diário da República* (Official Gazette) (Series II), 31.03.1994 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.7.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Banning of political parties.
 1.5.4.1 **Constitutional Justice** – Decisions – Types – Procedural decisions.
 4.5.10 **Institutions** – Legislative bodies – Political parties.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Fascist ideology / Political party, dissolution / Fundamental right, limitation, special care.

Summary:

Act 64/78 – a legislative measure required to implement the constitutional rule prohibiting organisations which espouse fascist ideology – differentiates, from a procedural point of view between, on the one hand, the legal identification of an organisation as espousing this ideology and the call for its disbandment and, on the other hand, the criminal consequences connected with forming organisations of this type.

Despite the inevitable inter-dependence and complementarity of this identification and the criminal consequences, the powers of the Constitutional Court are limited to the issue of whether the organisation in question adopts a fascist ideology and whether, consequently, it must be compulsorily disbanded.

The Constitution and the law prohibit neither individual espousal of fascist ideology nor the public expression, the defence or the propagation of this ideology; they do, however, prohibit the existence of organisations which are set up for those purposes.

Since the legislative concept of “organisation” is a very broad one, and given that this is a matter of restricting fundamental rights, freedoms and guarantees, special care must be taken when putting Act 64/78 into practice.

The concept of an organisation espousing fascist ideology is determined, *prima facie*, by its very *raison d'être*, and by its constitutional justification; it must be gauged according to present day circumstances and not only in historical terms.

Supplementary information:

Although, in the Court's opinion, the organisation concerned was apparently liable for prosecution, the Court did not in the event have to decide since, before a case could be brought, the organisation had already voluntarily and permanently disbanded.

Languages:

Portuguese.



Identification: POR-1997-2-003

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 21.05.1997 / **e)** 407/97 / **f)** / **g)** *Diário da República* (Official Gazette), 164 (Series II), 18.07.1997, 8602-8608 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
 5.3.33.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Criminal procedure.

Headnotes:

In a general way, telephone taps raise the particularly problematic dilemma of the weight which should be given to identifying and punishing offences on one hand and protecting individual rights on the other. Comparative law demonstrates that neither legislation nor legal theory or case law have succeeded so far in setting out general principles which would make it possible to address and resolve such issues in a legal framework. As a general rule, since there is little legislation in this area, theory and case law play a greater role than usual in the assessment of measures concerning telephone tapping. The constitutional principle that the rights of citizens should be interfered with as little as possible lends weight to the argument that judges, who are required to monitor directly and closely activities relating to taps should have direct power to act.

It is because telephone taps represent a particularly serious threat that the law has established all possible safeguards for their use. It follows that they are only admissible under very stringent substantive and formal conditions which ensure an appropriate balance between, on the one hand, the sacrifices and dangers entailed in telephone tapping and, on the other hand, the higher interest of punishing crime. The rules governing telephone tapping therefore have to be interpreted restrictively: since the constitutional principle concerned prohibits interference in telecommunications, where such interference is permitted the principle of proportionality has to be observed by guaranteeing that the restriction of the fundamental right due to the telephone tap is reduced to the minimum strictly necessary to satisfy the protection of the constitutional interest in identifying a specific offence and punishing its perpetrator.

Summary:

According to Article 34.1 of the Constitution, an “individual's home and the privacy of his or her correspondence and other means of private communication are inviolable”, while Article 34.4 of the Constitution establishes that any “interference by a public authority with correspondence or telecommunications is prohibited, except in the cases laid down by the law relating to criminal procedure”. The other relevant constitutional rules are Article 32 of the Constitution (Guarantees in Criminal Proceedings), whose paragraph 4 provides that a “judge shall have jurisdiction throughout the preliminary investigation”

and paragraph 6 which includes among the cases where evidence is of no effect, any evidence obtained by “wrongful interference with private life, the home, correspondence or telecommunications”.

Four Articles of the Code of Criminal Procedure (Articles 187-190) establish the exceptional conditions governing telephone taps, whereby they may be authorised and carried out under judicial supervision, as well as a “catalogue” listing the type of offences eligible for such authorisation. Under this system, telephone tapping is exclusively restricted to offences the nature of which made this means of obtaining evidence a particularly suitable form of investigation, or which, because of the seriousness of the interests at stake, justify the use of a measure usually regarded as representing a great potential danger for society.

In the present case, the question of unconstitutionality concerned the provision of the Code of Criminal Procedure requiring that a telephone tap should be recorded in writing and that immediate notification should be sent to the judge who had ordered or authorised the operation, together with the relevant transcript, cassette recording or any element of a similar nature. The purpose of the appeal was to determine the constitutionality of the judgement (considered non-restrictive) of the word “immediately” in respect not of telephone taps themselves but of their transcription.

Nevertheless, the Constitutional Court held that this rule was unconstitutional if it was interpreted to mean that it was not necessary for the report of the interception and recording of telephone conversations or communications to be immediately drafted and sent to the judge, so that first the latter could decide, in good time, whether to add these elements to the case file or to destroy the information gathered, in whole or in part, and so that second, the judge could have time to decide whether the decision ordering the telephone tap should be upheld or modified before a new report of the same kind was added to the case file.

Accordingly, the Court considered first that, on this point, the interpretative criterion used should be the one which imposed the least possible restriction on the fundamental rights affected by a telephone tap and, second, that the judge’s action should be seen as a guarantee that this restriction was kept within strict and acceptable limits and, moreover, would form an integral part of the telephone tapping operation. The Court therefore considered that the word “immediately” not only applies to the moment when the transcriptions are completed, but also and most importantly implies that the judge who ordered the tapping should be directly associated with and in control of the operation.

Supplementary information:

One judge gave a dissenting opinion against this judgement.

Languages:

Portuguese.



Identification: POR-2001-2-001

a) Portugal / b) Constitutional Court / c) Plenary / d) 02.05.2001 / e) 187/01 / f) / g) *Diário da República* (Official Gazette), 146 (Serie II), 26.06.2001, 10492-10506 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 1.3.2.2 **Constitutional Justice** – Jurisdiction – Type of review – *Ex post facto* review.
- 1.6.1 **Constitutional Justice** – Effects – Scope.
- 1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes* – *Stare decisis*.
- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
- 5.2 **Fundamental Rights** – Equality.
- 5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
- 5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
- 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one’s profession.
- 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Profession, freedom to choose / Drug, pharmaceutical / Pharmacy, transfer / Pharmacist, profession / Pharmacy, ownership / Health, protection / Proportionality, definition.

Headnotes:

The freedom to choose one's occupation or type of work, which is enshrined in Article 47.1 of the Constitution, is a personal right – not just a guarantee or a basis of economic activity – which consists not only of the negative “right of defence” but also of a positive dimension in relation to the “right to work”. Another aspect of the freedom to exercise an occupation is that it must be understood broadly in the sense that, while an occupation (such as that of pharmacist) may be exercised either on a self-employed basis or for an employer, and while both ways of exercising an occupation are important, the choice of one or the other way is itself protected as part of the right established in Article 47.1 of the Constitution.

If this view is taken of the occupation of pharmacist, characterising it as an independent profession (although this should not be incompatible with viewing pharmacists also as shopkeepers), the pharmacy premises consist essentially of the resources and assets, both material and non-material, which permit the establishment and exercise of that occupation – including the performance of quality and toxicity controls on products supplied, manual preparation and the lawful public sale of medicines. That a certain training and certain skills are required in order to be able to exercise the occupation is therefore no more than a professional safeguard. Legal restrictions, be they on access to pharmacy ownership or on the operation of a pharmacy as a business concern, are legitimate as restrictions laid down “in the public interest” or “inherent in the capacity” required of pharmacists.

Since in principle the legislative right to impose conditions on or restrict the exercise of the fundamental rights concerned is unquestionable, it follows that legal regulations conditioning or restricting access to a certain activity or occupation, or to private economic enterprise in a given field, are not unconstitutional unless they can in no way be justified by the specific terms of Articles 47.1 and 61.1 of the Constitution (the latter of which relates to private economic enterprise) or unless they exceed the general limits laid down in Articles 18.2 and 18.3 of the Constitution for legal measures restricting fundamental rights, freedoms and guarantees, namely:

- the requirement that restrictions be necessary and proportionate;
- the requirement that they be general, abstract and non-retroactive;
- the requirement that they respect the essential content of the constitutional principle establishing the right.

In the case at issue, there is no doubt that the restrictions challenged are general, abstract and non-retroactive. Further, it appears unlikely that the essential content of the freedoms referred to above is infringed by the placing of restrictions, in the form of qualification requirements, on the choice and exercise of the occupation of self-employed pharmacist and pharmacy owner. From the point of view of freedom to choose an occupation, then, it also needs to be ascertained whether the restrictions introduced by the legal rules in question can be deemed to be necessary and proportionate.

Today, the legal notion of proportionality, in the broad sense, severely limits the exercise of public authority, to the advantage of personal rights and freedoms. In various decisions, the Portuguese Constitutional Court, too, has already recognised and applied the principle of proportionality, frequently referring to it when examining criminal laws or laws of another kind which made rights subject to conditions or restrictions. As regards restrictions placed on rights, freedoms and guarantees, the proportionality requirement is inherent in Article 18.2 of the Constitution. Yet, as a general principle limiting the exercise of public authority, proportionality may be based upon the general principle of the rule of law. There need to be limits which take account of the relationship between public authorities' aims and measures. Legislators and government must adapt their proposals for action to their stated aims, rather than determine which measures they consider to serve no purpose or to be overly restrictive. Moreover, the principle of proportionality, in its broad sense, can be broken down analytically into three requirements linked to this relationship between measures and stated aims: the need to adapt the means to the ends, the requirement that the means be necessary or essential, and proportionality in the strict sense, implying a “just measure”.

On consideration of the various aims which the legislator hopes to achieve by means of the regulations whereby pharmacy ownership is reserved for pharmacists and by making it impossible to regard a pharmacy separately from its technical management, it can be concluded that these regulations are neither inappropriate nor unhelpful to the pursuit of these aims. This is true, firstly, of the aims of pharmaceutical activities, since it can reasonably be deduced that these arrangements not only favour the aims of public health, the public interest and pharmacists' professional and ethical independence, but do so more specifically, comprehensively or easily than could any provisions allowing for pharmacies to be freely owned. It is obviously also true of aims which are directly linked to pharmacy ownership – such as the conscientious performance of duties, the

owner's or manager's ethical obligations and responsibilities and keeping in check concentrations of ownership in the field of sale of pharmaceutical drugs.

Having examined the cited grounds, it can be concluded that the principles of indivisibility and of reserving ownership for pharmacists are not unreasonable. It can therefore be declared that these arrangements do not contravene the principle of proportionality (or "avoiding excess") – in particular when this principle is combined with the right to property or the freedom to exercise an occupation – as applicable even to restrictions on rights, freedoms and guarantees. Accordingly, as regards the legislator's stated aim of serving the public interest, these restrictions cannot be deemed to be inappropriate, unhelpful or disproportionate, and there is consequently no contravention of the principle of equality.

Summary:

The ombudsman applied for two legislative provisions reserving ownership of pharmacies for pharmacists to be declared unconstitutional. The applicant argued, first, that the legal consequence of these provisions was to place restrictions on the right to private property, which is enshrined in Article 62.1 of the Constitution; and second, that reserving pharmacy ownership for pharmacists was an exclusive business privilege which could not be justified on grounds of public health, since the law, which stipulated that a pharmacy's technical management must be supervised by a pharmacist responsible for the preparation of pharmaceuticals and for the public sale or distribution of medicines or medicinal products, and established the principle of pharmacists' independence for practical purposes, already adequately guaranteed public health protection.

On examination of the purpose of the rules in question and the grounds given for the application, it can be concluded that the principal aim of the application was to obtain an examination of the constitutionality of the rule reserving ownership of pharmacies serving the public for individual pharmacists or to commercial partnerships of pharmacists. The other provisions contested were secondary, or were designed to allow for the hypothetical case where the legal restrictions suddenly lapsed, because a pharmacy was acquired by a non-pharmacist, with undesirable consequences. In addition, the fact that these rules predated the entry into force of the Constitution in no way affects this viewpoint since, according to the application, they were substantively unconstitutional.

The claims of unconstitutionality were therefore as follows:

1. restriction placed on the freedom to transfer property (in breach of Article 62 of the Constitution);
2. restriction placed on the right to private economic enterprise (in breach of Article 61 of the Constitution);
3. breach of the principle of equality (a breach of Article 13 of the Constitution);
4. restriction placed on the freedom to choose one's occupation (in breach of Article 47.1 of the Constitution);
5. breach of the principle of proportionality (a breach of Article 18.2 of the Constitution).

The judgment opened with a brief summary of the basis of Portuguese legal provisions in this area, mentioning their history and conformity with international standards. The tradition whereby pharmacy ownership is reserved for pharmacists and the indivisibility in principle of ownership and technical management have been established in the Portuguese legal system since at least the 1830s. Similarly, in other European countries where pharmacies can be privately owned, ownership is most frequently reserved for pharmacists (either directly or through a company). A notable exception is the "liberal" United Kingdom model, under which anyone (including the companies which operate leading chain stores) may acquire a pharmacy.

In the framework of this abstract ex post facto review, the judgment concluding that the legal provisions in question were not unconstitutional obtained ten votes in favour, with two against.

Supplementary information:

In Judgment no. 76/85 the Constitutional Court had previously examined the constitutionality of a number of the provisions in question in relation to property rights and freedom of private economic enterprise. In doing so, it had taken account of the principle of equality and the obligation to adhere to the rule of collective acquisition of the principal means of production and the principle of the elimination of monopolies and of excessively large estates. At the time of the first revision of the Constitution, this obligation had been incorporated into Article 290.f. In that previous judgment, the Constitutional Court had concluded, with three dissenting votes, that the rules in question were not unconstitutional, so none of them were declared unconstitutional.

The present application for a ruling of unconstitutionality raised the following issues: first, the constitutionality of the rules contested and, second, the constitutionality of the rules restricting the transfer of pharmacy operation and the gift of pharmacies (these rules are another consequence of the restrictions placed on pharmacy ownership in the provisions already considered).

The subject of this application, and the majority of the questions of constitutionality which it raised, therefore partially overlapped with the issues resolved in Judgment no. 76/85. Nonetheless, where a judgment has previously been delivered dismissing a claim of unconstitutionality, the court can again rule on the same subject, whether the judgment was given as part of an ex post facto or a preventive review. In this regard, there was nothing to prevent an examination of the legal rules claimed in the present case to be unconstitutional, although the court had already issued one ruling on their constitutionality.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-1996-3-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 19.11.1996 / **e)** 140/1996 / **f)** / **g)** *Monitorul Oficial al României* (Official Gazette), 324/04.12.1996; *Curtea Constitutionala, Culegere de decizii si hotarâri* 1995-1996 (Official Digest), 709 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Public figure, status.

Headnotes:

The right to freedom of expression implies the right to unrestricted expression of any opinion or comment but also the duty to provide evidence in support of statements relating to an alleged offence committed by a person exercising a public function and to refrain from insults.

Summary:

During an ex-post review, the Constitutional Court ruled on a complaint that certain provisions of the Criminal Code concerning insults to authority were unconstitutional.

Article 16.1 of the Constitution, which sets out the principle of equality before the law, states that: "Citizens are equal before the law and public authorities, without any privilege or discrimination".

Regarding the principle of equality before the law, one of the fundamental rights of the citizen, namely the right to freedom of expression, including the freedom of the press, was dealt with in the aforementioned decision.

According to the Constitution, freedom of expression must not be prejudicial to the dignity, honour, privacy of person, and the right to one's own image.

These constitutional guarantees apply to all citizens equally, whether or not they exercise a public function.

In a trial relating to the aforementioned limits to freedom of expression, the question was raised whether freedom of expression could be limited in cases where statements were made concerning a person exercising a public function or who is identified with the authority on behalf of which he or she performs the duties pertaining to that function.

In the case of public authorities, particularly those consisting of a single person (eg. the President), the authority itself cannot be dissociated from the person who symbolises it and on behalf of which he or she performs his or her functions, under the conditions provided for in law.

The core of freedom of expression is the freedom to express opinions or comments which can also relate to simple facts. The limits on acceptable allegations are much broader when they relate to a politician than when they relate to other citizens, given the politician's role in society and the fact that, by its very nature, politics concerns everybody. However, this does not mean that the content and presentation of certain allegations can be used to damage the reputation of a politician by claiming that he or she is the perpetrator of certain imagined offences for which there is no evidence and no factual basis.

This is why the Constitutional Court ruled that opinions on political or moral issues or other comments could not constitute facts likely to damage the reputation of a person exercising a public office, but that insults or statements referring to unproven offences were an exception not covered by freedom of expression.

Languages:

Romanian.



Identification: ROM-2000-1-008

a) Romania / **b)** Constitutional Court / **c)** / **d)** 23.11.1999 / **e)** 199/1999 / **f)** Decision concerning the constitutionality of Sections 6 and 10 of the Organisation and Conduct of Public Meetings Act (no. 60/1991) / **g)** *Monitorul Oficial al României* (Official Gazette), 76/21.02.2000 / **h)** CODICES (English, French, Romanian).

Keywords of the systematic thesaurus:

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.

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

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

2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.

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

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

3.20 **General Principles** – Reasonableness.

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

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

Keywords of the alphabetical index:

Law, temporal conflict of laws / Demonstration, legal, prior authorisation, peaceful conduct / Public order.

Headnotes:

The legal requirement to seek approval to organise and conduct a public meeting is not unconstitutional. Freedom of assembly may lawfully be subject to limits and restrictions, to protect citizens' constitutional rights and freedoms.

Summary:

The Constitutional Court was asked to rule on the constitutionality of Sections 6 and 10 of the Organisa-

tion and Conduct of Public Meetings Act (no. 60/1991), on the grounds that they were in breach of Article 36 of the Constitution, on freedom of assembly, and Article 150 of the Constitution, on temporal conflict of laws.

The contested sections are as follows:

Section 6: The organisation of public meetings shall be declared to the municipality or other local authority where the meeting is to be held.

Section 10: After consultation with the local police, the local authority may prohibit the holding of the public meeting, if it has information that the conduct of the meeting would lead to a breach of Section 2 or if there are major construction or other public works at the location or on the route where the meeting is scheduled to take place.

The Constitutional Court found that Article 36 of the Constitution had to be taken in conjunction with Article 49 of the Constitution, since the exercise of freedom of assembly could be subject to certain legal restrictions and conditions, to ensure that citizens' constitutional rights and freedoms and their interests, and implicitly public order and national security, were not threatened.

In the context of Articles 11 and 20 of the Constitution, the Court noted that under Article 11 ECHR the right of assembly could be subject to certain restrictions which were prescribed by law and were necessary in a democratic society for the prevention of disorder, for the protection of morals or for the protection of the rights and freedoms of others. In this context, the European Court of Human Rights had ruled, in the cases of *Plattform Ärzte für das Leben v. Austria*, 1985, and *Rassemblement jurassien v. Switzerland*, 1979, that Article 11 ECHR allowed each state to adopt reasonable and appropriate measures to ensure the peaceful conduct of lawful demonstrations of its citizens, and that for gatherings taking place on the public highway, the requirement to seek prior authorisation was not unreasonable, since this would enable the authorities to ensure respect for public order and take the necessary measures to ensure that freedom to demonstrate was fully respected.

The Court found that since the contested provisions did not breach Article 36 of the Constitution, neither were they affected by Article 150.1, according to which laws and all other forms of legislation remained in force so long as they were compatible with the provisions of the Constitution.

Languages:

Romanian.



Identification: ROM-2001-2-005

a) Romania / b) Constitutional Court / c) / d) 03.07.2001 / e) 226/2001 / f) Decision no. 226 of 3 July 2001 on the constitutionality of the provisions of Section 6.a of Act no. 188/1999 on the Civil Service Regulations, with later amendments and supplements / g) *Monitorul Oficial al României* (Official Gazette), 605/26.09.2001 / h) CODICES (French).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.
 2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
 2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
 2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources.
 2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
 3.20 **General Principles** – Reasonableness.
 3.24 **General Principles** – Loyalty to the State.
 4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
 4.6.9.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or Nationality.
 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
 5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

International law, primacy / Civil service, specific requirement / Loyalty, to the nation, citizen, obligation.

Headnotes:

The condition laid down by Section 6.a of Act no. 188/1999 on the Civil Service Regulations, under which any person of solely Romanian nationality habitually resident in Romania is eligible to hold a civil service position does not infringe the right to work set out in Article 38.1 of the Constitution.

A person's access to an official post or high public office on these terms is consistent with the norms and provisions of international instruments.

The Constitutional Court has no active legislative functions, or capacities for revising the Constitution.

Summary:

In an interlocutory decision of 16 October 2000, the Bucharest Court of Appeal – Administrative Appeals Division – asked the Constitutional Court to rule on the objection challenging the constitutionality of the provisions of Section 6.a of Act no. 188/1999 on the Civil Service Regulations.

The impugned legislation was alleged to contravene the spirit and letter of the international human rights treaties ratified by Romania and forming part of its domestic law, since it discriminated against Romanian citizens on the ground of their dual or multiple nationality.

In this connection, reference was made to Articles 2, 21.1 and 21.2 of the Universal Declaration of Human Rights, Articles 2.2 and 6.1 of the International Covenant on Economic, Social and Cultural Rights, and Articles 2.1 and 25 of the International Covenant on Civil and Political Rights, together with Articles 5.9 and 7.5 of the Document of the Copenhagen Meeting.

The terms of Section 6.a of Act no. 188/1999 are as follows: a civil service post may be held by a person who fulfils the following conditions: a. being of solely Romanian nationality, and habitually resident in Romania. In considering the objection, the Court found that although the provisions of Section 6.a of Act no. 188/1999 were acknowledged to be fully in keeping with the terms of Article 16.3 of the Constitution, the objecting party had requested a review under Article 20 of the Constitution concerning

the primacy of international human rights provisions in the event of conflict with domestic law.

I. The Court observed that the true foundation for the request by the objecting party was Article 38.1 of the Constitution stipulating non-limitation of the right to work and free choice of occupation and workplace.

In the light of Articles 2 and 6 of the International Covenant on Economic, Social and Cultural Rights, the Court found that the right to work established by Article 38.1 of the Constitution could not be restrictively interpreted as the right of entry to either a regular civil service post or a similar post. Exercise of the right to work may be subject to conditions (education, age, etc) which are not to be construed as restricting the right to work. In the case of the civil service, there are other specific requirements besides these conditions.

The impugned legislation was fully in accordance with Articles 2 and 6 of the International Covenant on Economic, Social and Cultural Rights, with Articles 2, 23 and 29 of the Universal Declaration of Human Rights, and with Article 19.3 of the International Covenant on Civil and Political Rights. According to these provisions, the exercise of freedoms may by its very nature be subject to certain restrictions which must nevertheless be prescribed by law and necessary *inter alia* for maintaining national security or law and order.

Likewise concerning requirements as to the interpretation of Article 21 of the Universal Declaration of Human Rights as a whole, the Court made the observation that the provisions in question contemplate access to elected public offices, as long as these are deemed to embody paramount values of protection, expression of the people's will through genuine elections, the will of the people constituting the basis of the authority of the state, and elections held under procedures securing freedom of voting. Article 25 of the International Covenant on Civil and Political Rights has a similar purport.

It follows from the aforementioned international instruments that prohibition of all discrimination is not seen as unlimited but, in the context of a legal prescription may be assessed in terms of its reasonableness.

Consequently, the aforementioned rules and those of Articles 5.9 and 7.5 of the 1990 Document of the Copenhagen Meeting, prohibiting all discrimination in the exercise of civic rights, are not applicable to the case in point.

The Court also held that having regard to these international rules, the impugned statutory provisions met the requirements of Article 49 of the Constitution because the conditions which they stipulated were founded on interests relating to maintenance of national security. The conditions stipulated by law in this case were reasonable.

II. The court found Section 6.a of Act no. 188/1999 reflected in the provisions of Article 16.3 of the Constitution, interpreted in conjunction with Article 50 of the Constitution concerning loyalty to the nation. In the light of the foregoing, loyalty to the nation is clearly an essential obligation arising from the relationship of citizenship, a decisive one as regards regulation by the legislator of entry to certain official posts and high public offices. A similar condition is also found in Article 21.2 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights.

III. The Court also noted that from the legal theory angle, the expression “official posts and high public offices” could raise debate and criticism over their ambit and scope in one realm or another of community life and political affairs. Nonetheless, the Court does not have jurisdiction to modify, restrict or amplify the letter of the law without turning itself into an active legislator and thereby putting itself in the place of the parliament, the sole legislative authority.

IV. In the case in point, the Court correctly found the objection alleging unconstitutionality inadmissible in asking it to interpret a provision of the Constitution in such a way as to declare it incompatible with the international treaty framework relating to human rights. If it allowed the objection, the Court would take the revision of the Constitution upon itself, the effect of the decision being to nullify the application of the text.

In this way, the Court would extend the limits of its own jurisdiction.

Languages:

Romanian, French (translation by the Court).



Identification: ROM-2002-2-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.04.2002 / **e)** 129/2002 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 206 of the Penal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 399/2002 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Libel, through the press / Criminal law / Fact, material, concerning others.

Headnotes:

The provisions of Article 206 of the Penal Code which define defamatory acts as offences against the dignity of the individual are meant to safeguard other people's rights and freedoms and are not a violation of freedom of expression. This text concerns the punishment not of value judgments but of specific material facts about or ascribed to a person.

The inviolability of freedom of expression stipulated in Article 30.1 of the Constitution does not justify injury to the individual's dignity and right to a personal image. Freedom of expression is not an absolute freedom; it may have restrictions placed on it, provided that they are necessary for safeguarding the rights and freedoms of others.

The limits to freedom of expression must be established by law and must be necessary to ensure respect for the rights of others or protection of

national security, law and order, public health or public morality.

Summary:

The Constitutional Court had before it an objection alleging that the provisions of Article 206 of the Penal Code were unconstitutional.

In the statement of grounds for the objection, Article 206 of the Penal Code was alleged to infringe Articles 11.2 and 20 of the Constitution, in conjunction with the provisions of Article 10.1 ECHR and of Article 19.1.2 of the International Covenant on Civil and Political Rights. The objecting party asked the Court, also having regard to the provisions of Article 30 of the Constitution, to find the provisions of Article 206 of the Penal Code unconstitutional, at least in part from the angle of criminalising journalists' value judgments.

In its examination of the objection alleging unconstitutionality, the Court found that under the provisions of Article 206 of the Penal Code the legislator defined acts of defamation as punishable offences against human dignity, an essential value set forth in Article 1.3 of the Constitution. The impugned statute prescribes criminal sanctions for words, deeds and any other means whereby a person's honour or reputation is damaged, or for any statement or allegation in public of specific facts which, if true, would expose the person concerned to a criminal, administrative or disciplinary penalty or to public opprobrium, but not for value judgments.

The Court held that Article 206 of the Penal Code concerned punishment not for value judgments but for specific material facts about or ascribed to a person.

The Constitutional Court also found that not even the allegation of a violation of Article 10.1 ECHR was founded, because Article 10.2 ECHR requires that a measure restricting freedom be prescribed by law and necessary in a democratic society. In the cases relied on by the objecting party, *Dalban v. Romania*, and *Constantinescu v. Romania*, the European Court of Human Rights, having regard to the above criteria, held that the provisions of Article 206 of the Romanian Penal Code were not such as to infringe the provisions of Article 10 of the Convention.

The Court thus concluded that the provisions of Article 206 of the Penal Code concerning libel were not contrary to Article 30 of the Constitution (freedom of expression) or to the provisions of international human rights instruments.

Nor did the Court accept the argument that Articles 19.1 and 19.2 of the International Covenant on Civil and Political Rights had not been observed, considering that Article 19.3 thereof expressly prescribes the limits to freedom of expression.

Cross-references:

European Court of Human Rights:

- *Case Dalban v. Romania*, 28.09.1999, *Reports of judgments and decisions* 1999-VI;
- *Case Constantinescu v. Romania*, 27.06.2000, *Reports of judgments and decisions* 2000-VIII.

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-1996-2-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 27.03.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 04.04.1996 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Judicial bodies – Procedure.

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

4.7.15 **Institutions** – Judicial bodies – Legal assistance and representation of parties.

5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.

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

Keywords of the alphabetical index:

Lawyer, right of choice / State secret.

Headnotes:

The provisions of an Act, pursuant to which a lawyer could be barred from participating as a defence counsel in criminal proceedings connected with State secrets because he was not authorised to have access to State secrets, were found to be unconstitutional.

Summary:

The proceedings were instituted in the form of individual complaints lodged by citizens against the violation of their constitutional rights by certain sections of the State Secrets Act of the Russian Federation.

The reason for instituting the proceedings was the uncertainty that had arisen as to whether the provisions of the said law, whereby a lawyer could be barred from participating as defence counsel in criminal proceedings connected with State secrets

because he was not authorised to have access to State secrets, were in conformity with the Constitution of the Russian Federation.

The Constitution of the Russian Federation, international human rights instruments and federal legislation require the State to grant persons acting in the area of criminal procedure adequate guarantees of the protection of their rights and freedoms. Article 48 of the Constitution of the Russian Federation prescribes the right of everyone to receive qualified legal assistance and the assistance of a lawyer (defence counsel) at all stages of criminal proceedings. Pursuant to Article 14 of the International Covenant on Civil and Political Rights, which is part of the law of the Russian Federation, everyone, during the examination of the charges against him, shall be entitled to communicate with the defence counsel of his own choosing and to defend himself through such counsel.

Consequently, the refusal to allow the accused (the suspect) to take a lawyer of his own choosing on the grounds that the latter is not authorised to have access to State secrets, as well as the proposal made to the accused (the suspect) to choose his counsel from among a limited number of lawyers who have such access, pursuant to the application of the provisions of Section 21 of the State Secrets Act of the Russian Federation to the domain of criminal procedure, unlawfully restricted the constitutional right of citizens to receive qualified legal assistance and the right to an independent choice of counsel (Article 48 of the Constitution of the Russian Federation and Article 14 of the International Covenant on Civil and Political Rights). In conformity with Article 56.3 of the Constitution of the Russian Federation, the above-mentioned constitutional rights may not be restricted under any circumstances. The fact that the choice of counsel by the accused is subject to counsel's having authorised access to State secrets is also at variance with the adversarial principle and the principle of equal rights for the parties to proceedings, as set forth in Article 123.3 of the Constitution of the Russian Federation.

According to Article 2 of the Constitution of the Russian Federation, the individual and his rights and freedoms are the supreme value. Human and civil rights and freedoms determine the meaning, content and implementation of laws and the functioning of legislative and executive authority and are guaranteed by law (Article 18 of the Constitution of the Russian Federation).

Proceeding on the basis of these constitutional provisions, the legislator, in defining the measures and procedures for protecting State secrets, must

only make use of those which, in the given situation of the application of the law, exclude the possibility of a disproportionate restriction of human and civil rights and freedoms. In the framework of criminal procedure, these may result in particular in the exclusion of the public from hearings, in warning participants in the trial not to divulge State secrets made known to them in connection with the criminal proceedings, and in the prosecution of these persons if State secrets are divulged. Protecting State secrets during criminal proceedings is also secured by the provisions of the Regulations of the Bar of the RSFSR, approved by the RSFSR Act of 20 November 1980, which require lawyers to respect professional secrecy, not to commit offences incompatible with their membership of the Bar and to demonstrate model behaviour.

The legislator is also entitled to introduce other measures for safeguarding State secrets during criminal proceedings, but these must, however, have a criminal procedure aspect and be consistent with the importance of the secret and the legal status of the participants in the criminal proceedings.

The Constitutional Court of the Russian Federation found the text of Section 21 of the Russian Federation's State Secrets Act to be in conformity with the Constitution.

The application of the provisions of this section to lawyers participating as defence counsel in criminal proceedings and the barring from participation in the case of those not authorised to obtain access to State secrets, however, was held to be unconstitutional.

The Federal Assembly of the Russian Federation must, in light of this Decision, make the necessary changes to the legislation in force.

Languages:

Russian, French (translation by the Court).



Identification: RUS-1996-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 28.10.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 06.11.1996 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Judicial bodies – Procedure.

5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.

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

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

Keywords of the alphabetical index:

Case, criminal, termination of proceedings.

Headnotes:

The termination of criminal proceedings following a change in circumstances does not mean that the accused is guilty of committing an offence, does not prevent him or her from exercising his or her right to legal protection, and presupposes that he or she agrees to the termination of the proceedings for the reasons given.

Summary:

Criminal proceedings were brought against Mr O.V. Sushkov, for abuse of authority, under Article 6 of the Code of Criminal Procedure, which provides for the possibility of terminating criminal proceedings because of a change in circumstances, if the act committed by the person concerned no longer constitutes a threat to society or if the person has ceased to be a danger to society.

In his complaint to the Constitutional Court of the Russian Federation, the applicant asked the Court to recognise that Article 6 of the Code of Criminal Procedure did not comply with the Constitution because it violated the constitutional principle of presumption of innocence, failing to give the accused the right to object against the termination of proceedings and demand that the court consider the merits of the case.

Under the Constitution of the Russian Federation, any person charged with an offence is presumed innocent until his or her guilt has been proven in accordance with the procedures provided for by the federal legislation and confirmed by a court sentence which is final (Article 49.1 of the Constitution); everyone is guaranteed legal protection of his/her rights and freedoms and has the right to appeal in court against decisions and actions (or inaction) on the part of state authorities and officials (Article 46.1 and 46.2 of the

Constitution). Presumption of innocence and the right of citizens to legal protection are among the rights referred to in Article 56.3 of the Constitution of the Russian Federation which may not be restricted under any circumstances.

To resolve the matter of the constitutionality of Article 6 of the Code of Criminal Procedure, it is necessary to compare it systematically with the aforementioned provisions of the Constitution as well as the provisions of other Articles of the Code of Criminal Procedure, particularly Article 13, which states that justice in criminal cases can only be administered by courts.

On this basis, the decision to terminate proceedings, taken in accordance with the disputed rule, does not replace a court judgment and therefore it is not an act which establishes the guilt of the accused under the terms of Article 49 of the Constitution.

However, Article 6 of the Code of Criminal Procedure contains no direct instructions as to the need to obtain the agreement of the person concerned before terminating criminal proceedings. Moreover, an agreement of this nature was not demanded in practice, which led to violations of the constitutional right to legal protection and presumption of innocence.

Nonetheless, Article 6 of the Code of Criminal Procedure, both in its strictest sense and in the meaning which is now attributed to it by case-law, does not prevent an appeal in court against the decision to terminate proceedings, and, by extension, is not in breach of the Constitution of the Russian Federation.

Languages:

Russian, French (translation by the Court).



Identification: RUS-1996-3-009

a) Russia / **b)** Constitutional Court / **c)** / **d)** 17.12.1996 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 26.12.1996 / **h)** CODICES (English, German).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 4.10.7 **Institutions** – Public finances – Taxation.
- 5.1.1.5 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 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 – Right to property.
- 5.3.41 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Inspectorate, tax / Payment of taxes.

Headnotes:

Provisions of the Federal Tax Inspectorate Act giving the tax inspectorate the right to recover tax arrears from legal entities along with any fines incurred by late payment without there being any right to lodge an objection were not in breach of the Constitution since under Article 46 of the Constitution, legal entities from which such tax arrears have been recovered without the right to lodge an objection are entitled to appeal against the tax inspectorate's decision in court.

Summary:

The tax inspectorate recovers tax arrears from legal entities without there being any right to lodge an objection or object to the amounts of fines or other penalties prescribed by the law. A failure to pay taxes in time must be offset by a reimbursement of the overdue tax and complete compensation of the loss incurred by the State owing to the late payment of the tax. It is for this reason that the legislator has the right to demand payment of a sum in addition to the unpaid tax (the arrears) to cover the losses of the Treasury caused by the fact that they are prevented from collecting the entire sum of tax they are owed in time.

The strict system for the recovery of payments from such taxpayers stems from the compulsory and coercive nature of taxation under the law.

Recovery of the entire amount of tax on income (or profit) that has been concealed or only partially declared, as well as any fine, is, to all intents and purposes, more than just recovery of tax arrears as such. The strict system of recovering these pay-

ments, in the event that the taxpayer does not consent, through a decision of the tax inspectorate constitutes an excessive restriction on the right enshrined in the Constitution whereby nobody may be deprived of his/her property other than by a decision of the courts.

The case was brought to court following complaints from a group of legal entities that their constitutional rights and freedoms had been violated under Section 11 of the Russian Federation's Federal Tax Inspectorate Act in a number of specific cases.

The reason for initiating proceedings was the uncertainty as to whether the disputed provisions of the aforementioned Act were in accordance with the Constitution of the Russian Federation.

Fiscal law relationships are based on the subordination of one party to another. It is assumed that the fiscal authorities, working on behalf of the State, will have all the power whereas the taxpayer only has the duty to obey. The tax authorities' claim and the taxpayer's debt derive from the law and not from an agreement.

Legal entities are guaranteed judicial protection of their rights in rem. The strict system of tax recovery followed up by a judicial review designed to protect the rights of legal entities is not in breach of the provisions of the Constitution. The constitutional rights of the individual and the citizen enshrined in the Constitution also cover legal entities in so far as they can, by their very nature, be applied to them.

Languages:

Russian.



Identification: RUS-1999-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 02.02.1999 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 10.02.1999 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.

5.2 **Fundamental Rights** – Equality.

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

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

5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

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

Keywords of the alphabetical index:

Death penalty / Jurisdiction, territorial / Assize court, right to have a case heard by the assize court / Criminal procedure.

Headnotes:

Until the law granting the right to trial by jury to all persons charged with an offence carrying the death penalty comes into force, the death penalty cannot be enforced.

Summary:

The Constitutional Court heard a case concerning the constitutionality of a number of legislative provisions relating to the Assize Court. The case was heard following a request from the Moscow City Court and complaints from a number of citizens.

The Constitutional Court found as follows:

When the assize court was set up on 16 July 1993, the federal law on amendments and additions to certain legal instruments was passed. The act came into force on the date of its publication, but in its entirety in only 9 of the 89 constituent entities of the Russian Federation.

Under Article 41 of the Code of Criminal Procedure, cases are tried by the court in the judicial district in which the offence was committed; if it is impossible to decide where the offence was committed, the case falls under the jurisdiction of the court in the judicial district in which the preliminary investigation or inquiry was completed. Under Article 42 of the Code of Criminal Procedure, cases which for whatever reason fall simultaneously under the jurisdiction of several equivalent courts are tried by the court in the judicial

district in which the preliminary investigation or inquiry was completed.

The applicants considered that this could be used to justify refusing the right to trial by jury, as enshrined in Article 20 of the Constitution, to citizens charged with offences carrying the death penalty, in cases where no such courts had been set up in the territories concerned.

These and other legislative provisions were applied in specific cases and were used to justify refusing the right to trial by jury, as enshrined in Article 20 of the Constitution, to persons charged with offences carrying the death penalty.

Under Article 20.2 of the Constitution, until the death penalty is abolished, it may be imposed under federal law as an exceptional punishment for especially grave offences against the person, with the accused having the right to trial by jury.

It follows from this provision, in conjunction with Articles 18 and 46.1 of the Constitution, that in such cases the right of the accused to trial by jury is a specific guarantee of the right of every citizen to life (as a fundamental, inalienable right enjoyed by everyone from birth), a right explicitly secured in the Constitution itself.

Article 19 of the Constitution provides that all people are equal before the law and in a court of law. Accordingly, the right to trial by jury must be guaranteed, on an equal basis and to the same extent, to all persons charged with a serious offence regardless where the offence was committed, which court has general jurisdiction and which has specific jurisdiction over such cases and other similar circumstances.

The justification for the legislature's decision to institute trial by jury in only nine of the constituent entities of the Federation initially, having regard to the provisions of the former Constitution and organisational, material and technical considerations, was that trial by jury was to be introduced gradually as the judicial reform process advanced. However, that did not mean that there was no need to guarantee the right to trial by jury to all persons, everywhere, charged with offences carrying the death penalty; still less that legislation should not be passed, once the new Constitution came into force, ensuring that this right was exercisable throughout the country.

The contested provisions, which introduced trial by jury in only nine of the constituent entities of the Federation initially, are therefore not at variance with the Constitution.

In adopting the new Constitution and pursuing judicial reform, the legislature was required, in keeping with Section 6.1 of Title 2 ("Final and Transitional Provisions" and Article 20.2 of the Constitution), to ensure that suitable procedural machinery was in place for persons charged with serious offences, throughout the territory of the Federation, to exercise the right enshrined in the above-mentioned article.

It is over five years since the Constitution was adopted, which is a sufficient length of time for the legislature to have fulfilled this requirement. However, no changes to this effect have as yet been made to the law. What was intended as a transitional provision is in fact becoming a permanent restriction and therefore conflicts with Articles 19, 20.2 and 46.1 of the Constitution.

The Constitutional Court ruled as follows:

Persons charged with an offence for which federal law prescribes the death penalty as an exceptional penalty must in all cases have an effective right to trial by jury. Consequently, the Federal Assembly should immediately amend the legislation to ensure that throughout the territory of the Federation, all persons charged with an offence for which federal law prescribes the death penalty as an exceptional penalty are able to exercise this right. Until a law guaranteeing this right throughout the territory of the Federation comes into force, no person may be sentenced to death.

Languages:

Russian.



Identification: RUS-2002-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 14.03.2002 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.03.2002 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.

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

4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.

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

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

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

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

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

Keywords of the alphabetical index:

Arrest, warrant / Judgment, guarantees / Detention, maximum length / Constitution, transitional provisions.

Headnotes:

Keeping persons in custody, the arrest or provisional detention of a person for a period of more than 48 hours without a trial as prescribed by the Code of Criminal Procedure do not comply with the Constitution.

Summary:

The examination of the case was initiated on the basis of complaints of several citizens against the provisions of the Code of Criminal Procedure of the RSFSR, according to which the restriction of the liberty and personal inviolability of persons suspected of committing a crime for a period of 48 hours with the authorisation of the prosecutor but in the absence of a judgment is admissible. The applicants considered that these provisions were contrary to Article 22.2 of the Constitution, according to which arrest, custody and provisional detention are only allowed upon a court judgment and according to which a person cannot remain in custody for more than 48 hours unless a court judgment is delivered.

The Constitutional Court noted first of all that the right to liberty and personal inviolability enshrined in the Constitution is a fundamental human right. Specific constitutional guarantees in the sphere of criminal procedure for the judicial protection of this right have direct effect and consequently define the meaning, contents and application of the relevant provisions of criminal procedural legislation.

The Constitution of 1993 states in the Chapter on Concluding and Interim Provisions that until such time as the criminal procedural legislation of the Russian Federation has been brought into line with the provisions of the Constitution, the previous rules for arrest, detention and holding in custody of persons suspected of committing a crime shall be preserved. The Constitution imposes on the legislative body an obligation to introduce the necessary modifications in the legislation during this transitional period without specifying the duration of this transitional period.

The interim nature of arrest, provisional detention and custody procedures under the legislation previously in force was confirmed by the Federal Law of 1998 on the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols to the Convention. Referring to Articles 5.3 and 5.4 ECHR this law limited the application of the clauses to the period necessary to introduce the required modifications in the legislation.

If a right derives directly from the Constitution and the passing of a law is necessary to guarantee its authority, such a law must be adopted as soon as possible. The Constitutional Court has repeatedly stressed that since the adoption of the Constitution a significant time period has passed, sufficient for the legislative body to have enacted new legislation on criminal procedure so as to harmonise it with the Constitution. As this has not been done, the constitutional value of the interim provisions of the Constitution has changed. In other words, the interim regulations acquire in reality a permanent effect and thus violate both the right guaranteed by Article 22 of the Constitution and the principle of the direct effect of the rights and freedoms of humans and citizens. This amounts to a refusal to implement the guaranteed mechanism of judicial protection of established rights and freedoms, in particular by Article 9.3 of the International Covenant of Civil and Political Rights and by Article 5.3 ECHR.

Furthermore, the Constitutional Court observed that a new Code of Criminal Procedure was adopted on 18 December 2001. Under its provisions only a court is competent to rule on custody matters. However, in accordance with the Federal Law on the Entry into Force of the Code of Criminal Procedure, its provisions shall enter into force as of 1 January 2004; until then the prosecutor will make the decisions on the matter, as was previously the case.

It is to be noted that since the previous procedure will be maintained until the aforementioned date, the legal requirement under the Concluding and Interim

Provisions Chapter of the Constitution was applied in a strictly formal fashion by the legislative body, thereby violating the real meaning of this provision.

The Constitutional Court found that the challenged provisions of the Code of Criminal Procedure of the RSFSR were not in conformity with the Constitution and thus were inapplicable as of 1 July 2002.

The Federal Assembly must take steps immediately to introduce modifications and ensure the enforcement, as of 1 July 2002, of legal standards, introducing a judicial procedure upon arrest or remand in custody or the provisional detention of a suspected person for a period exceeding 48 hours.

Languages:

Russian.



Identification: RUS-2003-3-002

a) Russia / b) Constitutional Court / c) / d) 01.04.2003 / e) / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 09.04.2003 / h) CODICES (Russian).

Keywords of the systematic thesaurus:

- 3.18 **General Principles** – General interest.
- 3.16 **General Principles** – Proportionality.
- 3.25 **General Principles** – Market economy.
- 4.15 **Institutions** – Exercise of public functions by private bodies.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Audit, mandatory / Audit, performance, authorised auditor.

Headnotes:

The requirement that audits must be performed exclusively by audit organisations and not by individual auditors is designed to uphold the public interest and guarantee the authenticity of official accountancy. It cannot in itself be considered as an excessive restriction on freedom of business, as provided for in the Constitution.

Summary:

Further to an appeal lodged by a member of the public, an individual auditor, the Constitutional Court considered the constitutionality of a provision of the Federal Law on “auditing” to the effect that mandatory audits must be carried out by audit organisations.

The appellant contended that this provision unjustifiably restricted freedom of business, as provided for in the Constitution and exercised on the basis of the equality of all before the law and the courts.

The Court noted that, in accordance with the Constitution, freedom of business is governed by the law. Since this freedom is not absolute, it may be restricted by the law, but solely for the purposes set out in the Constitution. This is also in line with Article 1 Protocol 1 ECHR.

The challenged law describes auditing as a business activity carried out by audit organisations acting as legal entities and by directors of companies where no legal entity exists (individual auditors). Auditing is carried out either on the basis of a contract or on a mandatory basis, within the time-limits provided for by law.

The need for mandatory audits depends on the legal and institutional status of the entities being audited (open public companies), the nature of their functions (credit and insurance organisations, stock exchanges, investment funds), or the volume of their receipts. These circumstances are taken into account with the aim of defending the rights and legitimate interests of other persons and ensuring the economic security of the State. This necessitates establishing high-level guarantees of the authenticity of the relevant financial accounting system. One such guarantee is a mandatory audit carried out by independent audit organisations in the public interest.

Given that mandatory audits are designed to uphold the public interest and ensure the authenticity of official accountancy, the Federal legislative body is entitled to define the legal and institutional form to be taken by such independent mandatory audits.

The challenged law stipulates that a mandatory audit by an audit organisation should be conducted by individual auditors holding an auditor's qualification, who carry out the audit as employees of the audit organisation or as persons engaged by the latter on the basis of a civil-law contract. The auditor in question may also be the founder or joint founder of the audit organisation.

Accordingly, the challenged provision does not prevent an individual auditor from performing a mandatory audit in his/her capacity as employee of an audit organisation or from being its founder or joint founder. It cannot be considered as an excessive restriction on constitutional rights and freedoms, and is therefore not contrary to the Constitution.

Languages:

Russian.



Identification: RUS-2003-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 30.10.2003 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 31.10.2003 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

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

4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.

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

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

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

5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

5.3.40.3 **Fundamental Rights** – Civil and political rights – Electoral rights – Freedom of voting.

Keywords of the alphabetical index:

Election, propaganda / Election, campaign, media, coverage.

Headnotes:

In limiting the right of the media to publish election propaganda during the election campaign, the legislature must retain the balance between the constitutional values protected, in particular the right to free elections and freedom of speech and information. Only the inherence in the material of a special aim – to win voters over to a cause – may serve as a criterion on which to distinguish election propaganda and information.

Where the existence of a special aim of making propaganda has not been established through judicial channels, the actions of the media cannot be regarded as constituting propaganda or as a violation of a corresponding prohibition.

Summary:

Upon application by a group of deputies in the State Duma and the petitions of a number of citizens, the Constitutional Court examined the constitutionality of certain provisions of the federal law 'On the main guarantees of election rights'.

According to Article 45.5 of the law, communications on electoral activities in radio and television broadcasts and in the press must be disseminated exclusively by a separate information broadcast, without commentary; they must not give preference to any candidates whatsoever.

Article 48.2 of the law recognises as election propaganda during the election campaign:

- the expression of a preference for any candidates;
- a description of the possible consequences should candidates be elected or not be elected;
- the dissemination of information with a clear preponderance of information about specific candidates;
- activities tending to create a positive or negative attitude among voters towards candidates; and
- other activities intended to invite or inviting voters to vote for candidates.

Article 48 of the law also prohibits representatives of the media from engaging in election propaganda in the course of their professional activities.

The applicants maintain that those provisions constitute a disproportionate restriction of the right to free elections, freedom of speech and the right to information, and violate the guarantees of the freedom of mass media.

The Court noted that for the purposes of the Constitution, the Federal legislature, in order to guarantee free elections, is entitled to establish the procedures and the conditions of their informational security. At the same time, elections cannot be regarded as free unless freedom of information and freedom of expression are guaranteed. It is for that reason that the legislature must guarantee the rights of citizens while maintaining a balance between the constitutionally protected values, in particular the right to free elections and freedom of speech and information, without allowing either inequality or disproportionate restrictions.

The performance by the media of the social function of ensuring the informational security of elections is destined to foster the manifestation of the intentional will of the citizens and the public nature of elections. Since the enjoyment of the freedom of mass information places special obligations and particular responsibility on the media, the media must adopt ethical and considered positions and treat election campaigns in a fair, balanced and impartial manner.

The contested law delimits in election information electoral propaganda and information for voters. In carrying out their professional activities, media representatives must not engage in propaganda; where they infringe this prohibition they incur administrative liability.

The purpose of delimiting information for voters and electoral propaganda is to ensure the free manifestation of the will of citizens and the public nature of elections: that corresponds to the constitutional requirements. The freedom of the media to express opinions cannot be identified with the freedom to engage in election propaganda, for which the requirements of objectivity are not essential. Accordingly, in order to defend the right to free elections, federal law may in principle restrict the freedom of media representatives to express opinions.

Furthermore, the restrictions on constitutional rights must be necessary and proportionate to the constitutionally recognised aims of such restrictions.

Nor can the legislature impair the very essence of such a right.

In assessing the constitutionality of the contested provisions in the light of those considerations, the Constitutional Court made the following observations.

Since propaganda as well as information, whatever its nature, may cause the voters to make a particular choice, only the inherence in the material of a special aim, namely to win voters over to a cause, may serve as a criterion for distinguishing election propaganda from information. Otherwise, all activities involving the provision of information to the voters would constitute propaganda, which, by virtue of the prohibition in force for the media, would constitute a disproportionate restriction of the constitutional guarantees of freedom of speech and information and would violate the principles of free and public elections. The consequences of propaganda as an infringement on the part of the media are not an objective element of the offence, which is made out only by an unlawful act. Therefore, intention, as a necessary and subjective element of such an offence, cannot relate to the consequences and consists only in awareness of the direct aim of the unlawful act in question. It is for that reason that the provision of information to voters by the media cannot be recognised as (an exercise in) propaganda unless it is found by the courts to be intended as such.

Therefore it is not permissible to give a broad interpretation to the actions of the public media indicated in Article 48.2 of the law as offences, without establishing that they incline particularly to propaganda.

In turn, Article 45.5 of the law cannot be interpreted broadly as prohibiting the media from expressing their own opinion and commenting in programmes other than the separate broadcasts, since it is only these broadcasts that must not contain commentaries or express a preference for particular candidates.

Finally, the Court recognised that the provisions in issue are not contrary to the Constitution if its interpretation is followed.

At the same time, the Court held that the provision of Article 48.2, which regards propaganda as 'other acts intended to invite or inviting the voters to vote for certain candidates' was not compatible with the Constitution.

In the Court's opinion, the use of the expression 'other acts' permits a broad interpretation and arbitrary application of the provision. Furthermore, the

legislature's use of the concept of 'acts (...) inviting to vote' leads to an assessment of the consequences of the propaganda instead of revealing an aim – to invite the voters to vote in a specific way.

Languages:

Russian.



Slovakia

Constitutional Court

Important decisions

Identification: SVK-1995-3-008

a) Slovakia / **b)** Constitutional Court / **c)** Second Panel / **d)** 13.12.1995 / **e)** II.US 94/95 / **f)** Case of constitutional conflict between a generally binding rule passed by a local self-government and fundamental rights of citizens / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), 3/1996, in brief; *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), in complete version / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
 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.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Local self-government, legislative power.

Headnotes:

Local authorities are vested with the power to impose duties on persons to a limited degree, within the limits of the rights and freedoms regulated by the Constitution.

Summary:

The Attorney General of the Slovak Republic brought to the Constitutional Court, under Article 125, a petition on the constitutional conflict between

generally binding rule no. 23/1995 passed by a local authority in the city district of Bratislava-Karlova Ves and the Constitution. Consumption of all drinks containing more than 0.75% of alcohol at public places was prohibited by generally binding rule no. 23/1995. The Attorney General found this prohibition to be in conflict with Articles 2.3, 13.1, 13.2, 20 and 68 of the Constitution as well as with the Charter of Fundamental Rights and Liberties, Law no. 372/1990 On Petty Offences and Law no. 369/1990 On Self-Government in Municipalities.

The main issue for the Constitutional Court when deciding the case was the relationship between Article 2.3 of the Constitution and its 4th Chapter on local self-government. Under Article 2.3, "Anyone may act in a way not forbidden by law and no one may be forced to act in a way not prescribed by law." The pivotal question was whether the word "law" in Article 2.3 could be identified with a "generally binding rule" passed by the local authority. The Constitutional Court ruled that the word "law" means solely the laws adopted by Parliament through a procedure provided by the Constitution in its provisions on the law-making power of the National Council of the Slovak Republic.

The Constitutional Court further ruled that the legal rights of citizens may be limited only if two conditions are met. The first one is a formal prerequisite provided for in Article 2.3 of the Constitution. The second sine qua non condition is a material provision set out in Article 13.4 of the Constitution. This provision reads: "When imposing restrictions on constitutional rights and freedoms, respect must be given to the essence and meaning of these rights and freedoms."

The right to privacy is guaranteed by Article 16.1 of the Constitution. The Constitutional Court ruled that the very essence of this right is to prevent public authorities and state bodies including local authorities, from imposing on individuals restrictions that are not absolutely necessary. In the same way that the Law on Petty Offences and Law no. 46/1989 on Protection from Alcoholism, Smoking and Other Forms of Toxicomania allow for the protection of public order from the breach of public peace by noisy persons, drunk persons, etc., the municipal authority had the power to protect public peace through laws adopted for the whole country, without having to adopt a generally binding rule of its own. Accordingly the prohibition on drinking within the city district imposed on persons living or staying was not strictly necessary. Furthermore, the chance to be free from public authorities' interferences deriving from the right to privacy is in some respect guaranteed not only behind closed doors but also in public places. This right was not respected by the municipal authority

that imposed its prohibition on every person without reference to individual conduct or to any real participation in a breach of public peace. On these grounds the Constitutional Court decided that the generally binding rule passed by the municipal authority of Bratislava-Karlova Ves was not in conformity with the provisions of the Slovak Constitution.

Languages:

Slovak.



Identification: SVK-1998-2-005

a) Slovakia / **b)** Constitutional Court / **c)** Plenary / **d)** 28.05.1998 / **e)** PL. US 18/97 / **f)** Petition from members of Parliament / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), 209/1998, in brief; *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), in complete version / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
 5.3.25 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Conscientious objection, legal effect / Weapon, licence to carry / Conscientious objection, prohibition on carrying weapons.

Headnotes:

"Injury to rights" (Article 12.4 of the Constitution) means any situation when the only reason for excluding a person from a right is the previous exercise of some other fundamental right or freedom.

Summary:

The petitioner, a group of 32 members of the Parliament, claimed a constitutional conflict between the provisions of Articles 6.1.i and 10.1 of the Law on Weapons and Ammunition, and Article 25.2 of the Constitution taken in conjunction with Articles 12.1 and 12.4 of the Constitution.

Law no. 246/1993 on Weapons and Ammunition has been amended by Law no. 284/1995 so that a person applying for a licence to carry a gun is obliged to give evidence that he has not refused to perform military service or military exercise. If a licence holder later refuses to perform his military service or military exercise, this constitutes grounds for withdrawing the licence from him. The legal grounds are Articles 6.1.i and 10.1 of the amendment no. 284/1995. The petitioner claimed a constitutional conflict between those provisions and Article 25.2 of the Constitution: "No person may be forced to perform military duties if it is contrary to his or her conscience or religious faith or conviction. Further details shall be specified by law" if read in conjunction with two other constitutional provisions according to which: "All human beings are free and equal in dignity and rights. Their fundamental rights and freedoms are inalienable, irrevocable and absolutely perpetual" (Article 12.1 of the Constitution), and "No person shall suffer injury to his or her rights just because of exercising his or her fundamental right or freedom" (Article 12.4 of the Constitution).

The Constitutional Court reasoned first of all that the words "injury to rights" might not be identified with the right previously obtained. The Court held that those words mean any restriction imposed on the opportunity to obtain some right if such restriction resulted exclusively from a previous exercise of another fundamental right or freedom. The Court thus ruled that "injury to rights" means any situation when the only reason why a person was excluded from obtaining some right was a previous exercise of some other fundamental right or freedom by the same person.

According to Law no. 246/1993 as amended by Law no. 284/1995 a person was entitled to receive a licence to carry a gun on the condition that this person had not refused to exercise his constitutional right not to perform military duties. If the same person had exercised the constitutional right not to perform his military service, the licence to carry a gun would not have been given to him or would have been withdrawn from him. Exercise of the constitutional right guaranteed under Article 25.2 of the Constitution due to that regulation resulted in loss of the right set up by Law no. 246/1993. The Court found it contrary to the Constitution.

Languages:

Slovak.

*Identification: SVK-1999-1-001*

a) Slovakia / **b)** Constitutional Court / **c)** Plenary / **d)** 11.03.1999 / **e)** Pl. ÚS 15/98 / **f)** Constitutional conflict between the Constitution and the law / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.3.1 **General Principles** – Democracy – Representative democracy.
- 3.9 **General Principles** – Rule of law.
- 4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
- 4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
- 5.3.38.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Election, parliament, central committee, decisions / Election, electoral coalition, definition / Election, campaign, access to media / International law, status.

Headnotes:

The rights and freedoms guaranteed by international treaties on human rights and fundamental freedoms have a supportive relevance, especially with respect to the interpretation of the Constitution.

The Constitution cannot be interpreted in a manner that would result in the violation of an international treaty on human rights as long as the Slovak Republic is a party to such treaty.

Summary:

Through a motion for abstract review, a faction of members of Parliament challenged several provisions of the amendment to the Act on Elections to the National Council of the Slovak Republic, alleging a violation of various constitutional provisions, including freedom of expression, the right of equal access to elected offices, the principle of free political competition and the right of access to a court, as well as Articles 6.1 and 10 ECHR.

The Constitutional Court upheld several of the contested decisions, but held that the limitations imposed upon the access of a political party to judicial proceedings in electoral matters and upon the right of private TV stations to broadcast political campaign advertisements were unconstitutional.

Most importantly from the vantage point of the topic of this Special Bulletin, the Constitutional Court reaffirmed one of its early decisions when it stated that international treaties on human rights and fundamental freedoms were to be approached as a source of interpretive support in the judicial application of the Constitution. Moreover, according to the Constitutional Court the Constitution cannot be interpreted in a manner that would result in the violation of an international treaty on human rights if the Slovak Republic was a party to such treaty.

Languages:

Slovak.

*Identification: SVK-2000-3-005*

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 12.09.2000 / **e)** II.US 7/00 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.17 **General Principles** – Weighing of interests.
 4.7.8 **Institutions** – Judicial bodies – Ordinary courts.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13.6 **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 – Public hearings.
 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Hearing, public, tape recordings / Proceedings, purpose, fulfilment.

Headnotes:

A participant in civil proceedings has the right to make a sound recording of an open oral hearing without the prior consent of the court.

Summary:

The applicant was a participant in civil proceedings before a District Court. He recorded the proceedings on a tape recorder during the open hearing. Upon discovering this fact the presiding judge called on him not to record the proceedings without the consent of the court and instructed him to turn off the tape recorder.

The applicant filed a motion (petition) at the Constitutional Court seeking a pronouncement that his fundamental right to information, as guaranteed in Article 26.1 and 26.2 of the Constitution and in

Article 10.1 ECHR was infringed through the procedure of the court of first instance.

After accepting the petition, the Constitutional Court found that within Article 26 of the Constitution there are two groups of conduct and activities. First, those which require permission, which is a necessary condition for their exercise, e.g. "enterprise in the field of broadcasting and television may be liable to permission from the state". Second, those which may be performed without permission from any state authority. Supposing that there occur such circumstances as are mentioned in Article 26.4 of the Constitution they may however be restricted by law (if the restrictions are necessary in a democratic society for the protection of rights and freedoms of others, national security, public order, and the protection of public health and morals).

Concerning this case, the laws defining the right to information in connection with the possibility and means of obtaining it are the Code of Civil Procedure (§§ 116.2 and 117.1) and the Law on Courts and Judges.

According to the legal opinion of the Constitutional Court, the Code of Civil Procedure establishes the boundaries of judicial decision-making on measures needed for controlling the behaviour of people present at proceedings, on the conduct of proceedings with regard to their dignified and uninterrupted course, as well as on the appropriateness of measures for ensuring the fulfilment of the purpose of proceedings.

If the application of these measures could lead as a consequence to an infringement of the right guaranteed in Article 26.2 of the Constitution the judge is restricted by some of the purposes enumerated in Article 26.4 of the Constitution. The measures objected to in this case were assessed by the Constitutional Court as those stipulated by law for the protection of public order and for the protection of the rights and freedoms of others. In conformity with the Constitution, the right to information according to Article 26.1 and 26.2 of the Constitution may only be restricted and not excluded by such measures.

The Constitution does not include any restriction on the acquisition of information concerning the activity of the authorities of the Republic or the activity of the authorities of judicial power. The applicant was in the position of a participant in civil proceedings which, on the one hand, forms a generally accessible information source for the public and, on the other, represents a special source of information for each participant in the proceedings. Constitutional and legal guarantees of the right to information derive

from the status of a participant in civil proceedings. Apart from the constitutional law which guarantees every person the right to acquire and search for information in the sense of Article 26.1 and 26.2 of the Constitution, a participant in legal proceedings also has the legal right to search for information (e.g. the right to look in the court records) or to be informed (the right to be supplied with court documentation).

Neither the Constitution nor the legal regulation specify the ways in which a participant in proceedings may acquire information. They leave it to the discretion of each participant to decide how to apply the right to acquire information (whether he/she will make notes, memorise it or make use of devices intended for making sound recordings).

In this case, the single judge pronounced her finding that the applicant was recording the proceedings without the consent of the court and combined it directly with a demand to turn off the tape recorder. The judge made the consent of the court the condition for exercising the freedom to acquire information by making use of a device intended for making sound recordings.

A prohibition which may be lifted subject to the granting of permission may only be applied in situations where, on the basis of law, a certain right may be made available as and when a state authority gives prior permission for its exercise. The single judge assumed she could make such a prohibition with regard to her powers resulting from particular provisions of the Law on Courts and Judges.

The provision of this Law, however, concerns the use of video technology, and in the field of audio technology it concerns only long-distance transmission (broadcasting, television) but not tape recordings, unless they are simultaneously reproduced over a distance.

Whereas the Law on Courts and Judges does not require the consent of the presiding judge (single judge) for making a sound recording (as distinct from making a video recording or picture and sound broadcast) and nor does any other legal regulation, the Court expressed the opinion that the powers of the presiding judge include only that of adopting the "appropriate measures" of the relevant provision of the Code of Civil Procedure.

On the basis of the observed facts, the Constitutional Court found that the single judge's instruction not to record the course of the proceedings without her consent, combined with the requirement to turn off the tape recorder, amounted to a prohibition which

could be lifted if permission was granted. This exceeded the possibility of restricting the fundamental right to acquire information as stipulated by law. It is neither an appropriate nor a commensurate measure according to the Code of Civil Procedure or the Law on Courts and Judges. In this way the procedure of the District Court at the open hearing led to an infringement of the applicant's fundamental right according to Article 26.1 and 26.2 of the Constitution.

The Constitutional Court also found an infringement of the applicant's right to acquire information according to Article 10 ECHR. The infringement was caused by the fact that the court required that permission be granted in order to exercise rights that do not require permission according to Article 10 ECHR (although their exercise may be restricted under specific circumstances).

Languages:

Slovak.



Slovenia

Constitutional Court

Important decisions

Identification: SLO-1995-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.01.1995 / **e)** U-I-47/94 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 13/1995 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.

3.3.2 **General Principles** – Democracy – Direct democracy.

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

3.20 **General Principles** – Reasonableness.

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

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

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Referendum, scope / Legislative initiative / Referendum, restriction.

Headnotes:

The provisions of Article 90 of the Constitution do not require that the Law on referendums and popular initiatives envisage all known forms of referendums (preliminary, supplementary and abrogative). An arrangement which does not contain the provision that a referendum includes an abrogative one is not in conflict with the Constitution.

The abrogation of a valid law may also be achieved by means of a legislative initiative for adopting a law abrogating the valid law, to which is attached a request for holding a preliminary referendum on the

proposal of such a law. In the case of a timely submission of an initiative under Article 13 of the Law on referendums and popular initiatives, the legislator may not avoid a referendum by rejecting the draft law in the first reading, and thereby end the legislative procedure (a reasonable interpretation of Article 13.3 of the Law on referendums and popular initiatives).

Article 90.5 of the Constitution, providing that referendums shall be regulated by law, does not allow for the restriction of the constitutional right to request the holding of a referendum in such a way that this right would be abolished in relation to specific types of law. The Constitution itself lays down in Article 90.1 the scope of this right, and provides that referendums may be held on (all) matters regulated by law.

Any restriction of the right under Article 90 of the Constitution also indirectly limits the constitutional right under Article 44 of the Constitution (the right to participate in the administration of public affairs directly or indirectly, consequently also by referendum decision). Article 44, providing that this right shall be exercised "in accordance with the law", does not give the legislator the authority to restrict it (according to Article 15.2 of the Constitution), but only the authority to regulate the manner of its implementation (by Article 15.3 of the Constitution).

Under the provisions of Article 15.3 of the Constitution, the law may only restrict a constitutional right when it is crucial for the protection of the rights of others (in accordance with the principle of proportionality), or in cases set out in the Constitution – with a legislative proviso (with the formulations "under conditions defined by law", "in cases which are defined by law", "within the boundaries of the law", "restricted by law" etc). When the content and scope of a right is already set out in the Constitution, the constitutional formulation that this right shall be exercised "in accordance with the law" or that it "shall be regulated by law" means that the legislator has only the authority (in accordance with Article 15.2) to prescribe the manner this right is to be exercised and not the authority to restrict it.

A legal provision that authorises the National Assembly to assess the clarity of a referendum question and that enables the National Assembly to decide not to hold a referendum because of the lack of clarity of the question which is intended to be the subject of the referendum is unconstitutional for the reason that it does not allow adequate judicial protection. Judicial protection, under Article 157.2 (the issue of whether such a case is in fact conceivable remained open), does not mean in such cases effective and thus appropriate protection of the constitutional right affected.

Summary:

The Constitution does not lay down any restrictions as to what may be decided in a legislative referendum, since it is possible to hold referendums on "matters which are regulated by law" – thus on all such questions. However, Article 10 of the Law on referendums and on popular initiatives (LRPI) sets out the kinds of laws for which it is not possible to hold a referendum. The argument of the opposing party, that a referendum is also possible under the provisions of the LRPI in the form of preliminary and supplementary referendums on a law, whereby a law falling under Article 10 might be abrogated, is not acceptable. In relation to laws under the second and third paragraphs of Article 10 of the LRPI (laws on which the implementation of the budget is directly dependent and laws for the implementation of ratified international treaties), it is clear that a referendum is not allowed against such laws according to Article 10 of the LRPI. Perhaps the same could also be argued in relation to laws under the first paragraph (laws adopted under an accelerated procedure, when required by the exceptional needs of the state in the interests of defence or natural disasters) because the Law uses the words "which are being adopted according to an accelerated procedure", although that wording would not include laws which have been adopted according to an accelerated procedure (therefore those same laws, after they have already been adopted and validated). However, such an interpretation of Article 10.1 of LRPI would be clearly in conflict with the intention of these legal provisions (to prevent possible harm arising from a referendum rejecting the validation and implementation of urgent measures). Consequently, a referendum against the legal provisions of such measures, as long as the conditions persist requiring such measures would certainly be in conflict with the content and intention of this legal provision. Only after such conditions cease to exist would it be permissible to hold an "abrogative" referendum against a law that would nevertheless continue to be in effect – and it would no longer be a referendum forbidden by Article 10.1. In view of the above interpretation, the Constitutional Court considered that the provisions of Article 10 of the LRPI actually excluded the holding of referendums on the three types of laws mentioned therein, so the Court had to rule on whether those provisions were in accordance with the Constitution.

As to all three kinds of laws for which the holding of referendums is excluded by Article 10 of the LRPI, it would perhaps be possible to base that restriction on the need for the protection of the public interest or that without such a restriction, the "rights of others" could be affected for example, by certain laws in Article 10.2 (implementing the budget), the right to

social security and so on, without the need of a more detailed assessment. Even if it were possible to establish that all laws embraced by the provisions of Article 10 had the aim or intention of protecting the “rights of others” through the protection of the public interest (which is not certain), it is clear that the absolute exclusion of the possibility of a referendum is not essential to achieve such an aim. The same aim could be achieved by the use of a less burdensome restriction of constitutional rights under Articles 44 and 90 (hereinafter: the right to a referendum decision), in particular, by the use of the mechanism envisaged in Article 16 of the LRPI. According to this, the National Assembly, when it believes that the content of a request for holding a referendum is in conflict with the Constitution, may request the Constitutional Court to decide on the matter. By the use of this mechanism, it is possible to avoid abstract legal prescriptions; the nature of the three types of laws cited in Article 10 in any case justify a restriction on the constitutional right to decision-making by referendum. In each case, the Constitutional Court will have to judge whether the abrogation of a valid law due to a referendum or its non-abrogation would really affect such an important constitutional right and that upon weighing that right against the constitutional benefits, it would be permissible to restrict the constitutional right by way of a referendum decision.

The only consideration still remaining is whether in relation to law Article 10.1 of the LRPI, the procedure under Article 16 of the LRPI would not be too late and would simply, because of its implementation (even if the Constitutional Court were to consent quickly to the National Assembly, is proposed that a referendum on such an essential law on the exceptional needs of the state, in the interests of defence, or natural disaster not be held because of unconstitutionality), cause serious or even irreparable damage to a very important constitutional benefit. It is not possible to exclude in advance the possibility of this occurring with such a law, but, on the other hand, it is clear that the present formulation of Article 10.1 is nevertheless too wide or too loose. It would cause the automatic exclusion of the possibility of a referendum in the case of any law adopted by accelerated procedure and relating to any kind of exceptional need of the state, to any kind of defence interest or any kind of natural disaster. There could also be abuse of the concept of the “exceptional needs of the state” or the concept of “defence interests”, with the intent of excluding the possibility of verification by referendum of a specific legal arrangement. For the reasons cited above, the Constitutional Court found Article 10.1 to be in conflict with the Constitution and struck down the whole of Article 10, although it was of the opinion that a more precise formulation of the provisions of

the first paragraph, taking into account the above-mentioned considerations and excluding to a greater extent the possibility of abuse, would perhaps stand the test of compliance with the Constitution.

Article 14 of the impugned law sets out that a question which is the subject of referendum must be clearly expressed, and the request must be accompanied with an explanation. A decision as to whether these requirements are met is left entirely to the National Assembly which may, in accordance with Article 15 of the LRPI, decide that a referendum shall not be held if the conditions are not met. The Constitution does not set out these conditions, though they certainly belong in the framework of the legislative regulation of referendums. The legislator must adopt a regulation of referendums that is capable of being implemented. It is clear that it is not possible to carry out a referendum capable of achieving its intended and constitutionally defined purpose with an unclear and incomprehensible question. Even the fact that the decision on the clarity of a question is left to the National Assembly is not open to dispute from the point of view of constitutionality, since the National Assembly is constitutionally competent for holding referendums and must therefore decide whether the conditions for so doing are met. However, the decision on the clarity of a question is a sensitive matter and the possibility of arbitrariness is not excluded. The requirement of preventing arbitrariness on all levels of legal decision-making, especially when any potential arbitrariness could threaten constitutionally guaranteed rights, is in accordance with the principle of a legal and democratic state. The right to decision-making by referendum being a constitutional right of citizens, Article 15.2 of the impugned law is in conflict with the Constitution insofar as it does not envisage judicial protection against a decision of the National Assembly. Article 15.4 of the Constitution, provides that the judicial protection of human rights and fundamental freedoms must be guaranteed.

Supplementary information:

Legal norms referred to:

- Articles 3, 14, 15, 44, 90, 1 and 157 of the Constitution.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-1997-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 16.01.1997 / **e)** U-I-273/96 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 13/1997 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom

Keywords of the alphabetical index:

Freedom of enterprise / Medicine, trade / Educational background, responsible person.

Headnotes:

The provision of the Constitution on free enterprise (Article 74 of the Constitution) protects individual freedom while at the same time enabling the legislator, with respect to the carrying out of specific activities, to prescribe special restrictive conditions to ensure the safeguarding of the public interest.

Restricting of the freedom to engage in business activity is justified if it is indispensable to the safeguarding of public benefits and if a measure has been selected which interferes as little as possible with freedom of free enterprise. Restrictions can be subjective (educational background, experience, personality characteristics etc.) or objective in nature (equipment, procedures etc.), and in this respect the constitutional principle of the proportionality of measures designed to safeguard public benefits applies. The measure must be such as to protect public benefits against demonstrable or highly probable damages or hazards which cannot be prevented by other less burdensome measures. The safeguarding of public benefit is indispensable in particular in the case of threat to human health and life. That also includes wholesale trade in medicinal products, which is why the measure introduced by the impugned part of Article 64 of the Medicinal

Products Act (ZZdr) is not in conflict with the Constitution.

Summary:

The Court rejected an application contesting the constitutionality of Article 64.1.2 of the ZZdr (Medicinal Products Act).

Under Article 74 of the Constitution, free enterprise shall be guaranteed. The establishment of businesses must be regulated by statute. The Constitution also provides that business activities in conflict with public interest may not be pursued. An extremely liberal understanding of entrepreneurship would not be in conformity with the Constitution, therefore the legislature may restrict certain forms of business (monopolies, cartels); and if such a measure is in the public interest (human health and life, protection of nature, consumers, employees etc.), it may impose special subjective and/or objective conditions with respect to some business activities. The imposition of special conditions with a view to protecting important general assets and rights of others is also in conformity with Article 15.3 of the Constitution.

Thus, constitutional rights may be restricted by statute if the legislature has established, on the balance of public interests and individual rights, that the restriction is indispensable. In enacting a restriction, the legislature must choose a measure which will ensure the effective protection of public benefits and which will, in the given circumstances, interfere as little as possible with constitutionally guaranteed rights. A measure employed by the legislature for the purpose of restricting constitutional rights in the public interest must be proportionate with the interference with the constitutional rights. For these may be interfered with only to the extent which is indispensable to ensure special protection. A measure introduced by the legislature to restrict a constitutional right is justified if, from the nature of the particular activity, it follows that the activity requires specific knowledge, skills and personality characteristics for it to be carried out, without which harmful consequences or a hazardous situation could result for the buyer of the goods manufactured or supplied. Therefore the operators of some activities must normally meet certain conditions in order to carry out these activities. This is true for health care and pharmacy activities. The rate of social development and new findings (new substances, environmental protection, safety as regards legal transactions, etc.), however, demand that the legislature extend the prescribing of conditions also to other activities. In this respect, the legislature must, on the basis of forecasts and probability judgements,

formulate the restricting provision so that it will be tailored to actual requirements and circumstances. Such restricting provisions as have been enacted in the public interest must be appropriate from an objective viewpoint and tailored to the aim pursued in accordance with the principles of a social state governed by the rule of law (Article 2 of the Constitution).

By the disputed provision the legislature has prescribed that legal entities and natural persons engaging in the wholesale of medicinal products must appoint a person responsible for the receipt and dispatching of medicinal products and the examination of documents. Such person must have in addition to a Bachelor of Science degree in pharmacy, also completed specialisation studies in the field of the testing of medicinal products. The Constitutional Court agrees with the applicant that the disputed part of Article 64 of the ZZdr enacts a restriction imposing conditions relating to the carrying out of business operations of legal entities and natural persons, wholesale traders in medicinal products, but it finds that the statutory restriction is not in conflict with the Constitution. For it is in the public interest for the manufacture of and trade in medicinal products to be organised in such a way as to ensure the safety of consumers of medicinal products. The trade in medicinal products is a primarily pharmaceutical activity, and the freedom of trade is essentially subordinated to safety in pharmaceutical activities. The Constitutional Court considers that the condition – that traders engaging in the wholesale of medicinal products must appoint a person responsible for the testing of medicinal products – has been enacted in conformity with the nature of medicinal products, because such goods could be dangerous to human health and life. The enacted measure would reduce to the minimum the possibility of damage occurring as a result of the use of medicinal products.

Supplementary information:

Legal norms referred to:

- Article 2, 15, 74 of the Constitution.
- Articles 26, 21 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-1997-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30.01.1997 / **e)** U-I-139/94 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 10/1997 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.
- 5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Data, personal, protection / Detective, conditions for issuance of a license / Constitutional Court, review, appropriateness, statutory provision.

Headnotes:

Provisions of a statute are not in conflict with the Constitution:

- where a condition for issuing a license for engaging in detective work is that in the period of the previous two years, the applicant did not carry out the tasks of a public law enforcement official of the Ministry of Interior or intelligence and security agencies;
or
- where they require firms registered for engaging in detective work to obtain the relevant licenses for persons who have already engaged in such activity.

Summary:

The impugned provision in Article 8 of the Detectives' Activities Act (ZDD) sets out that in order to be able to engage in detective work, a detective must have the relevant license, which can be issued by the competent Chamber at the applicant's request, if

among other things in the period of the previous two years the applicant has not carried out the tasks of a public law enforcement official of the Ministry of Interior or intelligence and security agencies. Such a provision restricts the freedom of work safeguarded in Article 49 of the Constitution.

The freedom of work as defined in the said Article is exercised directly on the basis of the Constitution in accordance with Article 15. According to the provision in Article 15.3, human rights and fundamental freedoms shall only be limited by the rights of others and in such cases as are set out by the Constitution. As the Constitution does not expressly mention a possibility for the freedom of work under Article 40 to be limited by statute, the Constitution permits only the limiting of this right for reasons of protection of the rights of others. Such a limitation is only permissible when it is based on the principle of proportionality, according to which such a measure must be:

- a. appropriate for reaching the constitutionally permissible legislative aim;
- b. indispensable, meaning that the said aim is not attainable by a less burdensome measure; and
- c. proportionate with the "weight" of one constitutional right as opposed to another.

The first question which arises is: what are the rights of other persons in the instant case that require protection by way of limitation. Although this has not been specified neither by the initiators nor by the National Assembly, at least two constitutional rights can be identified as having been interfered with: the right to privacy and personal rights under Article 35, and the right to the protection of personal data under Article 38. In carrying out the tasks of public law enforcement officials, such individuals come into possession of information relating to personal status and relations, frequently also by the use of special methods and techniques which are set out by the Constitution and statute to be a permissible interference with the right to privacy and with some other rights (inviolability of dwellings, privacy of the post and other means of communication) when in the public interest. The use of such information in performing the work of private detective, however, is a completely impermissible interference with the right to privacy and with personal rights. The same also holds for the protection of personal data, for in carrying out their work public law enforcement officials come into possession of information in personal data files, which is permissible when it is in the public interest but not when used in carrying out the work of private detective.

In assessing appropriateness, what should be set out is whether the limitation envisaged in the impugned provision of the Act is such as to allow the reaching of a constitutionally permissible legislative aim. In case U-I-201/93 (OdlUS V, 27), the Constitutional Court in considering a similar prohibition which prevented the judges and prosecutors from engaging in the work of barrister found that such prohibition was inappropriate. The Court found that the prohibition of engagement in the work of barrister with the seat of the office in a place where those persons had performed that function did not jeopardise the impartiality of courts of first instance, because barristers may engage in their work in the entire territory of Slovenia, not only in the place where their office is located. In the instant case, on the other hand, the situation is reversed, for the impugned provision of the ZDD completely prevents former public law enforcement officials from carrying out detective work anywhere in Slovenia. Thus, this prohibition in fact leads to the prevention of the use of information and contacts obtained or established during one's former employment in the carrying out of detective work.

That measure is also indispensable for the said aim to be reached, for one cannot see any other way in which this aim could be reached. For the mere prohibition – that a detective who has previously been a public law enforcement official should not use the information and contacts which he has obtained or established during his service – would be impossible to implement and control. It is quite logical to expect that a private detective will in performing his work use all the skills and knowledge at his disposal, so that it is impossible to prevent the use of information and contacts derived from previous employment otherwise than by prohibiting the engagement in such activity over a certain period of time in which the information and contacts will become obsolete so as to be useless or of diminished usefulness.

It is also impossible to agree with the claims of the initiators that material compensation for the statutory restriction on the free choice of profession is not guaranteed to the above-mentioned group of employees by any law or regulation, and that as a result, the impugned statutory provision is also contrary to the position taken by the Constitutional Court in Decision OdlUS I, 33. The reference to the position taken by the Constitutional Court is out of context. In case U-I-51/90, the Constitutional Court took the position that the statutory provision allowing a contractual regulation of the employment relationship whereby an employee agrees to restrict his or her freedom of employment and free enterprise upon the termination of the employment relationship (through the inclusion of a competition clause in the

contract) for which no material compensation is granted to the employee runs counter to the principles of law-governed state, since the competition clause does not equally burden both parties to the employment relation, for the obligations arising from the legally provisions prohibiting competition affect only the worker and they do so in a disproportionate manner. In the present case, however, we are not dealing with a contractual restriction on the freedom of work but with a restriction by statute, which is justified because of the rights of others and because it is in the public interest.

The impugned provision in Article 29 of the ZDD requires firms registered for carrying out detective work to obtain the relevant licenses for persons who have already been engaged in such activity. As has already been decided by the Constitutional Court concerning case U-I-67/95 (OdlUS V, 38), the fixing of conditions for carrying out an activity does not amount to a retrospective effect of the law or regulation even in cases where such law or regulation requires that the said conditions be fulfilled also by persons who are carrying out such activity at the moment of the entering into force of the said law or regulation. This is, in particular, the case where the statute provides a suitable time period for fulfilling such conditions, and the one-year period in the instant case is undoubtedly such.

Supplementary information:

Legal norms referred to:

- Articles 15, 35, 38 and 49 of the Constitution.
- Articles 23, 24, 26, 40 of the Constitutional Court Act (ZUstS). of the Constitution.

Cross-references:

- In stating the reasons for this Decision the Constitutional Court refers to its decisions U-I-201/93 of 07.03.1996 (OdlUS V, 7) and U-I-51/90 of 14.05.1992 (OdlUSS I, 33).
- For reasons of joint consideration and adjudication, the Constitutional Court decided by ruling of 18.01.1996 to join the case U-I-65/95 to the case under consideration.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-1997-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 19.06.1997 / **e)** Up-20/93 / **f)** / **g)** not published / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Right of reply, limitation / Retraction, right / International agreement, direct application / Freedom of expression, limitation, due to employment contract.

Headnotes:

The impugned verdict did not violate the complainant's constitutional right of reply under Article 40 of the Constitution by relying on the provision of Article 73 of the then applicable Act on Public Information Activities, which provided that mass media had to publish replies to published information which essentially complement the facts and data in the published information.

The right of reply under Article 40 of the Constitution cannot be directly exercised in the manner set out in Article 15.1 of the Constitution. The right of reply to published information covers a case where it is crucial that the manner of exercising that right be regulated by statute because of the particular nature of the right and because the content of the right has not been sufficiently developed in the Constitution itself. Without such regulation by statute, it would be difficult to exercise that right, and in case of such a gap in the law, it would become necessary "for law to be created by the courts" in the process of resolving the issues in cases brought before them.

It is possible to determine the content and scope of the right of reply to published information by interpreting the wording of Article 40 of the Constitution. Consequently, it is not a matter of a right which has been merely designated as one in the Constitution, while its content has remained completely undefined, so that its scope and framework can only be determined by statute. If that were the case, prior to the determination of the content of the right, it would be impossible to even speak of about interference with that right, for its scope and "area of protection" would still be unknown".

By taking into consideration the legislative history of the constitutional provision on the "right of reply to published information" it is possible, through interpretation to come to a conclusion that this right in itself necessarily comprises – in addition to the usual content inherent in the concept of "reply to published information" – a conceptual delimitation with respect to the right of correction. The condition for exercising the right of correction is that damage must have been caused to personal and private interests. However, that is not a condition for exercising the right of reply, which has been granted to individuals with a view to protecting public rather than personal interests (e.g., in the interest of objective, true, timely and unprejudiced informing of the public).

As to the assessment of statutory interference with the right of reply, statutory regulation denying the element of delimitation between the right of correction and the right of reply would only be considered constitutionally permissible if it were to fulfil the more rigorous criteria of evaluation set out in Article 15.3 of the Constitution, whereas statutory regulation of all other elements of that right – such as when and under what circumstances an individual would have a right of reply – would be considered constitutionally permissible if it were to fulfil the somewhat milder criteria of evaluation set out in Article 2 of the Constitution. The question put before the Court was whether it was also possible to assess the constitutional permissibility of statutory regulation denying the element of the above-mentioned delimitation on the basis of the somewhat less rigorous criteria of evaluation set out in Article 2 of the Constitution. The Constitutional Court found that it was not necessary for it to give a final answer to the difficult and complicated question that had been put to it because in the present case, the impugned statutory arrangement also satisfied the more rigorous criteria of evaluation under Article 15.3 (see Section 23 of the Reasons).

Summary:

In the case under consideration, the question arises of restricting the freedom of expression of a journalist as to what is known as the internal freedom of expression in mass media – the freedom of journalists within the house (*innere Pressefreiheit*). What is involved is the question of permissible interference by the employer – the publisher of a mass medium – with the constitutional right to freedom of expression of journalists, editors and responsible editors, and the question of compatibility of the right to freedom of expression of journalists and the interest of the publisher of a mass medium in the publication of information in accordance with his or her programme concept. This relation is regulated by statute (the former statute as well as the one now in force) in a manner which allows the restriction of the freedom of expression of a journalist, while taking into account the right of the publisher to conduct and edit a mass medium which he or she publishes in accordance with his or her orientation. The internal freedom of expression of a journalist is closely linked with the implementation of the programme concept and editorial policy. The restricting of freedom of expression is part of the relation established under labour law between the journalist and the employer. If as the result of the expression of his or her views certain consequences should result for a journalist, consequences that are now expressly prohibited by Article 33 of the ZJG (termination of employment, wage reduction, change of status in editorial staff, or other deterioration of position), this situation would be governed by labour law. Only after the injured party has exhausted the remedies envisaged by statute with a view to protecting his or her rights arising from employment relation, would he or she be in a position to request the protection of his or her constitutional right before the Constitutional Court. The Constitution (Article 160.3) makes it possible for the Constitutional Court to decide upon a constitutional complaint only where all other legal remedies have been exhausted.

Lastly, the complainant also claims that the fact that his reply was not published infringed his right under Article 39 to freedom of expression of thought and opinions. In so far as both rights under Article 40 could be deemed to be "specialised" rights arising from freedom of expression as a wider right, the finding that a specific right under Article 40 has not been infringed does not amount to a finding that the wider right – freedom of expression – has not been infringed. Such a relationship between the rights under Articles 39 and 40 does not, in fact, exist.

The essential difference between the two rights lies, as shown above, in the question of whom the right is “directed” against, and, consequently, of who can infringe it.

This, it is true, does not mean that a private publisher of a newspaper and his or her responsible editor cannot infringe the freedom of expression of a journalist at all, but that such an infringement could only take place where in interpreting and applying the statutory provisions which regulate the publishing and editing of newspapers (in this case, the provisions of the ZJO), there is insufficient consideration of the “indirect *Drittwirkung*”, that is, of the indirect effect of the constitutional freedom of expression on the said statutory provisions or the mutual rights and obligations of the journalist on the one hand and the owners and editor of the newspaper on the other hand. As has already been established in the instant case, it was only by the impugned provisions of the ZJO that the manner of exercising the right of reply was defined, and done so in a constitutionally permissible way and that same way could not be used to arrive at the conclusion that non-publication of controversial reply could constitute a violation of the complainant’s, that is, the journalist’s general constitutional right to freedom of expression. By accepting employment in the newspaper publishing house, the journalist has in advance accepted the fact that – in accordance with Article 33 of the ZJO – only his or her articles that are in conformity with the programme concept and editorial policy of the newspaper will be published in the said newspaper.

While this does not mean that every refusal of a journalist’s article on the part of the editorial staff should be considered in advance to be in conformity with programme concept and editorial policy of the newspaper (or, in accordance with the now applicable ZJG, to be in conformity with programme concept and the code of ethics of journalists). In this particular case, the refusal to publish the complainant’s article cannot be deemed to be an infringement of the programme concept and editorial policy of the journal. In this case, the assessment is made easier by the fact that the subject of the dispute is not the refusal to publish the journalist’s criticism “of conditions in his own house” or the conduct of an editor, as the said criticism had already been published, but that the subject of dispute is the refusal to publish subsequent criticism by the journalist “of his own house”, after the editorial staff had already publicly dismissed his criticism. If the journalist concerned had in his reply “essentially complemented the facts and data” of the information to which his reply referred, he could have thus exercised his constitutional right of reply. But as he did not satisfy the said conditions set by statute with respect to the exercise of this constitutional right,

as employee versus his employer (or versus editors as authorised representatives of the latter), he is not in a position to effectively invoke the general freedom of expression.

Within the framework of freedom of the press understood as set out above, an individual can, contrary to the will of the editorial staff of a particular newspaper, publish his or her opinion only when his or her constitutional right to correction or of reply to published information is concerned. With the right to correction, he or she can safeguard his or her personal interests, whenever they have been injured by a newspaper, and the right of reply allows him or her to act with a view to protecting the public interest. Thus, the latter right is, in the present constitutional order, the only substitute for the former right of publication “of opinions which are important to the public”, which is why it is even of greater importance for it to be accordingly treated in the Mass Media Act and in conformity with the Constitution. As also shown by the situation in other countries (and as also indicated in the above-mentioned first commentary to the new constitutional order, published in 1992), this constitutional order does not exclude the possibility for legislation to apply a wider concept of the right of publication of reply in the area of national (public) radio and television than in private communication media, or even to establish a wider right of publication of the opinions that are of importance to the public, not just the right of reply to information that has already been published – as is done in some Western countries, where public radio and television are under a statutory obligation to ensure that all important opinions and events in politics, culture, science etc. are represented in an appropriate and balanced manner.

Supplementary information:

Legal norms referred to:

- Articles 39 and 40 of the Constitution.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2001-H-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.11.2001 / **e)** U-I-68/98 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 01/2001 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.11 **General Principles** – Vested and/or acquired rights.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
- 5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, kindergarten, primary / Education, religious, participation of children of other denomination / State, statutory measures, milder measure.

Headnotes:

The Constitutional Court reviewed the question of whether the exclusion of denominational activities from the premises of public and licensed kindergartens and schools outside the scope of performing their public service, was a permissible interference with the positive aspect of the freedom of conscience of an individual (set out in Article 41.1), the right of parents set out in Article 41.3 and the right of parents set out in Article 2 of Protocol no. 1 to ECHR on the basis of the strict test of proportionality, which derives from Article 15.3. In accordance with this provision, human rights and fundamental freedoms may be limited only by the rights of others and in cases set out by the Constitution. Since the Constitution provides for limitations such as those included in the impugned statutory regulation, it was necessary to review whether the interference with the positive aspect of the freedom of conscience of an individual set out in Article 41.1, the right of parents set out in Article 41.3, and the right set out in Article 2 of Protocol no. 1 to ECHR was admissible in order to ensure the protection of the constitutional rights of others.

Summary:

In the framework of the freedom of religion, the Constitution ensures parents the right to provide their children with a religious upbringing in accordance with their beliefs (Article 41.3). These constitutional rights of parents oblige the State to respect their religious beliefs also in the field of schooling. The duty of the State to respect the religious beliefs of parents in the field of schooling also follows from Article 26.3 of the Universal Declaration of Human Rights (hereinafter the Declaration), which provides that parents have the right to decide on the education of their children, and from the second sentence of Article 2 of Protocol no. 1 to ECHR. This provides that the State in carrying out its tasks in the area of upbringing and education must respect the rights of parents to provide their children with a religious upbringing in accordance with their religious (and philosophical) beliefs. Foreign human rights legal theory emphasises that the provision of the second sentence is to be understood as the implementation and realisation of the first sentence, which ensures everyone the right to education. The Constitution defines freedom of education in Article 57, which determines that the State is to create the opportunities for citizens to obtain a proper education. The right to education imposes on the State, in particular, the obligation to ensure individuals non-discriminatory access to the existing types and degrees of education, and offer them a certain minimal standard of quality of such education. It follows from the case-law of ECHR that the obligation of the State to create possibilities for obtaining an appropriate education cannot be interpreted as a duty of the State to establish at its own expense a certain type or degree of education. However, in accordance with the theory and case-law of the ECHR, primary education is understood as the absolute minimum the State must provide. Furthermore, pursuant to the case law of the ECHR, the State is not obliged to provide at its own expense schools (or the teaching materials of such schools) that are consistent with the particular religious (or philosophical) beliefs of parents.

In the case at instance, the legislature interfered with the positive aspect of freedom of religion (Article 41.1) and the right of parents set out in Article 41.3 to protect the negative aspect of the freedom of religion of other children and their parents (Article 41.2). To achieve that goal, interference with the right set out in Article 41.1 was necessary. According to Article 41.2, citizens have the right not to declare their religious beliefs and to require that the State prevent any forced confrontation of the individual with any kind of religious belief. A democratic State (Article 1) is, on the basis of the separation of the State and the Church (Article 7),

obliged to ensure its neutrality in public institutions and the provision of public services, and it is obliged to prevent one religion or philosophical belief from prevailing over another, since no one has the right to require State support in the profession of their religion. To reach this goal, it is constitutionally permissible for the State to take such statutory measures as are necessary to protect the negative aspect of freedom of religion and thereby realise the obligation of neutrality.

Furthermore, the interference with the positive aspect of freedom of religion cannot be considered inappropriate as it may prevent the forced confrontation of non-religious persons or persons of other denominations with a religion to which they do not belong. This interference is also proportionate, in the narrow sense of the word, in so far as it relates to the prohibition of denominational activities in public kindergartens and schools. These are namely public (State) institutions financed by the State and are as such the symbols which represent the State externally and which make the individual aware of it. Therefore, it is legitimate that the principle of the separation of the State and religious communities, and thereby the neutrality of the State, be in this context consistently and strictly implemented. Considering the fact that a public kindergarten or a public school represents the State not only in carrying out educational and formative activities (public services) but also as public premises, the general prohibition of denominational activities on public premises does not constitute an impermissible disproportionality between the positive aspect of the freedom of religion and the rights of parents to raise their children in accordance with their religious persuasion on one hand and the negative aspect of freedom of religion on the other hand. In the event that denominational activities cannot be carried out in a local community due to the fact that there are no other appropriate premises, Article 72.5 ZOFVI envisages an exception from the general prohibition against denominational activities in public schools or public kindergartens. Thus, in this part, the statutory regulation is not inconsistent with Article 41 of the Constitution and Article 9 ECHR.

However, the interference with the positive freedom of religion and the rights of parents set out in Article 41.3 is not proportionate in the narrow sense of the word in the part relating to licensed kindergartens and schools outside the scope of performing a public service. In this respect, the adjective "public" does not refer to an institution as premises, nor does it refer to an entire activity, but only to that part of the activity that the State finances for carrying out a valid public program. The principle of democracy (Article 1), the freedom of the activities of religious

communities (Article 7.2), the positive aspect of freedom of religion (Article 41.1) and the right of parents to bring up their children in accordance with their personal religious beliefs (Article 41.3) impose on the State the obligation to permit (not force, foster, support or even prescribe as mandatory) denominational activities on the premises of licensed kindergartens and schools outside the scope of the execution of a valid public programme financed from State funds. This is all the more so as there are less burdensome measures available for safeguarding the negative aspect of the freedom of religion. In reviewing proportionality in the narrow sense we must weigh in individual cases the protection of the negative aspect of the freedom of religion (or freedom of conscience) of non-believers or the followers of other religions on one hand against the consequences ensuing from an interference with the positive aspect of freedom of religion and the rights of parents set out in Article 41.3 on the other. There is no such proportionality if we generally prohibit any denominational activity in a licensed kindergarten and school. With such a prohibition the legislature respected only the negative freedom of religion, although its protection, despite the establishment of certain positive religious freedoms and the rights of parents to give their children a religious upbringing, could as well be achieved by a milder measure. Comparative legal theory, legislation and case-law mention as such less burdensome measures for protecting the negative aspect of freedom of religion the following possibilities:

- a. that the mandatory attendance of religious lessons be prohibited; and
- b. that it be possible for religious lessons to be organised prior to the beginning of or after lessons so that the students who do not want to take part in such lessons may leave without disruption.

Foreign legal theorists also emphasise that from a view point of the individual's negative freedom of religion it is constitutionally more permissible for students to register for religious lessons rather than for them to opt out of them. In the instant case, it means that the weight of the consequences of interfering with the positive aspect of the freedom of religion and the rights of parents set out in Article 41.3 is not proportionate to the necessity of ensuring the negative aspect of freedom of religion of others, as this can be successfully protected by a that is less burdensome measure than the one in the statutory regulation. Therefore, the impugned provision is inconsistent with Article 41 in the part relating to licensed kindergartens and schools outside the scope of performing a public service.

Supplementary information:

For the same judgement, see also precis [SLO-2002-1-002] for different legal aspects.

Legal norms referred to:

- Article 41 of the Constitution.

Languages:

Slovenian, English (translation by the Court).

*Identification:* SLO-2003-H-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 08.05.2003 / **e)** U-I-272/98 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), no. 48/2003 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
 3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Proportionality.
 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Police, secret operation.

Headnotes:

A provision of the Police Act is inconsistent with the requirement of the definiteness of a law, due to the fact that it only names the measures (secret police operations, cooperation and the use of arranged documents and identification marks) that the police may use under certain conditions, which are not defined either in this provision or anywhere else in the

Act in such a way so as to be clear which police activities are allowed and where the limits are between what is allowed and what is prohibited.

The provision in the Police Act granting broad police powers in relation to ordering the above mentioned measures for all criminal offences that are prosecuted *ex officio* is inconsistent with the principle of proportionality.

The Police Act provision according to which the mentioned measures may be ordered for three months with the possibility of multiple three month extensions, inconsistent with the principle of proportionality is also for the reason that the effectiveness of police authority for the disclosure and prosecution of criminal offences can be achieved by a less severe interference with the constitutional right.

The operation of State bodies in issuing executive regulations must be, in terms of substance, legally subordinate. An executive regulation must not interfere, in terms of substance, with a statute, and in cases of interference with the constitutional rights, the binding effect of a statute on executive regulations is even stricter. Thus, in view of the annulment of the mentioned unconstitutional statutory provisions, the Constitutional Court also annulled the relevant provisions of the executive regulation.

Supplementary information:

Legal norms referred to:

- Article 37.2 of the Constitution.

Languages:

Slovenian, English (translation by the Court).

*Identification:* SLO-2003-H-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 04.12.2003 / **e)** U-I-60/03 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), no. 131/2003 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.16 **General Principles** – Proportionality.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.8 **Fundamental Rights** – Equality – Criteria of distinction – Physical or mental disability.
- 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
- 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
- 5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to be informed about the charges.
- 5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Psychiatric hospital, detention, judicial review / Patient, rights.

Headnotes:

Compulsory detention in closed wards of psychiatric hospitals is a severe interference with the human rights and fundamental freedoms of patients, particularly, with the right to personal liberty (Article 19.1 of the Constitution), the right to protection of mental integrity (Article 35 of the Constitution) and the right to voluntary medical treatment (Article 51.3 of the Constitution which guarantees not only the right to medical treatment but also the right to reject medical treatment). The purpose of the statutory regulation is to regulate compulsory detention of mental patients in closed wards of psychiatric hospitals in such a manner that the effective realisation of a legitimate purpose which justifies such measure is guaranteed (i.e. averting danger that is caused by the patient due to mental illness to either himself/herself or others, and suppressing reasons that cause such danger), and to guarantee at the same time the respect for human rights and fundamental freedoms of patients in accordance with international standards for the protection of human rights and in consideration of adequate solutions in comparable European legislation.

Compulsory detention in closed wards of psychiatric hospitals is a measure which should be used only in cases in which danger cannot be suppressed with other measures outside (of the closed ward) of a psychiatric hospital. As the legislature, made no other measure available to the courts except that of ordering compulsory detention in a closed ward of a psychiatric hospital, the legislature, contrary to Article 2 of the Constitution, it thereby interfered with personal liberty, which is guaranteed by the provision of Article 19.1 of the Constitution.

One of the fundamental rights that must be guaranteed to every mental patient who is compulsory detained is the right to judicial protection regarding the lawfulness of detention. According to the Constitutional Court, the legislature should, for proceedings of deciding on the lawfulness of detention in closed wards of psychiatric hospitals, set short time-limits, as only prompt judicial supervision regarding the lawfulness of detention can ensure the effective protection of the rights of patients. A notice of detention must contain data on the person detained, on their medical condition, and information on who brought them to the health institution. The statute does not explicitly state that the notice should also contain reasons for taking the measure of compulsory detention against that patient. However, it is only on the basis of these reasons that the court can judge whether compulsory detention is necessary (*ultima ratio*) in an individual case. That being so, the Constitutional Court found that the impugned statutory regulation was inconsistent with the right to (effective) judicial protection, which is guaranteed by the provision of Article 23.1 of the Constitution.

A patient who is not capable of understanding and asserting his/her rights in proceedings must be guaranteed adequate representation for the effective protection of the rights and interests of the patient in proceedings. As the impugned provisions of the Non-Litigious Civil Procedure Act do not allow such representation, they are inconsistent with the provisions of Articles 22 and 25 of the Constitution.

The measure of compulsory detention of patients in psychiatric hospitals is logically related to medical treatment (therefore it is carried out in hospitals). Its purpose is *inter alia* to suppress the reasons for taking or ordering that measure. Detention of patients in psychiatric hospitals thus includes certain forms of medical treatment that follow from the purpose and the nature of the measure. Naturally this cannot mean unrestricted authorisation for administering any kind of medical treatment without adequate external supervision. The legislature should on one hand define the kind of medical treatment that follows from the purpose and the nature of compulsory detention

and is logically connected to it, and on the other hand determine the kind of medical treatment that exceeds this framework and for which the explicit consent of a patient is needed. The Constitutional Court established that the legal non-regulation of the position and the rights of a patient at the time of detention in a psychiatric hospital amounted to an unconstitutional gap in the law that was inconsistent with the principle of legal certainty (Article 2 of the Constitution). Furthermore, the impugned statutory regulation was inconsistent with the provision of Article 51.3 of the Constitution, which imposes on the legislature a duty to determine cases in which compulsory medical treatment is allowed.

For the protection of the rights of patients, the legislature should clearly define cases and the conditions in which the use of measures of restraint and limitation are allowed. Furthermore, a certain method of supervision (supervision mechanisms) over the use of the above mentioned measures should be foreseen.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2003-H-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.12.2003 / **e)** U-I-36/00 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), no. 133/2003 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
 3.11 **General Principles** – Vested and/or acquired rights.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
 5.3.38.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
 5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pension, approximation / Pension, criteria.

Headnotes:

In the scope of its discretion, the legislature enacts various measures that it believes will be as successful as possible for reaching the goals envisaged. In the field of pension and disability insurance, within the framework of its discretion, the legislature also determines the limitations of pensionable earnings by determining the lowest and the highest pensionable earnings and the relation between them (Article 49 of the Constitution). By determining the lowest and the highest pensionable earnings the legislature followed the principle of solidarity. The statutory determination of the established relation between the lowest and the highest pensionable earnings or determining the highest pensionable earnings cannot amount to arbitrariness, unreasonableness or manifest inconsistency with the purpose of the statute.

The amended provisions of the Pension and Disability Insurance Act did not diminish the rights for the time before 1 January 2000. The impugned regulation is thus not inconsistent with Article 155 of the Constitution.

The statutory regulation that provides for the temporary suspension of the approximation of pensions, assessed on the basis of the highest pensionable earning determined by the previous regulations, and the temporary suspension of the approximation of exceptional pensions, the pensions of the bearers of the Partisans Memorial 1941 (*Partizanska spomenica* 1941), medal and other pensions exceeding a determined amount, is not inconsistent with Article 2 of the Constitution.

The legislature could determine that the temporary suspension of the approximation of pensions referred only to pensions assessed from the highest pensionable earnings, as such a determination in connection with the principle of solidarity can be a sound reason and one that is related to the goal of the reform of pension and disability insurance.

The assessment of a pension does not depend on the relation between performance (paid contributions) and performance in return (pension). Therefore, the assessment cannot interfere with the right to property right and cannot violate the provisions of Articles 33, 67 and 69 of the Constitution.

Lowering the amount of pensions until the assessment of new pensions and evaluating the insurance period entirely on the basis of the regulation of the

provision of Article 50 of the Pension and Disability Insurance Act (hereinafter ZPIZ-1), amounts to, considering the reasons for the reform of the pension and disability system, a constitutionally admissible interference with the principle of trust in the law (Article 2 of the Constitution).

The change in the system of the approximation of pensions, which came into force through the provision of Article 2 of ZPIZ-1, did not interfere with the vested rights but only with the expectation that the approximation of pensions would also be carried out as in the previous year. The legislature had a legitimate reason, in a prevailing public interest, for weakening the legal position of the recipients of pensions.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2004-H-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.02.2004 / **e)** U-I-127/01 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), no. 25/2004 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Proportionality.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
 5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
 5.3.43 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Vaccination, compulsory / Public health, vaccination, compulsory.

Headnotes:

The Infectious Diseases Act is inconsistent with the Constitution as it does not regulate the procedure and rights of persons involved as regards establishing the existence of justified reasons for not receiving compulsory vaccinations, and it does not regulate liability for damages of the State for damage caused to an individual due to compulsory vaccination.

In the case of Article 22.1.1 of ZNB (compulsory vaccination), it is an interference with certain human rights – the right of individuals to decide themselves, the right to the protection of physical integrity (Article 35 of the Constitution), and the right to voluntary medical treatment (Article 51.3 of the Constitution).

As the Constitution itself in Article 51.3 allows that statute may determine health measures even without the consent of an individual, the legislature can, as a means for reaching a goal which it pursues, regulate compulsory vaccination.

The benefit of vaccination to the health of individuals and the broader community exceeds any possible damage which may occur to individuals due to the side effects of the above-mentioned measure.

Benefits of compulsory vaccination to the health of individuals and the members of the broader community exceed the consequences of the interference with the constitutional rights of individuals. Therefore, compulsory vaccination, as determined by ZNB, is not an excessive measure.

Furthermore, the challenged statutory provisions cannot be alleged to be inconsistent with Article 56 of the Constitution. The Constitution binds the State to provide children with special protection and care. Special protection and care must be guaranteed to children also in the field of health protection. By laying down compulsory vaccination the legislature has acted in accordance with the duty to provide all, particularly children, with the necessary preventive and curative health measures that guarantee the highest possible level of health.

Supplementary information:

Legal norms referred to:

- Article 51.3 of the Constitution.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2004-H-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 08.07.2004 / **e)** U-I-111/04 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), no. 77/2004 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.

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

3.16 **General Principles** – Proportionality.

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

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

5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

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

Keywords of the alphabetical index:

Mosque, construction, referendum.

Headnotes:

A local community order by which a referendum is called is a general act by which entitled persons are called to express their will on on a specific date the subject of the referendum question. The Constitutional Court has jurisdiction to review the constitutionality of such an act at the request of a person entitled to make a request.

The right to freely profess a religion, which is set out in Article 41.1 of the Constitution, entails the right of individuals and religious communities to individually or collectively profess their religion in objects that are typical and generally accepted for their profession of religion and practicing of religious rites. Referendum decision-making on land use whose aim it is to prevent the building of a mosque would not only entail deciding on the placing of the object into the area, but also deciding on whether or not the members of the Islamic religious community may profess their religion

in a mosque. An order calling for such a referendum interferes with the right to freely profess a religion.

If an interference with a human right intends to restrict such without that human right intending to protect the rights of others, that interference is inadmissible under Article 15.3 of the Constitution, according to which human rights may be limited only by the rights of others and in such cases as are provided by the Constitution. The order calling for a referendum whose intention is to limit the right to freely profess a religion as ensured by the Constitution without thereby protecting the rights of others, is consequently inconsistent with the Constitution.

A petition for the review of the constitutionality of the Local Self-Government Act submitted by the mayor of a municipality, who did not have statutory authorisation for commencing proceedings for the review of the constitutionality of a state regulation, was rejected by the Constitutional Court for the reason that granting the petition would not have improved the petitioner's legal position.

Supplementary information:

Legal norms referred to:

- Articles 15, 39, 41 and 44 of the Constitution.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-1995-3-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.06.1995 / **e)** CCT 3/94 / **f)** The State v. Makwanyane and Another / **g)** 1995 (3) *South African Law Reports* (Official Gazette) 391 (CC) / **h)** 1995 (6) *Butterworths Constitutional Law Reports* 665 (CC); CODICES (English).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Death penalty / Punishment, cruel, inhuman or degrading.

Headnotes:

Capital punishment is unconstitutional because it constitutes an unjustified infringement upon the right not to be subjected to cruel, inhuman or degrading punishment, and upon the right to life.

Summary:

The Court found that the imposition of the death penalty is inherently arbitrary, in that it is conditioned by factors such as race, class and poverty, the quality of advocacy, the subjective attitudes of the judiciary, and the possibility of error. The element of arbitrariness is compounded by the fact that the death penalty is uniquely irremediable. This supports the conclusion that capital punishment offends the constitutional proscription of “cruel inhuman or

degrading treatment or punishment”. The uniquely cruel, degrading and inhuman character of capital punishment also offends internationally recognised conceptions of human dignity that are embodied in the South African Constitution.

The unqualified right to life enshrined in the Constitution lends further support to the conclusion that the death penalty falls into the category of cruel, inhumane or degrading punishment.

While public opinion regarding the issue is of some relevance, the question before the Court was not what the majority of South Africans believed to be the appropriate sentence for murder, but rather whether the Constitution allowed capital punishment. Under the new legal order that was for the courts to determine.

Turning to the question of whether the infringement of fundamental rights entailed by capital punishment could be justified as both reasonable and necessary under the limitations clause, the Court noted that this evaluation involved a weighing of values and a case-by-case proportionality assessment. It was true that the death penalty acted as a deterrent, but the fact that no proof was offered that the death penalty constituted a more effective deterrent than long term imprisonment undermined the argument that capital punishment was both reasonable and necessary. Similarly, the objective of prevention and the objective of retribution (which, in view of the fundamental values underlying the Constitution, ought not to be accorded great weight), had to be evaluated in light of alternative punishments that could satisfy those goals while impairing rights to a lesser extent, and be weighed against the factors that, taken together, rendered capital punishment cruel, inhuman and degrading. While imprisonment involved the limitation of the incarcerated’s rights for purposes of punishment, execution destroyed those rights altogether.

The Court decided that, taking all of these factors into account, the clear and convincing case necessary to justify capital punishment had not been made.

The Justices unanimously concurred in the order of the Judge President, and a majority of the Justices concurred in the Judge President’s decision that the death penalty was an unjustifiable limitation on the prohibition of cruel, inhuman or degrading treatment or punishment.

Supplementary information:

This decision was issued under the Interim Constitution. Capital punishment remains the subject of lively debate. The working draft of the new Constitution

published on 22 November 1995 by the Constituent Assembly addresses the question of capital punishment within the context of the right to life. Two options are proposed for discussion. One expressly abolishes capital punishment; the other envisages that the death sentence be constitutionally sanctioned as an exception to the right to life. The final text of the Constitution is expected to be adopted by the Constituent Assembly in May 1996.

Languages:

English.



Identification: RSA-1998-3-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.10.1998 / **e)** CCT 11/98 / **f)** National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others / **g)** 1999 (1) *South African Law Reports* (Official Gazette), 6 (CC) / **h)** 1998 (12) *Butterworths Constitutional Law Reports* 1517 (CC); CODICES (English).

Keywords of the systematic thesaurus:

3.22 **General Principles** – Prohibition of arbitrariness.
 5.2 **Fundamental Rights** – Equality.
 5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
 5.3.42 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Law, application / Arbitrariness, statute / Order of invalidity, confirmation / Constitution, function in a democratic society / Constitutional invalidity / Criminal law / Legitimate purpose / Sodomy / Homosexuality.

Headnotes:

While Section 20A of the Sexual Offences Act 1957 and other legislation sought to prohibit and criminalise homosexual conduct between men the Constitution

guarantees the right to equality, privacy and human dignity as well as the equal protection of the law.

The purpose of a Bill of Rights is to recognise the rights of historically disadvantaged groups such as the gay and lesbian community, and free such communities from the shackles of past injustices and discrimination. The offence of sodomy was therefore unconstitutional as it violated an individual's right against unfair discrimination and the rights of privacy and human dignity. Such laws had no legitimate purpose and could not be saved by the limitations clause.

Summary:

In a unanimous decision written by Justice Ackermann the Court held that the offence of sodomy as contained in Section 20A of the Sexual Offences Act of 1957 and other legislation was unconstitutional as it infringed on Section 9 of the Constitution, the equality provision, and other rights contained in the Constitution. The National Coalition for Gay and Lesbian Equality challenged the constitutionality of these provisions and the High Court had declared these provisions to be inconsistent with the Constitution. The Constitutional Court was asked by the applicants to confirm the High Court's decision. The Court held that the common law and statutory offence of sodomy was unconstitutional.

It was argued that the purpose of applying the criminal sanction to acts of sodomy was purely to criminalise private sexual conduct between consenting male adults which caused no harm to others. The provisions failed to criminalise similar intimacy between a man and a woman, or any sexual intimacy between women. Section 9.3 of the Constitution listed sexual orientation as a protected ground against discrimination and therefore any discrimination was presumed to be unfair unless the contrary was proven. No evidence was lead to prove that the legislation had a legitimate purpose or that the discrimination was fair. The ultimate determining factor was the impact of the discrimination on the affected group. The Court held further that the infringement on the right could not be justified under the limitations clause (Section 36 of the Constitution), as the tainted provisions contained no legitimate purpose, but merely served to enforce majority views over the conduct of a historically marginalised group.

In a separate concurring judgement in which Justice Ackermann concurred, Justice Sachs held that human rights are better approached and defended in an integrated rather than a dislocated fashion.

In addition Justice Sachs held that the right to privacy as contained in Section 14 of the Constitution had been violated as the scope of the privacy right was closely related to the concept of personal identity. The expression of sexuality required a partner and it was not for the State to arrange the choice of partner, but for the individual to choose for him or herself.

Justice Sachs reiterated the centrality of dignity and self-worth to the Court's jurisprudence on equality. Inequality is established not simply through group-based differential treatment but through differentiation which perpetuates disadvantage. This leads to the scarring of the sense of dignity and self-worth of members of the gay and lesbian community. Fear of discrimination would lead to concealment of true identity, thus harming personal confidence and self-esteem.

Finally, in Justice Sachs' view, the Constitution requires that the law and public institutions acknowledge the diversity of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal is no longer the basis for establishing what is legally normative. The scope of what is constitutionally acceptable has expanded to include the widest range of perspectives and to acknowledge and accommodate the largest spread of difference. The decision of the Court should thus be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa.

Cross-references:

- *Brink v. Kitshoff* NO 1996 (4) SA 197, 1996 (6) BCLR 752 (CC), *Bulletin* 1996/1 [RSA-1996-1-009];
- *Fraser v. Children's Court, Pretoria North* 1997 (2) SA 261, 1997 (2) BCLR 153 (CC), *Bulletin* 1997/1 [RSA-1997-1-001];
- *Harksen v. Lane* NO 1997 (11) BCLR 1489 (CC), *Bulletin* 1997/3 [RSA-1997-3-011];
- *Larbi-Odam v. Member of the Executive Council for Education, North-West Province* 1997 (12) BCLR 1655 (CC);
- *President of South Africa v. Hugo* 1997 (4) SA 1, 1997 (6) BCLR 708 (CC), *Bulletin* 1997/1 [RSA-1997-1-004];
- *Prinsloo v. Van der Linde* 1997 (3) SA 1012, 1997 (6) BCLR 759 (CC), *Bulletin* 1997/1 [RSA-1997-1-003].

Languages:

English.



Identification: RSA-2000-1-005

a) South Africa / b) Constitutional Court / c) / d) 14.04.2000 / e) CCT 25/99 / f) The State v. Manamela and Another / g) 2000 (3) *South African Law Reports* (Official Gazette), 1 (CC) / h) 2000 (5) *Butterworths Constitutional Law Reports* 491 (CC); CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

5.3.13.23.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – Right not to incriminate oneself.

Keywords of the alphabetical index:

Burden of proof, criminal proceedings / Right to remain silent.

Headnotes:

A law which makes it an offence to acquire stolen goods otherwise than at a public sale without having reasonable cause to believe that the person disposing of the goods was entitled to do so, reverses the normal criminal onus of proof. This unjustifiably limits the presumption of innocence and justifiably limits the right to remain silent. Both the parliamentary purpose and the concerns of the prosecution which lead to the enactment of the law are sufficiently catered for by the imposition of an evidential burden on the accused to prove reasonable cause.

Summary:

Section 37.1 of the General Law Amendment Act no. 62 of 1955 makes it an offence to acquire stolen goods otherwise than at a public sale without having reasonable cause to believe that the person disposing of them was entitled to do so. This imposes

a duty on the accused to establish reasonable cause on a balance of probabilities in order to escape conviction and reverses the normal criminal onus of proof. The court unanimously found that the section infringed both the right to silence and the presumption of innocence enshrined in Section 35.3.h of the Constitution.

The court held unanimously that the limitation on the right to silence was justified in terms of Section 36 of the Constitution, since knowledge that stolen goods could easily be disposed of encourages the scourge of violent crime and in most cases the state cannot obtain evidence of the circumstances in which the accused acquired the stolen goods. Accordingly, there was nothing inherently unreasonable or unduly intrusive in requiring the accused to show that he or she held a reasonable belief that the goods had not been stolen.

The court was divided however, over the question whether the limitation on the presumption of innocence could also be justified under Section 36 of the Constitution. In a joint judgment, Madala, Sachs and Yacoob JJ held on behalf of the majority that the provision was overbroad. It was not limited to the receipt of motor cars or other items where persons could be expected to keep records. Instead, it caught in its net millions of people, frequently poor and illiterate, who bought household necessities from door to door vendors. They, and not the professional receivers, were the persons most vulnerable to incorrect conviction resulting from application of the reverse onus. The risk of social stigma and imprisonment was unacceptably high. Although the court emphasised that the range of policy choices available to parliament to deal with the problem of receiving stolen goods ought not to be unduly limited, the majority adopted the remedy of reading in and replaced the invalid reverse onus provision with words imposing an evidential burden. Accordingly, the burden of proof resting on the prosecution is alleviated by an obligation resting on the accused to produce evidence of a belief that the goods were not stolen which could reasonably be true.

In a dissenting judgment, O'Regan J and Cameron AJ held that the reverse onus was justifiable since it was reasonable in the circumstances to require the accused to prove on a balance of probabilities that his or her belief as to honest acquisition was reasonable. They concluded that the section creates a special statutory offence which imposes an obligation on citizens to assist in combating crime by acting diligently when acquiring goods otherwise than at a public sale. Where, as in South Africa, the market for dealing in stolen goods is extensive and thefts often accompanied by excessive violence, society has the

right to oblige its citizens to act vigilantly to eradicate that market. The dissent addressed the majority's concern about the risk of unfair convictions by pointing out that the requirement of the reasonableness of the belief of the receiver of stolen goods contained in the statute takes account of the circumstances of the accused; that it is a lesser crime than common law theft and receiving stolen property; that the sentence may include fines and suspended sentences in appropriate cases; and that the accused is entitled to legal representation in appropriate cases.

Cross-references:

Presumption of innocence and reverse onus provisions:

- *S v. Zuma and Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), *Bulletin* 1995/3 [RSA-1995-3-001];
- *S v. Bhulwana, S v. Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), *Bulletin* 1995/3 [RSA-1995-3-008];
- *S v. Mbatha, S v. Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), *Bulletin* 1996/1 [RSA-1996-1-001];
- *S v. Julies* 1996 (4) SA 313 (CC), 1996 (7) BCLR 899 (CC);
- *Scagell and Others v. Attorney-General, Western Cape and Others* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC), *Bulletin* 1996/3 [RSA-1996-3-017];
- *S v. Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC), *Bulletin* 1997/1 [RSA-1997-1-002];
- *S v. Ntsele* 1997 (11) BCLR 1543 (CC), 1997 (2) SACR 740 (CC), *Bulletin* 1997/3 [RSA-1997-3-012];
- *S v. Mbatha, S v. Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), *Bulletin* 1996/1 [RSA-1996-1-001]. Right to silence;
- *Osman and Another v. The Attorney General, Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), *Bulletin* 1998/3 [RSA-1998-3-008].

Languages:

English.



Identification: RSA-2000-2-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.06.2000 / **e)** CCT 15/2000, CCT 07/2000 / **f)** First National Bank of South Africa Ltd v. Land and Agricultural Bank of South Africa and Others; Sheard v. Land and Agricultural Bank of South Africa and Another / **g)** 2000 (3) *South African Law Reports* (Official Gazette), 626 (CC) / **h)** 2000 (8) *Butterworths Constitutional Law Reports* 876 (CC); CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.18 **General Principles** – General interest.
 3.20 **General Principles** – Reasonableness.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Debtor, right to access courts / Loan / Property, protection, procedure / Execution, movables / Self-help, rule of law, contradiction.

Headnotes:

Legislative provisions that authorise the Land Bank of South Africa to attach and sell debtors' movable or immovable property in execution, and which give that bank a preferential right to the proceeds of a sale in execution of movables without recourse to a court of law, violate the constitutional right of access to courts which is fundamental to a democratic society that adheres to the rule of law. The Land Bank of South Africa's interest in saving time and money by bypassing the courts in this manner did not justify the violation of the right and the relevant statutory provisions are unconstitutional.

Summary:

In these two cases, heard together, the Court had to adjudicate on certain provisions in Sections 34 and 55 of the Land Bank Act 13 of 1944 (the Act). These sections authorise the Land Bank of South Africa (the Land Bank) to recover its debts by attaching and selling debtors' property in execution without recourse to a court of law. Section 34.5 grants the bank a preferential right to the proceeds of a sale in execution of movables. The Land Bank conceded the unconstitutionality of the impugned provisions to the extent that they infringed the debtor's right of access

to courts. In the First National Bank case, the Land Bank sought a suspension of the order of invalidity so as to preserve the statutory security it enjoyed over the proceeds of a sale of movable property in execution while allowing the relevant authorities time to correct the constitutional defects.

Mokgoro J, writing on behalf of a unanimous Court, confirmed that the debt recovery procedure provided for by the Act was unconstitutional. The process of execution sanctioned by the Act was essentially the same as that contained in Section 38.2 of the North West Agricultural Bank Act 14 of 1981 which the Constitutional Court had struck down in *Lesapo v. North West Agricultural Bank and Another*, as an impermissible infringement of the right of access to courts contained in Section 34 of the Constitution. The impugned sections in the Act constituted a form of self-help inimical to the rule of law. Contrary to the ordinary civil process of execution, the Act empowered the Land Bank to take the law into its own hands, to serve as judge in its own cause and to usurp the inherent powers and functions of the courts by deciding its own claims and relief. The Land Bank's interest in reducing the risk of loss through time- and cost-saving measures which bypass the judicial system, could not justify infringing the right of individuals to have justifiable disputes settled by a Court of law.

Turning to the question whether the order of invalidity ought to be suspended, the Court recognised that Section 34 loans enable the Land Bank to make short and medium term advances to farmers without contractual security, pledges or collateral security, on the strength of the bank's statutory security. Section 34 of the Act therefore renders the Land Bank a preferred creditor and to strike down the section with immediate effect would prejudice the Land Bank financially and force it either to raise interest rates or decline future advances. This would undermine the role of the Land Bank which is to provide accessible financial services to small-scale and struggling farmers, as well as beneficiaries of land reform programmes. The Court accordingly held that it was reasonable, in the interests of sound public policy, to preserve the current form of security by suspending the order of invalidity for a period of two years. In the interim the Land Bank was prohibited from attaching and selling the property of debtors in the absence of a court order.

Cross-references:

Access to court:

- *Lesapo v. North West Agricultural Bank and Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC).

Suspension of orders of invalidity:

- *Fraser v. Naude and Others* 1999 (1) SA 1 (CC), 1998 (11) BCLR 1357 (CC).

Languages:

English.



Identification: RSA-2000-2-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 25.08.2000 / **e)** CCT 1/2000 / **f)** The Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others / **g)** / **h)** 2000 (10) *Butterworths Constitutional Law Reports* 1079 (CC); CODICES (English).

Keywords of the systematic thesaurus:

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

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

3.18 **General Principles** – General interest.

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

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

Keywords of the alphabetical index:

Search, premises / Seizure, of information / Warrant, legislative provisions authorising issue.

Headnotes:

A law which authorises a judicial officer to grant a warrant of search and seizure for the purposes of investigating criminal activity constitutes a reasonable and justifiable limitation of the right to privacy if it can be interpreted so as to provide certain criteria on the basis of which the judicial officer must exercise that power.

Summary:

The respondents (including an individual and a group of companies) applied to the High Court for relief following a raid on their offices during which a large quantity of documents and computer records were seized in terms of the National Prosecuting Authority Act 32 of 1998 (the Act). The Act grants extensive search and seizure powers to an Investigating Director in the office of the National Director of Public Prosecutions when the latter conducts a 'preparatory investigation' or an 'inquiry' relating to the commission of certain specified offences (Sections 28.13 and 23.14 read with Section 29 of the Act). A preparatory investigation is a preliminary step which can be instituted to enable the Director to determine whether there are reasonable grounds to conduct an inquiry. In terms of Section 29.4 of the Act, these search and seizure powers can be exercised once a judicial officer has issued a warrant. Section 29.5 prescribes that it must appear to the judicial officer that there are reasonable grounds for believing that anything connected with the preparatory investigation is, or is suspected to be, on the targeted premises. These grounds must relate to:

- a. the nature of the preparatory investigation;
- b. the suspicion that gave rise to the preparatory investigation; and
- c. the need for a warrant with regard to the preparatory investigation.

Langa DP, writing for a unanimous Court, held that the search and seizure operation envisaged by the Act clearly violated the right of individuals and legal persons to privacy (Section 14 of the Constitution). The only question was whether the violation could be justified under Section 36 of the Constitution. The answer depended in the first place on the proper meaning of Section 29.5 of the Act. Section 39 of the Constitution requires a court, when called upon to consider the constitutionality of legislative provisions, to examine the objects of an Act and read its provisions in conformity with the Constitution, provided that such an interpretation can be reasonably ascribed to those provisions.

The Court held that on a proper construction of Section 29.5 of the Constitution, in light of several factors, including its legislative history, it was clear that the legislature must have intended that judicial officers would not issue a warrant in the absence of a reasonable suspicion that an offence has been committed. The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that a specified offence has been committed, that there are reasonable grounds to

believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of her discretion, the judicial officer considers it appropriate to issue a search warrant. These were considerable safeguards protecting the right to privacy.

The Court held that the purpose of the provisions in the Act authorising the Directorate to engage in preparatory investigations was to assist the Director to cross the threshold from a mere suspicion to a specified offence had been committed to a reasonable suspicion that such an offence had been committed, which is a pre-requisite for the holding of an inquiry. In view of the complexities of organised crime and the difficulty of identifying criminal conduct which may or may not constitute a specified offence, there was a clear need for the Investigating Directorate to have search and seizure powers. Under those circumstances, a search warrant may properly be obtained, on the basis of a reasonable suspicion that an offence has been committed, provided that the judicial officer is of the opinion that the search and seizure might establish that such an offence is a specified offence.

Ultimately, since the importance of the purpose of granting search and seizure powers in these circumstances had been established and given that the Act struck a balance between the need for search and seizure powers and the right to privacy, the limitation of the privacy right was reasonable and justifiable.

Cross-references:

Right to privacy:

- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) *Bulletin* 1998/3 [RSA-1998-3-009];
- *Mistry v. Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) *Bulletin* 1998/2 [RSA-1998-2-006];
- *Case and Another v. Minister of Safety and Security and Others*;
- *Curtis v. Minister of Safety and Security and Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), *Bulletin* 1996/1 [RSA-1996-1-006];
- *Bernstein and Others v. Bester and Others NO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC), *Bulletin* 1996/1 [RSA-1996-1-002].

Constitutional interpretation:

- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC), *Bulletin* 2000/1 [RSA-2000-1-001];
- *De Lange v. Smuts NO and Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004];
- *Mistry v. Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC), *Bulletin* 1998/2 [RSA-1998-2-006];
- *S v. Bhulwana*; *S v. Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), *Bulletin* 1995/3 [RSA-1995-3-008].

Languages:

English.



Identification: RSA-2001-1-005

a) South Africa / b) Constitutional Court / c) / d) 11.04.2001 / e) CCT 44/2000 / f) The State v. Russell Mamabolo / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

- 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
- 3.17 **General Principles** – Weighing of interests.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Contempt of court / Court, authority and impartiality / Decision, criticism.

Headnotes:

The crime of scandalising the Court (a species of contempt of court) does limit freedom of expression. Such a limitation is reasonable and justifiable in an open and democratic society in order to preserve the administration of justice provided that the crime is appropriately narrowly defined.

The summary procedure in cases of scandalising adopted in the High Court unjustifiably limits a number of constitutionally protected fair trial rights. Offences of scandalising the Court should be prosecuted in the normal way.

Summary:

This case concerned the constitutional validity of the conviction and sentence of the appellant, a spokesperson for the Department of Correctional Services for the offence of scandalising the Court. A high court judge granted a prisoner bail and the appellant issued a statement to the effect that the bail had been wrongly granted and that the prisoner would not be released. The Judge ordered the appellant and the Director-General of the Department to appear before him to explain and justify what they had said. They filed affidavits and were represented by counsel. The Director-General was ultimately discharged but the appellant was convicted of contempt of Court for bringing the dignity, honour and authority of the Court into discredit and sentenced to a fine and suspended imprisonment.

On appeal the appellant, supported by the Freedom of Expression Institute, e tv and Business Day as amici curiae, argued that the appellant's constitutional rights to freedom of expression and to a fair trial had been infringed. Appellant's counsel contended that the offence of scandalising i.e. contempt of Court by way of statements not made in court or relating to pending proceedings, could no longer be recognised in the light of the Bill of Rights. The argument for the amici was that the recognition of the right to freedom of expression limits scandalising to cases of clear and imminent danger to the administration of Justice. The state supported the validity of both the crime and procedure adopted.

The Court found that the crime of scandalising the Court (a species of contempt of court) does limit freedom of expression. Such a limitation is reasonable and justifiable in an open and democratic society in order to preserve the administration of justice provided that the crime is appropriately narrowly defined. The Court noted that the courts in many such societies have this power for this purpose. It held that

freedom of expression must be weighed against public confidence in courts.

The majority (per Justice Kriegler) held that because the Constitution regards human dignity, equality and freedom as foundational and recognises the importance of the dignity of the judiciary and demands that it be protected, conduct or language which is likely to damage the administration of justice is punishable as scandalising. Freedom of expression, on the other hand is not accorded the same weight. In a separate judgment, Justice Sachs disagreed with the majority of the Court as to how the balance is to be struck and expressed the view that something more than this is required to justify limits on freedom of speech – in order to constitute a crime, the conduct must pose a real and direct threat to the administration of justice.

The Court found that the summary procedure as adopted in the High Court, in cases of scandalising unjustifiably limits a number of constitutionally protected fair trial rights. Offences of scandalising the Court should be prosecuted in the normal way.

Contrary to the perceptions of the Judge, in the Court a quo, there had, in fact, been no defiance of the court order. Furthermore, appellant's public utterances did not constitute the crime of scandalising the Court. The appellant's conviction and sentence were accordingly set aside.

Cross-references:

Contempt of court:

- *Coetzee v. Government of the Republic of South Africa; Matiso and Others v. Commanding Officer, Port Elizabeth Prison, and Others*, 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC), *Bulletin* 1995/3 [RSA-1995-3-005].

Justification:

- *S v. Manamela and Another* (Director-General of Justice intervening), 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), *Bulletin* 2000/1 [RSA-2000-1-005].

The right to fair trial:

- *S v. Dzukudza and Others; S v. Tshilo*, 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), *Bulletin* 2000/3 [RSA-2000-3-012];
- *S v. Zuma and Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401, *Bulletin* 1995/3 [RSA-1995-3-001].

Languages:

English.

*Identification:* RSA-2002-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 25.01.2002 / **e)** CCT 36/2000 / **f)** Prince v. The President of the Law Society of the Cape of Good Hope and Others / **g)** 2002 (2) *South African Law Reports* (Official Gazette) 794 (CC) / **h)** 2002 (3) *Butterworths Constitutional Law Reports* 231 (CC); CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
 3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 3.19 **General Principles** – Margin of appreciation.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Cannabis, possession, use / Cannabis, use, for religious purposes / Court, duty to enforce the laws / Drug, harmful, use, exception.

Headnotes:

In a democratic society, the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and to enforce that prohibition by means of criminal sanction. Where it acts consistently with the Constitution, courts have to enforce the laws whether they agree with them or not.

Legislation prohibiting the possession and use of cannabis limits the individual and collective religious rights of Rastafarians. Such a limitation is, however, justifiable under Section 36 of the Constitution in particular, considering that South Africa is one of the

major sources from which the world trade in cannabis was supplied and has an international obligation to curtail that trade. If a religious exemption for the possession and use of harmful drugs were to be permitted, the State's ability to enforce its drug legislation would be substantially impaired.

Summary:

In 1997, the Cape Law Society refused to register Gareth Anver Prince's contract of community service which he was required to perform to qualify for admission as an attorney. He was refused registration on the grounds of two convictions for possession of cannabis in contravention of Section 4.b of the Drugs and Drug Trafficking Act no. 140 of 1992. Prince stated that he would continue to use cannabis because the use of cannabis was an integral part of his religion, Rastafarianism.

The Court of first instance, the Cape High Court, refused to set aside the Law Society's decision. On appeal, the Supreme Court of Appeal dismissed Prince's challenge to the constitutionality of the prohibition on cannabis. Prince then appealed to the Constitutional Court – the highest court on constitutional matters. The only issue was the constitutional validity of the prohibition on the use or possession of cannabis for religious purposes. The appeal was opposed by the Attorney-General and the Minister of Health, with the Law Society and the Minister of Justice abiding the decision of the Supreme Court of Appeal.

Prince did not dispute that the prohibition served a legitimate government interest and the Court was therefore not required to decide whether cannabis should be legalised. Instead, the constitutional complaint was that the prohibition went too far in that it included the possession or use of cannabis required by the Rastafarian religion.

In a joint judgment on behalf of the majority of the Court, Chief Justice Chaskalson and Justices Ackermann and Kriegler dismissed the appeal. They held that the prohibition against the possession and use of cannabis was part of a worldwide attempt to curb its distribution and was fully supported by the government. Whether decriminalisation of the possession and use of small quantities of cannabis was a more appropriate response to the problem than criminalisation, was not suggested and was not an issue in the appeal. In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by means of criminal sanction. Where it acted consistently with the Constitution, courts had to enforce the laws whether they agreed with them or not.

The majority held that the only question was whether the law was inconsistent with the Constitution because it interfered with Prince's right to freedom of religion and his right to practise his religion. The Court held that Rastafarianism was indeed a religion and that the legislation therefore impacted on the Rastafarians' individual rights (Section 15 of the Constitution) and collective rights (Section 31 of the Constitution) to practise their religion. What had to be decided was whether the limitation was justifiable under Section 36 of the Constitution.

There was no objective way in which law enforcement officials could distinguish between the religious and recreational possession or use of cannabis. South Africa was one of the major sources from which the world trade in cannabis was supplied and had an international obligation to curtail that trade. If a religious exemption for the possession and use of harmful drugs were to be permitted, the State's ability to enforce its drug legislation would be substantially impaired.

In a dissenting judgment, Justice Ngcobo held that the proportionality exercise involved the question of whether the granting of the religious exemption would undermine the objectives of the prohibition. The suppression of illicit drugs did not require a blanket ban on the sacramental use of cannabis when such use had not been shown to pose a risk of harm. The prohibition contained in the impugned provisions was too extensive. It followed that the prohibition was inconsistent with the constitution because it proscribed the religious use of cannabis even when such use did not threaten the government interest.

In a separate dissenting judgment, Justice Sachs expressed his general agreement with the judgment of Justice Ngcobo. He held that the real difference between the majority and minority judgments related to the extent to which the State should accommodate the religious convictions and practices of minority religious communities. The proportionality exercise had to be undertaken with due consideration of the broad historical context; the special responsibility the courts had when responding to claims by marginalised and disempowered minorities for Bill of Rights protection; South Africa's obligations in the context of international conventions dealing with drugs; the possibility of developing a notion of limited decriminalisation as a half-way house between prohibition and legalization; and the special significance of this matter for the constitutional values of tolerance, openness and respect for diversity.

In response to the minority, the majority held that granting a limited exemption for the non-invasive use of cannabis would not meet the appellant's religious needs and would still interfere materially with the ability of the State to enforce its legislation.

Supplementary information:

This matter first came before the Constitutional Court in November 2000 in the case of *Prince v. President of the Cape Law Society and Others*, 2001 (2) *South African Law Reports* 388 (CC); 2001 (2) *Butterworths Constitutional Law Reports* 133 (CC). As the focus of the challenge had been on the decision of the Law Society, there was insufficient evidence on record to determine the constitutionality of the impugned provisions. After extensive argument, the parties were granted leave to submit further evidence in the form of affidavits dealing with, amongst other things, the circumstances under which Rastafarian use cannabis and the practical problems involved in the granting of a religious exemption.

Cross-references:

- *Christian Education South Africa v. Minister of Education*, 2000 (4) *South African Law Reports* 757 (CC); 2000 (10) *Butterworths Constitutional Law Reports* 626 (CC), *Bulletin* 2000/2.

Languages:

English.



Spain

Constitutional Court

Important decisions

Identification: ESP-1995-2-013

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 08.05.1995 / **e)** 66/1995 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 13.06.1995 / **h)**.

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Public order, protection.

Headnotes:

The right of assembly (Article 21.1 of the Constitution) safeguards the collective exercise of freedom of expression by a gathering of people formed to promote the exchange or expression of ideas, defend certain interests or publicise problems and demands. Under the Constitution it is permissible to place restrictions on this right in order to protect public order, people and property. Thus a gathering may be prohibited only if such a measure is necessary – i.e. if there is no less restrictive and equally effective measure – and proportionate in the strict sense of the term, i.e. carefully weighed up or balanced, in that the benefits or advantages of the measure in terms of the public interest must outweigh the harm caused to the assets or values at stake.

Summary:

Following a call by the Federation of Banking Trade Unions for a demonstration in support of the demand for the negotiation of a new collective agreement, the prefectural authorities decided to ban the demonstration on the grounds that it would seriously affect traffic and public order. This decision, which was appealed

against through administrative channels, was subsequently upheld by a court decision, which was in turn the subject of the present constitutional appeal, based on the following three grounds: the ban was misconceived; the placing of restrictions on the exercise of the right of assembly provided for in the State Authorities Act governing that right (L.O. 9/1983) was unconstitutional; and the measure adopted was disproportionate. Having held that the allegation that the prefectural decision was misconceived was constitutionally inadmissible, as it had not been proved in the case in question that the decision had been an obstacle to the exercise of the right of assembly, the Constitutional Court focused its analysis on the restrictive interpretation of the exercise of the right of assembly reflected in the decisions and on the proportionate nature of the measure adopted.

To this end, having considered the content of the right of assembly and analysed its components, the Court pointed out that, in the case of many social groups, this right was the main means by which to express ideas and put forward demands in public. That said, as in the case of any other right, the Constitution placed limits on its exercise. In this case, these limits applied when the exercise of this right on a public thoroughfare could cause “public order disturbances which could endanger persons and property”. Having specified that the concept of public order referred to a practical situation and that it could not under any circumstances be applied in order to discriminate against the messages it was planned to put across in the course of such a demonstration, the Court added that the application of the prescribed restriction was admissible only if there were well-founded reasons to believe that there was a possibility of a practical disturbance likely to undermine public order within the meaning of the Constitution. In short, in order to restrict the exercise of the right of assembly, it was necessary, in each case, to weigh up all the specific circumstances in order to determine whether there were in fact well-founded reasons for believing that the traffic problems would have the features and effects described above. Accordingly, any prefectural decision banning a gathering must state the reasons for this ban and show why it was impossible to take the precautions needed to allow the exercise of the right of assembly. Given the constitutional nature of the right, the authority had, before banning a gathering, to apply criteria of proportionality and make use of its powers to suggest changes in the date, venue or duration of the gathering so that it could take place, even though in some cases such changes could, admittedly, make the exercise of the right meaningless. In the present case, the Court considered that the decisions appealed against were sufficiently well-founded, that sufficient reasons had

been given for them and that they were proportionate since they fulfilled the minimum conditions that could be laid down.

One judge expressed a dissenting opinion on the grounds that the ban was based on an abstract assessment of the effect of the demonstration on traffic.

Languages:

Spanish.



Identification: ESP-1996-3-030

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 16.12.1996 / **e)** 207/1996 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 19, 22.01.1997, 12-21 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.20 **General Principles** – Reasonableness.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Right to personal privacy / Physical intervention.

Headnotes:

The recognition of the right to physical and moral integrity (Article 15 of the Constitution) safeguards the inviolability of the person not only against assault with intent to commit bodily or mental harm but also against any form of physical or mental interference without the person's consent.

The right to personal privacy secured by Article 18.1 of the Constitution has a far wider substantive scope than the right to bodily privacy, and presupposes the existence of a sphere which is strictly individual, preserved from the action and knowledge of others, and moreover necessary according to the norms of

our culture for maintaining a minimum standard of quality of life.

Summary:

This appeal for constitutional protection was lodged against a court order for an investigative measure involving physical intervention and analysis of the appellant's hair to establish whether he had consumed cocaine or other toxic or narcotic substances and if so, for how long. For this purpose, the appellant was expected to let a forensic medical expert remove hair from several regions of the head together with all the hair of the armpits, and could not object without criminally resisting the judicial authority. This measure related to the investigation of a case involving suspected offences against public health regulations in which the appellant faced various charges of corruption and abuse of office for having abetted persons implicated in a drug trafficking affair, supposedly in return for a share of the drugs.

The Constitutional Court began by determining whether or not the measure in question lay within the protected constitutional sphere of the right to physical integrity (Article 15 of the Constitution) and the right to personal privacy (Article 18 of the Constitution). In the circumstances, the Court's judgment stressed that the measures which could be ordered in the course of criminal proceedings, such as searches or taking of evidence on the person of the accused or of third parties, fell into two categories with reference to the fundamental right principally affected. The first category comprised procedures defined as body inspections and searches, i.e. all manner of procedures involving scrutiny of the human body either to identify the accused (measures of identification, fingerprinting, anthropometry, etc.), or to establish circumstances relating to the commission of a punishable offence (electrocardiograms, gynaecological examinations, etc.), or to find the corpus delicti (anal or vaginal inspections, etc.), which might infringe the right to personal privacy (Article 18.1 of the Constitution). The second category of measures defined as physical interventions, comprised extraction from the body of certain internal or external substances for the purpose of subjecting them to expert examination (blood sampling, urine analysis, removal of hair and nails, biopsies, etc.) or exposing them to radiation (X-ray, tomography, magnetic resonance, etc.) in order to establish certain circumstances relating to the commission of a punishable offence or to the accused's implication in it, measures generally coming within the ambit of the right to physical integrity (Article 15 of the Constitution).

In accordance with its practice, the Constitutional Court held that the area of constitutional protection secured by the fundamental right of physical integrity was relevant to the intervention and analysis stipulated by the impugned court order, if only of superficial relevance, in so far as this right could be infringed without necessarily endangering or damaging the subject's health. As a result, the aforesaid order also related to the area of constitutional protection secured by the right of personal privacy, considering that an examination ordered with so much material and temporal latitude constituted an intrusion into the private sphere, though indubitably the consumption of a certain kind of drug at a given time lay within that sphere.

The Constitutional Court next determined whether the infringement of these fundamental rights by the impugned measure had an objective and reasonable constitutional justification. In that respect, the Court referred to its doctrine of proportionality, in particular the requirements for ensuring proportionality:

- a. the measure restricting the fundamental right must be prescribed by law;
- b. the measure must be adopted under the terms of a reasoned court decision;
- c. the measure must be appropriate, necessary and proportional to a rightful constitutional aim.

The Constitutional Court further specified the conditions of permissible interference with the right to physical integrity: the measure must be carried out by medical or health personnel, must pose no danger to health and must not involve inhuman or degrading treatment.

In the present case, the Constitutional Court held that the physical intervention restricting the rights of physical integrity and personal privacy infringed those rights owing to lack of statutory justification and breach of a requirement of constitutional law, ie the proportionality of sacrifices which must attend the adoption of measures restricting fundamental rights. In this case, the measure was really not at all indispensable for the purpose of substantiating that the unlawful acts under investigation had indeed occurred or that they had been committed by the person charged. Lastly, the Constitutional Court held that there was considerable disproportion between the impact of the measure ordered and the expected results.

Languages:

Spanish.



Identification: ESP-1998-1-003

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 17.02.1998 / **e)** 37/1998 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 65, 17.03.1998, 31-39 / **h)**.

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 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:

Strike, filming a picket line / Strike, identification of the participants.

Headnotes:

The right to strike recognised in Article 28.2 of the Constitution includes the right to disseminate information on the strike. In essence, therefore, it also comprises the right to publicise the strike, provided that it is publicised in a peaceful way, without any coercion, intimidation, threats or acts of violence of any kind, and respects the right of workers to choose not to exercise their right to strike.

Any measure which restricts a fundamental right has to be assessed from the angle of proportionality. For this purpose, it is first necessary to determine whether the measure is capable of achieving the desired result (assessment as to appropriateness); second, it has to be established whether the measure is necessary, i.e. whether there is any more moderate alternative measure which could achieve the aim pursued just as effectively (assessment as to necessity); last, it has to be determined whether the measure is a balanced one, i.e. whether it is more beneficial to the general interest than it is prejudicial to other interests or values involved (assessment as to proportionality in the strict sense).

Summary:

This judgment concerns a trade union's application for constitutional protection in connection with a case of violation of the right to trade union freedom (Article 28.1 of the Constitution) and of the right to strike (Article 28.2 of the Constitution), following an intervention by the police of an Autonomous Community during which a picket line was photographed and filmed with a video camera.

With reference to the facts declared proven in the judicial decisions handed down in the course of the preliminary judicial proceedings, the Constitutional Court observed that the members of the picket line in question performed their task without causing any disruption to public order and that their picketing proceeded quite normally, without any act that could in any way be construed as an offence. Moreover, it had been proved, under the terms of the judicial decisions referred to above, that the police of the Autonomous Community concerned, despite requests from several members of the picket line, had not agreed to stop filming and taking photos and had refused to identify the strikers.

The Constitutional Court pointed out first of all that the right to strike included the right to call for solidarity from third parties. With regard to the filming of the picket line by the police, the Court confined its analysis to three key aspects of the question: whether this act restricted or limited, if only superficially, the exercise of the right to strike; whether there was any constitutionally important right, or legal interest justifying such a restriction; and last, whether the restrictive measure was justified or proportionate in this specific case, regard being had, chiefly, to whether or not equally effective alternative measures existed and to the proportionality of the sacrifice of the fundamental right in question.

The Constitutional Court stated first that in filming the picket line, the police had sought to discourage or obstruct the free exercise of the right to strike. It could therefore be argued that the police had impaired the effectiveness of this right to the extent that it was impossible to overlook either the possible dissuasive effects on those participating peacefully in a picket line of being filmed continuously without any explanation and without knowing how the film would be used, or the effects which such a measure might have on the people at whom the information disseminated by the picket line was aimed.

However, the Constitutional Court could not rule out the possibility that, under some circumstances and subject to observance of the required guarantees, monitoring measures such as those challenged in this

application could be used to prevent disruptions of public order and to protect the free exercise of rights and freedoms. In this specific case, despite the possible existence of a constitutionally legitimate interest, namely the protection of citizens' rights and freedoms and the maintenance of public order – an interest which might therefore justify the adoption of a preventive monitoring measure – the Constitutional Court considered, having regard to the circumstances of this case, that the police measure had been disproportionate. In this connection, it pointed out that the activity of disseminating information and publicising the strike had been conducted in a positive and lawful manner at all times, without any act that could be construed as an offence. Furthermore, it emphasised that the police officers had refused to explain to the strikers the reasons for such a measure, even though the members of the picket line had specifically requested them to do so. In addition, the police had not agreed, as a possible alternative measure, to personally identify the members of the picket line.

Finally, it must also be pointed out that at the time of the facts there was a gap in the law with regard to the circumstances of such filming and the procedures to be observed, particularly as regards the keeping of recordings made in such circumstances, their availability for inspection by the courts, rights of access to them, and their destruction.

Languages:

Spanish.

*Identification:* ESP-1999-3-018

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 22.07.1999 / **e)** 144/1999 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 26.08.1999, 35-47 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.

4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.

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

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

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

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

Keywords of the alphabetical index:

Criminal record, access / Election, ineligibility for election.

Headnotes:

A candidate's debarment from standing for election to a representative political post, following a legal declaration of disqualification (Sections 2.2, 3 and 6.1 of the Organic Law on general rules on elections) directly affects electors' right to participate, through their elected representatives, in conduct of public affairs (Article 23.1 of the Constitution), in as far as this right is exercised in conformity with electoral legislation and does not allow the election of persons not entitled to stand. The election of any person not entitled to stand contravenes electoral law, abuses the electorate and prevents democracy from functioning.

In virtue of the right to privacy (Article 18.1 of the Constitution), any individual should be able to deny a third party access to parts of their personal and family life and enjoy the right to power of alienation on all information therein, in order to safeguard it from any unwanted publicity or the curiosity of a third party. This privacy should, firstly, have its boundaries established by law and secondly, be safeguarded by the public authorities against potential violations where legislation provides that individual private information should be contained in files or registries belonging to the same public authorities. A person's criminal record is private information and consequently, the processing of and access to it should be subject to legal provisions on criminal records. Access to this sort of information outside cases and circumstances stringently regulated by law constitutes a breach of the right to privacy (Article 18.1 of the Constitution).

Summary:

A criminal court had suspended the applicant's right to vote at a time when local and autonomous community parliamentary elections were due in which the applicant was standing as a candidate. The court had decided not to inform direct by the Election Commissions responsible, under Spanish electoral law, for ensuring the smooth conduct of the electoral process and checking eligibility to vote or stand that the candidate was temporarily disqualified (in accordance with Sections 2, 3 and 6.1 of the Organic Law on general rules on elections). The commissions had eventually learned the facts, enforced the suspension, declared the applicant unfit to stand in the elections and taken the relevant steps to execute the decision, all on the very day that the elections took place and after administrative proceedings that can only be called eventful.

The Constitutional Court held that the Election Commission decisions were not contrary to the Constitution. At the time of the elections, the applicant had been stripped of his right to vote or stand, notwithstanding the public declaration of his candidature. The disqualification rendered his candidature absolutely void. Further, the decision was the only way of protecting the rights of voters and the democratic nature of election of political representatives.

The only aspect that the Constitutional Court deemed unlawful and decisive in the "eventful" administrative proceedings was that the Chair of one of the Election Commissions, (a Court of Appeal judge overseeing correct election procedure) had made a telephone request for information from the applicant's criminal record in order to see if he had a conviction and his right to vote had been temporarily suspended. The Constitutional Court took the view that neither the legislation on criminal records nor the special legislation on Election Commissions allowed access to anyone's criminal record, even to establish whether they had the right to stand for election. The unlawful access to the applicant's criminal record was therefore an invasion of his privacy.

Supplementary information:

Legal norms referred to:

- Articles 2, 3, 6.1, 19, 41, 47, 115, 152 and 177 of the Organic Law on the General Rules on Elections.

Cross-references:

- See Royal Decree 435/92 of 30.04.1992 concerning the notification of sentences to the Central Criminal Records Office and the Returning Office.

Languages:

Spanish.

*Identification:* ESP-2000-2-019

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 29.05.2000 / **e)** 141/2000 / **f)** Pedro Carrasco Carrasco / **g)** *Boletín oficial del Estado* (Official Gazette), 156, 30.06.2000, 40-46 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
- 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.41 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Marital separation / Child, paternal rights / Sect / Proselytism, of minor children / Fundamental right, restriction, justification.

Headnotes:

The placing of excessive restrictions on the access of a father separated from his minor children on the grounds of his religious beliefs is in breach of the right to freedom of religion (Article 16 of the Constitution).

Minors enjoy full entitlement to their fundamental rights. The exercise of these rights and the faculty of choice in their regard do not depend entirely on the decisions of those who have parental authority over or custody and care of a minor; they must reflect the child's level of maturity and the different stages of his/her capacity to act as recognised in law.

Minors have the right to freedom of religion and protection from psychological duress. It follows that they have the right not to share their parents' beliefs and not to be exposed to their proselytising. For this reason, where conflict exists between the rights of parents and minor children, it must be settled with regard firstly to the interests of the latter.

Justification must be given for all restrictions imposed by the authorities on freedom of religion.

Summary:

The applicant's wife had sought marital separation on the grounds *inter alia* that ever since her husband had joined the organisation known as the "Gnostic Christian Universal Movement of Spain" he had consistently failed to comply with his obligations towards his family, had placed conditions on the couple's intimacy and had pressurised her to join the movement. The court at first instance had ruled for separation and granted custody of the children to the wife, although parental authority was awarded to both parents.

Under the terms of this ruling, the father had access on alternate weekends and for half of all holidays. He was also explicitly barred from exposing the children to his religious beliefs or making them attend gatherings associated with those beliefs. Granting an application brought by the wife, the Provincial Court of Appeal (Audiencia Provincial) drastically curtailed the father's access, limiting it to weekends only with no rights during holidays and placing an absolute prohibition on the children spending the night in his home. The Court of Appeal based its decision on a psychosocial report introduced into the file which stated that the movement to which the father belonged could be identified as a destructive sect and that measures should therefore be taken to prevent the father, as a member of this organisation, from exposing his children to his beliefs.

The father lodged an appeal for constitutional protection, alleging that the Provincial Court of Appeal decision to restrict his right of access to his minor children because of his membership of the Gnostic Christian Universal Movement of Spain contravened his freedom of religion. The Constitutional Court allowed the father's appeal, set aside the restrictions imposed by the Court of Appeal and reinstated the access decreed by the trial court.

The Court held that parents' freedom of religion and their right to proselytise their children were limited by the children's own freedom of religion and right to protection from psychological duress. Children had the right not to share their parents' beliefs or to be exposed to their proselytising. For this reason, where these rights were in conflict the interests of minors must always be given priority (Articles 15 and 16 of the Constitution, in the light of Article 39).

The Court held as a general rule that the freedom of religion established in Article 16 of the Constitution meant that one could lawfully profess the beliefs of one's choice, behave as dictated by those beliefs, argue them with other people and engage in proselytism. The nature of this freedom varied according to whether it related to the conduct itself or to the religious freedom of others. In the first case, freedom of religion as laid down in Article 16 of the Constitution afforded total protection which ended only where this freedom overlapped with other fundamental rights and interests which were constitutionally guaranteed. However, where freedom of religion impinged on other people it was limited not only by the restrictions mentioned above and by those necessary for the statutory preservation of law and order, but also by the right of others not to believe and not to be involved in or subjected to proselytism by third parties (a negative demonstration of religious freedom). The right not to be subjected to psychological duress (Article 15 of the Constitution) placed a further restriction on the right to freedom of religion. In no circumstances could differences in belief result in different treatment under the law.

In the present case, the Constitutional Court found that the disputed court decision to restrict freedom of religion was legitimate in its purpose. Nonetheless, the disproportionate nature of the restrictions imposed by the Provincial Court of Appeal involved discrimination against the applicant on grounds of his beliefs. The Constitutional Court judgment indicated that the decision by the court at first instance to prohibit the children's exposure to their father's beliefs (a decision which was not contested) was sufficient to prevent the threat which these beliefs posed for them. Any further restriction on the father's

freedom of religion would have required specific evidence that it was necessary, and such evidence did not exist in the preliminary civil proceedings.

Supplementary information:

- Article 14 of the United Nations Convention on the Rights of the Child.
- European Parliament resolution on the European Charter on the Rights of the Child (Resolution A3-0172/92 of 08.07.1992, paragraphs 25 and 27 § 8).
- Organic Law no. 1/1996 of 15.01.1996 on the legal protection of minors.

Cross-references:

Freedom of religion and ideology:

- Constitutional Court Judgments nos. 9/1985, 20/1990, 292/1993, 173/1995, 166/1996 (*Bulletin* 1996/3 [ESP-1996-3-026]) and 177/1996;
- Judgments of the European Court of Human Rights of 25.05.1993 in the case of *Kokkinakis v. Greece* (*Special Bulletin Leading Cases – ECHR* [ECH-1993-S-002]) and of 24.02.1998 in the case of *Larissis and others v. Greece*.

Languages:

Spanish.



Sweden

Supreme Administrative Court

Important decisions

Identification: SWE-2003-H-001

a) Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 22.09.2003 / **e)** 6814-6817 / **f)** Legal capacity for a dissolved company / **g)** *Regeringsrättens Årsbok (RÅ)* / **h)**.

Keywords of the systematic thesaurus:

5.1.1.5.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.

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

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

5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Appeal, right / Company, tax, inability to pay / Company, dissolved, legal capacity.

Headnotes:

Although as a rule a dissolved company lacks legal competence, it may, owing to special circumstances, be granted the right to a trial. However, no such circumstances existed in the present case. The company's liability to pay additional tax had already been tried in one instance, which was enough to satisfy the requirements in Article 6 ECHR.

Summary:

The tax authorities denied a limited company a deduction for an amount of pre-paid tax and charged the company additional tax. The company appealed against the decision to the County Administrative Court. During the proceedings in this instance, the company went bankrupt. The court rejected the appeal. The company then applied to the Administrative Court of Appeal. During these procedures the

company was wound up; there were no surplus assets; and the company was dissolved. The court dismissed the company's action on the grounds that it no longer had legal capacity and, thus, not legally competent. The company appealed to the Supreme Administrative Court. The court found that the company's liability to pay additional tax had already been tried in one instance, which was enough to satisfy the requirements in Article 6 ECHR. The court's conclusion was partly a consequence of its interpretation of the special provision in Article 2.2 Protocol 7 ECHR, which in matters of a minor character allows exception to be made from the right to appeal to a higher court. The court of appeal's decision was affirmed.

Languages:

Swedish.



Identification: SWE-2003-H-002

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 28.10.2003 / **e)** 5610-5611 / **f)** Legal aid / **g)** *Regeringsrättens Årsbok (RÅ)* / **h)**.

Keywords of the systematic thesaurus:

4.10.7 **Institutions** – Public finances – Taxation.

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

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

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

Keywords of the alphabetical index:

Tax, evasion / Entrepreneur, legal aid, right.

Headnotes:

The possibilities for an entrepreneur to receive legal aid in tax-cases are limited. When applying Article 6.3c ECHR in a case concerning additional tax, the amount of the additional tax and the scope

and nature of the case should be considered. Legal aid should be granted only if the sanctions in question were particularly heavy and the legal issues were complicated.

Summary:

After having found that A.S., a taxi-fleet operator, had not declared all his earnings, the tax authorities increased the amount of his declared income and charged him additional tax. A.S. appealed against the decision to the County Administrative Court, which rejected the appeal. A.S. appealed against the judgment to the Administrative Court of Appeal and applied for legal aid regarding his liability to pay additional tax. The court rejected his request for legal aid. Relying on Article 6.3c ECHR, A.S. appealed against that decision. He observed that he had been charged more than 230 000 SEK in additional tax, which exceeded the maximum amount for fines.

The Supreme Administrative Court noted that according to the Swedish Legal Aid and Advice Act (*Rättshjälpslagen* [1996:1619]), the possibilities for a businessman to receive legal aid in tax-cases were limited. Legal aid should be granted only if the sanctions in question were particularly heavy and the legal issues were complicated (cf. van Dijk/van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3 ed. 1998, p. 472-473). The Court found that those requirements were not satisfied in A.S.'s case.

Languages:

Swedish.



Switzerland Federal Court

Important decisions

Identification: SUI-1982-R-001

a) Switzerland / **b)** Federal Court / **c)** Second public law Chamber / **d)** 12.03.1982 / **e)** P.1210/1981 / **f)** Rivara v. Council of State of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 108 Ia 41 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Worship, outdoors / Religious event, authorisation.

Headnotes:

Free exercise of acts of worship; religious procession on a public thoroughfare.

Articles 50.1 and 50.2 of the Constitution; cantons must permit a procession to take place subject to the conditions laid down in these provisions (confirmation of case-law; recital 2a).

Article 1 of the Geneva law on open-air acts of worship, which forbids any form of procession or religious event on the public thoroughfare, is in breach of Article 50 of the Constitution (recitals 2b and c).

Cantons may impose a requirement of authorisation for religious events on the public thoroughfare. There was no justification for refusing authorisation in this case (recital 3).

Languages:

French.



Identification: SUI-1999-1-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 02.12.1998 / **e)** 1P.277/1997 / **f)** Demokratische JuristInnen der Schweiz (DJS) and others v. Canton of Basel-Land / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 I 127 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 2.1.3.2.3 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Other international bodies.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.17 **General Principles** – Weighing of interests.
- 4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
- 5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to examine witnesses.

Keywords of the alphabetical index:

Undercover agent, anonymity / Undercover agent, evidence / Witness, protection / Defence, effective / Witness, anonymous.

Headnotes:

Anonymity of undercover agents during criminal proceedings, revision of the Code of Criminal Procedure of the Canton of Basel-Land, Article 4 of

the Federal Constitution and Articles 6.1 and 6.3.d ECHR.

Examination of prosecution witnesses and use of anonymous evidence in the light of the case-law on the right to a fair trial (recital 6).

General observations on the protection of witnesses (recital 7).

Difficulty in making an effective defence in the presence of evidence given by anonymous witnesses (recital 8). Procedural measures to compensate (recital 9). Balancing conflicting interests; interpreting provisions on safeguarding the anonymity of undercover agents to comply with the Constitution and the European Convention on Human Rights (recital 10).

Summary:

The Cantonal Parliament of Basel-Land introduced a new section on operations by undercover agents into the Code of Criminal Procedure. The change in legislation was adopted by referendum. The new provisions lay down the conditions and manner of operations by undercover agents, their training, monitoring and period of deployment. It is stipulated specifically that any such undercover operation must have the prior approval of the courts, which can guarantee the anonymity of the agents concerned to the extent that their identity may not be revealed either during investigation or during court proceedings. When they are giving evidence to a criminal court, the identity of undercover agents may be kept secret by the temporary exclusion of the public from the court or by measures to prevent their identification, such as the use of screens, face masks or devices altering the human voice. Only the president of the court is made aware of an undercover agent's identity.

By means of a public-law appeal, the Basel section of the Swiss Association of Democratic Lawyers and a number of private individuals contested this change in legislation before the Federal Court. At issue in particular were the provisions safeguarding the anonymity of undercover agents. It was argued that such anonymity did not permit the defendant to make an effective defence, and consequently that it was in breach of Article 4 of the Federal Constitution and Article 6.3.d ECHR.

The Federal Court undertook an abstract review of the provisions in question and dismissed the appeal. It made a detailed analysis of the case-law of the European Court of Human Rights in connection with Article 6.3.d ECHR. It considered the problem of

protecting undercover agents alongside the more general issue of witness protection and contrasted these with the rights of the defence, making particular reference to legal theory and to Recommendation no. R(97)13 of 10 September 1997 of the Committee of Ministers of the Council of Europe.

The purpose of guaranteeing anonymity was to protect undercover agents and their families against intimidation and threats; it also enabled agents to continue working for the prosecution once proceedings were under way. However, in the opinion of the European Court of Human Rights, the anonymity of an undercover agent called to testify against a defendant was “an almost insurmountable handicap”. Although the latter could contest evidence as to the facts of the case and examine the witness, he/she was unable to call in question the credibility of an undercover agent. In order to compensate in part for the difficulties experienced by the defence, it was possible to apply a verification procedure whereby the witness must be reliably identified, the president of the court could personally examine the agent and report to the opposing parties, further important information might arise from consultation of the file on the agent’s deployment, and, lastly, the person overseeing the agent’s deployment could be examined.

It was not easy to achieve a balance between the conflicting interests. In view of the defendant’s right to examine the agent in the criminal court and the possibility of verification measures, it was not contrary to Article 4 of the Federal Constitution or Article 6.3.d ECHR to allow anonymous evidence by undercover agents. However, the guarantee on the rights of the defence limited the use of such evidence, and the trial judge must take account of all circumstances. It would nevertheless be contrary to both the Constitution and the Convention to base a conviction solely or mainly on anonymous evidence.

Languages:

German.



Identification: SUI-1999-2-006

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.07.1999 / **e)** 1A.178/1998, 1A.208/1998 / **f)** A. v. Federal Prosecutor, Federal Department of Justice and Police, and Federal Council / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 II 147 / **h)** *Pratique juridique actuelle* 1999 1491; *La Semaine judiciaire* 2000 I 202; *Europäische Grundrechte-Zeitschrift* 1999 475; *Revue de droit administratif et de droit fiscal* 2000 1 589; CODICES (German).

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.

1.4.1 **Constitutional Justice** – Procedure – General characteristics.

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

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

2.1.1.4.8 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.

2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.

3.13 **General Principles** – Legality.

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

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

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.

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

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

Keywords of the alphabetical index:

International law, primacy / Propaganda, material, confiscation / Security, external and internal / Security, national.

Headnotes:

Article 98a and Article 100.1a of the Federal Judicature Act (OJ); Article 6.1 ECHR; admissibility of an administrative-law appeal against confiscation of propaganda material belonging to the Kurdistan Workers Party.

Once a confiscation order has been made, there ceases to be any interest in contesting a seizure which preceded the order (recital 2).

Confiscation of propaganda material for reasons of external or internal security affects civil rights and obligations within the meaning of Article 6.1 ECHR (recital 4b).

In conflicts of law, international law in principle takes precedence over national law, in particular where the international rules seek to protect human rights. Thus, despite the letter of Article 98a and 100.1.a OJ and by virtue of Article 6.1 ECHR, an administrative-law appeal to the Federal Court against a confiscation order of the Federal Council is admissible (recital 4c-e).

Article 55 of the Federal Constitution (freedom of the press) and Article 10 ECHR; Article 102.8, 102.9 and 102.10 of the Federal Constitution; Article 1.2 of the Federal Council decree on subversive propaganda; confiscation of propaganda material for reasons of internal or external security.

The Federal Council decree on subversive propaganda constitutes, when taken together with Article 102.8, 102.9 and 102.10 of the Federal Constitution, a sufficient legal basis for a serious interference with freedom of expression and freedom of the press (recital 6).

In the circumstances of the case, the confiscation of written material belonging to the Kurdistan Workers Party (PKK) was consistent with the proportionality principle in that, in furtherance of the PKK's cause, the material incited violence and exerted pressure on emigrants living in Switzerland (recital 7).

Summary:

In 1997, the customs authorities intercepted 88 kg of propaganda material which the PKK had sent to A., who was resident in Switzerland. The federal prosecutor seized the material on grounds of internal and external security. A. appealed to the Federal Department of Justice and Police, which treated the appeal as a report to the surveillance authority and dismissed it. Under the 1948 decree on subversive

propaganda the Federal Council then ordered the confiscation and destruction of the material.

A. lodged administrative-law appeals with the Federal Court to have the seizure decision and confiscation order set aside. He also requested that the material be returned to him. He relied, in particular, on Article 6.1 ECHR.

As the seizure decision had become devoid of purpose, the Federal Court decided not to go into the first appeal. It did, however, consider the appeal against the confiscation order, dismissing it on substantive grounds.

Under the Federal Judicature Act, decisions of the Federal Council cannot, in principle, be referred to the Federal Court, with one exception which did not apply in the present case.

The issue was whether the confiscation order fell under Article 6.1 ECHR. Confiscation is a serious interference with the appellant's property rights. According to legal theory, government measures taken on grounds of internal or external security do not fall within the ambit of the Convention. The European Court of Human Rights has never taken a clear position on the subject. In view of the seriousness of the interference, there could be no denial that Article 6.1 ECHR was applicable. The appellant's further reliance on Articles 10 and 13 ECHR did not have a decisive bearing.

In the present case, the provisions of the Federal Judicature Act could not be interpreted in a manner consistent with the European Convention on Human Rights. Swiss law here clashed with the Convention's requirements, and Articles 114bis.3 and 113.3 of the Federal Constitution did not resolve the matter. General principles of international law and the Vienna Convention on the Law of Treaties require that states honour their international undertakings. The federal authorities thus had a duty to set up judicial authorities that met the requirements of Article 6 ECHR, and the Federal Court was required to deal with A.'s appeal against the Federal Council decision.

The 1948 decree on subversive propaganda was an independent decree of the Federal Council directly based on Article 102.8, 102.9 and 102.10 of the Federal Constitution. It was thus a sufficient legal basis to justify interfering with freedom of expression and freedom of the press, notwithstanding that the international situation had altered appreciably in recent years, and that, with the entry into force of a new federal law introducing internal security measures, the decree had been repealed.

The confiscated material contained PKK propaganda openly calling for armed resistance to the Turkish state; it went well beyond mere propaganda for the Kurdish movement. The material inciting violence was capable of endangering the peaceful co-existence of different groups living in Switzerland and seriously interfering with Switzerland's neutrality and external relations. These dangers justified confiscating the propaganda material.

Languages:

German.



Identification: SUI-1991-S-003

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 15.11.1991 / **e)** 2A.120/1991 / **f)** Federal Tax Office v. Estate X. and Administrative Court of the Canton of Lucerne / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 117 Ib 367 / **h)** *Journal des Tribunaux*, 1993 I 273; *Archives de droit fiscal suisse*, 61 779; *Der Steuerentscheid*, 1992 B 101.6 4; *Revue fiscale*, 47 1992 390; *La Semaine judiciaire*, 1992 448; *Revue de droit administratif et de droit fiscal*, 1992 324; *Europäische Grundrechte-Zeitschrift*, 1992 416; CODICES (German).

Keywords of the systematic thesaurus:

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

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

2.1.1.4.8 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.

2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.

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

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

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

Keywords of the alphabetical index:

Succession, tax, penalty, liability of heirs / Tax, criminal legislation / International law, domestic law, relationship.

Headnotes:

Article 114bis.3 of the Federal Constitution (under which the Federal Court applies the Federal legislation and the agreements passed by the Federal Assembly), Article 130.1 of the Order of the Federal Council on the collection of a direct federal tax (AIFD), Article 6.2 ECHR; criminal tax legislation; liability of heirs; presumption of innocence; examination of Federal legislation.

It is not open to the court to examine the constitutionality of the provisions of the AIFD, by virtue of Article 114bis.3 of the Federal Constitution (recital 1).

Is it possible to examine to what extent the provisions of the AIFD are compatible with the ECHR (recital 2)?

The liability of the heirs for the taxes avoided and penalties incurred by the deceased – provided for under Article 130.1 AIFD – is not contrary to the presumption of innocence arising from Article 6.2 ECHR (recitals 3-5).

Summary:

X. died on 18 October 1988. His legal heirs discovered that he had not declared his entire assets and income to the tax authorities. They accordingly advised the tax authorities, who proceeded to initiate proceedings to recover the tax and to hold the heirs liable for the tax evaded together with a penalty. The heirs appealed to the Cantonal Administrative Court, which set aside the tax penalty. The Federal Court heard the appeal brought by the Federal Tax Office and affirmed the obligation of the heirs to pay the tax due together with the penalty.

The heirs do not oppose their obligation to pay the tax due from the deceased; the proceedings are confined to the question of whether the provision in the order of the Federal Council on direct federal tax, under which the heirs are jointly liable for the penalty incurred by the deceased in proportion to their share of the estate and irrespective of any fault on their part, is contrary to the principle of presumption of innocence as laid down by Article 6.2 ECHR.

According to the Federal Constitution, the Federal Court is required to apply the laws and agreements passed by the Federal Parliament. The European Convention on Human Rights is part and parcel of Swiss law, the Federal Parliament having approved the accession of Switzerland to the Convention. The Federal Court, like any other authority, is thus bound by the Convention. It ranks higher than a mere federal law. International public law (Vienna Convention on the Law of Treaties, 23 May 1969, to which Switzerland is a party) expressly provides that international treaty law is to prevail over domestic law. The Federal Constitution does not preclude the Federal Court from inquiring as to whether a federal law is compatible with the Convention; it merely precludes repealing or amending it; on the other hand, it may refrain from applying it in a specific case where to do so would be contrary to international law and would thus render Switzerland liable to a conviction for contravening that law. In examining whether a provision of federal law is in accordance with the European Convention on Human Rights, the Federal Court must first of all ascertain whether it is possible to interpret such a provision as being in accordance with the Convention.

In this case, the provision in the federal decree whereby heirs are responsible for a penalty imposed on account of tax evasion on the part of the deceased during his lifetime is not contrary to the European Convention on Human Rights. While it is true that heirs are not liable for fines imposed for ordinary criminal law offences by the deceased, the case is otherwise with tax law because of its peculiarities (the heirs not being entitled to benefit in any way from a more favourable situation than that of the deceased to whose estate they succeed; moreover, the heirs have the right to repudiate the succession). The presumption of innocence on the part of the heirs is not at issue. The penalty is imposed not on account of any fault on their part, but purely as the result of that of the deceased. Moreover, the penalty in this particular case has been reduced to one quarter because the heirs of their own accord informed the tax authorities of the tax evasion by the deceased; such a reduction is aimed to ensure that heirs are not treated worse than a deceased person who, while he was alive, could at any time have advised the tax authorities of the tax evasion and thereby himself obtained a reduction in the fine.

Languages:

German.



Identification: SUI-2001-3-009

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 20.09.2001 / **e)** 1P.147/2001 / **f)** Labour party and others v. Municipality of Davos and Administrative Court of the Canton of Grisons / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 164 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Public property, use / Demonstration, authorisation / Area, use by the public, demonstration / Demonstration, postponement.

Headnotes:

Refusal to authorise a demonstration during the 2001 World Economic Forum in Davos; freedom of opinion and assembly; Articles 16 and 22 of the Federal Constitution; Article 11 ECHR and Article 21 of the International Covenant on Civil and Political Rights.

Principles of freedom of opinion and assembly in connection with demonstrations on public property: requirement of authorisation, assessing interests with reference to the theoretical content of fundamental rights, imposition of obligations and conditions, duty of organisers to co-operate (recital 3).

Examination of the application with reference to traffic conditions and risks of disturbance (recital 4).

In principle, the right to organise demonstrations extends to areas which are not public property, but are used by the public (recital 5b).

Assessment of postponement of a demonstration (recital 5c).

Summary:

As part of a co-ordinated anti-WTO campaign, the Labour Party applied in late November 2000 for permission to hold a protest march in Davos on Saturday 27 January 2001 against the World Economic Forum, which was due to be held in the town at that time. The Executive Council of the municipality of Davos refused permission, on the ground that traffic, already congested as a result of winter conditions and the influx of tourists (particularly on Saturdays), might be brought to a standstill. It also referred to the need to protect Forum participants effectively, and to the danger of acts of violence, of the kind which had marked anti-WTO demonstrations throughout the world. The Labour Party and a trade union appealed to the Administrative Court of the Canton of Grisons, which upheld the refusal, on the ground that restrictions on freedom of opinion and assembly were allowable under the Federal Constitution. In the special circumstances of the case, it held that forbidding the demonstration was consistent with the proportionality rule.

The Labour Party and the trade union brought a public law appeal against the Administrative Court's decision in the Federal Court. Specifically, they argued that it violated freedom of opinion and assembly, as guaranteed by the Federal Constitution, the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The Federal Court declared this appeal inadmissible.

The Federal Court does not insist that a present interest must exist if the issues raised by an appeal are general, and may arise again at any time in similar circumstances, and if the Constitutional Court is unlikely to be able to consider them in good time. However, it gives decisions on questions of principle only, and does not make a detailed examination of the interests that may be at issue in any given circumstances.

The Federal Constitution guarantees freedom of opinion and assembly in general. In the case of demonstrations on public property, these freedoms acquire a special character. Demonstrations constitute intensified public use of public property,

and prevent individuals from using it normally. Prior authorisation may be required, but freedom of opinion and assembly mean that the authorities may not simply refuse permission. To some extent, they are required to make public property available to the demonstrators, or suggest other venues if the demonstration cannot be held in the place requested – and must also act to ensure that the demonstration can in fact take place. They must also, however, ensure the free flow of traffic, maintain order and protect non-demonstrators against any violation of their fundamental rights. They must assess the interests involved carefully. Imposing certain obligations or conditions on demonstrators may be the best solution in some cases.

Local conditions in Davos are such that traffic may well be brought to a standstill, particularly on a Saturday, when numerous visitors arrive; there are also security problems, and acts of violence are a danger. These are sufficient reasons for restricting freedom of opinion and assembly. The question must still be asked whether the authorities failed to observe the proportionality principle in forbidding the demonstration, and should have explored alternative solutions.

The appellants do not argue that the protest march could have been re-routed to avoid disrupting traffic, and could thus have been permitted. They do claim, however, that a static demonstration could have been held in an open space or square. In their decisions, the municipal authority and the Administrative Court both state that there is no public square owned by the municipality and under its authority. The question of ownership in the private law sense is not, however, decisive. Insofar as roads and squares are used by the public, they can be made available for demonstrations. The authorities are therefore required to explore these possibilities, and violate the Federal Constitution by failing to do so. However, since no present interest was involved in the instant case, the Federal Court did not allow the appeal on this point and did not instruct the cantonal and local authorities to review the matter. The last question is whether it might have been possible to hold the demonstration on the Sunday, rather than the Saturday, or on some other day. Such a postponement is compatible with fundamental rights. As long as the demonstrators can disseminate their opinions freely and bring them to the notice of the journalists assembled for the World Economic Forum, there is no disproportionate interference. Since the organisers opposed postponement, the Executive Council was not required to examine this solution more closely.

Languages:

German.



Identification: SUI-2002-3-005

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.08.2002 / **e)** 1P.91/2002 / **f)** Botta et al. v. Canton of Graubünden / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 128 I 327 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.4 **General Principles** – Separation of powers.
- 3.13 **General Principles** – Legality.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.

Keywords of the alphabetical index:

Order, content, general clause / Law and order, protection and keeping / Police, power.

Headnotes:

Order on the Cantonal Police Force issued by the Grand Council of Graubünden, right to issue orders on police measures to protect law and order, principle of the separation of powers, general policing clause, restriction of fundamental rights.

The powers of the Grand Council to legislate by way of order on police matters within the framework of the general policing clause; no violation of the principle of the separation of powers (point 2).

An order of the Grand Council is a formal legal basis for the restriction of fundamental rights. The principle of the rule of law and the requirement of sufficiently detailed legal rules in police matters. Proportionality of the measures for maintaining order (measures prohibiting access, creation of prohibited zones and temporary seizure of objects) (point 4).

Summary:

The Grand Council of the Canton of Graubünden (Cantonal Parliament) partially amended the Order on the Cantonal Police Force by adding a provision on policing measures to protect law and order. This provision generally sets out that with a view to

protecting law and order and preventing various public dangers, the police may implement measures as dictated by the particular situation. In particular, the police may order individuals out of a specific place or area, prohibit access to specified buildings, grounds or areas, prohibit loitering in such areas, and temporarily confiscate objects presenting a danger or liable to be used in a dangerous manner. In the explanatory memorandum to the draft amendments, the Government of the Canton of Graubünden pointed out that the Cantonal Police Force was having to cope with an increasing workload in terms of protecting law and order and public safety and needed additional powers in order to meet these new needs. The new provision was needed, inter alia, to ensure the proper supervision of such major events as the Davos Economic Forum and the world skiing championships.

A number of individuals lodged a Constitutional complaint asking the Federal Court to quash this new provision, claiming that it violates the principle of the separation of powers and certain fundamental rights, such as personal freedom. The Federal Court dismissed the complaint.

In accordance with the Constitution of the Canton of Graubünden, the Grand Council may issue orders without holding any compulsory referendum. Given that the Grand Council remained within the framework of the general policing clause, it did not violate the principle of the separation of powers by adding a provision on police measures to protect law and order to the Order on the Cantonal Police Force.

The impugned provision is general in scope. In order to discharge its duties the police force must take the requisite measures to protect law and order and public safety. These measures vary in accordance with the individual situation, and may, for instance, be taken in the wake of a road accident or a disaster with a view to evacuating inhabitants or prohibiting access to certain areas. The impugned provision is therefore closely linked to the general policing clause. Such measures can, however, infringe certain fundamental rights in a variety of ways, including personal freedom, freedom of assembly and opinion and the protection of property.

These fundamental freedoms may be restricted provided that there is a sufficient legal basis for doing so, that the measures taken correspond to a public interest, and that the measures comply with the proportionality rule. According to case-law, a Cantonal Parliament Order which is not subject to referendum is a sufficient legal basis.

The principle of legality requires statutes restricting fundamental rights to be accessible and sufficiently detailed to ensure certainty of the law, foreseeability of State actions and equality of treatment. However, the degree of detail required must not be defined in overall abstractions: rather it depends on the subject under consideration. In the policing field, the principle of legality comes up against very specific difficulties. Police forces are called upon to act in a wide variety of situations. This being the case, the general policing clause enables the authorities to face up to serious, direct and imminent dangers. In the instant case, the Grand Council cannot be blamed for not having set out more detailed regulations on the conditions and measures to be taken in the area of protecting law and order and public safety.

No one can seriously dispute the fact that protecting law and order and public safety corresponds to a public interest. Depending on the actual circumstances, it can sometimes be appropriate to prohibit access to certain places or to carry out evacuations. Moreover, the same applies in cases where demonstrators have asked the authorities to place certain street or squares at their disposal, because in such cases it may prove necessary to adopt special measures to ensure that the demonstration goes off smoothly.

The police force is often involved in situations requiring it to prevent dangers or rescue individuals or objects. Where such interests are at stake, the restrictions to fundamental rights provided for in the provisions complained of are not unreasonable: they are in fact proportional. In the case of "private" demonstrations, the demonstrators, participants, interested parties and third persons may have many opposing interests, which have to be weighed up very carefully. Substitute measures may be adopted to meet the needs of third persons. The complexity of such situations is such as to preclude any definitive appraisal under an abstract review of cantonal regulations by the Federal Court. It is therefore vital that the police implement the impugned provisions in an appropriate manner in each individual situation, in compliance with the proportionality rule.

Languages:

German.



Identification: SUI-2003-1-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 07.11.2002 / **e)** 2P.297/2001 / **f)** V. et al. v. Grand Council of the Canton of Bern / **g)** *Arrêts du Tribunal fédéral suisse* (Official Digest), 129 I 12 / **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.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

School, state, compulsory / Child, protection / School, disciplinary exclusion, temporary.

Headnotes:

Article 19 of the Federal Constitution (Right to Primary Education), Article 36 of the Federal Constitution (Limitations of Fundamental Rights) and Article 62 of the Federal Constitution (Education); Article 29.2 of the Constitution of the Canton of Bern (Cst./BE); fundamental social rights; disciplinary exclusion from school.

Article 19 of the Federal Constitution lays down the right to free primary education corresponding to the personal abilities of individual children and the development of their personalities in state schools for a minimum nine years' compulsory schooling (point 4).

Article 29.2 of the Constitution of the Canton of Bern not only extends this right to all schools during the period of compulsory schooling, but also provides for a broader right of the child to protection, assistance and support (point 5).

Where limitations are imposed on fundamental social rights, Article 36 of the Federal Constitution must be applied by analogy to the determination of whether the conditions are fulfilled for the legally founded existence of an overriding public or private interest and proportionality (points 6-9).

In principle, the territorial authority must make the appropriate arrangements for excluded schoolchildren to be taught by qualified persons or public institutions, at least until the end of the period of compulsory schooling (point 9.5).

The scale of measures set out in Article 28 of the Law on compulsory Schooling of the Canton of Bern, which lays down the supreme sanction (*ultima ratio*) of temporary (partial or total) exclusion from school for a maximum twelve weeks per school year, can be interpreted in a manner consistent with the Constitution (point 10).

Summary:

The Grand Council of the Canton of Bern has amended its Compulsory Education Act, in particular by adding to Section 28 on discipline and disciplinary action. In addition to the teachers' right to take against offending pupils the disciplinary measures necessary for the proper functioning of the school, the school board may order the partial or total exclusion, for a maximum of twelve weeks, of any pupils whose behaviour is seriously disruptive.

Lodging a Constitutional complaint, a number of parents asked the Federal Court, on their own behalf and on behalf of their children, to strike down the cantonal provision allowing children to be expelled. They argued a breach of Article 19 of the Federal Constitution, which guarantees the right to a free and adequate basic education and cited Article 29.2 of the Constitution of the Canton of Bern which sets out a child's right to protection, assistance and supervision as well as the right to a free education consistent with a child's individual abilities. The Federal Court dismissed the Constitutional complaint, accepting, in an abstract review of the regulations, that the provision at issue could be applied in accordance with the Constitution.

Article 19 of the Federal Constitution establishes a fundamental social right; it provides an entitlement to a service rendered by the state. The purpose of basic education is to permit a child's personal development and fulfilment as well as to promote equal opportunity. The cantons have wide discretion in the education that they provide, but they are required to guarantee an appropriate education for each individual. The provision in the cantonal constitution goes beyond federal constitutional law, guaranteeing a child's right to protection, assistance and supervision.

The scope of a social right is determined in the light of its actual substance. The conditions set out in Article 36 of the Federal Constitution enabling fundamental rights to be restricted do not apply to social rights. A court is nevertheless required to take into account the interests at stake, both public and private, as well as the proportionality principle in a case relating to social rights.

Disciplinary exclusion from a school for an indefinite period would be in breach of the constitutional right to an adequate basic education. Disciplinary exclusion from a school for a definite period has to be evaluated on the basis of the following elements:

It is very much in the public interest that schools should ensure that teaching takes place unhampered and that a climate conducive to the pupils' development is created. That public interest takes precedence over the individual interests of some pupils and justifies certain disciplinary restrictions. Consideration of pupils' individual interests is also limited by the interests of other pupils, who are entitled to an adequate basic education. It cannot be maintained that excluding a disruptive pupil is not a way of attaining the desired aim, that is, restoring the climate of the school. However, it is important that less serious disciplinary measures are taken first and that exclusion remains a last resort. The provision of the cantonal constitution cited also grants the right to assistance and supervision for a child of school age.

The impugned legislation provides for disciplinary measures varying in severity. Teachers take the requisite measures for the school to function smoothly. If necessary, the school may inform the school board and seek advice from a specialist service in order, if appropriate, to take action such as transferring the pupil to another class, another school, or a school in another municipality. In the case of serious or repeated breaches of discipline a pupil will receive a reprimand or a threat of exclusion. The disciplinary system therefore provides for a pupil's exclusion only as a last resort. The period of exclusion is determined on a case-by-case basis; a twelve-week suspension will therefore be decided only in extreme cases. In view of the body of provisions relating to disciplinary measures, the impugned legislation cannot be criticised in terms of the proportionality principle.

In the event of exclusion, parents must make provision for an appropriate activity for their child, if necessary with support from a specialist service and the aid of the education authority, while the school must prepare in good time for the pupil's reinstatement. These obligations are consistent with parents' duties within the meaning of the Civil Code and take account of a child's right to assistance and supervision from the state. The impugned provisions cannot therefore be interpreted as meaning that it is solely the parents' responsibility to look after pupils during the exclusion period.

In short, the new provision of the Compulsory Education Act is not incompatible with the right to an adequate basic education and can be enforced in specific cases in accordance with constitutional requirements.

Languages:

German.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-1996-3-009

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 18.12.1996 / **e)** U.160/96 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 1/97 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.

3.3 **General Principles** – Democracy.

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

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

5.2 **Fundamental Rights** – Equality.

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

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

Keywords of the alphabetical index:

Referendum, premature election / Legislative initiative, popular / Election, premature.

Headnotes:

By refusing the citizen initiative to call a referendum on premature elections for Representatives in the Assembly of the Republic, because the Assembly reasoned that there was no constitutional grounds for such a referendum, the right of the citizens for political association and activity in the frames determined by the Constitution and by law was neither excluded nor limited.

Summary:

Several complaints were lodged to the Constitutional Court by citizens for protection of the freedom of political association and activity. They all claimed that their freedom of political association and activity had been violated by the conclusion of the Assembly of the Republic which stated that there were no constitutional grounds for calling a referendum on premature elections for Representatives in the Assembly of the Republic. In this conclusion the Assembly stated that a referendum on petition lodged by at least one hundred and fifty thousand electors, provided by Article 73.3 of the Constitution, may be called only for questions concerning the matters within its sphere of competence, and that the matter of premature elections of Representatives of the Assembly does not belong to this sphere. The citizens who lodged the complaints to the Court had signed the petition calling for a referendum.

The Court found that a citizen initiative had been put forward by the Democratic Party and *VMRO-DPMNE* (political party) by collecting one hundred and fifty thousand signatures of voters calling for a referendum on the question: "Are you in favour of scheduling premature elections for Representatives of the Assembly of the Republic of Macedonia, which would be exercised at the end of 1996 ?". The petition had been submitted to the Assembly and the Assembly adopted a conclusion that there were no constitutional grounds for calling such a referendum.

The Court refused the complaints lodged on the ground that the freedom of political association and activity had been violated, for the following reasons:

The Constitution provides direct constitutional protection of certain human and citizens rights and freedoms in cases of its violation. One of these rights is the freedom of political association and activity. Under the Constitution, citizens are guaranteed freedom of association to exercise and protect their political, economic, social, cultural and other rights and convictions. Citizens may freely establish associations of citizens and political parties, join them or resign from them. According to this, the Constitution gives legal grounds which are general and equal for all citizens and provides equal position for all citizens in their opportunity to exert influence on the political power in the State.

The freedom of political association and activity, as a fundamental right, is exercised directly under the constitutional provisions. According to the constitutional concept of indivisibility and mutuality of human and citizen freedoms and rights, the freedom of political association and activity should not be its own

purpose but it is a necessary condition for a person's affirmation as a free individual in cases when he needs to exercise his conviction and interests in a political way in association with others, in order to take part or to influence the political power. The exercising of this freedom by one person is limited by the exercising of the same freedom by other persons. It is not an absolute freedom but has to be exercised according to the constitutional provisions and in the institutions provided by the Constitution. The exercising of this freedom cannot be used for violent destruction of the constitutional order or for violation of constitutional provisions.

Under Article 61 of the Constitution, the Assembly of the Republic is a representative body of the citizens and a supreme legislative body, composed of Representatives elected at general, direct and free elections. In carrying out the duties within its sphere of competence, the Assembly has adopted the challenged conclusion in which it has found that there are no constitutional grounds for calling a referendum on question for premature elections, because the Constitution has no opportunity to provide for such an election. By this conclusion, according to the Court, the right of the citizens to political association and activity in the frames determined by the Constitution and the law was neither excluded nor limited. Thus by the act of lodging the petition for calling a referendum the citizens had an opportunity to influence in a political way state power, because the Assembly as a supreme legislative power, could allow the petition if the majority of the Representatives voted for it.

Languages:

Macedonian.

**Identification: MKD-1998-1-003**

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 08.04.1998 / **e)** U.br. 50/98 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 20/98 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.6.7 **Constitutional Justice** – Effects – Influence on State organs.
- 2.1.1 **Sources of Constitutional Law** – Categories – Written rules.
- 3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.
- 3.17 **General Principles** – Weighing of interests.
- 4.2 **Institutions** – State Symbols.
- 4.2.1 **Institutions** – State Symbols – Flag.
- 4.2.3 **Institutions** – State Symbols – National anthem.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.37 **Fundamental Rights** – Civil and political rights – Linguistic freedom.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Civil right, civil obligation / Mayor, obligation / Hatred, incitation.

Headnotes:

Freedom of thought and public expression of thought are subjective rights inalienably connected with human personality. The guarantee of these freedoms means that everyone can develop their own opinions in all spheres of life and publicly express them free from external or State intervention. Since the Constitution contains neither specific nor general legal reservations restricting the exercise of the freedom of thought and public expression of thought, these limitations are to be found in the Constitution and its provisions as a whole, taking into consideration as well the international instruments ratified in conformity with the Constitution.

Despite the high level of guarantees provided, the freedom of thought and public expression of thought provided for in the Constitution of the Republic of Macedonia are not absolute and cannot exist unrestrictedly. The legal framework has to limit the exercise of individual freedoms to some extent for the protection of others and for the security of society as a whole.

Summary:

Rufi Osmani, Major of the Municipality of Gostivar, lodged a petition with the Constitutional Court for the protection of his personal convictions, conscience, thought and public expression of thought, the freedom of which is guaranteed in Article 16 of the Constitution. As an act by which this freedom had been violated, he indicated a final judgment of the Municipal Court of Gostivar from 17 September 1997, which found him guilty of certain criminal offences, notably “Inciting national, racial and religious hatred, discord and intolerance”, “Organising resistance” and “Non-enforcement of a court’s decision”, and sentenced him to a single penalty of imprisonment for 13 years and 8 months, a sentence which the Court of Appeal reduced to 7 years.

By the aforementioned decision, the applicant was convicted for having organised and agreed to a protest meeting “To protect the official use of the national flag” on 24 May 1997 at 1.0 pm in Gostivar’s main square, at which the flag of the Republic was not hoisted, and the national anthem of Albania was played. The applicant publicly expressed his thoughts using, amongst others, the following formulations: “we give our life, but not the flag”, “we do not recognise decisions of the Constitutional Court of the Republic of Macedonia”, “our territories in Macedonia are ours, that should be known once and for good”, “our flag will always fly on each of our territories”, “their black hand bloodied the university in Tetovo yesterday; this same black hand wishes to bloody the national flag today... I sent them a clear message: as long as I’m in the Municipality of Gostivar, no one can touch the Albanian flag”, “in the election campaign I promised that we shall make Gostivar an Albanian city, and we will”, “we will use the Albanian flag, there will be official use of the Albanian language and many other institutions, as there will be very soon in the other Albanian municipalities set up within the framework of the project for regionalism”.

It is of the utmost importance that this protest meeting was organised after the passing and as a consequence of the Decision of the Constitutional Court of the Republic of Macedonia U.br.52/97 of 21 May 1997 by which the constitutionality and legality of Article 140 of the Municipality of Gostivar’s Statute was reviewed and specific acts and gestures undertaken based on the disputed Article of the Statute were disallowed until the taking of a final decision by the Court.

The Constitutional Court held that the Municipal Court of Gostivar by its judgment had found the applicant guilty because, abusing his office as Mayor of Gostivar and by continuous activity, he had incited

and inflamed national hatred, discord and intolerance among the citizens of the Municipality of Gostivar and more widely among citizens of other neighbouring municipalities and organised resistance and disobedience toward legal decisions and government measures by the following acts:

- first, when enacting the statutory decision of the Municipal Council of Gostivar for the use of flags in the municipality, he did not point out the unconstitutionality and illegality of passing such a decision, and after its announcement and publication he did not notify the Government of the Republic of Macedonia of its unconstitutionality and illegality, which a Mayor is obliged to do under the Law on Local Government;
- then, although he knew the decision to be unconstitutional and illegal, immediately after its enactment he undertook the following activities;
- by his permission, the flags of the Republic and the flags of Albania and Turkey were hoisted on the masts in front of the building of the Municipal Council of Gostivar;
- before Labour Day holidays, he gave written notification to all public institutions, informing them that they were obliged, during the Labour Day holidays, to hoist these flags in conformity with the statute;
- he organised armed guards to be stationed in front of the building of the Council of Municipality of Gostivar to prevent the removal of the flags from the masts;
- he created a central crisis headquarters, and made written operation plans for constituting central and regional organising structures, managing bodies within the central crisis headquarters and regional crisis headquarters;
- he created a managing body for establishing a strategic and operating plan in case of police intervention, which precisely determined the structure and names of people who would be in charge of questions such as information and propaganda, security, transport and connections, finances, medical aid etc.;
- he suspended the municipality's management and Council, specifying the primary tasks as temporary ones; and

as a result of such activity, on 26 May 1997, following the desecration of the flag of Albania by a group of citizens of Macedonian ethnic origin, a disturbance of the public order and peace began in front of the building of the Municipal Council of Gostivar by a fight among a large group of citizens of Macedonian and Albanian nationality. Further, on the morning of 9 July

1997 the police forces took action to enforce the Constitutional Court's Decision U. no. 52/97 dated 21 May 1997 and U.no. 52/97 dated 11 June 1997 according to which the flags of the Republics of Albania and Turkey should have been taken down from the masts. As a result of organised resistance and disobedience in the face of this lawful decision, its enforcement was hard to achieve, and direct armed conflict ensued between the forces of the Ministry of Internal Affairs and the assembled people, causing three deaths as well as bodily injuries to a large group of citizens and police officers.

The applicant argued that freedom of thought and public expression of thought are absolute rights guaranteed by the Constitution and that each restriction or additional regulation means the negation of these rights. Therefore his conviction and sentencing generated direct violation of rights guaranteed by the Constitution.

The Court held, however, that, given all the circumstances in which it was undertaken, the applicant's gesture had completely lost the content of public expression of thought in the sense in which the Constitution guarantees and protects this freedom. In light of the circumstances of the event, the applicant's public expression of thought did not expose his intellectual or political attitude, nor did it represent in some manner the intellectual and political convictions of the participants of the meeting, but represented a direct call and initiative for the present people of Albanian ethnic origin not to obey i.e. to destroy the legal system by force, inciting national intolerance, discord and hatred among the population in Gostivar, in a situation of already perceptible tension amongst people of different ethnic origin.

Languages:

Macedonian, English (translation by the Court).



Identification: MKD-2000-2-005

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.07.2000 / **e)** U.br.220/99 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 57/2000 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

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

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

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

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

5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.

5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

- the constitutional right of citizens freely to express their confession (Article 19 of the Constitution);
- the impossibility of individual rights and freedoms being withheld because of affiliation to or practice of a certain religion, including the impossibility of a ban on becoming a member of a religious community (Article 4 of the Law on religious communities and religious groups);
- Articles 9 and 14 ECHR, which guarantee everyone the freedom to manifest his/her religion, provided that the enjoyment of rights and freedoms is without discrimination based on any religion.

Keywords of the alphabetical index:

Employer, employee, relations / Holiday, religious / Religion, affiliation, evidence.

Headnotes:

The enjoyment of a statutory based right (the right to leave during a religious holiday) which derives from exercising a certain freedom (freedom of religion) has to be based on objective facts supported by evidence. The rule of law, understood as the supremacy of objective legal norms over subjective will and the existence of relatively objective criteria for ascertaining a citizen's affiliation to a certain religious belief, requires the determination of objective facts related to such a right being enjoyed.

Summary:

The Court refused an individual's request for protection from discrimination based on religious affiliation resulting from a judgment of the Court of Appeal. Due to a lack of procedural presumption for decision-making, stated by the Rules of procedure of the Court (expiration of two months after delivery of the act), it rejected the request in part dealing with singular acts, which in the petitioner's opinion violated his right.

The petitioner's request was based both on procedural and substantive grounds. The procedural ground referred to the constitutional protection of human rights and freedoms before regular courts and the Constitutional Court, through a procedure based upon the principles of priority and urgency (Article 50 of the Constitution). The substantive ground took into consideration several principles:

- the principle of equality of citizens in enjoying their rights and freedoms (Article 9 of the Constitution);

The facts of the case were as follows. The petitioner, a Macedonian who celebrated Christian holidays, left his office two working days on the first days of Ramazan Bajram and Kurban Bajram – holidays in the Muslim religion. Since he did not obtain leave, in first instance he was dismissed, which was later replaced with a fine. The petitioner justified the leave on the ground that he accepted the Muslim religion. Therefore, those days were not working days for him (according to the Law on holidays in the Republic of Macedonia) and he could not be made to bear any damaging consequences on that account. However, neither the employer nor the courts in two instances accepted his claim that he accepted the Muslim religion, and considered that his leave was unjustified.

The fact that the petitioner's claim that he is affiliated to the Muslim religion was not accepted and that he was asked to prove such religious belief meant that the petitioner felt discriminated against. In his opinion, the Constitution guarantees the freedom of religion as a personal conviction, the expression of which is part of one's privacy and therefore no one is obliged to prove it. The petitioner based the protection of his rights and freedoms only on his claim that he was affiliated to the Muslim religion indicating that neither he nor anyone else should be required to prove such an assertion.

In making its decision, the Court found it crucial to settle the following preliminary question: is the expression of the citizen's will sufficient to enjoy a certain right deriving from a freedom or must the citizen rely on objective facts which should be supported by evidence?

Taking into account that the rule of law is one of the fundamental principles of the constitutional order and that there are objective criteria for ascertaining a citizen's affiliation to a particular religion, the Court judged that objective facts related to the enjoyment of a right have necessarily to be verified. Taking the rule

of law as the supremacy of objective legal norms over subjective will, and after a public hearing and several consultations had been held, and especially bearing in mind the petitioner's statement, the Court found that the contents and form of his religious belief did not objectively correspond to that of the Muslim religion on several grounds. For example, he did not know the basic premises of that religious system, through which the essence of such belief is expressed; nor did he know how to enter this belief. Therefore, the Court found that the petitioner had not been discriminated against by the Court of Appeal's judgment, i.e. the fact that the court entered into fact-finding and determined objective facts had not put the petitioner in a disadvantageous position in comparison to other citizens based on his religious belief.

Languages:

Macedonian.



Turkey Constitutional Court

Important decisions

Identification: TUR-2001-3-010

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 12.09.2001 / **e)** K.2001/333 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

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 – Limits and restrictions.
 5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Housing, rent, maximum, fixing by the state.

Headnotes:

Placing restrictions on the annual increase rate of rental prices of real estate by law is not contrary to the Constitution. However, determining the maximum annual increase much below the general price increase represents a restriction that exceeds the aim pursued by law.

Summary:

While trying a case, the Adana 2 Peace Court applied to the Constitutional Court to annul the provision of Law 6570 which regulates the maximum annual interest rates on property rents.

The conditions of restrictions on fundamental rights and freedoms are determined in Article 13 of the Constitution. Fundamental rights and freedoms may only be restricted on the grounds set forth in the Constitution in order to ensure the requirements of a democratic social order. Any restriction on fundamental rights and freedoms shall not be more than the requirements of the pursued objective. It is not contrary to the Constitution

to limit the maximum annual property rents because of public interest concerns. However, the 10% increase envisaged in the disputed provision of Law 6570 was much lower than the general price increase, i.e. the general interest rate in 2001. Thus, the restriction exceeded the aim pursued and resulted in an imbalance between landlords and tenants. Consequently, it could not be asserted that the restriction was in conformity with the requirements of a democratic social order. The provision of Law 6570 is contrary to the Constitution and should be annulled.

The judgment was delivered unanimously.

Languages:

Turkish.



Identification: TUR-2001-3-012

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 22.11.2001 / **e)** K.1999/1 / **f)** Dissolution of a Political Party / **g)** *Resmi Gazete* (Official Gazette), 22.11.2001, 24591 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.3.4.7.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Banning of political parties.

3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.

4.5.10.4 **Institutions** – Legislative bodies – Political parties – Prohibition.

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

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

Keywords of the alphabetical index:

Political party, dissolution / Political party, programme / Minority, language.

Headnotes:

Including the promotion, protection or dissemination of languages or cultures other than Turkish in a political party's programme runs counter to national

unity and the indivisibility of the state, and is contrary to Article 78/a-b of the Law on Political Parties and the Constitution.

Summary:

The Chief Public Prosecutor brought an action against the Democratic People's Party to dissolve the party under different provisions of the Law on Political Parties and of the Constitution. After completing the necessary prosecutions the Constitutional Court dissolved the party because of the following reasoning.

According to the Constitution and the Law on Political Parties, the word "Turkish" includes all individuals having Turkish citizenship without considering his or her ethnic origin. The defendant party rejected the concept of a modern nation. The program of the party depended on racial and regional discrimination. It was clear that this kind of conception could corrupt the state order, which depends on territorial and national unity. Therefore, it was found contrary to the provisions of Article 78/a-b of the Law on Political Parties to make any discrimination between Turks and Kurds in the Party's manifesto and to assert that there is an ethnically Kurdish nation which is subjected to assimilation.

Under Article 81/a-b of the Law on Political Parties it may not be claimed that there are minorities depending on national, religious and linguistic discrimination in the territory of the Turkish Republic. It is illegal to try to corrupt national unity by promoting cultures and languages other than Turkish and Turkish culture. In the party's manifesto, it is written that there are minorities depending on cultural, racial and language differences in the territory of the Turkish Republic. Thus, it was found that the party aimed to create minorities by protecting, by promoting and by disseminating languages and cultures other than Turkish and Turkish culture. Since the Party manifesto contradicts Article 81/a-b of the Law on Political Parties, the Democratic People's Party needed to be dissolved.

The President, Mr M. Sezer, and the members, Mr H. Kılıç, Mr Y. Acargün, Mr S. Adalı and Ms F. Kantarcıoğlu, had dissenting opinions on different points.

Languages:

Turkish.



Identification: TUR-2003-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 05.06.1997 / **e)** K 1997/53 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25069, 04.04.2003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.
- 5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Media, press, function / Media, newspaper, distribution, obligation / Media, seller, activity.

Headnotes:

In order to safeguard the right to receive information, some requirements may be introduced concerning the distributors and the sellers of periodical and non-periodical publications. Where the rules on the subject are not obeyed, the imposition of a heavy fine is not unconstitutional. However, suspension of the activities of the sellers of printed materials is contrary to the Constitution.

Summary:

The main opposition party (at the material time, the Motherland Party) applied to the Constitutional Court seeking the annulment of some provisions of the Law 4202 amending the Press Law (5680).

The first sentence of Supplementary Article 7 of the Law provides that the individuals and corporations dealing with the distribution of periodical and non-periodical publications are under an obligation to

distribute them if the owners of such publications demand their distribution, provided that they are paid an amount not exceeding the amount paid by the other owners of such publications. According to the second sentence of the Article, persons who do not comply with that rule shall be penalised with a heavy fine not exceeding the total value of such publications that remain undistributed.

Article 28 of the Constitution regulates freedom of press, and the third paragraph of the Article (now, the second paragraph) states: "...[t]he state shall take the necessary measures to ensure freedom of the press and freedom of information".

Freedom of press encompasses the right to receive information, to express ideas, to comment and to criticise as well as the right of publication and distribution. It is natural for the State to take the necessary measures to safeguard the rights of the distribution of printed materials.

On the other hand, Article 48.1 of the Constitution states: "...[e]veryone has the freedom to work and conclude contracts in the field of his/her choice. The establishment of private enterprises is free". These freedoms may only be restricted by law and with the aim of public interest. The restrictions made on the basis of Article 13 of the Constitution must not be contrary to the requirements of a democratic society, and they must not be used for the aims other than the ones prescribed.

The restrictions in the first and the second sentences of Supplementary Article 7 are directed at the necessary measures to be taken by a State under Article 28 of the Constitution. This arrangement aims at ensuring individuals the right to receive information, and there is no contradiction with the requirements of a democratic society.

Article 18 of the Constitution provides that no one shall be forced to work and that forced labour is prohibited. The individuals and corporations dealing with the distribution of periodical and non-periodical publications are not forced to work under the impugned provisions. Since the delivery of such publications constitutes one of the features of the right of the press and the right to receive information, the obligation of the distribution of such publications is an arrangement that serves the purpose of the public interest.

Moreover, Article 38 of the Constitution sets out the principle of the legality of punishment. As to the provision in the second sentence, it cannot be said that it is uncertain, since it clearly indicates that those who prevent the distribution of the publications shall be liable to pay a heavy fine.

The third sentence of Supplementary Article 7 of the Law provides that if the act mentioned in the first sentence is repeatedly committed, the heavy fine mentioned above shall be doubled, and the activities of the individual or corporate body distributors shall be stopped.

As to repetition, the main opposition party claimed that the kind of activity covered and the period of such repetition are not indicated in the sentence, and it is contrary to the principle of *ne bis in idem*. According to the Constitutional Court, the details of the repetition were not indicated in the Article. However, Article 10 of the Criminal Code states: “the provisions of this Code shall be applied to special criminal laws provided that their provisions are not contrary to the provisions of the Criminal Code”. Consequently, there is no doubt that the provisions of the Criminal Code relating to repetition are to be applied to the impugned provision. Therefore, the Constitutional Court found that the request had to be rejected.

As to the suspension of the activities of the distributors, such suspension is in conflict with the aim of ensuring that individuals receive information, as it is the obligation of the distributors to distribute the periodical and non-periodical publications. Since such punishment is not appropriate for the aim pursued, it cannot be asserted that this kind of punishment is an obligation that could be envisaged. Without considering the aim pursued, the introduction of this kind of punishment may pave the way for an imbalance between aims and means. To restrict excessively the right to receive information, even for a limited period of time, is incompatible with the requirements of a democratic society.

Consequently, the Constitutional Court found that the part of the statement reading: “... their activities shall be suspended up to three months” was contrary to the Constitution and had to be annulled.

According to Supplementary Article 8.1 of the Law, it is obligatory for periodical and non-periodical publications to be offered for sale in sales agencies. If sales agencies do not comply with that requirement, they shall be closed down for three days by the order of the governor. If the action is repeated, that period shall be extended to at least three months.

The administrative sanctions may be applied by the administrative authorities on the basis of administrative rules and without referring the matter to a judicial authority. Suspension, prohibition and stopping of activities are all sanctions by which precautionary measures are applied.

According to Article 13 of the Constitution, fundamental rights and freedoms may only be restricted for the reasons referred to in the article; they may not be contrary to the requirements of a democratic social order; and they may not be used for the aims other than those prescribed (before the October 2001 amendments). Suspension of the sales agencies injures the essence of the right to receive information. The impugned rule seeks to safeguard the right to receive information. Consequently, the suspension of sales agencies in certain conditions is a contradiction.

In some places the sellers of the periodical and non-periodical publications are kiosks, groceries, etc. On the ground that the suspension of these kinds of places of business was contrary to Article 48 of the Constitution (Freedom to Work and Conclude Contracts) and Article 5 of the Constitution (Fundamental Aims and Duties of the State), the Court decided to annul the provision mentioned above.

The Supplementary Article 8.2 provides that individuals who obstruct or hinder the presentation for sale of the periodical and non-periodical publications by means of threat, by tricks of trade or by other means shall be sanctioned.

An objection was raised that these acts were sanctioned in the Criminal Code, and it was not logical to have a law punishing individuals for the same acts.

In the Criminal Code, the acts such as threats, tricks of trade and etc. are deemed to be crimes. There is no rule preventing the parliament from introducing these kinds of amendments for such acts.

Therefore, the objection was rejected.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2000-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.12.1999 / **e)** 11-rp/99 / **f)** Constitutionality of Articles 24, 58, 59, 60, 93, 190-1 of the Criminal Code (capital punishment) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 4/2000 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

3.13 **General Principles** – Legality.

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

5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.

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

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

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

Keywords of the alphabetical index:

Death penalty, abolition / Punishment, purpose / Miscarriage of justice.

Headnotes:

The inalienable right to life is an integral part of a person's right to human dignity. As fundamental rights of the person, they predetermine the possibility of realising other rights and liberties and may be neither restricted nor abolished. Provisions of Articles of the Criminal Code which provide for capital punishment as a type of punishment are unconstitutional.

Summary:

The people's deputies applied to the Constitutional Court regarding the constitutionality of the provisions

of Article 24 of the Criminal Code on capital punishment as an exceptional sanction applied in cases of serious offences which are stipulated in the Special Part of the Code. The people's deputies maintained that the right to life provided by the Constitution is absolute, and, while interpreting the Constitution, a profound and clearly outlined respect for the value of human life as one of the fundamental principles of building a democratic society ruled by law should be taken into consideration. Therefore, in the context of the Constitution, imposing the death penalty as an exceptional sanction should be regarded as an "arbitrary deprivation of a human being's right to life".

The Constitution defines a human being, its life and health, honour and dignity, immunity and safety as the supreme social value (Article 3.1 of the Constitution), and provides that the establishment and protection of human rights and liberties is the main duty of the state (Article 3.2 of the Constitution).

The key constitutional provision recognising the right to life is the provision stipulating that this right is an integral (Article 27.2 of the Constitution), inalienable and inviolable (Article 21 of the Constitution) right. The right to life belongs to human beings from birth and is protected by the state.

The Constitution declares that constitutional rights and liberties, in particular the right to life, are guaranteed and may not be abolished (Article 22.2 of the Constitution). It also states that it is prohibited to introduce any changes or alterations which abolish the rights and liberties of human beings and citizens (Article 157.1 of the Constitution). It is prohibited to narrow the scope and content of existing rights and liberties when new laws are passed or changes are introduced to existing laws (Article 22.3 of the Constitution).

The provisions of Article 22.2 of the Constitution place a duty upon the state to guarantee constitutional rights and liberties, the right to life in the first place, and the duty to refrain from adopting any acts which may lead to the abolition of constitutional rights and liberties, including the right to life. Depriving a human being of life by the state through execution as a sanction even within the provisions stipulated by law is regarded as abolishing the integral right to life and is thus contrary to the Constitution.

Each person has the right to freely develop his or her personality as long as this does not violate the rights and liberties of others. The Constitution attributes an integral right to life to each human being (Article 27.1 of the Constitution) and guarantees protection of this right from abolition. At the same time, it establishes the

provision that each person has the right to defend his/her life and health, and the lives and health of other people, from illegal encroachments (Article 27.3 of the Constitution). The Criminal Code has established provisions related to the acts of a person in a situation of necessary self-defence in order to protect his/her life and health or the lives and health of other persons if dictated by urgent necessity to prevent or terminate socially dangerous encroachments.

Constitutional support for an integral right to life as well as for other rights and liberties is based on the following fundamental principle: all exceptions related to rights and liberties of human beings and citizens shall be established by the Constitution rather than by laws or other normative acts. In accordance with Article 64.1 of the Constitution, "constitutional rights and liberties of human beings and citizens may not be restricted except in the cases provided for in the Constitution".

The Constitution does not contain any provision whatsoever stating that the death penalty is an exception to the provisions of the Constitution on an integral right to life.

The inconsistency of the death penalty with the purposes of punishment as well as the possibility of judicial error should also be considered. This does not comply with constitutional guarantees of protection of human rights and liberties (Article 58 of the Constitution).

The death penalty also contradicts Article 28 of the Constitution which states that "nobody may be exposed to torture, cruel, inhuman or degrading treatment or punishment", which reflects Article 3 ECHR.

Languages:

Ukrainian.



Identification: UKR-2001-2-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 23.05.2001 / **e)** 6-rp/2001 / **f)** Constitutionality of the provisions contained in the third, fourth, and fifth paragraphs of Article 248-3 of the Code of Civil Procedure of Ukraine (case: Constitutionality of

Article 248-3, CCP of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 22/2001 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
3.9 **General Principles** – Rule of law.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Administrative act, appeal, procedure / Fundamental right, exercise / Association, appeal to court.

Headnotes:

Article 124.2 of the Constitution, which states that the jurisdiction of the courts shall cover any and all legal relations which arise in the state, and Article 55.1 and 55.2 of the Constitution, give grounds for concluding that the courts have jurisdiction over any petition of a person as to the protection of his/her rights and freedoms. Therefore, the court may not refuse to exercise its jurisdiction if a Ukrainian citizen, an alien or a stateless person feels that his rights and freedoms have been violated or infringed, or that obstacles have been or created to his exercising them, or where there are any other infringements of his rights and freedoms.

In case of disputes concerning violation of human rights and freedoms by civic associations, their officials and servants, citizens shall have the right based on Article 55 of the Constitution to apply for protection of such rights and freedoms in court. The determination of the matters belonging to internal organisation activities or of the exclusive competency of civic associations, as the case may be, shall be made by the Court.

Summary:

The provisions of Article 248-3.5 of the Code of Civil Procedure conform to the Constitution. The provisions state that the courts have no jurisdiction as to petitions "on acts and actions of civic associations, which for the purposes of the statutes or by-laws, belong to their internal organisational activities or their exclusive competence".

However, Article 248-3.3 and 248-3.4 of the Code of Civil Procedure is unconstitutional.

The Constitutional Court was involved in settling a dispute on the constitutionality of the provisions laid down in Article 248-3.3, 248-3.4 and 248-3.5 of the Code of Civil Procedure of Ukraine.

The protection of human rights and freedoms determines the contents and scope of the activities of the state (Article 3.2 of the Constitution). The state, by employing different legal means, provides protection of the rights and freedoms of all citizens via legislative authorities, executive and judicial authorities and other public bodies, which are to exercise their powers in the framework specified by the Constitution and according to the laws of Ukraine. The provisions laid down in Article 8.2 of the Constitution specify that these norms have direct effect.

The right to petition the court for the protection of the constitutional rights and freedoms is directly based on the Constitution and is guaranteed by it. This constitutional right may not be repealed (Article 22.2 of the Constitution).

According to Article 55.1 of the Constitution, human rights and freedoms are protected by the courts. Citizens have the right to appeal to court for protection of their rights and freedoms.

The right to judicial protection applies to fundamental, inalienable human rights and freedoms, and no limitation of this is allowed even under martial or emergency law Articles 8, 55 and 64 of the Constitution). This completely conforms to Article 8 of the Universal Declaration of Human Rights, whereby any person, in the case of violation of his fundamental rights, provided by the Constitution and the law, shall have the right to an effective renewal of such rights by the competent national court.

The Constitution, having specified the right of citizens and others to judicial protection of their rights and freedoms, guarantees to any person the right to appeal to the court against the judgments, activity or inactivity of state authorities, local devolved government authorities, officials and civil servants.

According to Article 248-1.3 of Chapter 31-A of the Code of Civil Procedure, the subjects whose decisions, activity or inactivity may be appealed against in the court, shall include: "public authorities and their servants; local devolved government authorities and their servants; managers of institutions, organisations, corporations and other associations irrespective of ownership; government

authorities and managers of civic associations, and also servants performing organisational and executive, administrative and business duties or carrying out such responsibilities according to special powers". The subject of judicial appeal under this Chapter may be acts or omissions – regulatory or otherwise – of any of the above authorities, which have taken such decisions to act (or not to act) either individually or on a collegiate basis.

The provisions laid down in Article 55 of the Constitution regarding the ability of citizens to appeal against decisions affecting the protection of their human rights and freedom applies equally to judicial decisions, investigative and administrative actions or inactions, and actions of officials in the Office of the Prosecutor. It is also possible to appeal against the decisions of pre-judicial investigative agencies.

Appeals may also be made against procedural actions of judges, concerning issues related to the jurisdiction of courts over disputes, preparatory procedures before cases are heard, and first instance and appellate procedural decisions. Such appeals may only be made, subject to the judicial procedure according to the procedural law of Ukraine.

In conformity with Article 248-3.5 of the Code of Civil Procedure, no court shall be eligible to receive petitions "on acts and actions of civic associations, which for the purposes of statutes or by-laws, relate to their internal organisational activities or their exclusive competence".

According to Article 92.1.11 of the Constitution, the law is to set out the grounds for the organisation and activities of political parties and other civic associations.

No intervention of public authorities and civil servants is allowed in the activities of civic associations, except for cases stipulated in Article 8.2 of Law on Civic Associations. Such prohibition on interference in the activities of political parties and their local units, with some exception, is provided also by Article 4.3 of the Law on Political Parties in Ukraine. Civic associations are to act based on laws, statutes and regulations. Therefore, the internal organisation and relationships between the members of the civic associations, their subdivisions, and statutory responsibility of the members, are governed by the corporate norms set forth by the civic associations themselves based on the law; they are to specify the matters which belong to their internal activities or exclusive competency and are subject to independent judgment. Therefore no intervention in the activity of the civic associations carried out in the framework of the law is allowed.

Languages:

Ukrainian.

**Identification:** UKR-2001-3-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 14.11.2001 / **e)** 15-rp/2001 / **f)** Constitutionality of paragraph 4.1 of the Regulation on Passport Service of the Ministry of Internal Affairs, approved by the Cabinet of Ministers (the domicile registration case) / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.

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

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.

3.13 **General Principles** – Legality.

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

5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Residence, free choice / Residence, permit / *Propiska*.

Headnotes:

The system of “*propiska*” (registration of the population’s place of residence), as established by Section 4.1 of the Regulation on the Passport Service of the Ministry of Internal Affairs, requiring a person to obtain, prior to changing of place of residence, a special permit is inconsistent with the freedom of movement guaranteed by Article 3.1 of the Constitution.

Summary:

Members of the parliament applied to the Constitutional Court and requested the Court to declare Section 4.1 of the Regulation on the Passport Service of the Ministry of Internal Affairs unconstitutional. The Court established that the Passport Service organises work related to documenting the population, “*propiska*” (registration of the population’s place of residence), cancellation of such registration, monitoring the residents at their place of residence, and other similar services.

The Constitutional Court noted that pursuant to Article 33 of the Constitution, everyone who is legally present in Ukraine has freedom of movement, free choice of a place of residence and freedom to leave Ukraine. Freedom of movement and freedom to choose a place of residence are essential guarantees of individual freedom and constitute inviolable and incontestable rights (pursuant to the Article 21 of the Constitution). As such, they shall not be restricted, except in cases envisaged by Article 64.1 of the Constitution.

The right to freedom of movement and free choice of a place of residence, as inviolable human rights, are supported by international legal instruments: the General Declaration of Human Rights of 1948, the International Pact on Civil and Political Rights of 1966, and Protocol 4 of the European Convention on Human Rights. Article 2 Protocol 4 ECHR sets forth the rule, pursuant to which the exercise of the right to freedom of movement and freedom to choose a place of residence may not become subject to any restrictions except for those provided for by legislation.

Pursuant to Article 92.1.1 of the Constitution, rights and freedoms of citizens and other individuals, and guarantees of exercising such rights and obligations, shall be determined solely by legislation. The Court noted that analysis of the regulations subject to this legislation shows that “*propiska*” (registration of official residence) has a generally restrictive nature and is executed on the basis of departmental regulations.

Section 4.1 of the Regulation on the Passport Service of the Ministry of Internal Affairs, approved by the Cabinet of Ministers on 10 October 1994, no. 700, pursuant to which the Passport Service applies its restrictive procedure to the choice of a place of residence, is in contradiction to Articles 33.1 and 64.1 of the Constitution.

Languages:

Ukrainian.



United States of America Supreme Court

Important decisions

Identification: USA-1997-3-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 19.02.1997 / **e)** 95-1065 / **f)** Schenck v. Pro-Choice Network of Western New York, et al. / **g)** 117 *Supreme Court Reporter* 855, 1997 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.

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

3.16 **General Principles** – Proportionality.

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

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

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

Keywords of the alphabetical index:

Injunction, review / Judicial review, content-neutral / Judicial review, tests / Abortion, clinic, blocking of access / Buffer zone / Demonstration / Order, judicial.

Headnotes:

A court reviewing a content-neutral judicial prior restraint on the exercise of free speech must impose a higher level of scrutiny than that applied to a similar generally-applicable legislative restriction. The reviewing court must determine whether the judicial injunction burdens no more speech than necessary to serve a significant governmental interest.

Governmental interests in insuring public safety and order, promoting free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services, in combination, are sufficiently significant to justify an injunction crafted to secure unimpeded

physical access to an abortion clinic, so long as the judicial order burdens no more speech than is necessary to serve those interests.

Summary:

Protesters opposed to provision of abortion services challenged a federal court order which placed restraints on certain aspects of their expressive activity in the vicinity of certain abortion clinics. Abortion doctors and clinics and an organisation dedicated to maintaining access to abortion services had asked the court to order certain individuals and organisations to refrain from disruptive activity at the clinics, including blocking entry to the facilities. In that activity, the protesters had blocked patients and employees from entering the clinics, had accosted women seeking to enter the clinics, and had attempted to dissuade women moving toward the clinics from having abortions.

The court issued an injunction which banned demonstrations 1) within a fixed distance (fifteen feet) from doorways and entryways to clinic facilities ("fixed buffer zones") and 2) within a fifteen-foot distance from any person or vehicle seeking access to or leaving such facilities ("floating buffer zones"). In issuing the injunction, the district court rejected the protesters' assertion that the order violated their right to free speech under the First Amendment. The Court of Appeals affirmed the district court's decision.

Holding that the proper test for review of a content-neutral injunction (in other words, a regulatory act made without reference to the content of the affected speech) which restricts the exercise of free speech is whether the challenged provisions burden no more speech than necessary to serve a significant governmental interest, the Supreme Court upheld the constitutionality of the fixed buffer zones but struck down the floating buffer zones. The Court concluded that both provisions were grounded in significant governmental interests: insuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services. However, in the case of the floating buffer zones, the injunction threatened to burden more speech than was necessary because of the lack of certainty concerning maintenance of the proper distance from a moving person or vehicle. Particularly in light of the traditional use of public sidewalks as locations for expressive activity regarding matters of public concern, this lack of certainty posed a substantial risk that the order would unduly burden the exercise of First Amendment rights. The fixed buffer zones, on the other hand, did not pose such a threat.

Supplementary information:

In this decision, the Supreme Court reiterated the principle articulated three years earlier in the *Madsen* case: that a content-neutral judicial order placing a prior restriction on expressive activity must be held to a higher standard of scrutiny than is a generally-applicable legislative act. A generally-applicable legislative time, place, and manner regulation of expressive activity in a traditional public forum such as public streets and sidewalks is compatible with the First Amendment if it is narrowly tailored to serve a significant governmental interest. However, because a judicial order entails a greater risk of censorship and discriminatory application than does a generally-applicable legislative act, it must be subject to a somewhat more stringent level of judicial review: one which pays close attention to the fit between the objectives of the regulatory act and the restrictions it imposes on expressive activity.

Cross-references:

- *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

Languages:

English.



Identification: USA-2002-2-007

a) United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2002 / **e)** 01-521 / **f)** Republican Party of Minnesota v. White / **g)** 122 *Supreme Court Reporter* 2528 (2002) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.7.4.1.3 **Institutions** – Judicial bodies – Organisation – Members – Election.
 4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

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

Keywords of the alphabetical index:

Judge, candidate, electoral campaign, freedom of expression / Scrutiny, strict.

Headnotes:

Speech about the qualifications of candidates for public office lies at the core of the free speech protections of the First Amendment to the Constitution.

It is not the function of government to select which topics are worth discussing in the course of an electoral campaign for public office.

Under the First Amendment, a content-based restriction on the speech of candidates for public office will be subject to a strict scrutiny test that requires the measure's proponent to show that it is narrowly tailored to serve a compelling state interest.

Summary:

The Constitution of the State of Minnesota provides that all state court judges must be selected on the basis of popular, non-partisan (without political party affiliation) elections. Since 1974, under what is known as the "announce clause", candidates for judicial offices, including incumbent judges, are prohibited from stating their views on disputed legal or political issues. This prohibition was issued by the Minnesota Supreme Court in the form of an ethical rule, and candidates violating it are subject to a variety of potential sanctions, including suspension or permanent loss of one's license to practice law, or probation.

A Minnesota attorney, seeking to be a candidate for judicial office, challenged the constitutionality of the announce clause in federal court. The attorney, Gregory Wersal, alleged that the clause violated his rights of free speech under the First Amendment to the Constitution because it forced him to refrain from announcing his views on disputed issues during the electoral campaign. The First Amendment states in relevant part that the U.S. Congress "shall make no law... abridging the freedom of speech", and is made applicable to the States by means of the due process clause of the Fourteenth Amendment to the Constitution. Other plaintiffs in the suit, including the Republican Party of Minnesota, alleged that the prohibition against Wersal made it impossible for them to learn his views and therefore to determine whether or not to support his candidacy.

The U.S. District Court, in a decision affirmed by the Court of Appeals, ruled that the announce clause did not violate the First Amendment. On review, the U.S. Supreme Court reversed the decision of the Court of Appeals. In so doing, the Supreme Court determined that the announce clause was subject to the test of strict scrutiny because it prohibits speech on the basis of its content and because it interferes with a category of speech that is at the core of First Amendment protections: speech about the qualifications of candidates for public office. Under the strict scrutiny test, a proponent of the measure in question bears the burden of proving that it is narrowly tailored to serve a compelling state interest.

The Court of Appeals had determined that the State of Minnesota had identified two interests that were sufficiently compelling to justify the announce clause: preserving the impartiality of the State's judiciary, and preserving the appearance of the impartiality of the State's judiciary. The Supreme Court examined three potentially applicable meanings of the term "impartiality" and found that the announce clause failed the strict scrutiny test under each. As to the first possible meaning – a lack of bias for or against either of the parties to a judicial proceeding – the Court concluded that the announce clause was not narrowly tailored to serve impartiality in this sense because it does not restrict speech for or against particular parties, but instead interfered with speech for or against particular issues. The Court acknowledged that a party taking a particular stand on a legal issue is likely to lose if that issue is central to the case in question; however, this would not be due to any bias by the judge against that party or favoritism toward the other party because any party taking that position would be likely to lose. The Court concluded that the second possible meaning – the absence of preconception in favour of or against a particular legal view – did not serve a compelling state interest because a judge's lack of predisposition regarding the relevant legal issues in a case has never been viewed as a necessary component of equal justice. Finally, the Court found that a third possible meaning of "impartiality" – the quality of maintaining an open mind to competing arguments on a particular issue – was underinclusive in that it allowed appreciable damage to that purportedly vital interest to remain unprohibited. In this regard, the Court rejected the argument that statements made in an electoral campaign, as opposed to statements that might have been made by a future candidate in other settings, are uniquely destructive of the quality of open-mindedness. In sum, the Court concluded that the announce clause could not survive strict scrutiny under any reasonable construction of the term "impartiality" and therefore found it invalid under the First Amendment.

Supplementary information:

Four of the Supreme Court's nine Justices dissented from the Court's judgment. In two dissenting opinions, the dissenting justices disagreed with the Court's decision because it insufficiently recognised the importance of judicial integrity, as reflected by judicial independence and impartiality, and mistakenly assumed that judicial candidates should have the same freedom to express themselves on matters of current public importance as do candidates for legislative and executive positions in which the office holders serve in representative capacities.

Languages:

English.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-1994-H-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 05.10.1994 / **e)** C-404/92 / **f)** X v. Commission of the European Communities / **g)** *European Court Reports* II-02823 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

HIV, test, refusal, civil servant / Civil servant, HIV, test, refusal / Healthy, state, secret, right / Right, essence.

Headnotes:

1. The right to respect for private life, which is embodied in Article 8 of the European Convention on Human Rights and which derives from the common constitutional traditions of the Member States, is one of the fundamental rights protected by the Community legal order. It includes in particular a person's right to keep his state of health secret (see paragraph 17).

2. Restrictions may be imposed on fundamental rights protected by the Community legal order, provided that they in fact correspond to objectives of general public interest and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected (see paragraph 18).

3. The pre-recruitment medical examination, provided for by Article 13 of the Conditions of Employment of other Servants, is designed to enable the institution concerned to determine whether a member of the temporary staff fulfils the requirements of Article 12.2.d as to physical fitness. However, although the pre-recruitment examination serves a legitimate interest of the institution, that interest does not justify the carrying out of a medical test against the will of the person concerned. Nevertheless, if the person concerned, after being properly informed, withholds his consent to a test which the medical officer of the institution considers necessary in order to evaluate his suitability for the post for which he has applied, the institution cannot be obliged to take the risk of recruiting him (see paragraphs 19-21).

4. To interpret the provisions relating to the pre-recruitment medical examination of a member of the temporary staff as imposing an obligation to respect a refusal by the person concerned only in relation to a specific Aids screening test but as allowing any other tests to be carried out which might merely point to the possible presence of the Aids virus would impair the scope of the right to respect for private life. Observation of that right requires the refusal of the person concerned to be respected in its entirety. Where that person has expressly refused to undergo an Aids screening test, that right precludes the institution concerned from carrying out any test liable to point to, or establish, the existence of that illness (see paragraphs 22-23).

Summary:

During the medical check-up all staff and officers of the European Communities undergo prior to recruitment, the applicant underwent a clinical examination and additional biological tests. When invited to submit to a screening test for Aids, he refused. Shortly thereafter, he was informed by mail that the Commission's medical officer had found him physically unfit to work as a typist, and that he could therefore not be recruited. His medical report was then forwarded to his general practitioner, who informed the president of the Commission, on the applicant's behalf, that the institution's medical officer had made a mistake in his diagnosis in concluding that the applicant suffered from an opportunistic infection indicating the terminal stage of Aids and denounced the fact that he had been subjected to a surreptitious test for Aids without his knowledge. However, the medical committee to which his case was submitted, at his request, confirmed the medical officer's opinion. Based on these conclusions, the Commission considered that he did not fulfil the physical aptitude conditions for recruitment.

After filing two complaints against this decision, in vain, the applicant lodged a first appeal with the Community court to annul the impugned decision, followed by a second appeal against the Commission, for damages. In its decision of 18 September 1992 (X/Commission, joined cases T-121/89 and T-13/90, Rec. p. II-2195), the Court of First Instance of the European Communities dismissed both appeals. The applicant then appealed to the Court of Justice to set that decision aside.

X's appeal was based mainly on an alleged violation of the right to respect for private life guaranteed under Article 8 ECHR. In particular he claimed that, contrary to the findings of the Court of First Instance, it had been established that he had been subjected, surreptitiously, to a test for Aids normally used to verify the evolution of the disease in HIV-positive patients. The performance of a lymphocyte test without his consent allegedly violated his physical integrity. The Commission pointed out that candidates undergoing pre-recruitment medical examinations tacitly consented to the medical officer doing his job, if necessary by carrying out certain additional tests to confirm his findings. It added that being an asymptomatic carrier of the Aids virus was not, in itself, a disqualifying factor for recruitment, as there was no risk of transmission in the course of normal workplace relations. Only the existence of an immune disorder, whatever its origin, was important when determining a person's aptitude for employment, in view of the increased proneness to infections.

After recalling the importance of the right to respect for one's private life, but also the existence of possible restrictions to fundamental rights, the Court observed that there was no justification, during a pre-recruitment medical examination, for carrying out a test against a person's will. However, while a person was entitled to refuse to undergo a test considered necessary in order to evaluate his or her fitness for a job, the institution concerned could not be expected to take the risk of recruiting them. In any event, when the applicant expressly refused to be screened for Aids, his right to respect for his private life required the administration to refrain from carrying out any test likely to suggest or confirm the existence of that disease, which it had failed to do in this particular case. The Court accordingly annulled the impugned decision. Under Article 54.1 of the statute (EC) of the Court of Justice and, having found that the case was ready for trial, it then considered the merits. For the reasons mentioned above, it annulled the decision of the Commission informing the applicant that he did not meet the conditions of physical fitness for recruitment. It nevertheless dismissed the claim for damages for failure to respect the administrative procedure laid down in the staff regulations.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

*Identification:* ECJ-1995-2-010

a) European Union / b) Court of First Instance / c) Third Chamber / d) 13.07.1995 / e) T-176/94 / f) K v. Commission of the European Communities / g) *European Court Reports FP-II-621* / h).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Duty of care / Assistance, duty to grant / Confidentiality, medical / Tradition, national constitutional / Confidentiality, professional.

Headnotes:

Fundamental rights form an integral part of the general principles of law, the observance of which the Community judicature ensures. For that purpose, the Community judicature draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention on Human Rights, to which Article F.2 EU expressly refers, has special significance in that respect (cf. points 29-30).

The right to respect for private life enshrined in Article 8 ECHR is one of the fundamental rights protected by the legal order of the Community. It includes in particular the right for every person to keep his state of health secret (cf. point 31).

Fundamental rights, however, do not constitute unfettered prerogatives but may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the objective pursued, a disproportionate and intolerable interference which encroaches upon the very substance of the rights guaranteed. For that reason it is impossible to consider that an official's right to respect for his private life has been infringed where facts concerning his health have been made known to the persons responsible for examining a complaint against the refusal to reimburse medical expenses submitted by him and in support of which those facts were relied on, without any request that it should be dealt with anonymously. That communication is provided for by the relevant rules, it is necessary in order to verify whether claims for reimbursement are substantiated, a verification on which the survival of the common sickness insurance scheme for Community officials depends, and it is not disproportionate in so far as it is confined to a restricted category of persons, all bound by the obligation of professional secrecy under Article 214 EC Treaty (cf. points 33-45).

Disclosure of a complaint exclusively to the persons competent to deal with it cannot constitute a breach of the principles of assistance and regard for welfare, even if the complaint does contain information which might give rise to a suspicion that the applicant's professional abilities are waning (cf. point 48).

Summary:

The applicant, an insulin-dependant diabetic, made a claim against a decision of the payments office of the health insurance scheme common to the Community institutions, who had, despite the seriousness of the applicant's illness entitling him to reimbursement at 100% of his medical expenses, only authorised partial reimbursement of his expenses for certain dental care. This claim having been unreservedly distributed to various services within the Commission, he requested the Commission to publicly acknowledge that it erred in divulging his health problems, and that token damages of 1 ECU be paid in respect of same. This request having been implicitly refused, he lodged a claim for annulment of the decisions rejecting his claim and damages, and sought damages against the Commission to the value of 25 000 ECU to compensate the material and moral damage incurred, on the

basis of an alleged infringement of Articles 8 and 10 ECHR and also the duty of care and the duty to grant assistance. The Court of First Instance, having dismissed the ground for relief based on infringement of the right of freedom of expression due to the applicant's failure to elaborate on this notion, rejected the ground based on infringement of the right to respect for family and private life, holding that, supposing there were interference in the applicant's private life, this was not without legal justification, being in the interest of "economic stability" and "protection of health", and was not disproportionate to the required objective, in compliance with Article 8.2 ECHR. The appeal was therefore rejected.

Supplementary information:

- See also *supra*, CFI, 23.02.1995, *F. v. Council* (Case T-535/93); *European Court Reports*, FP-II-163, and the references cited under [Cross-references].

Cross-references:

On the restrictions to the exercise of fundamental rights, see:

- ECJ, 13.12.1979, *Liselotte Hauer* (Case 44/79) [1979] *European Court Reports* 3727, 3744;
- ECJ, 08.10.1986, *Keller* (Case 234/85) [1986] *European Court Reports* 2897, 2912;
- ECJ, 11.07.1989, *Schröder* (Case 265/87) [1989] *European Court Reports* 2237, 2267;
- ECJ, 13.07.1989, *Wachauf* (Case 5/88) [1989] *European Court Reports* 2609, 2639;
- ECJ, 08.04.1992, *Commission v Germany* (Case C-62/90) [1992] *European Court Reports* 2575;
- ECJ, 05.10.1994, *X v Commission* (Case C-404/92 P) [1994] ECR 4737.

Languages:

French.



Identification: ECJ-1996-2-011

a) European Union / b) Court of Justice of the European Communities / c) / d) 30.07.1996 / e) C-84/95 / f) *Bosphorus v. Minister for Transport, Energy and Communications, Ireland and the Attorney General* / g) *European Court Reports* I-3953 / h) CODICES (French).

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 4.18 **Institutions** – State of emergency and emergency powers.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
- 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

International Community, general interest / Security Council / Property, right to enjoyment / Embargo / Sanction, economic.

Headnotes:

Fundamental rights such as the right to peaceful enjoyment of property and the freedom to pursue a commercial activity are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community. Those restrictions may be substantial where the aims pursued are themselves of substantial importance. That is precisely the case as regards Regulation no 990/93, the aim of which is to contribute at Community level to the implementation of the sanctions against the Federal Republic of Yugoslavia adopted by the Security Council of the United Nations, since that regulation pursues an objective of general interest which is fundamental for the international community, namely to put an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina. The impounding under that regulation of an aircraft which is owned by an undertaking based in the Federal Republic of Yugoslavia, but has been

leased for four years to another undertaking neither based in nor operating from that republic and in which no person or undertaking based in or operating from that republic has a majority or controlling interest, cannot therefore be regarded as inappropriate or disproportionate (cf. points 21-26).

Summary:

The Supreme Court of Ireland referred to the Court for a preliminary ruling under Article 177 EC, a question on the interpretation of Article 8 of Council Regulation no. 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro). The Regulation implements in the community some aspects of the sanctions adopted by the Security Council of the United Nations against the aforementioned republic. The question arose in proceedings between a Turkish company operating principally as an air charter and travel organizer and the Irish Minister for Transport. The Turkish company had leased two aircrafts from the Yugoslav national airline. Following maintenance operations at Dublin Airport one of the aircraft was impounded after order from the Minister for Transport. The Turkish company submitted that the regulation in question was aiming at penalizing the Federal Republic of Yugoslavia and its nationals as well as to apply sanctions against them, but the sanctions could not be extended to apply to third parties that were completely innocent and exercised their activities in good faith from a neighbouring State, with which the Community had friendly relations. Furthermore the Turkish company invoked that its fundamental rights, in particular the right to peaceful enjoyment of its property and the freedom to pursue a commercial activity would be infringed if the regulation were to apply.

The Court concluded, after having examined the wording, the context and the objectives of the regulation in question in the light of the resolutions adopted by the Security Council, that Article 8 of the regulation applied to the conflict and that, considering that an objective of general interest so fundamental for the international community, which consisted in putting an end to the state of war and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft could not be regarded as inappropriate or disproportionate.

Supplementary information:

On the principle of proportionality, see also:

- ECJ, 14.05.1996, *The Queen v. Commissioners of Customs & Excise, ex parte Faroe Seafood Co. Ltd, Føroya Fiskasøla and Commissioners of Customs & Excise, ex parte John Smith and Celia Smith, joined cases C-153/94 and C-204/94*, not yet reported; paragraphs 113-116;
- ECJ, 23.05.1996, *Maas & Co. NV v. Belgische Dienst voor Bedrijfsleven en Landbouw*, Case C-326/94, not yet reported, paragraphs 29, 36;
- CFI, 05.06.1996, *NMB*, Case T-162/94, not yet reported; paragraphs 69-86;
- ECJ, 13.06.1996, *Binder GmbH & Co. International v. Hauptzollamt Stuttgart-West*, Case C-205/94, not yet reported; paragraphs 30-37;
- ECJ, 04.07.1996, *Hüpeden & Co. KG v. Hauptzollamt Hamburg-Jonas*, Case C-295/94, not yet reported, paragraphs 14-40;
- ECJ, 04.07.1996, *Pietsch v. Hauptzollamt-Waltershof*, Case C-296/94, not yet reported, paragraphs 15-34;
- Order ECJ, 12.07.1996, *United Kingdom and Northern Ireland v. Commission*, Case C-180/96 R, not yet reported; paragraphs 73,76;
- Order of the President of the CFI, 13.07.1996, *The National Farmers' Union*, Case T-76/96 R, not yet reported; paragraphs 83-96.

Languages:

English (language of the case); German, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese, Swedish (translations of the Court).



Identification: ECJ-1999-H-001

a) European Union / **b)** Court of First Instance / **c)** First Chamber / **d)** 19.05.1999 / **e)** T-34/96 et T-163/96 / **f)** Bernard Connolly v. Commission of the European Communities / **g)** *European Court Reports* IA-00087; II-00463 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 4.6.9 **Institutions** – Executive bodies – The civil service.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.

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

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

Keywords of the alphabetical index:

Civil servant, loyalty, obligation / Civil servant, publication, prior authorisation.

Headnotes:

1. The exercise of fundamental rights such as the right to property may be restricted, provided that those restrictions correspond to objectives of general interest pursued by the Communities and that they do not constitute a disproportionate and intolerable interference which infringes the very substance of the rights granted. The requirements of Article 11 of the Staff Regulations, which provides that an official is to conduct himself solely with the interests of the Communities in mind, meet the legitimate objective of guaranteeing not only the independence but also the loyalty of the official to his institution; and the pursuit of this objective justifies the minor inconvenience of obtaining permission from the appointing authority to accept sums from sources outside the institution to which he belongs (see paragraph 111).

2. Article 12.1 of the Staff Regulations, which provides that '[a]n official shall abstain from any action and, in particular, any public expression of opinion which may reflect upon his position', is designed to ensure that Community officials conduct themselves in such a way as to present an image of dignity consistent with the particularly correct and respectable conduct which one is entitled to expect of members of an international civil service. It follows, in particular, that insults expressed publicly by an official which offend the honour of those to whom they refer constitute in themselves a reflection on the post within the meaning of that provision.

Article 12.1 of the Staff Regulations, in the same way as Articles 11 and 21, constitutes one of the specific expressions of the obligation of loyalty, which requires not only that an official should refrain from conduct which reflects on the post and show due respect for the institution and its authorities, but also, and especially where he occupies a senior post, that he should conduct himself in a manner that is beyond suspicion, so that the relationship of trust between the institution and himself may at all times be maintained.

Article 12 of the Staff Regulations is not a fetter on freedom of expression, which is a fundamental right

enjoyed by Community officials, but places reasonable limits on the exercise of that right in the interests of the service.

The obligations arising under Article 12 of the Staff Regulations and the duty of loyalty continue to apply during a period of leave on personal grounds.

Since Article 12 of the Staff Regulations applies to all officials, without distinguishing according to their administrative situation, that fact that an official may be on leave on personal grounds cannot exempt him from the obligations which that Article imposes on him. Furthermore, the respect which the official owes to the dignity of his post is not limited to the particular time when he carries out one specific task or another, but is binding in all circumstances, just as the duty of loyalty does not only apply when he carries out specific tasks but also extends to the entire sphere of the relations between the official and the institution (see paragraphs 123, 124, 127).

3. The right to freedom of expression laid down in Article 10 of the European Convention on Human Rights is a fundamental right protected by the Community judicature and enjoyed, in particular, by Community officials. None the less, fundamental rights are not absolute prerogatives and may be restricted, provided that such restrictions actually correspond to objectives pursued by the Community in the general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference with the very substance of the rights thus guaranteed. Considered in the light of those principles Article 17.2 of the Staff Regulations, on the publication by officials of matters dealing with the work of the Communities, cannot be regarded as imposing an unwarranted restriction on an official's freedom of expression.

First, the requirement laid down in that Article that the official concerned should obtain the prior permission of the appointing authority corresponds to the legitimate objective that any matter dealing with the work of the Communities must not prejudice the interests of the Communities and, in particular, the reputation and image of one of the institutions. Second, Article 17.2 of the Staff Regulations is not disproportionate to the objective which that article seeks to protect in the general interest. On the one hand, prior permission to publish is required only where the matter which the official concerned intends to publish, or have published, 'deal[s] with the work of the Communities'. On the other hand, it does not place any outright ban on publication. On the contrary, the final sentence of Article 17.2 of the Staff Regulations clearly establishes the principle that permission to publish will be granted, since such

publication is to be refused only where the publication concerned is liable to prejudice the interests of the Communities (see paragraphs 148 to 152).

Summary:

Mr Connolly, a civil servant in the Commission and head of unit in the Directorate General of Economic and Financial Affairs, was thrice refused authorisation to publish articles on, *inter alia*, the European monetary system. He subsequently requested – and was granted – leave for personal reasons for a period of three months, following which he returned to his job in the Commission. Although this was not among the reasons he had given for requesting leave, Mr Connolly took advantage of the leave to publish a book, without authorisation, severely criticising European monetary policy. Pending the outcome of the disciplinary proceedings taken against him, the Commission suspended him from his duties. On the opinion of the disciplinary board, Mr Connolly was eventually dismissed, without loss of his accrued pension rights. He then petitioned the Court of First Instance of the European Communities to set aside the opinion of the disciplinary board and the decision to dismiss him, and to award him damages.

In support of his claims, the applicant alleged restrictions to his enjoyment of fundamental rights. First, he claimed that the opinion of the disciplinary board and the decision to dismiss him were based on an interpretation of Article 11 of the Staff Regulations of the Communities incompatible with Article 1 protocol 1 ECHR, on the protection of property. By prohibiting, as a matter of principle, the receipt of remuneration – such as royalties – from sources outside the institution to which the staff member belonged, he argued, Article 11 of the Staff Regulations effectively violated the right to property. Similarly, the interpretation placed on Article 12 of the Staff Regulations, on the duty of loyalty, was incompatible with the freedom of expression enshrined in Article 10 ECHR, in so far as it allegedly deprived civil servants of any personal opinion, even outside the work environment. He also alleged that the interpretation of Article 17.2 of the Staff Regulations, concerning the publication of any matter dealing with the work of the Communities, was in violation of Article 10 ECHR. The need for prior authorisation effectively gave the institution unlimited powers of censorship.

The Court of First Instance rejected all the applicant's arguments. After recalling that fundamental rights are not absolute prerogatives but may be subject to limits or restrictions justified by the interests of the service or the general interest, the Court observed that Articles 11, 12 and 17.2 of the Staff Regulations could not be considered to impose disproportionate

restrictions on the exercise by public servants of their fundamental rights.

Examination of the submissions in support of the applicant's claims having revealed no misconduct by the Commission, and therefore no fault rendering it liable, the case for damages was also dismissed.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2000-H-001

a) European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 14.07.2000 / **e)** T-82/99 / **f)** Michael Cwik v. Commission of the European Communities / **g)** *European Court Reports* FP-IA-0155; FP-II-0713 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Civil servant, publication, authorisation, prior.

Headnotes:

1. Freedom of expression, enshrined in Article 10 ECHR, is one of the fundamental rights which, as the Court of Justice has consistently held and as is reaffirmed by the preamble to the Single European Act and by Article F.2 of the Treaty on European Union (now, after amendment, Article 6.2 EU), are protected in the Community legal order and apply *inter alia* to Community officials. However, fundamental rights do not constitute an unfettered prerogative but may be subject to restrictions, provided that the latter in fact correspond to objectives of general

interest and do not constitute, in relation to the objective pursued, a disproportionate and intolerable interference in a democratic society, which infringes upon the very substance of the rights safeguarded.

Considered in the light of those principles, Article 17.2 of the Staff Regulations gives expression to the permanent need to strike a fair balance between ensuring that a fundamental right may be exercised and protecting a legitimate objective of general interest. Hence, that objective may justify restricting the exercise of such a right only if the actual circumstances require it and only in so far as necessary. According to that provision, an official is obliged to request permission to publish an Article but the obligation is limited to Articles dealing with the work of the Communities and permission may be refused only 'where the proposed publication is liable to prejudice the interests of the Communities' (see paragraphs 50 to 52).

2. In a democratic society founded on respect for fundamental rights, the fact that an official publicly expresses points of view different from those of the institution for which he works cannot, in itself, be regarded as liable to prejudice the interests of the Communities for the purposes of Article 17.2 of the Staff Regulations. Clearly, the purpose of freedom of expression is precisely to enable expression to be given to opinions which differ from those held at an official level. To accept that freedom of expression could be restricted merely because the opinion at issue differs from the position adopted by the institutions would be to negate the purpose of that fundamental right. Likewise, Article 17.2 of the Staff Regulations would be rendered nugatory, since, as is apparent from its wording, it clearly lays down the principle on which permission for publication is granted, specifically providing that such permission is to be refused only where the proposed publication is liable to prejudice the interests of the Communities.

Consequently, the mere fact that there is a difference of opinion between an official and his institution does not justify refusing a request under Article 17.2 of the Staff Regulations for permission to publish, in so far as there is no evidence that making that difference public would be liable to prejudice the interests of the Communities (see paragraphs 57 to 60).

Summary:

In the context of litigation concerning European Community officials, an application was lodged with the Court of First Instance to set aside a decision of the Commission refusing to authorise an official to publish the text of a lecture he had given.

The applicant was initially authorised to give a lecture on an economic subject. His superiors then refused to authorise him to publish the text of his lecture, on the grounds that it might harm the interests of the Community. In support of his claim the applicant alleged that under Article 17.2 of the Staff Regulations of the Communities, officials enjoyed freedom of expression in the framework of their statutory obligations and that, in prohibiting the publication of his text on the grounds that it would restrict the Community's room for manoeuvre, the Commission had made a mistake of law in its interpretation of the Staff Regulations and abused the power of discretion they conferred on it. The applicant refuted that publication of the text in question might restrict the Commission's room for manoeuvre and claimed accordingly that the restriction of his freedom of expression was unjustified. The Court of First Instance, having recalled that fundamental rights, including freedom of expression, were protected by Community law, but that restrictions could be placed on the exercise of these rights to protect a legitimate aim in the general interest, verified whether the permission to publish was effectively denied in this case in order not to place the interests of the Community at risk. It noted that according to the Commission's decision to prohibit publication, the danger to the interests of the Community consisted solely in the public expression by an official of points of view different from those of the institution. Considering that differences of opinion are the whole point of freedom of expression, the Court found that this ground did not justify a restriction of the right to freedom of expression, and that the denial of permission to publish had no legal foundation and should be annulled.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-H-001

a) European Union / **b)** Court of First Instance / **c)** First Chamber / **d)** 02.10.2001 / **e)** T-222/99, T-327/99 et T-329/99 / **f)** Jean-Claude Martinez, Charles de Gaulle, Front national et Emma Bonino and others v. European Parliament / **g)** *European Court Reports*, II-02823 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.2 **Sources of Constitutional Law** – Categories – Unwritten rules.

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

3.16 **General Principles** – Proportionality.

4.5.4 **Institutions** – Legislative bodies – Organisation.

4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.

4.5.3 **Institutions** – Legislative bodies – Composition.

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

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

Keywords of the alphabetical index:

European Union, Parliament, traditions, common to member states / Administration, good, principle / Parliament, group, dissolution / Parliament, member group, affiliation.

Headnotes:

1. Whilst the purpose of the rules of procedure of a Community institution is to organise the internal functioning of its services in the interests of good administration, and the rules laid down therefore have as their essential purpose to ensure the smooth conduct of procedure, that consideration alone does not preclude an act of the Parliament providing a general interpretation of a provision of its Rules of Procedure proposed by the Committee on Constitutional Affairs from having legal effects in regard to third parties and thus from being capable of forming the subject-matter of an action for annulment brought before the Community judicature under Article 230 EC. The Parliament cannot claim that that act purports merely to give a general and abstract interpretation of the provisions at issue not capable of forming the subject-matter of an action for annulment (see paragraphs 32, 56-57).

2. Elected under Article 1 of the Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage as representatives of the peoples of the States brought together in the Community, the Members of the Parliament must, in regard to an act emanating from the Parliament and producing legal effects as regards the conditions under which the electoral mandate is exercised, be regarded as third parties within the meaning of Article 230.1 EC (see paragraph 61).

3. Rule 29.1 of the Rules of Procedure of the Parliament, which provides that Members may form themselves into groups according to their political

affinities and appears in a rule dealing with the 'formation of political groups', must necessarily be construed as meaning that Members who choose to form a group within the Parliament may do so only on the basis of political affinities. Any argument as to the optional nature of the criterion of political affinities referred to in that provision is therefore invalidated by the very terms of that provision, in conjunction with its heading.

In that regard, the attitude previously adopted by the Parliament in regard to the statements of formation of certain groups must be regarded as reflecting an assessment as to observance of the requirement of political affinities dependent upon the specific content and context of each of those statements. Conversely, it cannot be deemed to constitute a legal interpretation according to which the requirement of political affinities mentioned in successive versions of the Parliament's Rules of Procedure could be regarded as optional (see paragraphs 80-81, 85).

4. As is clear from Rule 180 of the Parliament's Rules of Procedure, it has competence to ensure, if need be by referring a matter to the Committee on Constitutional Affairs, that its Rules of Procedure are being correctly applied and interpreted. In that respect it has competence specifically to monitor compliance with the requirement of political affinity laid down in Rule 29.1 by a group declaring its formation to the President of the Parliament under Rule 29.4. To deny the Parliament that monitoring power would be tantamount to compelling it to deprive Rule 29.1 of all effectiveness (see paragraph 101).

5. The concept of political affinity in Rule 29.1 of the Parliament's Rules of Procedure must be understood as having in each specific case the meaning which the Members forming themselves into a political group under Rule 29 intend to give to it, without necessarily openly so stating. It follows that Members declaring that they are organising themselves into a group under this provision are presumed to share political affinities, however minimal.

However, that presumption cannot be regarded as irrebuttable. Pursuant to its supervisory competence, the Parliament has the power to examine whether the requirement laid down in Rule 29.1 has been observed where the Members declaring the formation of a group openly exclude any political affinity between themselves, in patent non-compliance with the abovementioned requirement (see paragraphs 103-104).

6. The reference in the statement of formation of a parliamentary group to the fact that the various signatories comprising it retain their voting freedom both

in committee and in plenary assembly does not warrant the conclusion that there are no political affinities between those signatories. In fact, that is an expression of the principle of the independent mandate enshrined in Article 4.1 of the Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage and Rule 2 of the Parliament's Rules of Procedure and cannot therefore have any influence on assessment of a group's compliance with Rule 29.1. Nor does the fact that Members forming themselves into a group declare that they remain politically independent from one another suffice to warrant a finding that they do not share political affinities. A declaration of that kind is similarly in keeping with the principle of the independent mandate.

None the less, that is not the case where the members of the group concerned categorically rejected any common political affinity, undertook on no account to give the impression of sharing any such affinity and precluded in advance any action, even of an ad hoc nature, which might during the currency of that legislature have been conducive to that end (see paragraphs 108-109, 111).

7. Article 241 EC gives expression to the general principle conferring upon any party to proceedings the right to challenge, in order to seek annulment of a decision of direct and individual concern to that party, the validity of a previous act of the institutions which forms the legal basis of the decision which is being challenged, if that party was not entitled under Article 230 EC to bring a direct action challenging that act, by which it was thus affected without having been in a position to ask that it be declared void.

In that regard, the scope of that Article must extend to acts of the institutions which were relevant to the adoption of the decision forming the subject-matter of the action for annulment, even if such acts did not formally constitute the legal basis of that decision (see paragraphs 133, 135).

8. The Parliament is authorised by virtue of the power to determine its own internal organisation conferred on it by Articles 25 CS, 199 EC and 112 EA to take appropriate measures to ensure the proper functioning and conduct of its proceedings.

In that connection, the combined provisions of Rule 29.1 and Rule 30 of the Parliament's Rules of Procedure allowing within the Parliament only the formation of groups founded on political affinities and providing that the Members not belonging to a political group are to sit as non-attached Members under the conditions laid down by the Bureau of the Parliament, rather than authorising them to form a technical group or to constitute a mixed group,

constitute measures of internal organisation which are warranted by the special characteristics of the Parliament, the constraints under which it operates and the responsibilities and objectives assigned to it by the Treaty (see paragraphs 144, 149).

9. The principle of non-discrimination, which constitutes a fundamental principle of law, prohibits comparable situations from being treated differently or different situations from being treated in the same way, unless such treatment is objectively justified.

In that regard, the Members of the Parliament all have a mandate bestowed on them democratically by the electorate and all assume the same task of political representation at European level. In that respect they are all in the same situation. It is certainly the case that Rule 29.1 in conjunction with Rule 30 of the Parliament's Rules of Procedure, by allowing only the formation of groups based on political affinities, introduces a distinction between two categories of Members, those belonging to a political group within the meaning of the Parliament's internal rules and those who sit as non-attached Members under the conditions laid down by the Bureau of the Parliament. That distinction is justified, however, by the fact that the former satisfy, unlike the latter, a requirement under the Rules of Procedure dictated by the pursuit of legitimate objectives. Accordingly, such a distinction cannot be held to constitute an infringement of the principle of non-discrimination (see paragraphs 150-153).

10. It is for the Parliament to determine whether the situation arising from application of the various internal provisions governing the status of the non-attached Member is in all respects in conformity with the principle of equal treatment.

In that connection, although the attainment of the legitimate objectives pursued by the Parliament by means of its organisation in political groups justifies the fact that those groups, and thus the Members belonging to them, enjoy certain privileges and facilities denied to non-attached Members, it is for the Parliament to examine under the relevant internal procedures whether the differences in treatment as between those two categories of Member stemming from the abovementioned provisions are all necessary and thus objectively justified in the light of the abovementioned objectives. If appropriate, it will be for the Parliament under its power of internal organisation to remedy the inequalities inherent in those provisions which do not satisfy that requirement of necessity and which might consequently be held to be discriminatory on review by the Community judicature of acts of the Parliament adopted under those provisions (see paragraph 157).

11. The principle of protection of legitimate expectations, which is one of the fundamental principles of the Community, presupposes that the Community institution in question gave to those concerned specific assurances giving rise on their part to reasonable expectations.

In that connection, the absence in the past of opposition by the Parliament to statements concerning the formation of political groups not having the same characteristics as a group whose formation is now being declared cannot be regarded as a specific assurance giving rise in the minds of the Members who declared that they were forming that group reasonable expectations as to its compliance with the requirement of political affinities laid down in Rule 29.1 of the Parliament's Rules of Procedure (see paragraphs 183-184).

12. Whilst the principle of democracy is a founding principle of the European Union, it does not preclude the Parliament from adopting measures of internal organisation, such as Rule 29.1 in conjunction with Rule 30 of the Parliament's Rules of Procedure, which allow only the formation of groups based on political affinities and which enable it to perform as well as possible, in keeping with its special characteristics, the institutional role and the objectives assigned to it by the treaties (see paragraph 200).

13. In compliance with the internal procedures provided for in that regard and subject to possible review by the Community judicature, it is for the Parliament to determine whether the situation of non-attached Members within the meaning of Rule 30 of the Rules of Procedure of the Parliament who in the exercise of their functions are deprived by various provisions of the internal rules of the Parliament of the benefit of a number of material, administrative, financial and parliamentary privileges which are accorded to the political groups is in all respects compatible with the principle of democracy. Under that principle the conditions under which Members who have been democratically vested with a parliamentary mandate exercise that mandate cannot be affected by their not belonging to a political group to an extent which exceeds what is necessary for the attainment of the legitimate objectives pursued by the Parliament through its organisation in political groups (see paragraphs 201-202).

14. The principle of proportionality requires measures adopted by the Community institutions to be appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question, and where there is a choice between several appropriate measures, the least onerous measure must be used.

In that connection, the combined provisions of Rule 29.1 and Rule 30 of the Parliament's Rules of Procedure, which only allow the formation of groups based on political affinities, constitute measures of internal organisation which are appropriate and necessary in the light of the legitimate objectives pursued by the Parliament. In fact, in the light of the Parliament's specific characteristics and operating constraints, only groups made up of Members sharing political affinities within the meaning of Rule 29.1 enable the Parliament to perform the institutional tasks and the objectives assigned to it by the Treaty. If Members declaring that they are forming a group as provided for in Rule 29.1 share no political affinity, the Parliament has no choice but to prohibit the formation of such a group and, as provided for by Rule 30, to deem them to be non-attached, since otherwise it would jeopardise the attainment of the legitimate objectives which it pursues by means of its organisation in political groups. Accordingly, Rule 29.1 in conjunction with Rule 30 cannot be regarded as measures which, in breach of the principle of proportionality, go beyond what is appropriate and necessary in order to attain the legitimate objectives pursued (see paragraphs 215-217).

15. It is for the Parliament to consider, in compliance with the internal procedures provided for in that regard and subject to possible review by the Community judicature, whether the situation of Members who are non-attached within the meaning of Rule 30 of the Parliament's Rules of Procedure and, in the exercise of their functions, do not enjoy the same advantages as those conferred on the members of political groups complies with the principle of proportionality, by verifying whether in the case of each of the relevant provisions of the Parliament's internal rules, a less stringent solution would be just as appropriate for achieving the legitimate objectives pursued by the Parliament by way of its political group structure (see paragraphs 218-219).

16. The principle of freedom of association which is enshrined in Article 11 ECHR and stems from the constitutional traditions common to the Member States is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article 6.2 EU, are protected in the Community legal order. Nevertheless, even if that principle were intended to apply to the internal organisation of the Parliament, it should be stressed that it is not absolute. Restrictions may be imposed, for legitimate reasons, on the exercise of freedom of association, provided that those restrictions do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of that right.

In that regard, the principle of freedom of association does not preclude the Parliament in the context of its power of internal organisation from making formation of a group of Members of the Parliament subject to a requirement of political affinity dictated by the pursuit of legitimate objectives and from prohibiting the formation of a group which is in patent breach of that requirement. Such measures, which are based on legitimate grounds, do not affect the right of Members concerned to organise themselves into a group provided that the conditions laid down in that connection by the Rules are observed (see paragraphs 231-233).

17. Even if the case-law to the effect that in ensuring that fundamental rights are safeguarded the Community judicature is obliged to draw inspiration from the constitutional traditions common to the Member States applies by analogy to the parliamentary traditions common to the latter, the act of the Parliament banning the formation of groups whose members abjure any political affinity cannot be adjudged contrary to a parliamentary tradition common to the Member States.

In fact, even though the formation of technical or mixed groups is permitted by one or other of the national parliaments, it does not appear that the national parliaments which, like the Parliament, make formation of a group within the parliament subject to a requirement of political affinity would interpret a statement concerning the formation of a group such as a group abjuring any political affinity as between its members in a manner differing from the Parliament's interpretation. Nor does it appear that formation of a group whose members expressly state that it is entirely unpolitical, would be possible in the majority of national parliaments (see paragraphs 240-242).

18. Under Rule 180.5 and 180.6 of the Parliament's Rules of Procedure, interpretations by the Parliament are adopted in the form of explanatory notes to the corresponding rule or rules and those explanatory notes constitute precedents in particular for the application of the rules concerned. Unlike Rule 181.3, which concerns amendments to those Rules, and under which any such amendment is to enter into force only on the first day of the part-session following its adoption, under the abovementioned provisions of Rule 180 the application to a specific case of the interpretation of a provision of the Rules of Procedure adopted by the Parliament is not subject to any time-limit or formality.

Thus, the interpretation by the Parliament of a rule elucidates and specifies its meaning and scope as it ought to be and ought to have been understood and applied from the time of its entry into force. It follows that the provision as so construed may be applied to

situations arising prior to the adoption of the interpretative decision (see paragraphs 251-252).

19. Point XV 8 of Annex VI and Rule 180.1 and 180.3 of the Parliament's Rules of Procedure must be construed as giving competence to the Committee on Constitutional Affairs, where a question is referred to it, to propose to the Parliament its interpretation of the rule in connection with the specific problem giving rise to such referral (see paragraph 259).

20. There is a misuse of powers, of which misuse of procedure is merely another form, only if the contested measure appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving ends other than those stated (see paragraph 276).

Summary:

In the case of the constitution of the TDI group (see the judge's order of 25 November 1999 published in Bulletin n° ECJ-1999-H-001), the Court of First Instance of the European Communities judges the merits of the appeals. It begins by examining the arguments of the European Parliament as to why the appeals for annulment lodged by MEPs in the TDI group, the *Front national* and the *Lista Emma Bonino* are inadmissible. The defence claimed that the act at issue consisted simply of adopting the interpretation of Rule 29 of the Parliament's rules of procedure proposed by the Committee on Constitutional Affairs. As there was no decision calling for the dissolution of the TDI group, neither the *Front national*, nor Mrs Bonino or any other MP could request its annulment. Furthermore, the act of 14 September 1999 was unimpugnable as it only concerned the internal organisation of the Parliament's work, and had no legal effects on third parties. In any event the applicants were not directly and individually concerned, within the meaning of Article 230.4 EC, by this act, which, the defence argued, merely gave a general, abstract interpretation of a general legal provision. The Court accepted none of these arguments. While the impugned act indeed comprised a general interpretation, it also included the decision that the TDI group no longer existed *ex tunc* as it was not in conformity with Rule 29.1 of the rules of procedure of the Parliament. Likewise the act of 14 September 1999 could not strictly be considered to concern only the internal organisation of the Parliament's work, as it affected the conditions in which the members concerned carried out their parliamentary duties and therefore had legal effects on them. The Court of First Instance accordingly found that the impugned act concerned the applicant parties directly and individually and declared the appeals for annulment admissible.

On the merits, the Court confirmed the imperative nature of the provision in Rule 29.1 of the rules of procedure of the Parliament concerning political affinities. In respect thereof it ruled out any violation of the principles of equal treatment, democracy, proportionality and freedom of association, and any disregard for the parliamentary traditions shared by the member states. It also ruled out the allegations of violation of essential formalities and abuse of procedure. The appeals were thus finally dismissed.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2002-H-001

a) European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 11.09.2002 / **e)** T-13/99 / **f)** Pfizer Animal Health SA v. Council of the European Union / **g)** *European Court Reports* II-03305 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

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

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

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

Keywords of the alphabetical index:

Health, protection, precaution, principle / Precaution, principle / Expert, opinion, scope / Animal, food, additive, human health, risk.

Headnotes:

1. A regulation is of individual concern to a person where, in the light of the specific circumstances of the case concerned, it adversely affects a particular right on which that person could rely.

Furthermore, by terminating or, at the least, suspending the procedure which had been opened, at the request of an economic operator, for the purposes of obtaining a new authorisation of virginiamycin as an additive in feedingstuffs, and in the course of which that operator had the benefit of procedural guarantees, Regulation no. 2821/98 providing for the withdrawal of the authorisation to market certain additives in feedingstuffs, including virginiamycin, within the Community affects that operator by reason of a legal and factual situation which differentiates it from all other persons. That fact is also such as to distinguish it for the purposes of Article 173.4 of the Treaty, now, after amendment, Article 230.4 EC (see paragraphs 98-100, 104).

2. In accordance with Article 130r.2 of the Treaty (now, after amendment, Article 174.2 EC), the precautionary principle is one of the principles on which Community policy on the environment is based. The principle also applies where the Community institutions take, in the framework of the common agricultural policy, measures to protect human health. It is apparent from Article 130r.1 and 130r.2 of the Treaty that Community policy on the environment is to pursue the objective *inter alia* of protecting human health, that the policy, which aims at a high level of protection, is based in particular on the precautionary principle and that the requirements of the policy must be integrated into the definition and implementation of other Community policies. Furthermore, as Article 129.1.3 of the Treaty (now, after amendment, Article 152 EC) provides, and in accordance with settled case-law, health protection requirements form a constituent part of the Community's other policies and must therefore be taken into account when the common agricultural policy is implemented by the Community institutions (see paragraph 114).

3. The Community institutions may lay down for themselves guidelines for the exercise of their discretionary powers by way of measures not provided for in Article 189 of the Treaty (now Article 249 EC), in particular by communications, provided that they contain directions on the approach to be followed by the Community institutions and do not depart from the Treaty rules. In such circumstances, the Community judicature ascertains, applying the principle of equal treatment, whether the disputed measure is consistent with the guidelines that the institutions have laid down for themselves by adopting and publishing such communications (see paragraph 119).

4. Where there is scientific uncertainty as to the existence or extent of risks to human health, the Community institutions may, by reason of the

precautionary principle, take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.

It follows, first, that as a result of the precautionary principle, as enshrined in Article 130r.2 of the Treaty (now, after amendment, Article 174.2 EC), the Community institutions were entitled to take a preventive measure regarding the use of virginiamycin as an additive in feedingstuffs, even though, owing to existing scientific uncertainty, the reality and the seriousness of the risks to human health associated with that use were not yet fully apparent. A fortiori, the Community institutions were not required, for the purpose of taking preventive action, to wait for the adverse effects of the use of the product as a growth promoter to materialise. Thus, in a situation in which the precautionary principle is applied, which by definition coincides with a situation in which there is scientific uncertainty, a risk assessment cannot be required to provide the Community institutions with conclusive scientific evidence of the reality of the risk and the seriousness of the potential adverse effects were that risk to become a reality.

However, a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified. It follows from the Community Courts' interpretation of the precautionary principle that a preventive measure may be taken only if the risk, although the reality and extent thereof have not been fully demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken.

The taking of measures, even preventive ones, on the basis of a purely hypothetical risk is particularly inappropriate in the matter of additives in feedingstuffs. In such matters a zero risk does not exist, since it is not possible to prove scientifically that there is no current or future risk associated with the addition of antibiotics to feedingstuffs. Moreover, that approach is even less appropriate in a situation in which the legislation already makes provision, as one of the possible ways of giving effect to the precautionary principle, for a procedure for prior authorisation of the products concerned.

The precautionary principle can therefore apply only in situations in which there is a risk, notably to human health, which, although it is not founded on mere hypotheses that have not been scientifically confirmed, has not yet been fully demonstrated.

In such a situation, risk thus constitutes a function of the probability that use of a product or a procedure will adversely affect the interests safeguarded by the legal order.

Consequently, the purpose of a risk assessment is to assess the degree of probability of a certain product or procedure having adverse effects on human health and the seriousness of any such adverse effects (see paragraphs 139-148).

5. In the assessment of risk, it is for the Community institutions to determine the level of risk – i.e. the critical probability threshold for adverse effects on human health and for the seriousness of those possible effects – which in their judgment is no longer acceptable for society and above which it is necessary, in the interests of protecting human health, to take preventive measures in spite of any existing scientific uncertainty.

Although they may not take a purely hypothetical approach to risk and may not base their decisions on a zero-risk, the Community institutions must nevertheless take account of their obligation under Article 129.1.1 of the Treaty (now, after amendment, Article 152 EC) to ensure a high level of human health protection, which, to be compatible with that provision, does not necessarily have to be the highest that is technically possible.

The level of risk deemed unacceptable will depend on the assessment made by the competent public authority of the particular circumstances of each individual case. In that regard, the authority may take account, *inter alia*, of the severity of the impact on human health were the risk to occur, including the extent of possible adverse effects, the persistency or reversibility of those effects and the possibility of delayed effects as well as of the more or less concrete perception of the risk based on available scientific knowledge.

In matters relating to additives in feedingstuffs the Community institutions are responsible for carrying out complex technical and scientific assessments. In such circumstances a scientific risk assessment must be carried out before any preventive measures are taken.

A scientific risk assessment is commonly defined, at both international level and Community level, as a scientific process consisting in the identification and characterisation of a hazard, the assessment of exposure to the hazard and the characterisation of the risk.

The competent public authority must, in compliance with the relevant provisions, entrust a scientific risk assessment to experts who, once the scientific process is completed, will provide it with scientific advice.

Scientific advice is of the utmost importance at all stages of the drawing up and implementation of new legislation and for the execution and management of existing legislation. The duty imposed on the Community institutions by Article 129.1.1 of the Treaty to ensure a high level of human health protection means that they must ensure that their decisions are taken in the light of the best scientific information available and that they are based on the most recent results of international research.

Thus, in order to fulfil its function, scientific advice on matters relating to consumer health must, in the interests of consumers and industry, be based on the principles of excellence, independence and transparency.

When the precautionary principle is applied, it may prove impossible to carry out a full risk assessment because of the inadequate nature of the available scientific data. A full risk assessment may require long and detailed scientific research. Unless the precautionary principle is to be rendered nugatory, the fact that it is impossible to carry out a full scientific risk assessment does not prevent the competent public authority from taking preventive measures, at very short notice if necessary, when such measures appear essential given the level of risk to human health which the authority has deemed unacceptable for society.

The competent public authority must therefore weigh up its obligations and decide either to wait until the results of more detailed scientific research become available or to act on the basis of the scientific information available. Where measures for the protection of human health are concerned, the outcome of that balancing exercise will depend, account being taken of the particular circumstances of each individual case, on the level of risk which the authority deems unacceptable for society.

Where experts carry out a scientific risk assessment, the competent public authority must be given sufficiently reliable and cogent information to allow it to understand the ramifications of the scientific question raised and decide upon a policy in full knowledge of the facts. Consequently, if it is not to adopt arbitrary measures, which cannot in any circumstances be rendered legitimate by the precautionary principle, the competent public authority must ensure that any measures that it takes,

even preventive measures, are based on as thorough a scientific risk assessment as possible, account being taken of the particular circumstances of the case at issue.

Notwithstanding the existing scientific uncertainty, the scientific risk assessment must enable the competent public authority to ascertain, on the basis of the best available scientific data and the most recent results of international research, whether matters have gone beyond the level of risk that it deems acceptable for society. That is the basis on which the authority must decide whether preventive measures are called for and, should that be the case, which measures appear to it to be appropriate and necessary to prevent the risk from materializing (see paragraphs 151-163).

6. In matters concerning the common agricultural policy the Community institutions enjoy a broad discretion regarding definition of the objectives to be pursued and choice of the appropriate means of action. In that regard, review by the Community judicature of the substance of the relevant act must be confined to examining whether the exercise of such discretion is vitiated by a manifest error or a misuse of powers or whether the Community institutions clearly exceeded the bounds of their discretion. The Community institutions enjoy a broad discretion, in particular when determining the level of risk deemed unacceptable for society.

Where a Community authority is required to make complex assessments in the performance of its duties, its discretion also applies, to some extent, to the establishment of the factual basis of its action.

It follows that judicial review of the Community institutions' performance of their duty must be limited. The Community judicature is not entitled to substitute its assessment of the facts for that of the Community institutions, on which the Treaty confers sole responsibility for that duty. Instead, it must confine itself to ascertaining whether the exercise by the institutions of their discretion in that regard is vitiated by a manifest error or a misuse of powers or whether the institutions clearly exceeded the bounds of their discretion (see paragraphs 166-169).

7. Under the precautionary principle the Community institutions are entitled, in the interests of human health to adopt, on the basis of as yet incomplete scientific knowledge, protective measures which may seriously harm legally protected positions, and they enjoy a broad discretion in that regard.

In such circumstances, the guarantees conferred by the Community legal order in administrative proceedings are of even more fundamental

importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case.

It follows that a scientific risk assessment carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures (see paragraphs 170-172).

8. Against a legislative background in which the Community institution is not bound by the scientific opinion given by the competent scientific committee, the role played by a committee of experts, such as the Scientific Committee for Animal Nutrition, in a procedure designed to culminate in a decision or a legislative measure, is restricted, as regards the answer to the questions which the competent institution has asked it, to providing a reasoned analysis of the relevant facts of the case in the light of current knowledge about the subject, in order to provide the institution with the factual knowledge which will enable it to take an informed decision.

However, the competent Community institution must, first, prepare for the committee of experts the factual questions which need to be answered before it can adopt a decision and, second, assess the probative value of the opinion delivered by the committee. In that regard, the Community institution must ensure that the reasoning in the opinion is full, consistent and relevant.

To the extent to which the Community institution opts to disregard the opinion, it must provide specific reasons for its findings by comparison with those made in the opinion and its statement of reasons must explain why it is disregarding the latter. The statement of reasons must be of a scientific level at least commensurate with that of the opinion in question (see paragraphs 197-199).

9. Even if, under the relevant legislation, the Community institutions are able to withdraw authorisation from an additive without first having obtained a scientific opinion from the competent scientific committees, it must be held that it is only in exceptional circumstances and where there are adequate guarantees of scientific objectivity that the Community institutions may, when they are required to assess particularly complex facts of a technical or scientific nature, adopt a preventive measure withdrawing authorisation from an additive without obtaining an opinion from the scientific committee set

up for that purpose at Community level on the relevant scientific material (see paragraphs 265, 270).

10. In an action for annulment under Article 173 of the Treaty (now, after amendment, Article 230 EC), the assessment made by the Community institutions can be challenged only if it appears incorrect in the light of the elements of fact and law which were available to them at the time when the contested measure was adopted (see paragraph 324).

11. In an action for annulment of Regulation no. 2821/98 providing for withdrawal of the authorisation to market certain additives in feedingstuffs, including virginiamycin, in the Community, it is not for the Community Courts to assess the merits of either of the scientific points of view argued before them and to substitute their assessment for that of the Community institutions, on which the Treaty confers sole responsibility in that regard. Since the Community institutions could reasonably take the view that they had a proper scientific basis for a link between the use of virginiamycin as an additive in feedingstuffs and the development of streptogramin resistance in humans, the mere fact that there were scientific indications to the contrary does not establish that they exceeded the bounds of their discretion in finding that there was a risk to human health.

It is clear, on the contrary, that the Community institutions could properly find that there were serious reasons concerning human health, within the meaning of Article 3a.e of Directive 70/524 concerning additives in feedingstuffs, for restricting streptogramins to medical use (see paragraphs 393, 402).

12. The principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

However, in matters concerning the common agricultural policy, the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty (now, after amendment, Articles 34 EC and 37 EC). Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate, regard being had to the objective which the competent institution is seeking to pursue (see paragraphs 411-412).

13. The fact that the Community institutions have not adopted measures at international level against imports of meat produced using virginiamycin as a growth promoter cannot of itself affect the validity of the ban on the use of virginiamycin within the Community. It would rather have to be established that in the absence of any such action the contested regulation was in itself a manifestly inappropriate means of achieving the objective pursued (see paragraph 433).

14. The importance of the objective pursued by Regulation no. 2821/98 providing for withdrawal of the authorisation to market certain additives in feedingstuffs, including virginiamycin, within the Community, i.e. the protection of human health, may justify adverse economic consequences, and even substantial adverse consequences, for certain traders. The protection of public health, which the regulation is intended to guarantee, must take precedence over economic considerations.

Furthermore, although the freedom to pursue a trade or business forms part of the general principles of Community law, that principle does not amount to an unfettered prerogative but must be viewed in the light of its social function. Consequently, it may be restricted, provided that the restrictions imposed in fact correspond to objectives of general interest pursued by the Community and do not, in relation to the aim pursued, constitute a disproportionate and intolerable interference which would affect the very substance of the right so guaranteed (see paragraphs 456-457).

15. The right to be heard in an administrative procedure taken against a specific person, which must be observed, even in the absence of any rules governing the procedure, cannot be transposed to a legislative procedure leading, as in the present case, to the adoption of a measure of general application. The fact that an economic operator is directly and individually concerned by the contested regulation does not alter that finding (see paragraph 487).

Summary:

Pfizer Animal Health, the only manufacturer of Virginiamycin in the world, applied under Article 173.4 of the EC treaty (now, following amendment, Article 230.4 EC) for the annulment of Regulation no. 2821/98, in which the Council banned the use of this antibiotic as an additive in animal feedingstuffs. Pfizer based its application on eight grounds, respectively concerning violation of Article 11 of Directive 70/524 concerning additives in animal feedingstuffs, manifest errors of appreciation, violation of the precautionary principle and the

principles of proportionality and protection of legitimate trust, violation of the obligation to provide reasons, violation of the right to property and misuse of power.

After finding Pfizer's application admissible as the party potentially responsible for marketing the product at issue, within the meaning of Article 2.1 of Directive 70/524 as amended, the Court of First Instance examined all the pleadings based on the errors allegedly made in assessing and dealing with the risks to human health linked to the use of Virginiamycin as an additive, and in the application of the precautionary principle. It noted in this respect that the precautionary principle embodied in Article 130R.2 of the EC Treaty (now, following amendment, Article 174.2 EC) should certainly be applied when the community institutions take steps to protect human health under the common agricultural policy. These measures, it continued, may be adopted without waiting for the reality and the seriousness of the risks to human health to be fully demonstrated, as application of the precautionary principle presupposes an uncertain scientific context.

This does not mean that a preventive measure may be taken without sufficient supporting scientific data. It is for the Community institutions, in keeping with the procedural guarantees provided by the Community's legal order, to fix the acceptable level of risk beyond which preventive measures must be taken, based on as thorough a scientific risk assessment as possible, account being taken of the particular circumstances of the case at issue. In this context, the Court of First Instance points out, the Community judicature is not entitled to substitute its assessment of the facts for that of the Community institutions. Instead, it must confine itself to ascertaining whether there has been a manifest error or a misuse of powers or whether the institutions clearly exceeded the bounds of their discretion or the principle of proportionality. The Court of First Instance thus found that the applicant failed to demonstrate that the institutions had made mistakes in evaluating and dealing with the risks linked to the use of Virginiamycin as an additive in feedingstuffs. As no violation of the precautionary principle, the principle of protection of legitimate trust or the obligation to provide reasons had been established, the Court of First Instance dismissed the appeal as unfounded.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2003-H-001

a) European Union / **b)** Court of First Instance / **c)** Fifth Chamber / **d)** 23.10.2003 / **e)** T-65/98 / **f)** Van den Bergh Foods Ltd v. Commission of the European Communities / **g)** *European Court Reports* II-00000 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Competition, property right, limitation / Market, access.

Headnotes:

While the right to property is one of the general principles of Community law, it is not considered an absolute prerogative but one that must be taken in the light of its function in society. Accordingly restrictions may be placed on enjoyment of the right to property, as long as they effectively serve the aims pursued by the Community in the general interest and do not, in view of those aims, constitute a disproportionate and intolerable interference likely to affect the very substance of the rights thus guaranteed.

As Article 3.g of the EC Treaty (now, following amendment, Article 3.1.g EC) stipulates that, in order for the Community to achieve its aims, its activity shall include the institution of a system ensuring that competition in the internal market is not distorted and, in consequence, the application of Articles 85 and 86 of the Treaty (now, following amendment, Articles 81 EC and 82 EC) is in the public interest, restrictions may be placed on the right to property by virtue of these articles, provided that they are not disproportionate and do not affect the very substance of the right.

Accordingly, a manufacturer of ice cream for immediate consumption who is in a dominant position

may be prohibited from providing retailers with freezers subject to an exclusive arrangement under which they are not allowed to place products made by other manufacturers in said freezers (cf. paragraphs 170-171).

Summary:

The food company Van den Bergh Foods Ltd (hereinafter “HB”) is the leading manufacturer of ice cream in Ireland, particularly individually wrapped ice creams for immediate consumption. For a number of years, HB has supplied ice cream retailers, “free of charge” or for a symbolic rental fee, with freezers which remain its property, subject to the condition that they use them exclusively to stock ice cream supplied by HB. It also maintains the freezers at no extra cost, except in the event of negligence on the part of the retailer.

In 1989, Masterfoods Ltd (hereinafter “Mars”) entered the Irish ice cream market. Numerous retailers with freezers supplied by HB started to store Mars products in them, leading HB to demand that they respect the exclusivity clause. Challenging the validity of such a clause under both domestic and Community law, Mars appealed to the Irish High Court to declare it void. HB lodged a separate appeal to have Mars ordered not to encourage retailers to violate the exclusivity clause. In April 1990 the national court issued an interim order in favour of HB. In May 1992, it finally rejected the Mars company’s appeal and again ruled in favour of HB. Mars was ordered to stop encouraging retailers to store its products in the freezers supplied by HB. Mars then appealed the decision before the Supreme Court (Ireland), which referred the matter to the Court of Justice of the European Communities for a preliminary ruling. At the same time, Mars filed a complaint against HB with the Commission. By decision of 11 March 1998, the Commission found a violation of Articles 85 and 86 of the EC Treaty (now, following amendment, Articles 81 EC and 82 EC) and asked HB to put a stop to it. HB then lodged this appeal and successfully applied for execution of the impugned decision to be suspended pending the Court’s decision.

In support of its appeal the applicant company cited a number of grounds, including violation of its ownership right over the freezers supplied to the retailers. Banning the exclusivity clause meant that freezers paid for and maintained by the applicant could be used to store ice cream supplied by third parties, thus seriously affecting its property rights in respect of the freezers. According to the Commission, however, HB had already transferred part of its ownership rights over the freezers to the retailers against payment, the cost of supplying the freezers

effectively being included in the price of the ice cream delivered to the retailers. The firm could therefore not claim that its property rights had been “confiscated”. The applicant firm could also recover the cost of its investment by charging a separate rental fee for its freezers. It had failed to demonstrate how such a separate rental system might disrupt its distribution network.

The Court of First Instance confirmed that the right to property is one of the general principles of Community law. It is not an absolute prerogative, however. Restrictions may be placed on it as long as they effectively serve the aims pursued by the Community in the general interest and do not, in view of those aims, constitute a disproportionate and intolerable interference likely to affect the very substance of the right thus guaranteed. Application of Articles 85 and 86 of the treaty is in the public interest of the Community. Restrictions may therefore be placed on enjoyment of the right to property by virtue of these provisions. According to the Court, the impugned decision did not deprive HB of its property rights over its freezers or prevent it from exploiting its assets by hiring them out for a fee. It simply stipulated that if HB decided to exploit them by supplying them “free of charge”, it could not do so on the basis of an exclusivity clause as long as it held a dominant position on the market. The appeal on the grounds of violation of the right to property was therefore dismissed, as was the appeal as a whole.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-1983-S-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 25.03.1983 / **e)** / **f)** Silver and Others v. the United Kingdom / **g)** Vol. 61, *Series A of the Publications of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.15 **General Principles** – Publication of laws.
 3.16 **General Principles** – Proportionality.
 3.19 **General Principles** – Margin of appreciation.
 5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope.
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
 5.3.33.1 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Correspondence.

Keywords of the alphabetical index:

Prisoner / Correspondence, delay.

Headnotes:

Excessive control of prisoners' correspondence constitutes a violation of the right to respect for one's correspondence.

Summary:

All of the applicants except one were detained in prison in the United Kingdom at the time of the events giving rise to this case.

At issue was the stopping by the prison authorities of 62 letters written by the applicants in the period between January 1972 and May 1976. In addition, one of the applicants complained of delay in posting one of his outgoing letters and another of the withholding of one of his incoming letters. In the case of one of the applicants, the three letters at issue are examples of correspondence which she was prevented from continuing with the imprisoned brother of a friend of hers, in the case of the other applicants, the letters were addressed to or sent by various people, including relatives, solicitors, Members of Parliament and journalists. The correspondence dealt with many different subjects, such as prison conditions, legal proceedings, business transactions and family and personal matters.

Prisoner's correspondence was, in England and Wales, subject to a number of Prison Rules made by the Home Secretary under the Prison Act 1952. At the time of the events giving rise to this case, the Rules were supplemented by directives to prison governors, contained in Standing Orders and Circular Instructions which were not made public. In accordance with the Rules and directives, the letters in question were stopped or delayed on a number of different grounds, including restrictions on correspondence with persons other than relatives or friends or in connection with any legal or other business provisions prohibiting the inclusion of complaints about prison treatment, threats of violence, grossly improper language or material intended for publication.

With effect from 1 December 1981, the directives on prisoners' correspondence were substantially modified and revised Standing Orders on the subject have now been published in their entirety.

Mr Silver petitioned the Home Secretary on 20 November 1972 for permission to seek legal advice concerning allegedly negligent treatment in prison. Leave was refused on 18 April 1973.

With regard to this refusal, the Court, recalling its established case-law, held that it constituted a violation of Article 6.1 ECHR, the right to a fair trial, in that Mr Silver had been denied access to the courts.

It then turned to the issue of whether the treatment of the 64 letters in question constituted a violation of Article 8 ECHR, the right to respect for one's

correspondence. As the stopping or delaying of the letters undisputedly constituted "interferences by a public authority", the Court had to consider whether the conditions on which Article 8.2 ECHR permits such interferences were satisfied.

The Court first examined whether the interferences were "in accordance with the law". The fact that they complied with English law was not disputed. However, the Court, referring to its case-law, recalled that the phrase "in accordance with the law" meant that the interference in question had to have a basis in domestic law and that the relevant law had to be adequately accessible to the citizen. Here, a basis for the prison authorities' actions was to be found not in the Home Secretary's directives, which lacked the force of law, but in the Prison Act and Rules and the latter, unlike the unpublished directives, were adequately accessible.

A further requirement was that the law had to be sufficiently precise to enable a citizen to foresee, to a degree that was reasonable in the circumstances, the consequences of his conduct. However, the interpretation and application of many laws were questions of practice. Since the directives established a practice that in general had to be followed, they could, to the limited extent to which those concerned had been made aware of their contents, be taken into account in determining whether the criterion of foreseeability was satisfied in the present case.

The Court emphasised that an interference with an individual's rights had to be subject to effective control, especially where, as in this case, the executive enjoyed wide discretionary powers. However, it did not accept that those safeguards had to be incorporated into the actual text which authorised the interference. The question of safeguards, being closely linked with that of effective remedies, fell to be taken into account in the context of Article 13 ECHR the right to an effective remedy for breach of a Convention right.

Applying the foregoing principles, the Court found no reason to hold that the stopping of the majority of the letters involved had not been "in accordance with the law".

However, in the light of the facts of the case, the Court did accept that 13 of the 64 letters had been interfered with in circumstances which could be regarded as unforeseeable, and therefore not "in accordance with the law". They contained mainly references to legal representation, or communications to legal representatives, material intended for publication, improper language, and complaints in respect of prison conditions or officers.

The question of whether the interference in question had had a “legitimate aim” within the meaning of Article 8.2 ECHR was not in fact raised before the Court. It saw no reason to doubt that each interference had an aim that was legitimate, for example, “the prevention of disorder or crime”, “the protection of morals”, or “the protection of the rights and freedoms of others”.

The Court then turned to the necessity of the interferences “in a democratic society”. It recognised that some measure of control over prisoners’ correspondence was called for and was not incompatible in itself with the Convention. Recalling some of the principles that emerged from its case-law, the Court reiterated that the Contracting States enjoy a certain, but not unlimited, margin of appreciation when imposing restrictions, but that it is for the Court to give a final ruling on their incompatibility with the Convention. Accordingly, the Court recalled that interferences must correspond to a “pressing social need” and be “proportionate to the legitimate aim pursued”, and that the provisions of the Convention that authorised exceptions to a guaranteed right are to be narrowly interpreted.

Applying the foregoing principles, the Court held that the stopping of the majority of the letters involved was not “necessary”.

The Court concluded that, with the exception of 7 of the letters, the stopping or delaying of the remaining 57 letters involved a violation of Article 8.1 ECHR.

The Court next turned to the alleged violation of Article 13 ECHR taken in conjunction with the violations found of Article 8 ECHR.

After recalling certain of the principles that emerged from its case-law on the interpretation of Article 13 ECHR, the Court found firstly that the possibility for the applicants to complain about the control of their correspondence to the Prison Board of Visitors or the Parliamentary Commissioner for Administration, neither of whom could render binding decisions, did not amount to an “effective remedy” for the purposes of Article 13 ECHR.

The Court examined the two other possible channels for complaint, namely a petition to the Home Secretary and the institution of proceedings before the English courts. After reviewing their respective powers, it found that, to the extent that the applicable regulations were incompatible with the Convention, these channels did not provide an “effective remedy”. To the extent, however, that those regulations were compatible with Article 8 ECHR, the aggregate of

these remedies satisfied, in those cases where they were available, the requirements of Article 13 ECHR.

The Court accordingly held that, in all the instances where it had found a violation of Article 8 ECHR and in one of the remaining seven cases, there had been a violation of Article 13 ECHR.

Cross-references:

- *Golder v. the United Kingdom*, 21.02.1975, Series A, no. 18; *Special Bulletin Leading Cases – ECHR* [ECH-1975-S-001];
- *National Union of Belgian Police v. Belgium*, 27.10.1975, Series A, no. 19; *Special Bulletin Leading Cases – ECHR* [ECH-1975-S-002];
- *Handyside v. the United Kingdom*, 07.12.1976, Series A, no. 24; *Special Bulletin Leading Cases – ECHR* [ECH-1976-S-003];
- *Ireland v. the United Kingdom*, 18.01.1987, Series A, no. 25; *Special Bulletin Leading Cases – ECHR* [ECH-1978-S-001];
- *Klass and Others v. Germany*, 06.09.1978, Series A, no. 28; *Special Bulletin Leading Cases – ECHR* [ECH-1978-S-004];
- *Sunday Times v. the United Kingdom*, 26.04.1979, Series A, no. 30; *Special Bulletin Leading Cases – ECHR* [ECH-1979-S-001];
- *X. v. the United Kingdom*, 05.11.1981, Series A, no. 46;
- *Van Droogenbroeck v. the Netherlands*, 24.06.1982, Series A, no. 50;
- *Sporrong and Lönnroth v. Sweden*, 23.09.1982, Series A, no. 52; *Special Bulletin Leading Cases – ECHR* [ECH-1982-S-002].

Languages:

English, French.



Identification: ECH-1984-S-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 28.11.1984 / **e)** 9/1983/65/100 / **f)** Rasmussen v. Denmark / **g)** Vol. 87, *Series A of the Publications of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.16 **General Principles** – Proportionality.
- 3.19 **General Principles** – Margin of appreciation.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
- 5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Equality of arms.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.
- 5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Child / Divorce / Paternity, contested.

Headnotes:

Statutory time limits which prevent the father but not the mother of a child born in wedlock from bringing proceedings to contest the paternity of the child are not discriminatory.

Summary:

Mr Rasmussen married in 1966 and in January 1971 his wife gave birth to a female child. Doubts arose as to the paternity of the child, but the applicant refrained from bringing any action to contest paternity in order to save the marriage.

The applicant and his wife divorced in July 1975. In accordance with an agreement concluded previously with his wife, the applicant undertook not to institute any proceedings to contest paternity and his wife abandoned any claim for maintenance of the child.

In January 1976, the applicant's former wife wrote to him contending that she was not bound by this agreement. He thereupon applied to the Court of Appeal for leave to institute proceedings to contest paternity, as the time-limits prescribed by Section 5.2 of the 1960 Legal Status of Children Act had expired. However, the Court of Appeal refused leave on 12 April 1976 on the ground that there were no special circumstances to warrant granting any exemption from the requisite time-limits.

After having obtained fresh information, the applicant applied once more to the Court of Appeal

in November 1978, but leave was again refused. This decision was subsequently upheld by the Supreme Court in January 1979.

The applicant claimed to have been the victim of discrimination on the grounds of sex, in violation of Article 14 ECHR, in that, under the relevant Danish legislation, his right of access to the courts in order to challenge paternity was subject to time-limits, whereas his former wife could have applied at any time. He therefore relied upon Article 14 ECHR combined with Article 6 ECHR (right to a fair trial) and/or Article 8 ECHR (right to respect for private life).

The first question for the Court was to establish the applicability to the applicant's case of Article 6 ECHR and/or Article 8 ECHR, as Article 14 ECHR would only have effect in relation to "the enjoyment of rights or freedoms" safeguarded by the Convention.

The Court held that both Articles applied. It considered that the public interest involved could not exclude the applicability of Article 6 ECHR to the litigation which was, by its very nature, "civil" in character, as it was undeniably a matter of family law. Furthermore, the proceedings in question undoubtedly concerned the applicant's private life.

The next question for the Court was whether there had, on the facts, been a difference of treatment as between the applicant and his former wife. It was clear that under the 1960 Act, the time-limit in issue only applied to the husband when instituting paternity proceedings. The Court held that there was no call to examine the grounds on which this distinction was based, as it regarded the list in Article 14 ECHR as inexhaustive.

Although the Court held that the husband and wife had not actually been placed in analogous positions as far as the paternity suit was concerned, it did not consider it necessary to resolve this question.

The Court then drew attention to the fact that for the purposes of Article 14, an objective and reasonable justification is one which has a "legitimate aim" and where there is a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". In response to these criteria, the Government had pleaded that the difference of treatment was justified, notably in the interests of the child, and had relied on the State's "margin of appreciation" in the matter.

The Court pointed out that this "margin of appreciation" varied according to the circumstances, the subject-matter and its background. In this respect, the

existence or non-existence of common ground between the laws of the Contracting States might be relevant. It found, however, that there was no such common ground in the area in question.

The Court then examined closely the circumstances and general background of the contested measures. Bearing in mind the authorities' margin of appreciation in the matter, the Court concluded that they were entitled to think at the relevant time that the introduction of time-limits solely for the husband was justified for legitimate purposes, namely to ensure legal certainty and to protect the interests of the child, with which the mother's interests usually coincided. The Court also considered that the authorities had not transgressed the principle of proportionality. Accordingly, the difference complained of was not discriminatory within the meaning of Article 14 ECHR, and there had therefore been no violation of that article taken in conjunction with Articles 6 or 8 ECHR.

Cross-references:

- Belgian "Linguistic Case", 23.07.1968, Series A, no. 6; *Special Bulletin Leading Cases – ECHR* [ECH-1968-S-003];
- *Golder v. the United Kingdom*, 21.02.1975, Series A, no. 18; [ECH-1975-S-001];
- *National Union of Belgian Police v. Belgium*, 27.10.1975, Series A, no. 19; *Special Bulletin Leading Cases – ECHR* [ECH-1975-S-002];
- *Swedish Engine Drivers' Union v. Sweden*, 06.02.1976, Series A, no. 20;
- *Engel and Others v. the Netherlands*, 08.06.1976, Series A, no. 22; *Special Bulletin Leading Cases – ECHR* [ECH-1976-S-001];
- *Ireland v. the United Kingdom*, 18.01.1978, Series A, no. 25; *Special Bulletin Leading Cases – ECHR* [ECH-1978-S-001];
- *Sunday Times v. the United Kingdom*, 26.04.1979, Series A, no. 30; *Special Bulletin Leading Cases – ECHR* [ECH-1979-S-001];
- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31; *Special Bulletin Leading Cases – ECHR* [ECH-1979-S-002];
- *Van der Mussele v. Belgium*, 23.11.1983, Series A, no. 70; *Special Bulletin Leading Cases – ECHR* [ECH-1983-S-003].

Languages:

English, French.



Identification: ECH-1986-S-003

a) Council of Europe / b) European Court of Human Rights / c) Plenary Court / d) 08.07.1986 / e) 6/1984/78/122 / f) *Lingens v. Austria* / g) Vol. 103, *Series A of the Publications of the Court* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.3 **Sources of Constitutional Law** – Techniques of review.
- 3.3 **General Principles** – Democracy.
- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
- 5.3.29 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Journalist, politician, defamation / Politician, reputation / Censure / Media, press, function / Defamation, politician.

Headnotes:

The conviction of a journalist, on the grounds of defamation of a leading politician, contravenes the rights to freedom of expression and of the written press.

Summary:

On 14 and 21 October 1975, Mr Lingens published in the Vienna magazine *Profil* two Articles containing strong criticisms of Mr Kreisky, who was at the time the Federal Chancellor, for his attitude towards a political leader who, during the Second World War, had served in an SS brigade, and for his attacks on Mr Wiesenthal, who had publicly denounced that leader.

Mr Kreisky subsequently brought a private prosecution against the applicant for defamation in the press. On 26 March 1979, the Vienna Regional Court partially upheld the complaint and sentenced the applicant to a fine of 20,000 Schillings. Following an appeal by both parties, the Vienna Court of Appeal quashed the judgement. It referred the case back to the Regional Court which, on 1 April 1981, confirmed its previous decision. Mr Kreisky and the applicant appealed again, and on 29 October 1981, the Court of Appeal reduced the fine to 15,000 Schillings.

In response to the Government's argument concerning a possible conflict between Article 10 ECHR (freedom of expression), and Article 8 ECHR (right to respect for private life), the Court replied that the applicant's criticisms related to public statements by Mr Kreisky and to his attitude as a politician. There was accordingly no need in this instance to read Article 10 ECHR in the light of Article 8 ECHR.

The Court found that there had been "interference by a public authority" with the exercise of the applicant's freedom of expression (Article 10 ECHR), as a result of his conviction for defamation by the Vienna Regional Court, which had been upheld by the Court of Appeal.

The Court noted that the interference had been "prescribed by law" (Article 111 of the Austrian Criminal Code) and had a legitimate aim under Article 10.2 ECHR, namely the protection of the reputation of others.

According to its case-law regarding the "necessity" of an interference "in a democratic society", the Court recalled that the requirement implied, in the sense of Article 10.2 ECHR, a "pressing social need". It furthermore recognised that whilst the Contracting States do have a certain margin of appreciation in assessing whether such a need exists, it nonetheless goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it.

The Court began by examining the court decisions in question in the light of the case as a whole, including the Articles held against Mr Lingens and the context in which they had been written.

As to the proportionality of the sanction, the Court recalled that freedom of expression was one of the essential foundations of a democratic society and was applicable also to "information" or "ideas" that offended, shocked or disturbed. The Court emphasised the particular importance of these principles for

the press. It was incumbent on the press to impart information and ideas on political issues and on other questions of public interest, and the public had a right to receive them. Furthermore, freedom of the press afforded one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.

The Court concluded from the foregoing that the limits of acceptable criticism were wider as regards a politician than as regards a private individual. Although the former also enjoyed the protection of Article 10 ECHR, the requirements of the protection of his reputation had to be weighed in relation to the interests of open discussion of political issues, which, according to the Court, is at the very core of the concept of a democratic society, which prevails throughout the Convention.

The relevant Articles had dealt with political issues of public interest in Austria. The Court found that their content and tone had been fairly balanced, but the expressions objected to had been likely to harm Mr Kreisky's reputation. However, since the case concerned a politician, regard had to be had to the background against which the Articles had been written, namely that of a post-election political controversy.

In the view of the Court, the penalty imposed on the applicant amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in the future. In the political field, such a sanction was liable to hamper the press in performing its task of purveyor of information and public watchdog.

The Court then examined the judicial decisions at issue, which had held that the expressions used by the applicant were objectively defamatory. It found that the passages held against the applicant were value-judgements. The Austrian Courts had sought to determine whether the applicant had established the truth of his statements in accordance with Article 111.3 of the Criminal Code. In the Court's view, a distinction needed to be made between facts and value-judgements. The existence of facts could be demonstrated, whereas it was impossible to prove the truth of value-judgements. Furthermore, the facts on which the applicant had founded his value-judgement as well as his good faith had been undisputed.

The Court thus concluded that the interference in question was not necessary for the protection of the reputation of others and therefore that the violation of Article 10 ECHR was established.

Cross-references:

- *Handyside v. the United Kingdom*, 07.12.1976, Series A, no. 24; [ECH-1976-S-003];
- *Sunday Times v. the United Kingdom*, 26.04.1979, Series A, no. 30; [ECH-1979-S-001];
- *Barthold v. Germany*, 25.03.1985, Series A, no. 90.

Languages:

English, French.

*Identification:* ECH-1990-S-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 24.04.1990 / **e)** 7/1989/167/223 / **f)** *Kruslin v. France* / **g)** Vol. 176, *Series A of the Publications of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – Legality.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.
- 5.3.33.1 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Correspondence.
- 5.3.33.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Law, quality, foreseeable consequences / Law, precision.

Headnotes:

Telephone tapping under a warrant issued by an investigating judge in application of a law which does

not afford sufficient safeguards violates the right to respect for private life and correspondence.

Summary:

In April 1985 the Indictment Division of the Toulouse Court of Appeal committed the applicant, Mr Kruslin, for trial at the Haute-Garonne Assize Court on charges of aiding and abetting a murder, aggravated theft and attempted aggravated theft. One item of evidence was the recording of a telephone call that the applicant had had on a line belonging to a third party, a recording that had been made at the request of an investigating judge at Saint-Gaudens in connection with other proceedings. An appeal on points of law brought by the applicant on this ground was dismissed by the Court of Cassation.

The Court found that the interception complained of amounted to interferences by a public authority with the exercise of the applicant's right to respect for his correspondence and his private life, as protected by Article 8 ECHR. It proceeded to ascertain whether such interferences were justified under Article 8.2 ECHR.

The Court found that the expression "in accordance with the law", within the meaning of Article 8.2 ECHR, required firstly that the impugned measure should have some basis in domestic law, but also referred to the quality of the law in question, requiring that it should be accessible to the person concerned, who had moreover to be able to foresee its consequences for him, and that it should be compatible with the rule of law.

As to whether there had been a legal basis for the measures in French law, the Court pointed out, firstly, that it was primarily for the national authorities, in particular the courts, to interpret and apply domestic law. It was therefore not for the Court to express an opinion contrary to theirs on whether telephone tapping ordered by investigating judges was compatible with Article 368 of the Criminal Code. For many years now, the courts – and in particular the Court of Cassation – had regarded Articles 81, 151 and 152 of the Code of Criminal Procedure as providing a legal basis for telephone tapping carried out by a senior police officer under a warrant issued by an investigating judge. The Court held that settled case-law of that kind could not be disregarded. In relation to Article 8.2 ECHR, and other similar clauses, the Court had always understood the term "law" in its substantive sense, not its formal one, and had included both enactments of lower rank than statutes and unwritten law.

The Court therefore held that the interferences complained of had a basis in French law.

As regards the “quality of the law”, in the sense of its accessibility, this did not, in the view of the Court, raise any problem. The same was not true of the requirement that the law be “foreseeable” as to the meaning and nature of the applicable measures.

The Court found that tapping and other forms of interception of telephone conversations represented a serious interference with private life and correspondence, and accordingly had to be based on a “law” that was particularly precise. It was essential to have clear, detailed rules on the subject, especially as the technology available for use was continually becoming more sophisticated.

The Government had listed many safeguards which they said were provided for in French law. These related either to the carrying out of the telephone tapping or to the use made of the results or to the means of having any irregularities righted, and the Government had claimed that the applicants had not been deprived of any of them.

The Court did not in any way minimise the value of several of the safeguards. It noted, however, that only some of them were expressly provided for in Articles 81, 151 and 152 of the Code of Criminal Procedure. Others had been laid down piecemeal in judgements given over the years, the great majority of them after the interceptions complained of by the applicants. Some had not yet been expressly laid down in the case law at all. Above all, the system did not for the time being afford sufficient safeguards against various possible abuses. The Court therefore held that the applicants had not enjoyed the minimum degree of protection to which citizens were entitled under the rule of law in a democratic society. There had consequently been a breach of Article 8 ECHR.

Cross-references:

- *De Wilde, Ooms and Versyp v. Belgium*, 18.06.1971, no. 12; *Special Bulletin Leading Cases – ECHR* [ECH-1971-S-001];
- *Klass and Others v. Germany*, 06.09.1978, no. 28; *Special Bulletin Leading Cases – ECHR* [ECH- 1978-S-004];
- *Sunday Times v. the United Kingdom*, 26.04.1979, no. 30; *Special Bulletin Leading Cases – ECHR* [ECH-1979-S-001];
- *Malone v. the United Kingdom*, 02.08.1984, no. 82; *Special Bulletin Leading Cases – ECHR* [ECH- 1984-S-007];

- *Müller and Others v. Switzerland*, 24.05.1988, no. 133; *Special Bulletin Leading Cases – ECHR* [ECH-1988-S-003];
- *Salabiaku v. France*, 07.10.1988, no. 141-A; *Special Bulletin Leading Cases – ECHR* [ECH-1988-S- 006];
- *Markt Intern Verlag GmbH and Klaus Beerman v. Germany*, 20.11.1989, no. 165.

Languages:

English, French.



Identification: ECH-1990-S-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 30.08.1990 / **e)** 18/1989/178/234-236 / **f)** Fox, Campbell and Hartley v. the United Kingdom / **g)** Vol. 182, *Series A of the Publications of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
- 5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
- 5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Detention, continued / Detention, lawfulness / Terrorism, suspect, detention, length / Suspicion, reasonable / Suspicion, honest.

Headnotes:

The arrest and detention in Northern Ireland, for periods ranging between 30 and 44 hours approximately of persons suspected of being terrorists constitutes a violation of the right to liberty and security of the person if that suspicion was genuine, but not reasonable.

Summary:

Section 11 of the Northern Ireland (Emergency Provisions) Act 1978 conferred on the police a power to arrest without warrant and detain for a maximum of 72 hours any person whom they suspected of being a terrorist.

In 1986 the applicants were arrested in Northern Ireland by the police. They were informed at the time of their arrest that they were being detained under Section 11 of the 1978 Act as they were suspected of being terrorists. They were held in a police station where they were questioned about their involvement in specific terrorist acts. They were then released without being charged, after a maximum of 44 and minimum of 30 hours.

The power to arrest and detain under Section 11 of the 1978 Act was renewable on a six-monthly basis and was so renewed until the relevant provision was repealed in 1987.

The applicants argued that they had not been arrested on "reasonable suspicion of having committed an offence", as the suspicion under the Act needed only to be genuinely and honestly held by the arresting officer.

The Court first recognised that it was not its task to review the legislation in abstracto but to examine its application in these particular cases. The "reasonableness" of the suspicion on which an arrest had to be based formed an essential part of the safeguard laid down in Article 5.1 ECHR against arbitrary arrest and detention. Having a "reasonable suspicion" presupposed the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence, although what might be regarded as "reasonable" depended on all the circumstances.

In view of the terrorist situation in Northern Ireland, the "reasonableness" of the suspicion justifying such arrest could not always be judged according to the same standards that were applied when dealing with conventional crime. Nonetheless, the Court had to be able to ascertain whether the essence of the

safeguard against arbitrary arrest and detention laid down in Article 5.1.c ECHR had been secured, and so had to be furnished with at least some facts or information capable of satisfying it that the arrested person was reasonably suspected of having committed the alleged offence particularly where domestic law had set a lower threshold by merely requiring honest suspicion.

The Court accepted that the arrest and detention of each of the applicants had been based on a bona fide suspicion that he or she was a terrorist. However, it did not accept that the elements relied on by the United Kingdom Government could, on their own, support the conclusion that there had been a "reasonable suspicion". Neither the previous convictions of two of the applicants some seven years earlier for acts of terrorism, nor the fact that all three applicants were questioned about specific terrorist acts during their detention could, without further material, have satisfied an objective observer that the suspicion had been reasonable.

The Court thus held that there had been a breach of Article 5.1 ECHR.

As regards the alleged breach of Article 5.2 ECHR, the right to be informed promptly of the reasons for his arrest, the Court pointed out that whether the content and promptness of the information conveyed were sufficient had to be assessed in each case according to its special features. Whilst the reasons for the arrest had not been sufficiently indicated in the present case when the applicants were taken into custody, they had been brought to their attention during their subsequent interrogation. Moreover, the intervals of a few hours that had elapsed between arrest and interrogation could not be regarded as falling outside the constraints imposed by the notion of promptness. There had thus been no breach on Article 5.2 ECHR in the instant case.

As the breach of Article 5.1 ECHR occasioned by the applicants' arrest and detention could not give rise to an enforceable claim for compensation before the Northern Ireland courts, the Court upheld the allegation of a violation of Article 5.5 ECHR (enforceable right to compensation).

Cross-references:

- *Klass and Others v. Germany*, 06.09.1978, no. 28; *Special Bulletin Leading Cases – ECHR* [ECH- 1978-S-004];
- *Brogan and Others v. the United Kingdom*, 29.11.1988, no. 145 – B; *Special Bulletin Leading Cases – ECHR* [ECH-1988-S-007].

Languages:

English, French.

**Identification:** ECH-1992-S-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Plenary Court / **d)** 29.10.1992 / **e)** 64/1991/316/387-388 / **f)** Open Door and Dublin Well Woman v. Ireland / **g)** Vol. 246-A, *Series A of the Publications of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.

2.3 **Sources of Constitutional Law** – Techniques of review.

3.16 **General Principles** – Proportionality.

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

5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Injunction, abortion, counselling, prohibition / Woman, pregnant, counselling / Abortion, counselling.

Headnotes:

The injunction restraining two counselling agencies from providing pregnant women with information concerning abortion facilities abroad was held to violate freedom to receive and impart information, on the ground that it was disproportionate to the legitimate aim pursued.

Summary:

Open Door and Dublin Well Woman are two non-profit making organizations: the first was engaged, *inter alia*, in counselling pregnant women, the second

provided a broad range of services relating to every aspect of women's health, including the counselling of pregnant women. Abortion being one of the options discussed, the agencies also indicated medical clinics in Great Britain where such services were provided to those women choosing such an option.

In 1983, at the time of the referendum leading to the amendment of the Constitution concerning the right to life of the unborn, Dublin Well Woman issued a pamphlet explaining the implications of the wording of the new constitutional provision. It highlighted that one of these implications was that anyone could seek a court injunction to prevent them from offering their non-directive counselling service. Indeed, the "Society for the Protection of Unborn Children" sought a court injunction against both organisations.

On 16 March 1988, the Supreme Court held that the non-directive counselling of the applicant agencies violated the constitutionally guaranteed right to life of the unborn (Article 40.3.3 of the Irish Constitution). It issued an injunction restraining the applicant organisations, their employees and their agents, from assisting pregnant women in Ireland to travel abroad to obtain abortions.

In August and September 1988, Open Door, Dublin Well Woman, Ms Mahler and Ms Downes (two counsellors at Dublin Well Woman) and Mrs X and Ms Geraghty (two women of childbearing age) lodged applications to the Commission of Human Rights. The question to be solved by the Court of Human Rights was whether the Supreme Court's injunction constituted an unjustified interference with the applicants' right to impart and receive information (Article 10 ECHR).

The Court noted that it was not disputed that the Supreme Court's injunction interfered with the applicant agencies and their counsellors' freedom to impart information and with Ms X and Ms Geraghty's right to receive information in the event of pregnancy. The interference was, undoubtedly, prescribed by law as the protection of the unborn was guaranteed under Article 40.3.3 of the Irish Constitution. As the right to life of the unborn was an aspect of protection of morals, the restriction of the freedom to impart and receive information pursued one of the legitimate aims foreseen by Article 10.2 ECHR.

Acknowledging that national authorities enjoy a wide margin of appreciation in matters of morals, the Court nonetheless observed that their power of appreciation was not unlimited. The Court clarified that it was not called on to examine whether the right to life, as guaranteed by Article 2 ECHR, encompassed also the foetus. Its task was that of evaluating whether the

interference complained of was “necessary in a democratic society”.

In the light of its case law, the Court examined whether the restriction complained of was “proportionate to the legitimate aim pursued”. In the instant case, the Court was struck by the absolute nature of the injunction, which imposed “perpetual” restraint for seeking counselling from the applicant agencies on termination of pregnancy. It was of the opinion that the link between the provision of information and the destruction of unborn life was not as definite as contended since the attacked counselling had been tolerated by the authorities until the Supreme Court’s judgment. Moreover, the information that the injunction sought to restrict was also available from other sources. Furthermore, evidence suggested that the injunction had created a risk to the health of women seeking abortion.

Responding to the Government’s concern that Article 10 ECHR should not be interpreted in such a way that it could limit, destroy or derogate from the special protection that Irish law accorded to the right to life of the unborn, the Court highlighted that the injunction had not prevented Irish women from obtaining abortions abroad or obtaining information elsewhere. Accordingly, it was not the interpretation of Article 10 ECHR but the position in Ireland regarding the implementation of the law that made the continuance of the level of abortions abroad still possible.

The Court concluded that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aim pursued. Accordingly there had been a breach of Article 10 ECHR.

Cross-references:

- *Observer and Guardian v. the United Kingdom*, 26.11.1991, Series A, no. 216; *Special Bulletin Leading Cases – ECHR* [ECH-1991-S-004].

Languages:

English, French.



Identification: ECH-1996-3-014

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 22.10.1996 / **e)** 36-37/1995/542-543/628-629 / **f)** *Stubbings and others v. United Kingdom* / **g)** *Reports of Judgments and Decisions*, 1996 / **h)** CODICES (English, French).

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- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.10 **General Principles** – Certainty of the law.
- 3.19 **General Principles** – Margin of appreciation.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
- 5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

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Headnotes:

British rules on limitation preventing alleged victims of child sexual abuse from commencing civil proceedings do not impair the very essence of the right of access to a court nor the right to respect for private life.

Summary:

Ms Leslie Stubbings was born on 29 January 1957. She alleges that, between the ages of two and fourteen, she was sexually abused on a number of occasions by her adoptive father, Mr Webb, and by his son, which caused her to experience severe psychological problems. However, it was not until September 1984, following treatment by a consultant child and family psychiatrist, that she realised for the first time that there might be a connection between the childhood abuse and her state of mental health. On 18 August 1987 she commenced proceedings against the Webbs, seeking damages for the alleged assaults. The defendants applied to have the claim dismissed as time-barred under the Limitation Act 1980. Both the High Court and the Court of Appeal were bound by earlier authority to hold that Ms Stubbings’ claim was based on a “breach of duty” within the meaning of

Section 11 of the 1980 Act. The limitation period for such actions was three years, either from the date on which the cause accrued or from the date on which the plaintiff first knew the injury in question was both significant and attributable to the defendants. The Court of Appeal accepted Ms Stubbings' argument that she did not realise she had a cause of action until September 1984, when with therapy she grasped the causal link between the abuse and her mental health problems. In any case, Section 33 of the 1980 Act provided that the court could allow such an action to proceed even if commenced after the expiry of the three-year period, where it would be equitable to do so. The defendants appealed to the House of Lords, which, having considered the background to the 1980 Act, held that the words "breach of duty" in Section 11 did not in fact embrace actions based on intentionally inflicted injuries, such as rape and indecent assault. Instead, these types of claim were subject to the six-year limitation period provided for in Section 2 of the Act. This limit, which could not be disapplied by the Court, started to run from the plaintiff's eighteenth birthday. Ms Stubbings's claim was therefore out of time.

Following the judgment of the House of Lords in *Stubbings v. Webb*, the applicants Mrs J.L., Mrs J.P. and Mrs D.S. abandoned their civil proceedings, the proceedings being time-barred six years after their eighteenth birthdays.

The Court recalls that Article 6.1 ECHR embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. It is noteworthy that limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.

In the instant case, the English law of limitation allowed the applicants six years from their eighteenth birthdays in which to initiate civil proceedings. In addition, subject to the need for sufficient evidence, a criminal prosecution could be brought at any time and, if successful, a compensation order could be made. Thus, the very essence of the applicants' right of access to a court was not impaired. The time limit in question was not unduly short; indeed it was longer than the extinction periods for personal injury claims set by some international treaties. Moreover, it becomes clear that the rules applied were proportionate to the aims sought to be achieved when it is considered that if the applicants had commenced action shortly before the expiry of the period, the courts would have been required to adjudicate on events which had taken place approximately twenty years earlier.

Accordingly, taking into account in particular the legitimate aims served by the rules of limitation in question and the margin of appreciation afforded to States in regulating the rights of access to a court, the Court finds that there has been no violation of Article 6.1 ECHR of the Convention taken alone.

The Court then observes that Article 8 ECHR is clearly applicable to these complaints, which concern a matter of "private life", a concept which covers the physical and moral integrity of the person. It is to be recalled that although the object of Article 8 ECHR is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: there may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. It follows that the choice of means calculated to secure compliance with this positive obligation in principle falls within the Contracting States' margin of appreciation.

In the instant case, however, such protection was afforded. The abuse of which the applicants complained is regarded most seriously by the English criminal law and subject to severe maximum penalties. Provided sufficient evidence could be secured, a criminal prosecution could have been brought at any time and could still be brought. In principle, civil remedies are also available provided they are sought within the statutory time limit.

Accordingly, in view of the protection afforded by the domestic law against the sexual abuse of children and the margin of appreciation allowed to States in these matters, the Court concludes that there has been no violation of Article 8 ECHR.

Languages:

English, French.



Systematic thesaurus (V16) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 Constitutional Justice¹

1.1 Constitutional jurisdiction²

- 1.1.1 Statute and organisation
 - 1.1.1.1 Sources
 - 1.1.1.1.1 Constitution
 - 1.1.1.1.2 Institutional Acts
 - 1.1.1.1.3 Other legislation
 - 1.1.1.1.4 Rule issued by the executive
 - 1.1.1.1.5 Rule adopted by the Court³
 - 1.1.1.2 Independence
 - 1.1.1.2.1 Statutory independence
 - 1.1.1.2.2 Administrative independence
 - 1.1.1.2.3 Financial independence
- 1.1.2 Composition, recruitment and structure
 - 1.1.2.1 Necessary qualifications⁴
 - 1.1.2.2 Number of members
 - 1.1.2.3 Appointing authority
 - 1.1.2.4 Appointment of members⁵
 - 1.1.2.5 Appointment of the President⁶
 - 1.1.2.6 Functions of the President / Vice-President
 - 1.1.2.7 Subdivision into chambers or sections
 - 1.1.2.8 Relative position of members⁷
 - 1.1.2.9 Persons responsible for preparing cases for hearing⁸
 - 1.1.2.10 Staff⁹
 - 1.1.2.10.1 Functions of the Secretary General / Registrar
 - 1.1.2.10.2 Legal Advisers
- 1.1.3 Status of the members of the court
 - 1.1.3.1 Term of office of Members
 - 1.1.3.2 Term of office of the President
 - 1.1.3.3 Privileges and immunities
 - 1.1.3.4 Professional incompatibilities
 - 1.1.3.5 Disciplinary measures
 - 1.1.3.6 Remuneration
 - 1.1.3.7 Non-disciplinary suspension of functions
 - 1.1.3.8 End of office
 - 1.1.3.9 Members having a particular status¹⁰
 - 1.1.3.10 Status of staff¹¹

¹ This chapter – as the Systematic Thesaurus in general – should be used restrictively, as the keywords in it should only be used if a relevant question is raised. This chapter is thus not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only find decisions under this chapter when the subject of the keyword is an issue in the case.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ E.g. Rules of procedure.

⁴ E.g. 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 E.g. State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, auditors, researchers, etc.

¹⁰ E.g. assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

1.1.4	Relations with other institutions	
1.1.4.1	Head of State ¹²	
1.1.4.2	Legislative bodies	
1.1.4.3	Executive bodies	
1.1.4.4	Courts	55
1.2	Types of claim	
1.2.1	Claim by a public body	
1.2.1.1	Head of State	
1.2.1.2	Legislative bodies	11
1.2.1.3	Executive bodies	
1.2.1.4	Organs of federated or regional authorities	
1.2.1.5	Organs of sectoral decentralisation	
1.2.1.6	Local self-government body	
1.2.1.7	Public Prosecutor or Attorney-General	
1.2.1.8	Ombudsman	
1.2.1.9	Member states of the European Union	
1.2.1.10	Institutions of the European Union	
1.2.1.11	Religious authorities	
1.2.2	Claim by a private body or individual	
1.2.2.1	Natural person	140
1.2.2.2	Non-profit-making corporate body	
1.2.2.3	Profit-making corporate body	
1.2.2.4	Political parties	
1.2.2.5	Trade unions	
1.2.3	Referral by a court ¹³	
1.2.4	Initiation <i>ex officio</i> by the body of constitutional jurisdiction	
1.2.5	Obligatory review ¹⁴	
1.3	Jurisdiction	153
1.3.1	Scope of review.....	129, 148, 243
1.3.1.1	Extension ¹⁵	65, 182
1.3.2	Type of review	
1.3.2.1	Preliminary review	
1.3.2.2	<i>Ex post facto</i> review	148
1.3.2.3	Abstract review	
1.3.2.4	Concrete review	51
1.3.3	Advisory powers	
1.3.4	Types of litigation	
1.3.4.1	Litigation in respect of fundamental rights and freedoms	207, 228
1.3.4.2	Distribution of powers between State authorities ¹⁶	
1.3.4.3	Distribution of powers between central government and federal or regional entities ¹⁷	.70
1.3.4.4	Powers of local authorities ¹⁸	
1.3.4.5	Electoral disputes	
1.3.4.5.1	Presidential elections	
1.3.4.5.2	Parliamentary elections	
1.3.4.5.3	Regional elections	
1.3.4.5.4	Local elections	
1.3.4.5.5	Elections of officers in professional bodies	
1.3.4.5.6	Referenda and other consultations ¹⁹	
1.3.4.6	Admissibility of referenda and other consultations ²⁰	171, 186, 215
1.3.4.6.1	Referenda on the repeal of legislation	

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ This keyword concerns questions of jurisdiction relating to the procedure and results of referenda and other consultations. For questions other than jurisdiction, see 4.9.2.1.

²⁰ This keyword concerns decisions preceding the referendum including its admissibility.

1.3.4.7	Restrictive proceedings	
1.3.4.7.1	Banning of political parties.....	146, 221
1.3.4.7.2	Withdrawal of civil rights	
1.3.4.7.3	Removal from parliamentary office	
1.3.4.7.4	Impeachment	
1.3.4.8	Litigation in respect of jurisdictional conflict	
1.3.4.9	Litigation in respect of the formal validity of enactments ²¹	
1.3.4.10	Litigation in respect of the constitutionality of enactments	
1.3.4.10.1	Limits of the legislative competence	
1.3.4.11	Litigation in respect of constitutional revision	
1.3.4.12	Conflict of laws ²²	
1.3.4.13	Universally binding interpretation of laws	
1.3.4.14	Distribution of powers between Community and member states	
1.3.4.15	Distribution of powers between institutions of the Community	
1.3.5	The subject of review	
1.3.5.1	International treaties	
1.3.5.2	Community law	
1.3.5.2.1	Primary legislation	
1.3.5.2.2	Secondary legislation	
1.3.5.3	Constitution ²³	
1.3.5.4	Quasi-constitutional legislation ²⁴	
1.3.5.5	Laws and other rules having the force of law.....	86, 209
1.3.5.5.1	Laws and other rules in force before the entry into force of the Constitution.....	55, 152
1.3.5.6	Decrees of the Head of State	
1.3.5.7	Quasi-legislative regulations	
1.3.5.8	Rules issued by federal or regional entities	
1.3.5.9	Parliamentary rules	
1.3.5.10	Rules issued by the executive	
1.3.5.11	Acts issued by decentralised bodies	
1.3.5.11.1	Territorial decentralisation ²⁵	
1.3.5.11.2	Sectoral decentralisation ²⁶	
1.3.5.12	Court decisions	228
1.3.5.13	Administrative acts	
1.3.5.14	Government acts ²⁷	
1.3.5.15	Failure to act or to pass legislation ²⁸	160
1.4	Procedure	
1.4.1	General characteristics	207
1.4.2	Summary procedure	
1.4.3	Time-limits for instituting proceedings	
1.4.3.1	Ordinary time-limit	
1.4.3.2	Special time-limits	
1.4.3.3	Leave to appeal out of time	
1.4.4	Exhaustion of remedies	
1.4.5	Originating document	
1.4.5.1	Decision to act ²⁹	
1.4.5.2	Signature	
1.4.5.3	Formal requirements	
1.4.5.4	Annexes	
1.4.5.5	Service	

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 For the withdrawal of proceedings, see also 1.4.10.4.

- 1.4.6 Grounds
 - 1.4.6.1 Time-limits
 - 1.4.6.2 Form
 - 1.4.6.3 *Ex-officio* grounds
- 1.4.7 Documents lodged by the parties³⁰
 - 1.4.7.1 Time-limits
 - 1.4.7.2 Decision to lodge the document
 - 1.4.7.3 Signature
 - 1.4.7.4 Formal requirements
 - 1.4.7.5 Annexes
 - 1.4.7.6 Service
- 1.4.8 Preparation of the case for trial
 - 1.4.8.1 Registration
 - 1.4.8.2 Notifications and publication
 - 1.4.8.3 Time-limits
 - 1.4.8.4 Preliminary proceedings
 - 1.4.8.5 Opinions
 - 1.4.8.6 Reports
 - 1.4.8.7 Evidence
 - 1.4.8.7.1 Inquiries into the facts by the Court
 - 1.4.8.8 Decision that preparation is complete
- 1.4.9 Parties
 - 1.4.9.1 *Locus standi*³¹
 - 1.4.9.2 Interest27, 186, 207, 210
 - 1.4.9.3 Representation
 - 1.4.9.3.1 The Bar
 - 1.4.9.3.2 Legal representation other than the Bar
 - 1.4.9.3.3 Representation by persons other than lawyers or jurists
 - 1.4.9.4 Persons or entities authorised to intervene in proceedings
- 1.4.10 Interlocutory proceedings
 - 1.4.10.1 Intervention
 - 1.4.10.2 Plea of forgery
 - 1.4.10.3 Resumption of proceedings after interruption
 - 1.4.10.4 Discontinuance of proceedings³²
 - 1.4.10.5 Joinder of similar cases
 - 1.4.10.6 Challenging of a judge
 - 1.4.10.6.1 Automatic disqualification
 - 1.4.10.6.2 Challenge at the instance of a party
 - 1.4.10.7 Request for a preliminary ruling by the Court of Justice of the European Communities
- 1.4.11 Hearing
 - 1.4.11.1 Composition of the bench
 - 1.4.11.2 Procedure
 - 1.4.11.3 In public / in camera
 - 1.4.11.4 Report
 - 1.4.11.5 Opinion
 - 1.4.11.6 Address by the parties
- 1.4.12 Special procedures
- 1.4.13 Re-opening of hearing
- 1.4.14 Costs³³
 - 1.4.14.1 Waiver of court fees
 - 1.4.14.2 Legal aid or assistance
 - 1.4.14.3 Party costs

³⁰ Pleadings, final submissions, notes, etc.

³¹ May be used in combination with Chapter 1.2 Types of claim.

³² For the withdrawal of the originating document, see also 1.4.5.

³³ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

1.5	Decisions	
1.5.1	Deliberation	
1.5.1.1	Composition of the bench	
1.5.1.2	Chair	
1.5.1.3	Procedure	
1.5.1.3.1	Quorum	
1.5.1.3.2	Vote	
1.5.2	Reasoning	
1.5.3	Form	
1.5.4	Types	
1.5.4.1	Procedural decisions.....	146
1.5.4.2	Opinion	
1.5.4.3	Finding of constitutionality or unconstitutionality ³⁴	
1.5.4.4	Annulment.....	51
1.5.4.4.1	Consequential annulment	
1.5.4.5	Suspension	
1.5.4.6	Modification	
1.5.4.7	Interim measures	
1.5.5	Individual opinions of members	
1.5.5.1	Concurring opinions	
1.5.5.2	Dissenting opinions	
1.5.6	Delivery and publication	
1.5.6.1	Delivery	
1.5.6.1.1	In open court / in camera	
1.5.6.2	Time limit	
1.5.6.3	Publication	
1.5.6.3.1	Publication in the official journal/gazette	
1.5.6.3.2	Publication in an official collection	
1.5.6.3.3	Private publication	
1.5.6.4	Press	
1.6	Effects	
1.6.1	Scope.....	148
1.6.2	Determination of effects by the court.....	41
1.6.3	Effect <i>erga omnes</i>	
1.6.3.1	<i>Stare decisis</i>	148
1.6.4	Effect <i>inter partes</i>	
1.6.5	Temporal effect	
1.6.5.1	Entry into force of decision	
1.6.5.2	Retrospective effect (<i>ex tunc</i>)	
1.6.5.3	Limitation on retrospective effect	
1.6.5.4	<i>Ex nunc</i> effect	
1.6.5.5	Postponement of temporal effect	
1.6.6	Execution	
1.6.6.1	Body responsible for supervising execution	
1.6.6.2	Penalty payment	
1.6.7	Influence on State organs.....	161, 216
1.6.8	Influence on everyday life.....	86
1.6.9	Consequences for other cases	
1.6.9.1	Ongoing cases	
1.6.9.2	Decided cases.....	5

³⁴

For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

2	Sources of Constitutional Law	
2.1	Categories³⁵	
2.1.1	Written rules	216
2.1.1.1	National rules	
2.1.1.1.1	Constitution	
2.1.1.1.2	Quasi-constitutional enactments ³⁶	
2.1.1.2	National rules from other countries	93
2.1.1.3	Community law	27, 53
2.1.1.4	International instruments.....	9, 39, 168, 195, 206, 234
2.1.1.4.1	United Nations Charter of 1945	
2.1.1.4.2	Universal Declaration of Human Rights of 1948.....	24, 55, 153, 225, 227
2.1.1.4.3	Geneva Conventions of 1949	
2.1.1.4.4	European Convention on Human Rights of 1950 ³⁷	5, 9, 18, 26, 27, 32, 42, 43, 45, 100, 107, 108, 117, 123, 124, 125, 127, 152, 155, 168, 169, 206, 207, 209, 210, 218, 224, 227, 233, 249, 251, 253, 255, 256, 258, 259
2.1.1.4.5	Geneva Convention on the Status of Refugees of 1951	
2.1.1.4.6	European Social Charter of 1961	126
2.1.1.4.7	International Covenant on Civil and Political Rights of 1966	11, 26, 36, 47, 100, 125, 127, 153, 155, 210, 227
2.1.1.4.8	International Covenant on Economic, Social and Cultural Rights of 1966	47, 153
2.1.1.4.9	Vienna Convention on the Law of Treaties of 1969.....	207, 209
2.1.1.4.10	American Convention on Human Rights of 1969	
2.1.1.4.11	African Charter on Human and Peoples' Rights of 1981	
2.1.1.4.12	European Charter of Local Self-Government of 1985	
2.1.1.4.13	Convention on the Rights of the Child of 1989	202
2.1.1.4.14	Statute of the International Criminal Court of 1998	
2.1.1.4.15	International conventions regulating diplomatic and consular relations	
2.1.2	Unwritten rules	5, 87, 238
2.1.2.1	Constitutional custom.....	86
2.1.2.2	General principles of law.....	233, 234
2.1.2.3	Natural law	
2.1.3	Case-law	
2.1.3.1	Domestic case-law	
2.1.3.2	International case-law	
2.1.3.2.1	European Court of Human Rights	51, 67, 103, 152, 155, 202, 206
2.1.3.2.2	Court of Justice of the European Communities	53, 100
2.1.3.2.3	Other international bodies	206
2.1.3.3	Foreign case-law.....	9, 100, 103
2.2	Hierarchy	
2.2.1	Hierarchy as between national and non-national sources	153
2.2.1.1	Treaties and constitutions	13, 168
2.2.1.2	Treaties and legislative acts.....	207
2.2.1.3	Treaties and other domestic legal instruments	
2.2.1.4	European Convention on Human Rights and constitutions	16, 152, 258
2.2.1.5	European Convention on Human Rights and non-constitutional domestic legal instruments	207, 209
2.2.1.6	Community law and domestic law	
2.2.1.6.1	Primary Community legislation and constitutions	144
2.2.1.6.2	Primary Community legislation and domestic non-constitutional legal instruments	
2.2.1.6.3	Secondary Community legislation and constitutions	

³⁵ Only for issues concerning applicability and not simple application.

³⁶ 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.).

³⁷ Including its Protocols.

	2.2.1.6.4	Secondary Community legislation and domestic non-constitutional instruments	
2.2.2		Hierarchy as between national sources	
	2.2.2.1	Hierarchy emerging from the Constitution	87
		2.2.2.1.1 Hierarchy attributed to rights and freedoms	
	2.2.2.2	The Constitution and other sources of domestic law	
2.2.3		Hierarchy between sources of Community law	
2.3		Techniques of review	253, 258
2.3.1		Concept of manifest error in assessing evidence or exercising discretion	
2.3.2		Concept of constitutionality dependent on a specified interpretation ³⁸	58, 65, 86, 164, 168, 189, 192, 206
2.3.3		Intention of the author of the enactment under review	100
2.3.4		Interpretation by analogy	
2.3.5		Logical interpretation	5
2.3.6		Historical interpretation	5
2.3.7		Literal interpretation	
2.3.8		Systematic interpretation	9, 55, 153
2.3.9		Teleological interpretation	234
3		<u>General Principles</u>	
3.1		Sovereignty	
3.2		Republic/Monarchy	
3.3		Democracy	9, 11, 47, 100, 215, 253
	3.3.1	Representative democracy	15, 108, 168, 200
	3.3.2	Direct democracy	171
	3.3.3	Pluralist democracy ³⁹	34, 108
3.4		Separation of powers	58, 63, 212
3.5		Social State⁴⁰	119, 134, 142, 184, 220
3.6		Structure of the State⁴¹	
	3.6.1	Unitary State	
	3.6.2	Regional State	
	3.6.3	Federal State	32
3.7		Relations between the State and bodies of a religious or ideological nature⁴²	78, 205
3.8		Territorial principles	32
	3.8.1	Indivisibility of the territory	216, 221
3.9		Rule of law	5, 11, 32, 47, 51, 90, 113, 132, 134, 138, 148, 161, 168, 174, 180, 182, 182, 185, 191, 215, 218, 224, 225, 253, 255
3.10		Certainty of the law⁴³	18, 47, 53, 60, 72, 80, 82, 109, 115, 118, 134, 180, 182, 237, 238, 259
3.11		Vested and/or acquired rights	134, 180, 184
3.12		Clarity and precision of legal provisions	39, 65, 138, 155, 171

³⁸ Presumption of constitutionality, double construction rule.

³⁹ Including the principle of a multi-party system.

⁴⁰ Includes the principle of social justice.

⁴¹ See also 4.8.

⁴² Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴³ Including maintaining confidence and legitimate expectations.

3.13	Legality ⁴⁴	5, 11, 53, 59, 89, 90, 100, 207, 212, 224, 227, 255
3.14	<i>Nullum crimen, nulla poena sine lege</i> ⁴⁵	72, 193
3.15	Publication of laws	249
	3.15.1 Ignorance of the law is no excuse	
	3.15.2 Linguistic aspects	
3.16	Proportionality	7, 9, 18, 26, 28, 36, 43, 49, 51, 53, 58, 60, 62, 72, 82, 84, 90, 92, 93, 97, 100, 103, 105, 107, 108, 118, 126, 132, 134, 136, 137, 138, 142, 144, 147, 148, 159, 163, 164, 174, 175, 180, 182, 182, 185, 186, 195, 197, 198, 199, 207, 210, 212, 213, 220, 228, 231, 233, 234, 235, 237, 238, 243, 248, 249, 251, 253, 258
3.17	Weighing of interests	7, 9, 36, 38, 44, 49, 51, 53, 58, 60, 62, 63, 65, 67, 68, 70, 75, 80, 82, 84, 87, 89, 92, 93, 96, 107, 109, 115, 118, 119, 121, 123, 126, 131, 147, 152, 155, 164, 169, 175, 187, 192, 193, 202, 206, 210, 212, 213, 216, 220, 222, 228, 237
3.18	General interest ⁴⁶	5, 7, 9, 27, 28, 44, 51, 53, 58, 63, 65, 72, 75, 84, 87, 89, 92, 93, 96, 105, 107, 109, 115, 119, 131, 136, 137, 144, 148, 163, 174, 180, 191, 192, 195, 197, 207, 212, 213, 222, 231, 233, 234, 235, 237, 248, 253
3.19	Margin of appreciation	51, 100, 115, 118, 119, 127, 129, 134, 152, 195, 249, 251, 259
3.20	Reasonableness	9, 38, 41, 44, 89, 93, 127, 148, 152, 153, 171, 191, 193, 198, 256
3.21	Equality ⁴⁷	70, 142
3.22	Prohibition of arbitrariness	51, 82, 171, 187, 188, 224
3.23	Equity	47
3.24	Loyalty to the State ⁴⁸	153
3.25	Market economy ⁴⁹	11, 27, 53, 132, 134, 163, 248
3.26	Principles of Community law	
	3.26.1 Fundamental principles of the Common Market	27
	3.26.2 Direct effect ⁵⁰	
	3.26.3 Genuine co-operation between the institutions and the member states	
4	<u>Institutions</u>	
4.1	Constituent assembly or equivalent body ⁵¹	
	4.1.1 Procedure	
	4.1.2 Limitations on powers	
4.2	State Symbols	216
	4.2.1 Flag	216
	4.2.2 National holiday	
	4.2.3 National anthem	216
	4.2.4 National emblem	

⁴⁴ Principle according to which sub-statutory acts must be based on and in conformity with the law.

⁴⁵ Prohibition of punishment without proper legal base.

⁴⁶ Including compelling public interest.

⁴⁷ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁸ Including questions of treason/high crimes.

⁴⁹ Including prohibition on monopolies.

⁵⁰ For the principle of primacy of Community law, see 2.2.1.6.

⁵¹ Including the body responsible for revising or amending the Constitution.

4.2.5	Motto	
4.2.6	Capital city	
4.3	Languages	
4.3.1	Official language(s)	103
4.3.2	National language(s)	
4.3.3	Regional language(s)	
4.3.4	Minority language(s)	
4.4	Head of State	
4.4.1	Powers	
4.4.1.1	Relations with legislative bodies ⁵²	
4.4.1.2	Relations with the executive powers ⁵³	
4.4.1.3	Relations with judicial bodies ⁵⁴	7
4.4.1.4	Promulgation of laws	
4.4.1.5	International relations	
4.4.1.6	Powers with respect to the armed forces	
4.4.1.7	Mediating powers	
4.4.2	Appointment	
4.4.2.1	Necessary qualifications	
4.4.2.2	Incompatibilities	
4.4.2.3	Direct election	
4.4.2.4	Indirect election	
4.4.2.5	Hereditary succession	
4.4.3	Term of office	
4.4.3.1	Commencement of office	
4.4.3.2	Duration of office	
4.4.3.3	Incapacity	
4.4.3.4	End of office	
4.4.3.5	Limit on number of successive terms	
4.4.4	Status	
4.4.4.1	Liability	
4.4.4.1.1	Legal liability	
4.4.4.1.1.1	Immunity	
4.4.4.1.1.2	Civil liability	
4.4.4.1.1.3	Criminal liability	
4.4.4.1.2	Political responsibility	
4.5	Legislative bodies⁵⁵	
4.5.1	Structure ⁵⁶	
4.5.2	Powers ⁵⁷	11, 184
4.5.2.1	Competences with respect to international agreements	11, 16
4.5.2.2	Powers of enquiry ⁵⁸	
4.5.2.3	Delegation to another legislative body ⁵⁹	
4.5.2.4	Negative incompetence ⁶⁰	28, 65
4.5.3	Composition	238
4.5.3.1	Election of members	168, 200
4.5.3.2	Appointment of members	
4.5.3.3	Term of office of the legislative body	
4.5.3.3.1	Duration	
4.5.3.4	Term of office of members	
4.5.3.4.1	Characteristics ⁶¹	

⁵² For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵³ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁴ For example, the granting of pardons.

⁵⁵ For regional and local authorities, see chapter 4.8.

⁵⁶ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁷ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁸ In particular, commissions of enquiry.

⁵⁹ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶⁰ Obligation on the legislative body to use the full scope of its powers.

⁶¹ Representative/imperative mandates.

	4.5.3.4.2	Duration	
	4.5.3.4.3	End	
4.5.4	Organisation ⁶²		238
	4.5.4.1	Rules of procedure	238
	4.5.4.2	President/Speaker	
	4.5.4.3	Sessions ⁶³	
	4.5.4.4	Committees ⁶⁴	
4.5.5	Finances ⁶⁵		
4.5.6	Law-making procedure ⁶⁶		18
	4.5.6.1	Right to initiate legislation	
	4.5.6.2	Quorum	
	4.5.6.3	Majority required	
	4.5.6.4	Right of amendment	65
	4.5.6.5	Relations between houses	
4.5.7	Relations with the executive bodies		11, 58
	4.5.7.1	Questions to the government	
	4.5.7.2	Questions of confidence	
	4.5.7.3	Motion of censure	
4.5.8	Relations with judicial bodies		
4.5.9	Liability		
4.5.10	Political parties		146
	4.5.10.1	Creation	
	4.5.10.2	Financing	
	4.5.10.3	Role	
	4.5.10.4	Prohibition	221
4.5.11	Status of members of legislative bodies ⁶⁷		
4.6	Executive bodies⁶⁸		
	4.6.1	Hierarchy	
	4.6.2	Powers	
	4.6.3	Application of laws	11, 28
		4.6.3.1 Autonomous rule-making powers ⁶⁹	70
		4.6.3.2 Delegated rule-making powers	28, 53, 63
	4.6.4	Composition	
		4.6.4.1 Appointment of members	
		4.6.4.2 Election of members	
		4.6.4.3 End of office of members	
		4.6.4.4 Status of members of executive bodies	
	4.6.5	Organisation	
	4.6.6	Relations with judicial bodies	
	4.6.7	Administrative decentralisation ⁷⁰	
	4.6.8	Sectoral decentralisation ⁷¹	
		4.6.8.1 Universities	
	4.6.9	The civil service ⁷²	108, 235
		4.6.9.1 Conditions of access	105, 111, 153
		4.6.9.2 Reasons for exclusion	47, 153
		4.6.9.2.1 Lustration ⁷³	100, 111
		4.6.9.3 Remuneration	134

⁶² Presidency, bureau, sections, committees, etc.

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.

4.6.9.4	Personal liability	
4.6.9.5	Trade union status	
4.6.10	Liability	
4.6.10.1	Legal liability	32
4.6.10.1.1	Immunity	
4.6.10.1.2	Civil liability	32
4.6.10.1.3	Criminal liability	
4.6.10.2	Political responsibility	
4.7	Judicial bodies ⁷⁴	117
4.7.1	Jurisdiction	225
4.7.1.1	Exclusive jurisdiction	
4.7.1.2	Universal jurisdiction	
4.7.1.3	Conflicts of jurisdiction ⁷⁵	
4.7.2	Procedure	157, 158
4.7.3	Decisions	
4.7.4	Organisation	
4.7.4.1	Members	
4.7.4.1.1	Qualifications	
4.7.4.1.2	Appointment	
4.7.4.1.3	Election	229
4.7.4.1.4	Term of office	
4.7.4.1.5	End of office	
4.7.4.1.6	Status	
4.7.4.1.6.1	Incompatibilities	
4.7.4.1.6.2	Discipline	
4.7.4.1.6.3	Irremovability	
4.7.4.2	Officers of the court	
4.7.4.3	Prosecutors / State counsel ⁷⁶	161
4.7.4.3.1	Powers	
4.7.4.3.2	Appointment	
4.7.4.3.3	Election	
4.7.4.3.4	Term of office	
4.7.4.3.5	End of office	7
4.7.4.3.6	Status	
4.7.4.4	Languages	
4.7.4.5	Registry	
4.7.4.6	Budget	
4.7.5	Supreme Judicial Council or equivalent body ⁷⁷	
4.7.6	Relations with bodies of international jurisdiction	
4.7.7	Supreme court	
4.7.8	Ordinary courts	169
4.7.8.1	Civil courts	
4.7.8.2	Criminal courts	157, 160, 206
4.7.9	Administrative courts	
4.7.10	Financial courts ⁷⁸	
4.7.11	Military courts	
4.7.12	Special courts	
4.7.13	Other courts	
4.7.14	Arbitration	
4.7.15	Legal assistance and representation of parties	157
4.7.15.1	The Bar	142
4.7.15.1.1	Organisation	
4.7.15.1.2	Powers of ruling bodies	
4.7.15.1.3	Role of members of the Bar	
4.7.15.1.4	Status of members of the Bar	

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

	4.7.15.1.5	Discipline	
	4.7.15.2	Assistance other than by the Bar	
	4.7.15.2.1	Legal advisers	142
	4.7.15.2.2	Legal assistance bodies	
4.7.16	Liability		
	4.7.16.1	Liability of the State	
	4.7.16.2	Liability of judges	
4.8	Federalism, regionalism and local self-government		59
4.8.1	Federal entities ⁷⁹		32
4.8.2	Regions and provinces		
4.8.3	Municipalities ⁸⁰		59, 125, 166, 186
4.8.4	Basic principles		59
	4.8.4.1	Autonomy	166
	4.8.4.2	Subsidiarity	
4.8.5	Definition of geographical boundaries		
4.8.6	Institutional aspects		
	4.8.6.1	Deliberative assembly	
	4.8.6.1.1	Status of members	
	4.8.6.2	Executive	
	4.8.6.3	Courts	
4.8.7	Budgetary and financial aspects		
	4.8.7.1	Finance	
	4.8.7.2	Arrangements for distributing the financial resources of the State	
	4.8.7.3	Budget	
	4.8.7.4	Mutual support arrangements	
4.8.8	Distribution of powers		32
	4.8.8.1	Principles and methods	
	4.8.8.2	Implementation	
	4.8.8.2.1	Distribution <i>ratione materiae</i>	27
	4.8.8.2.2	Distribution <i>ratione loci</i>	
	4.8.8.2.3	Distribution <i>ratione temporis</i>	
	4.8.8.2.4	Distribution <i>ratione personae</i>	
	4.8.8.3	Supervision	
	4.8.8.4	Co-operation	
	4.8.8.5	International relations	
	4.8.8.5.1	Conclusion of treaties	
	4.8.8.5.2	Participation in international organisations or their organs	
4.9	Elections and instruments of direct democracy⁸¹		
4.9.1	Electoral Commission ⁸²		200
4.9.2	Referenda and other instruments of direct democracy		171
	4.9.2.1	Admissibility ⁸³	
4.9.3	Electoral system ⁸⁴		
4.9.4	Constituencies		
4.9.5	Eligibility ⁸⁵		30, 200
4.9.6	Representation of minorities		
4.9.7	Preliminary procedures		
	4.9.7.1	Electoral rolls	15
	4.9.7.2	Voter registration card	
	4.9.7.3	Registration of parties and candidates ⁸⁶	

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 For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁴ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁵ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁶ For the creation of political parties, see 4.5.10.1.

	4.9.7.4	Ballot papers ⁸⁷	
4.9.8		Electoral campaign and campaign material ⁸⁸	164, 168, 229
	4.9.8.1	Financing	
	4.9.8.2	Campaign expenses	
	4.9.8.3	Protection of party logos	
4.9.9		Voting procedures	30
	4.9.9.1	Polling stations	
	4.9.9.2	Polling booths	
	4.9.9.3	Voting ⁸⁹	
	4.9.9.4	Identity checks on voters	
	4.9.9.5	Record of persons having voted ⁹⁰	
	4.9.9.6	Casting of votes ⁹¹	
	4.9.9.7	Method of voting ⁹²	
	4.9.9.8	Counting of votes	
	4.9.9.9	Electoral reports	
	4.9.9.10	Minimum participation rate required	
	4.9.9.11	Announcement of results	
4.10		Public finances	
	4.10.1	Principles	
	4.10.2	Budget	
	4.10.3	Accounts	
	4.10.4	Currency	
	4.10.5	Central bank	
	4.10.6	Auditing bodies ⁹³	
	4.10.7	Taxation	159, 204
		4.10.7.1 Principles	
	4.10.8	State assets	
		4.10.8.1 Privatisation	
4.11		Armed forces, police forces and secret services	60
	4.11.1	Armed forces	9, 55
	4.11.2	Police forces	90, 124, 182, 199, 212
	4.11.3	Secret services	90
4.12		Ombudsman⁹⁴	
	4.12.1	Appointment	
	4.12.2	Guarantees of independence	
		4.12.2.1 Term of office	
		4.12.2.2 Incompatibilities	
		4.12.2.3 Immunities	
		4.12.2.4 Financial independence	
	4.12.3	Powers	
	4.12.4	Organisation	
	4.12.5	Relations with the Head of State	
	4.12.6	Relations with the legislature	
	4.12.7	Relations with the executive	
	4.12.8	Relations with auditing bodies ⁹⁵	
	4.12.9	Relations with judicial bodies	
	4.12.10	Relations with federal or regional authorities	

87

E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

88

Tracts, letters, press, radio and television, posters, nominations, etc.

89

Impartiality of electoral authorities, incidents, disturbances.

90

E.g. signatures on electoral rolls, stamps, crossing out of names on list.

91

E.g. in person, proxy vote, postal vote, electronic vote.

92

E.g. *Panachage*, voting for whole list or part of list, blank votes.

93

E.g. Auditor-General.

94

Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

95

E.g. Court of Auditors.

4.13	Independent administrative authorities⁹⁶	
4.14	Activities and duties assigned to the State by the Constitution⁹⁷	
4.15	Exercise of public functions by private bodies	163
4.16	International relations	
	4.16.1 Transfer of powers to international institutions.....	5
4.17	European Union	
	4.17.1 Institutional structure	
	4.17.1.1 European Parliament	
	4.17.1.2 Council	
	4.17.1.3 Commission	
	4.17.1.4 Court of Justice of the European Communities ⁹⁸	
	4.17.2 Distribution of powers between Community and member states	
	4.17.3 Distribution of powers between institutions of the Community	
	4.17.4 Legislative procedure	
4.18	State of emergency and emergency powers⁹⁹	234
5	<u>Fundamental Rights¹⁰⁰</u>	
5.1	General questions	13, 142
	5.1.1 Entitlement to rights	134
	5.1.1.1 Nationals	
	5.1.1.1.1 Nationals living abroad	
	5.1.1.2 Citizens of the European Union and non-citizens with similar status	
	5.1.1.3 Foreigners.....	41, 60, 92
	5.1.1.3.1 Refugees and applicants for refugee status	
	5.1.1.4 Natural persons	
	5.1.1.4.1 Minors ¹⁰¹	59, 202
	5.1.1.4.2 Incapacitated	42, 86
	5.1.1.4.3 Prisoners	72, 84, 249
	5.1.1.4.4 Military personnel	
	5.1.1.5 Legal persons	159
	5.1.1.5.1 Private law	204
	5.1.1.5.2 Public law	
	5.1.2 Horizontal / Vertical effects	
	5.1.3 Limits and restrictions ¹⁰²	5, 7, 9, 11, 13, 15, 16, 18, 24, 26, 27, 28, 30, 32, 34, 36, 38, 39, 41, 42, 43, 44, 47, 49, 51, 53, 55, 58, 59, 60, 62, 63, 65, 67, 75, 78, 80, 82, 84, 86, 87, 89, 90, 93, 95, 96, 97, 98, 100, 103, 105, 107, 108, 109, 111, 113, 115, 117, 121, 123, 124, 125, 126, 127, 129, 130, 131, 144, 146, 147, 151, 152, 153, 155, 159, 161, 163, 164, 166, 167, 168, 169, 171, 174, 175, 177, 180, 182, 182, 184, 185, 186, 187, 191, 192, 193, 195, 197, 198, 199, 200, 202, 204, 204, 207, 210, 213, 215, 216, 218, 220, 221, 222, 224, 225, 227, 228, 229, 231, 233, 234, 235, 237, 238, 243, 248, 249, 251, 253, 255, 256, 258, 259
	5.1.3.1 Non-derogable rights	16, 18, 83, 157, 158, 160, 224
	5.1.3.2 General/special clause of limitation	132, 134, 136, 137, 138, 140, 142, 148, 166, 222
	5.1.3.3 Subsequent review of limitation	18, 72, 86
	5.1.4 Emergency situations ¹⁰³	5, 82, 92

⁹⁶ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹⁷ *Staatszielbestimmungen*.

⁹⁸ Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

⁹⁹ Including state of war, martial law, declared natural disasters, etc. for human rights aspects, see also keyword 5.1.3.1.

¹⁰⁰ Positive and negative aspects.

¹⁰¹ For rights of the child, see 5.3.44.

¹⁰² The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

¹⁰³ Includes questions of the suspension of rights. See also 4.18.

5.2	Equality	26, 27, 28, 47, 53, 121, 148, 160, 163, 171, 180, 188, 215
5.2.1	Scope of application.....	132
5.2.1.1	Public burdens ¹⁰⁴	138
5.2.1.2	Employment.....	24, 127
5.2.1.2.1	In private law.....	148, 218
5.2.1.2.2	In public law.....	7, 111, 134
5.2.1.3	Social security.....	184
5.2.1.4	Elections.....	30, 100
5.2.2	Criteria of distinction.....	127, 151
5.2.2.1	Gender.....	38, 65, 83, 251
5.2.2.2	Race.....	130
5.2.2.3	National or ethnic origin ¹⁰⁵	
5.2.2.4	Citizenship or nationality.....	41, 144, 153
5.2.2.5	Social origin.....	
5.2.2.6	Religion.....	78, 202, 218
5.2.2.7	Age.....	105
5.2.2.8	Physical or mental disability.....	182
5.2.2.9	Political opinions or affiliation.....	
5.2.2.10	Language.....	
5.2.2.11	Sexual orientation.....	188
5.2.2.12	Civil status ¹⁰⁶	
5.2.2.13	Differentiation <i>ratione temporis</i>	
5.2.3	Affirmative action.....	65
5.3	Civil and political rights	
5.3.1	Right to dignity.....	5, 68, 72, 75, 80, 90, 92, 109, 134, 140, 155, 188, 224
5.3.2	Right to life.....	5, 16, 36, 80, 160, 187, 224
5.3.3	Prohibition of torture and inhuman and degrading treatment.....	39, 90, 187, 224
5.3.4	Right to physical and psychological integrity.....	130, 182, 185, 198, 202
5.3.4.1	Scientific and medical treatment and experiments.....	
5.3.5	Individual liberty ¹⁰⁷	93, 95, 96, 161, 256
5.3.5.1	Deprivation of liberty.....	84, 92, 93
5.3.5.1.1	Arrest ¹⁰⁸	161, 256
5.3.5.1.2	Non-penal measures.....	42, 72, 86, 182
5.3.5.1.3	Detention pending trial.....	161, 256
5.3.5.1.4	Conditional release.....	
5.3.5.2	Prohibition of forced or compulsory labour.....	
5.3.6	Freedom of movement ¹⁰⁹	30, 32, 59, 89, 96, 125
5.3.7	Right to emigrate.....	
5.3.8	Right to citizenship or nationality.....	
5.3.9	Right of residence ¹¹⁰	30, 60
5.3.10	Rights of domicile and establishment.....	27, 167, 227
5.3.11	Right of asylum.....	
5.3.12	Security of the person.....	256
5.3.13	Procedural safeguards, rights of the defence and fair trial.....	38, 39, 95, 117, 157, 160, 206, 243
5.3.13.1	Scope.....	75, 249
5.3.13.1.1	Constitutional proceedings.....	140
5.3.13.1.2	Civil proceedings.....	
5.3.13.1.3	Criminal proceedings.....	75
5.3.13.1.4	Litigious administrative proceedings.....	
5.3.13.1.5	Non-litigious administrative proceedings.....	
5.3.13.2	Effective remedy.....	18, 45, 204

¹⁰⁴ Taxes and other duties towards the state.

¹⁰⁵ Here, the term "national" is used to designate ethnic origin.

¹⁰⁶ For example, discrimination between married and single persons.

¹⁰⁷ This keyword also covers "Personal liberty". It includes, for example, identity checking, personal search and administrative arrest.

¹⁰⁸ Detention by police.

¹⁰⁹ Including questions related to the granting of passports or other travel documents.

¹¹⁰ May include questions of expulsion and extradition.

5.3.13.3	Access to courts ¹¹¹	7, 15, 32, 45, 51, 98, 111, 121, 158, 159, 182, 191, 193, 207, 225, 249, 259
5.3.13.3.1	<i>Habeas corpus</i>	92, 161
5.3.13.4	Double degree of jurisdiction ¹¹²	160, 204, 207
5.3.13.5	Suspensive effect of appeal	
5.3.13.6	Right to a hearing	
5.3.13.7	Right to participate in the administration of justice ¹¹³	169
5.3.13.8	Right of access to the file	38, 39, 107
5.3.13.9	Public hearings	169
5.3.13.10	Trial by jury	160
5.3.13.11	Public judgments	
5.3.13.12	Right to be informed about the decision	182
5.3.13.13	Trial/decision within reasonable time	
5.3.13.14	Independence ¹¹⁴	
5.3.13.15	Impartiality	229
5.3.13.16	Prohibition of <i>reformatio in peius</i>	
5.3.13.17	Rules of evidence	97, 147, 189, 206
5.3.13.18	Reasoning	51
5.3.13.19	Equality of arms	38, 251
5.3.13.20	Adversarial principle	
5.3.13.21	Languages	
5.3.13.22	Presumption of innocence	158, 189, 209
5.3.13.23	Right to remain silent	7
5.3.13.23.1	Right not to incriminate oneself	189
5.3.13.23.2	Right not to testify against spouse/close family	
5.3.13.24	Right to be informed about the reasons of detention	
5.3.13.25	Right to be informed about the charges	182
5.3.13.26	Right to have adequate time and facilities for the preparation of the case	
5.3.13.27	Right to counsel	
5.3.13.27.1	Right to paid legal assistance	204
5.3.13.28	Right to examine witnesses	206
5.3.14	<i>Ne bis in idem</i>	222
5.3.15	Rights of victims of crime	72, 259
5.3.16	Principle of the application of the more lenient law	
5.3.17	Right to compensation for damage caused by the State	109, 180, 185, 233
5.3.18	Freedom of conscience ¹¹⁵	9, 44, 55, 68, 70, 78, 80, 186, 195, 202, 216, 218
5.3.19	Freedom of opinion	34, 121, 123, 253
5.3.20	Freedom of worship	70, 78, 89, 96, 177, 186, 195, 205
5.3.21	Freedom of expression ¹¹⁶	26, 27, 34, 49, 67, 68, 82, 97, 98, 108, 121, 123, 130, 131, 151, 155, 164, 168, 177, 193, 207, 210, 216, 222, 228, 229, 235, 237, 253
5.3.22	Freedom of the written press	34, 49, 123, 164, 177, 207, 222, 253
5.3.23	Rights in respect of the audiovisual media and other means of mass communication	27, 34, 67, 97, 131, 164, 168
5.3.24	Right to information	34, 121, 144, 164, 168, 169, 222, 258
5.3.25	Right to administrative transparency	98
5.3.25.1	Right of access to administrative documents	87
5.3.26	National service ¹¹⁷	9, 167
5.3.27	Freedom of association	58, 84, 146, 152, 215, 221
5.3.28	Freedom of assembly	58, 84, 171, 197, 210
5.3.29	Right to participate in public affairs	
5.3.29.1	Right to participate in political activity	215
5.3.30	Right of resistance	

¹¹¹ 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.

¹¹² This keyword covers the right of appeal to a court.

¹¹³ Including the right to be present at hearing.

¹¹⁴ Including challenging of a judge.

¹¹⁵ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹¹⁶ This keyword also includes the right to freely communicate information.

¹¹⁷ Militia, conscientious objection, etc.

5.3.31	Right to respect for one's honour and reputation	49, 67, 68, 121, 123, 131, 151, 182, 253
5.3.32	Right to private life	38, 45, 63, 87, 103, 118, 121, 124, 131, 138, 166, 188, 192, 198, 231, 233, 251, 255, 259
	5.3.32.1 Protection of personal data	18, 75, 113, 175, 200
5.3.33	Right to family life ¹¹⁸	60, 83
	5.3.33.1 Descent	118, 251
	5.3.33.2 Succession	209
5.3.34	Right to marriage	75
5.3.35	Inviolability of the home	75
5.3.36	Inviolability of communications	
	5.3.36.1 Correspondence	249, 255
	5.3.36.2 Telephonic communications	45, 113, 124, 147, 255
	5.3.36.3 Electronic communications	
5.3.37	Right of petition	
5.3.38	Non-retrospective effect of law	
	5.3.38.1 Criminal law	72
	5.3.38.2 Civil law	
	5.3.38.3 Social law	134
	5.3.38.4 Taxation law	
5.3.39	Right to property ¹¹⁹	119, 159, 248
	5.3.39.1 Expropriation	
	5.3.39.2 Nationalisation	115
	5.3.39.3 Other limitations	32, 43, 53, 109, 113, 115, 129, 132, 137, 138, 148, 184, 220, 234, 235, 248
	5.3.39.4 Privatisation	41
5.3.40	Linguistic freedom	216
5.3.41	Electoral rights	
	5.3.41.1 Right to vote	15, 30, 100, 168, 200
	5.3.41.2 Right to stand for election ¹²⁰	30, 200, 238
	5.3.41.3 Freedom of voting	164
	5.3.41.4 Secret ballot	
5.3.42	Rights in respect of taxation	127, 137, 138, 159, 204, 209
5.3.43	Right to self fulfilment	62, 68, 188
5.3.44	Rights of the child	83, 185, 202
5.3.45	Protection of minorities and persons belonging to minorities	78, 216
5.4	Economic, social and cultural rights	
5.4.1	Freedom to teach	28
5.4.2	Right to education	28, 180, 213
5.4.3	Right to work	65, 111, 144, 153
5.4.4	Freedom to choose one's profession ¹²¹	51, 105, 142, 148
5.4.5	Freedom to work for remuneration	43, 134, 142, 148, 175, 234
5.4.6	Commercial and industrial freedom	11, 27, 43, 53, 65, 134, 140, 144, 163, 174, 243
5.4.7	Consumer protection	144
5.4.8	Freedom of contract	134, 140, 163, 222
5.4.9	Right of access to the public service	111, 153
5.4.10	Right to strike	126, 199
5.4.11	Freedom of trade unions ¹²²	84, 199
5.4.12	Right to intellectual property	
5.4.13	Right to housing	
5.4.14	Right to social security	
5.4.15	Right to unemployment benefits	
5.4.16	Right to a pension	184
5.4.17	Right to just and decent working conditions	24
5.4.18	Right to a sufficient standard of living	

¹¹⁸ Aspects of the use of names are included either here or under "Right to private life".

¹¹⁹ Including compensation issues.

¹²⁰ For institutional aspects, see 4.9.5.

¹²¹ This keyword also covers "Freedom of work".

¹²² Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

5.4.19	Right to health	80, 182
5.4.20	Right to culture	
5.4.21	Scientific freedom	
5.4.22	Artistic freedom	

5.5

Collective rights

- 5.5.1 Right to the environment
 - 5.5.2 Right to development
 - 5.5.3 Right to peace
 - 5.5.4 Right to self-determination
 - 5.5.5 Rights of aboriginal peoples, ancestral rights
-

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.

	Pages		Pages
Abortion.....	80	Civil procedure.....	109, 259
Abortion, clinic, blocking of access.....	228	Civil right, civil obligation.....	216
Abortion, counselling.....	258	Civil right, notion.....	45
Act, unlawful benefit, deprivation.....	136	Civil right, scope.....	18
Administration, good, principle.....	238	Civil servant, dismissal.....	108
Administrative act, appeal, procedure.....	225	Civil servant, freedom of expression.....	108
Age, limit.....	105	Civil servant, HIV, test, refusal.....	231
Agnostic.....	17	Civil servant, loyalty, obligation.....	235
Agriculture, quota.....	53	Civil servant, publication, authorisation, prior.....	237
Agriculture, subsidy.....	53	Civil servant, publication, prior authorisation.....	235
Animal, food, additive, human health, risk.....	243	Civil service, specific requirement.....	153
Animal, protection.....	53	Civilian service.....	44
Appeal, right.....	204	Co-defendant, collusion.....	107
Arbitrariness, statute.....	188	Co-defendant, consultation of the case-file, restriction.....	107
Area, use by the public, demonstration.....	210	Collective agreement.....	126
Arrest, warrant.....	161	Collective responsibility.....	111
Assistance, duty to grant.....	233	Company, dissolved, legal capacity.....	204
Assize court, right to have a case heard by the assize court.....	160	Company, management board, member.....	63
Association, appeal to court.....	225	Company, public principle, distinction from private company.....	134
Atheist.....	17	Company, public, social purpose.....	134
Audit, mandatory.....	163	Company, tax, inability to pay.....	204
Audit, performance, authorised auditor.....	163	Compensation.....	121
Authority, public security.....	95	Compensation, conditions.....	115
Biker group.....	58	Compensation, damages, non-economic loss.....	45
Bio-component.....	144	Compensation, determination.....	45
Buffer zone.....	228	Compensation, fair.....	119
Burden of proof.....	68	Compensation, right.....	119
Burden of proof, criminal proceedings.....	189	Competence, <i>ratione temporis</i>	119
Burglary.....	36	Competition.....	27
Cannabis, possession, use.....	195	Competition, free.....	134
Cannabis, use, for religious purposes.....	195	Competition, property right, limitation.....	248
Care, duty to exercise.....	68	Competition, protection.....	11
Case, criminal, termination of proceedings.....	158	Confidence, profession.....	142
Censure.....	253	Confidentiality.....	87
Ceremony, religious, participation, freedom.....	17	Confidentiality, medical.....	233
Certainty, transaction.....	137	Confidentiality, obligation, breach.....	117
Child.....	251	Confidentiality, professional.....	233
Child, paternal rights.....	202	Conscientious objection.....	44
Child, paternity.....	118	Conscientious objection, legal effect.....	167
Child, protection.....	213	Conscientious objection, prohibition on carrying weapons.....	167
Child, sexual abuse.....	259	Conscientious objection, religious grounds.....	55
Child, unborn, protection of life.....	80	Constitution, function in a democratic society.....	188
Church, recognition.....	17	Constitution, fundamental principles.....	18
Citizen, non-citizen, constitutional rights and guarantees.....	98		

-
- Constitution, transitional provisions 161
 Constitutional Court, judicial self-restraint 18
 Constitutional Court, review,
 appropriateness, statutory provision 175
 Constitutional invalidity 188
 Construction, illegal, demolition, punitive
 character 136
 Contempt of court 193
 Correctional labour 24
 Correspondence, delay 249
 Court decision, repeal 109
 Court, authority and impartiality 193
 Court, duty to enforce the laws 195
 Criminal law 36, 38, 155, 188
 Criminal procedure 147, 160
 Criminal record, access 200
 Criminal, dangerous 72
 Criminal, violent 72
 Damage, compensation 32
 Dangerousness, prognosis 72
 Data, personal, protection 175
 Death penalty 160, 187
 Death penalty, abolition 5, 16, 224
 Death penalty, enforcement, prohibition 5
 Debtor, right to access courts 191
 Decision, court, stability 109
 Decision, criticism 193
 Declaration, property 138
 Decree, municipal 59
 Decree, presidential, right to appeal 7
 Defamation 68
 Defamation, facts, allegation, proof 67
 Defamation, politician 253
 Defence, effective 206
 Demolition, restitutionary character 136
 Demolition, unlawful construction 136
 Demonstration 228
 Demonstration, authorisation 210
 Demonstration, legal, prior authorisation,
 peaceful conduct 152
 Demonstration, postponement 210
 Denationalisation 41
 Detective, conditions for issuance of a license 175
 Detention, enforcement 72
 Detention, administrative, bargaining chip 92
 Detention, continued 256
 Detention, fundamental rights, limited action 84
 Detention, international zone 23
 Detention, lawfulness 256
 Detention, maximum length 161
 Detention, preventive 72
 Discretion, limitation 18
 Divorce 251
 DNA, analysis 118
 Drug, harmful, use, exception 195
 Drug, pharmaceutical 148
 Duty of care 233
 Eavesdropping, residential premises 75
 Education, authorisation 28
 Education, kindergarten, primary 180
 Education, private, subsidy 28
 Education, religious, participation of children
 of other denomination 180
 Education, teacher, training 28
 Educational background, responsible person 174
 Election, campaign, access to media 168
 Election, campaign, media, coverage 164
 Election, candidacy, restriction 100
 Election, disqualification 30
 Election, electoral coalition, definition 168
 Election, ineligibility for election 200
 Election, parliament, central committee,
 decisions 168
 Election, premature 215
 Election, propaganda 164
 Election, voters list, inaccuracy,
 right to challenge 15
 Embargo 234
 Employer, employee, relations 109, 218
 Employment 117
 Employment, preservation 65
 Entrepreneur, legal aid, right 204
 European Union, national, reverse
 discrimination 144
 European Union, Parliament, traditions,
 common to member states 238
 Evidence, exclusion 75
 Evidence, obligation to produce 97
 Execution, movables 191
 Expenditure, exceptional 127
 Expert, opinion, scope 243
 Extortion, serious 107
 Fact, material, concerning others 155
 Family law 87
 Family, paternity, contestation 118
 Fascist ideology 146
 Fifth commandment 9
 File, access 38
 Foetus, legal status 80
 Football, violence, preventive measure 95
 Foreigner, residence, permit 60
 Free movement of goods 144
 Free movement of services 27
 Freedom of enterprise 174
 Freedom of expression, limitation,
 due to employment contract 177
 Freedom of religion, negative 17
 Fundamental justice, principles 39
 Fundamental right, essence 259
 Fundamental right, essence, preservation 53
 Fundamental right, exercise 225
 Fundamental right, limitation, special care 146
 Fundamental right, more favourable protection 13
 Fundamental right, nature 18
 Fundamental right, protection, effectiveness 45
 Fundamental right, restriction, justification 202
 Fundamental right, violation, pro-active stage 124
 Garbage bag, search 124
 Genocide 26
 Grounds for justification 127
 Guilt, principle 72
 Hatred, incitation 216
-

Health, protection.....	148	Law, temporal conflict of laws.....	152
Health, protection, precaution, principle.....	243	Lawyer, right of choice.....	157
Healthy, state, secret, right.....	231	Lawyer, traineeship.....	142
Hearing of both parties.....	95	Lease.....	132
Hearing, public, tape recordings.....	169	Lease, termination.....	140
HIV, test, refusal, civil servant.....	231	Legal adviser, traineeship.....	142
Holiday, religious.....	218	Legislation, anti-trust.....	11
Homosexuality.....	188	Legislative initiative.....	171
Honour and dignity, defence.....	121	Legislative initiative, popular.....	215
Housing.....	119	Legitimate purpose.....	127, 188
Housing, allowance.....	132	Libel, through the press.....	155
Housing, rent, maximum, fixing by the state.....	220	Limitation period.....	259
Human dignity.....	5, 68, 109	Loan.....	191
Human life, intrinsic value.....	5	Local self-government, legislative power.....	166
Human right, core.....	132	Loyalty, to the nation, citizen, obligation.....	153
Human right, scope of application.....	98	Lustration.....	47
Hunting, self fulfilment.....	62	Marital separation.....	202
Identity card, content.....	78	Market, access.....	248
Ideology, national-socialist.....	17	Market, unfair, practice.....	144
Immigration, unlawful.....	23	Mayor, obligation.....	216
Import, measure having equivalent effect.....	144	Media, broadcasting, freedom.....	27
Imprisonment, conditions.....	72	Media, broadcasting, frequencies.....	27
Information, accurate, requirement.....	49	Media, broadcasting, licence.....	27
Information, classified, protection.....	51	Media, broadcasting, monopoly.....	27
Information, denial.....	121	Media, broadcasting, public broadcasting company.....	27
Information, dissemination by the government.....	70	Media, law, formal constitutionality.....	34
Information, false, freedom of expression.....	82	Media, news reporting, freedom.....	97
Information, obligation to provide.....	63, 113	Media, newspaper, distribution, obligation.....	222
Information, personal, use in criminal proceedings.....	75	Media, press, function.....	222, 253
Information, right to seek, obtain and disseminate.....	108	Media, radio, private, commercial.....	27
Informational autonomy.....	138	Media, radio, terrestrial transmission.....	27
Injunction action.....	68	Media, seller, activity.....	222
Injunction, abortion, counselling, prohibition.....	258	Media, television.....	67
Injunction, review.....	228	Media, television station, obligation to produce evidence.....	97
Inspectorate, tax.....	159	Medicine, trade.....	174
Interest, economic.....	63	Mental disturbance, medical examination.....	42
International agreement, direct application.....	177	Military service, obligation.....	44
International Community, general interest.....	234	Minor, limitation for staying in public places.....	59
International Labour Organisation, Convention no. 132.....	24	Minority, language.....	221
International law, domestic law, relationship.....	209	Miscarriage of justice.....	224
International law, primacy.....	153, 207	Monopoly, broadcasting.....	27
International law, status.....	168	Monopoly, state.....	11
Interrogation, methods.....	90	Morality, democracy, protection.....	100
Journalist, politician, defamation.....	253	Mosque, construction, referendum.....	186
Judge, candidate, electoral campaign, freedom of expression.....	229	Movement, restriction.....	23
Judgment, guarantees.....	161	Municipal council.....	59
Judicial review, content-neutral.....	228	Name, acquired through marriage.....	83
Judicial review, tests.....	228	Name, family, free choice.....	83
Jurisdiction, territorial.....	160	Name, modification.....	83
Labour law.....	24, 109	Name, right.....	83
Language, official, strengthening.....	103	Name, spelling, approximation.....	103
Language, official, use.....	103	National security.....	60
Law and order, protection and keeping.....	212	National security, threat.....	92
Law, application.....	188	Necessity, defence.....	90
Law, determination, degree.....	18	Necessity, requirement.....	138
Law, precision.....	255	Negationism.....	26
Law, quality, foreseeable consequences.....	255	Neutrality of the state, religious.....	70, 78
		Notary.....	137
		Offence, sexual.....	38

Old law, interpretation.....	55	Public health, vaccination, compulsory	185
Opinion, statement	68	Public order	82, 152
Order of invalidity, confirmation	188	Public order, protection	197
Order to move on.....	125	Public peace.....	82
Order, content, general clause	212	Public property, use.....	210
Order, detention, indefinite period	86	Public reasons, important, limitation, constitutional rights and freedoms.....	140
Order, judicial	228	Punishment, criminal, consequences.....	62
Organisation, anti-constitutional, participation.....	100	Punishment, cruel, inhuman or degrading.....	187
<i>Pacta sunt servanda</i>	13	Punishment, purpose	224
Panel, membership, gender equality.....	65	Quantitative restriction.....	144
Parent, natural.....	87	Racial hatred, incitement.....	130
Parentage	87	Record, production	38
Parliament, group, dissolution	238	Redundancy, definition.....	65
Parliament, member group, affiliation.....	238	Referendum, premature election	215
Party, membership, privileges	47	Referendum, restriction	171
Paternity, contestation, time-limit.....	118	Referendum, scope	171
Paternity, contested.....	251	Refugee, deportation	39
Patient, rights.....	182	Religion, affiliation, evidence.....	218
Patient, unsound mind.....	86	Religion, coercion.....	89
Payment of taxes.....	159	Religion, collective worship	96
Pension, approximation	184	Religion, demonstrating.....	78
Pension, criteria.....	184	Religion, sensibility, protection	89
Personality, right.....	68	Religious activity, freedom	17
Pharmacist, profession.....	148	Religious community, defamation	70
Pharmacy, ownership.....	148	Religious event, authorisation	205
Pharmacy, transfer	148	Rent, regulated.....	132
Photo, out of the courthouse, reporting	131	Requisition, vacant dwellings	119
Physical intervention.....	198	Residence, free choice.....	227
Police, power.....	124, 212	Residence, obligation	96
Police, secret operation.....	182	Residence, permit	227
Political party, dissolution	146, 221	Resocialisation, principle.....	72
Political party, programme.....	130, 221	Respect for the person, general right.....	68
Politician, defamation	49	Restitution, criteria.....	115
Politician, reputation	253	Retraction, right	177
Powers, implicit.....	32	Revisionism	26
Powers, negative, conflict.....	32	Right of reply, limitation	177
Precaution, principle.....	243	Right to be 'left in peace'	123
Pre-emptive right	41	Right to leave	24
Prejudice, moral, removal.....	121	Right to personal privacy.....	198
Presumption, constitutionality.....	86	Right to remain silent.....	189
Prisoner	249	Right to rest.....	24
Prisoner, right of association	84	Right, essence.....	137, 231
Proceedings, purpose, fulfilment	169	Right, notion	45
Procession, religious	17	Road, closure during prayer times	89
Profession, freedom to choose.....	148	Sanction, economic	234
Promotion, aspiration.....	117	School, disciplinary exclusion, temporary	213
Promotion, right	117	School, state, compulsory	213
Propaganda, material, confiscation	207	Scientology.....	68
Property, illegally occupied.....	30	Scrutiny, strict.....	229
Property, protection, procedure.....	191	Search, premises	192
Property, right to enjoyment	119, 234	Second World War, action during.....	123
<i>Propiska</i>	227	Secret service.....	51
Proportionality, definition	148	Secret service, records.....	47
Prosecutor, dismissal, appeal.....	7	Sect	68, 202
Proselytism, of minor children	202	Security clearance.....	51
Psychiatric disturbance, degree	42, 93	Security Council	234
Psychiatric hospital, detention, judicial review.....	182	Security service	51, 60
Psychiatric institution, criminal commitment, duration.....	93	Security, external and internal.....	207
Psychiatric institution, placement, urgency.....	42	Security, national.....	207
Public figure, status	151	Seizure, of information	192

Self-defence, excess.....	36	Weapon, use.....	9
Self-defence, limits.....	36	Witness, anonymous.....	206
Self-help, rule of law, contradiction.....	191	Witness, protection.....	206
Service, essential.....	126	Woman, pregnant, counselling.....	258
Social need, pressing.....	100		
Social policy, aim, legitimate.....	119		
Society, openness.....	82		
Society, tolerant.....	82		
Sodomy.....	188		
Soldier, missing in action, negotiations.....	92		
State office, nature.....	111		
State secret.....	157		
State, interest.....	51		
State, loyalty.....	47		
State, security, threat.....	44		
State, statutory measures, milder measure.....	180		
State, successor, liability for obligations of former state.....	32		
Strike, damage.....	126		
Strike, filming a picket line.....	199		
Strike, identification of the participants.....	199		
Strike, injunction proceeding.....	126		
Succession, tax, penalty, liability of heirs.....	209		
Supervisory board, right to be member.....	134		
Suspect, physical pressure against.....	90		
Suspicion, honest.....	256		
Suspicion, reasonable.....	256		
Tax, amnesty.....	138		
Tax, criminal legislation.....	209		
Tax, deduction.....	127		
Tax, evasion.....	204		
Telecommunications, duty to provide.....	113		
Telephone tapping.....	45		
Terrorism, fight.....	90		
Terrorism, notion.....	39		
Terrorism, suspect, detention, length.....	256		
Tobacco, sale, restrictions.....	43		
Tolerance, state.....	17		
Tolerance, threshold.....	89		
Totalitarian regime, values.....	47		
Tradition, national constitutional.....	233		
Transport, public, accident.....	32		
Treaty, human rights, direct applicability.....	13		
Treaty, ratification, reference for a preliminary ruling.....	5		
Undercover agent, anonymity.....	206		
Undercover agent, evidence.....	206		
University, administrative position.....	105		
University, professor, age, limit.....	105		
Vaccination, compulsory.....	185		
Value system.....	47		
Violence.....	36		
Violence, risk.....	58		
Vote, right, municipality of last domicile.....	30		
Wage.....	63		
Warrant, legislative provisions authorising issue.....	192		
Waterfall, right, acquisition.....	129		
Weapon, licence to carry.....	167		
Weapon, permit.....	62		
Weapon, self fulfilment.....	62		

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