

THE BULLETIN

The Constitutional Court of Georgia, then holding the Presidency of the Conference of European Constitutional Courts (CECC), asked the Venice Commission to produce a working document on the subject “*Role of Constitutional Courts in upholding and applying Constitutional Principles*”, chosen by the CECC for its XVIIth Congress in June 2017 in Batumi, Georgia. The CECC has divided the topic into two subtopics:

1. The role of the Constitutional Court in defining and applying explicit/implicit constitutional principles.
2. Constitutional principles as higher norms. Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

In cooperation with the CECC, the Venice Commission publishes this working document together with General Report of the XVIIth Congress as a special issue of the *Bulletin on Constitutional Case-Law*.

The aim of this *Special Bulletin* is to combine the General Report of the XVIIth Congress with a country specific presentation of the case-law of constitutional courts and equivalent bodies, following the usual design and layout of the Venice Commission's *Bulletin on Constitutional Case-Law*.

Constitutional values, principles and “simple” constitutional provisions can be difficult to discern and might be understood best by comparing them to the different layers of an onion: They are of different sizes, but form an unmistakable, integral whole.

More than any other piece of legislation, a constitution is more than the rules that it contains. A constitution does not only establish which type of government the country has or how parliament is set up, it also provides values that unite a country, that give it a common purpose. As the inner layer, these values are often referred to in the preamble of the constitution and are essential in guiding the constitutional court in interpreting the constitution.

Values often overlap – at least partially – with principles. For instance equality can be seen as a value as well as a principle. In France, for example, it is part of the motto of the State “*Liberté, égalité, fraternité*” but it is also a directly applicable rule and – as is the case in other countries – the French Constitutional Council will strike down legislation that is in breach of the principle of equality.

Constitutional courts may also face the situation in which they have to apply conflicting principles. Such cases tend to be the most difficult and challenging ones that courts have to deal with.

However, as the guardian of the constitution, constitutional courts were established to carry out this type of work and must confront it. In applying constitutional principles, the constitutional court will necessarily define and shape it.

A distinction should also be made between written and unwritten principles. Many courts have identified unwritten principles, which emanate from other provisions of the constitution, read together. There is no hierarchy between written and unwritten principles. Using its interpretation skills, constitutional courts develop and define principles – whether written or unwritten – in their case-law, over time. It is the court's interpretation that applies the principles in a coherent manner and that settles any conflicts between them in any given case.

The XVIIth Congress dealt with an important aspect of the wider issue regarding principles. In some countries, constitutions have “unchangeable” or “unamendable” or even “eternal” articles or clauses. This is the most rigid mechanism that can be applied to a constitution and is also sometimes referred to as “absolute entrenchment”.

These principles, protected by “unamendability” often concern the fundamental democratic form of government, the federal structure, sovereignty, territorial integrity and fundamental rights and freedoms, typically in the sense that these rights are inalienable.

Unamendable provisions are not an indispensable element of constitutionalism and systems which have such provisions often have them due to legitimate historical reasons, and they usually form an integral part of the constitutional identity.

In countries with systems that do not have a special provision on unamendability, it can usually be inferred that the entire constitution is subject to possible amendments.

Where they exist, such unamendable provisions create a hierarchy within the constitution: “higher” – unamendable – principles and “ordinary” constitutional law. Any legal hierarchy immediately raises the question of what happens if this hierarchy is not respected. What if the constituent power adopts provisions at the constitutional level that contradict the unamendable provisions or principles?

In some countries, it is again the constitutional court, which establishes whether or not there is such a contradiction in the first place and which will – at least when it is not possible to interpret the amendment in conformity with the unamendable provision – strike down that constitutional amendment. In such a case, the constitutional court does not only constitute a checking system for the ordinary legislator, but also for the “ordinary” constituent power.

A number of complex questions arise in such situations: Is the provision, which declares other provisions unamendable, unamendable itself? Can the “ordinary” constituent power remove the powers of the constitutional court to control this hierarchy?

Even if there is no judicial review of unamendability, such rules may still serve a political and practical purpose as declarations, which may have a restraining effect. Whether or not they are respected is then left to practice, as is the case for many other political questions for which there is no recourse to formal dispute resolution procedures.

In any case, a constitutional democracy should always allow for open discussion on reform of even its most basic principles and structures of government.

The Venice Commission strongly believes that having more stringent procedures for introducing constitutional amendments than those that exist for ordinary legislation is an important principle of democratic constitutionalism that fosters political stability, legitimacy, efficiency and enhances the quality of decision-making and the protection of non-majority rights and interests.

Constitutions, ideally, should be both rigid and flexible enough to be changed if there is a need to do so. The challenge lies in balancing these, to allow for reform yet ensure that constitutional stability, predictability and protection is not undermined.

This *Special Bulletin* contains judgments that have already appeared in regular editions of the *Bulletin on Constitutional Case-Law*, some of which have been reedited by the constitutional courts' liaison officers for this publication. It also contains judgments that have not yet been published in the *Bulletin*, but were considered to be relevant by the liaison officers. As with previous working documents, this issue contains contributions from members of the CECC as well as those from all courts participating in the Joint Council on Constitutional Justice, including non-European members and observers of the Venice Commission.

The Venice Commission will continue its tradition of publishing the working documents of the CECC in a special issue of the *Bulletin on Constitutional Case-Law* in the collection of *Special Bulletins on Leading Cases*, as was done with the working document on "Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives", requested by the Constitutional Court of Austria for the XVIth Congress of the CECC in Vienna on 12-14 May 2014; the document on "Constitutional Justice: functions and relationships with other public authorities", requested by the Constitutional Court of Romania for the XVth Conference on 23-27 May 2011; the document on "Problems of Legislative Omission in Constitutional Jurisprudence", requested by the Constitutional Court of Lithuania for the XIVth Conference on 3-6 June 2008; the document on "The criteria for the Limitation of Human Rights in the practice of Constitutional Justice", requested by the Supreme Court of Cyprus for the XIIIth Conference on 15-19 May 2005 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 XIIth Conference on 13-16 May 2002.

The *Special Bulletin* will also be incorporated into the Venice Commission's database of constitutional case-law (www.CODICES.coe.int) which contains 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 9,000 précis and 10,000 full texts.

The Venice Commission hopes to have contributed to the success of the XVIIth Congress of the CECC and more generally to the dissemination, knowledge and the development of constitutional case-law. It is particularly grateful to the liaison officers for their invaluable co-operation, which has made it possible for us to produce this *Special Bulletin*.

G. Buquicchio

President of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

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

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XVIIth Congress of the Conference of European Constitutional Courts

GENERAL REPORT



Role of the Constitutional Courts in upholding and applying Constitutional Principles

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I. Introduction

Constitutional principles form a fundamental core of constitutional theory and subsequent practise. However, both their scope as well as the way in which they are referred to vary substantially across jurisdictions. While some constitutions explicitly define the essence of principles, others only draw a basic framework around which a body of constitutional practice develops. In this complicated process of identifying, applying and interpreting principles, constitutional courts or their equivalent bodies play a vital role. Thus, *the first part of this report* attempts to identify common trends among the countries under review in terms of how constitutional principles are established and interpreted. The *second part* explores a possible hierarchical structure of constitutional principles as well as how they interact with international and/or European Union law. Finally, the report analyses constitutional amendment procedures and the peculiarities of their judicial review.

II. The role of constitutional courts or equivalent bodies in applying constitutional principles

a) The power to invoke constitutional principles

At the outset, it should be emphasised that all countries under review guarantee the power of constitutional courts or equivalent bodies to refer to constitutional principles during legal proceedings. These principles are viewed as a set of values forming the material core around which the body of the constitution is formed. Therefore, there is a general consensus that constitutional provisions cannot exist in isolation, and that they should rather be interpreted according to the overall content and overarching principles of a constitution.

The scope and mode of application of constitutional principles vary greatly across jurisdictions, and depend on the powers vested in constitutional courts. In most countries, the constitutional court is viewed as the supreme interpreter or “guardian” of the constitution, which gives the court a substantial degree of freedom and discretion to apply explicit or implicit constitutional principles.¹

Moreover, some national reports go even further and point out that individual principles when considered separately possess a strong normative value,² enabling them to be applied directly and independently.³ The *Constitutional Court of Portugal* regularly invokes constitutional principles when it is called upon to review the constitutionality of normative provisions. In Portugal, constitutional principles operate as an autonomous parameter, and the court is therefore required to assess the compatibility of impugned norms not only with constitutional provisions, but also directly with constitutional principles.⁴

¹ This approach was referred to in the National Reports of Andorra, Albania, Armenia, Austria, the Czech Republic, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Germany, Liechtenstein, Macedonia, Republic of Moldova, Montenegro, Poland, Italy, Russia, Turkey, Ukraine and Georgia.

² National Report of Bosnia and Herzegovina.

³ National Reports of Armenia, Portugal, Austria, Estonia, Lithuania, Romania, Slovakia and Slovenia.

⁴ National Report of Portugal.

Constitutional courts are generally free to interpret and apply constitutional principles. Their substantive discretion to do so is naturally derived from their role as the sole provider of constitutional justice; reference is also frequently made to the general independence of the judiciary during legal proceedings.⁵

Whilst some states that authorise their constitutional courts to invoke and apply constitutional principles directly, usually provide explicit provisions for such power,⁶ most national reports indicate that the reasoning and decision-making process is conducted independently without special provisions explicitly granting such power.

b) Organic or explicit constitutional principles

The national reports clearly indicate a lack of common agreement when it comes to defining or formulating constitutional principles: some states refer to them as “fundamental legal principles”,⁷ “legal precepts”,⁸ “general principles”,⁹ or simply as “values”.¹⁰ However, despite these different terms and considering the legal nature which “constitutional principle” intends to ascribe, all national reports converge to state that there is at least one fundamental principle which is explicitly and directly derived from the constitution.

For instance, the *Austrian Constitution* does not list its fundamental principles: these are developed instead through the wide interpretative powers applied by the Constitutional Court of Austria. The democratic, republican and federal principles are nevertheless enshrined in some of the Constitution’s declarations and programmatic provisions.¹¹

In essence, explicit constitutional principles find their way into a constitution by either being listed and described in the preamble or the main body of the constitution¹² that is later given wider content by the constitutional courts, or through broad and general formulations usually relating to unamendable “eternity clauses”¹³ or to principles the alteration of which would require complex legislative procedures.¹⁴

As a general trend in most states, explicit constitutional principles provide a *foundational core* which enables constitutional courts or equivalent bodies to interpret constitutional provisions progressively and dynamically.¹⁵ In this process, organic or explicit foundational constitutional principles can be grouped around two fields that they regulate: i) *principles characterising the state and its organisation* and ii) *explicit principles relating to rights and freedoms*.

⁵ This argumentation is directly referred to by national reports of the Czech Republic, the Russian Federation, Italy and Ukraine.

⁶ National Reports of Portugal, Slovakia and Romania.

⁷ National Report of Portugal, Austria and Georgia.

⁸ National Report of Germany.

⁹ National Report of Romania.

¹⁰ National Report of Croatia.

¹¹ National Report of Austria.

¹² National Reports of Albania, Andorra, Armenia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Macedonia, Republic of Moldova, Monaco, Montenegro, Poland, Portugal, Romania, Slovakia, Slovenia, Ukraine and Georgia.

¹³ National Report of Germany: “eternity clauses” bar legislators from amending the principles they contain. The Turkish Constitution also contains explicit eternal provisions.

¹⁴ The Austrian National Report refers to “fundamental principles” whose modification would only be possible through “total revision” procedures. A similarly complicated legislative procedure is mentioned in the National Report of Russia.

¹⁵ National Reports of Austria, Croatia, Germany, Italy, Russia and the Czech Republic.

i. Explicit principles characterising the state and its organisation

Notwithstanding differences of terminology and a divergence of scope, the rule of law is a constitutional principle common to all states: an absolute majority of constitutions explicitly refer to it as a founding principle.¹⁶ Some states, however, view the rule of law in a formalistic manner: primarily concerning issues of legal certainty, there is a clear tendency to interpret the principle widely so that it also encompasses substantial material aspects.

For example, the principles invoked by *the Constitutional Court of the Czech Republic* mostly relate to the rule of law and interpret it extensively. In conjunction with the formal understanding of the principle based upon legalism and positivism, the material scope expressed in general notions of fairness and justice is also considered substantial. A material understanding of the rule of law therefore requires the Czech courts to evaluate the conduct of public authorities in relation with certain fundamental principles and rights expressed in provisions on constitutional order and fundamental rights, forming the “core value base system” of the country’s Constitution.¹⁷

A number of states also refer to explicit principles of the separation of powers, of legality, of the primacy of the constitution and of the democratic form of government, all of which are further developed and interpreted through the practise of their constitutional courts or equivalent bodies.¹⁸

ii. Explicit principles relating to fundamental rights and freedoms

Numerous states identify explicit principles concerning fundamental rights and freedoms. In particular, most states identify the principles of equality and non-discrimination as an important explicit principle.¹⁹ In Belgium, for example, the principles of equality and non-discrimination are commonly invoked and induce a progressive enlargement of the Court’s jurisdiction with regard to the relevant provisions it is entitled to enforce.²⁰ According to the *Constitutional Court of Italy*, the principle of formal and substantive equality, expressly laid down in the Constitution, is an essential key to understand the logic of the entire framework of the Constitution.²¹

In the Russian Federation, *the constitutional principle of equality* is considered by the Court as a criterion for the evaluation of the legislative regulation of any rights and freedoms. The applicability of the principle of equality to all fundamental rights and freedoms does not eliminate the possibility of its diverse manifestations: with respect to personal rights, it primarily implies formal equality, though with respect to economic and social rights, only formal equality might devolve into material inequality.²²

¹⁶ National Reports of Albania, Armenia, Austria, Belarus, Bulgaria, Belgium, the Czech Republic, Croatia, Russia, Germany, Italy, Portugal, Hungary, Latvia, Liechtenstein, Montenegro, Poland, Romania, Slovakia and Georgia.

¹⁷ National Report of the Czech Republic.

¹⁸ National Reports of Armenia, Albania, Cyprus, Belarus, Bulgaria, France, Hungary, Italy, Romania, Ukraine, Slovakia and Georgia.

¹⁹ National Reports of Albania, Armenia, Bulgaria, Belgium, France, Italy, Lithuania, Montenegro, Russia and Georgia.

²⁰ National Report of Belgium.

²¹ National Report of Italy.

²² National Report of Russia.

Another important common constitutional denominator relates to the principle of sociality or social justice.²³ According to the Italian Constitutional Court, the principle of “social dignity” is considered to be the “pressure valve” of the entire system.²⁴

c) Implicit constitutional principles

Implicit constitutional principles play an essential role in constitutional proceedings: they serve as guidelines to understand and interpret constitutional provisions and to deliver legally binding and well-reasoned decisions.²⁵ Most states also acknowledge that implicit principles simultaneously provide a certain degree of flexibility for the constitution, which enables it to adjust itself to various social developments. Additionally, the systematic nature of the constitution – translated into an obligation to refrain from piecemeal interpretation – naturally allows implicit principles to be derived from the entire text.

Most constitutional courts recognise, in one form or another, the need to involve themselves in processes leading towards the application or determination of implicit constitutional principles, whilst others consider the body of the constitutional text itself to be self-sufficient enough, in the sense that it contains a detailed list of principles, for there to be no need to determine implicit principles.

As a general rule, implicit constitutional principles are deduced through generalisation or by looking at the text “as a whole,” – identifying connections and giving new meaning to various legal rules²⁶ – as well as by particularisation or deriving implicit principles from a specific overarching constitutional principle.²⁷ These approaches are, however, most frequently applied interchangeably.

In order to safeguard constitutional justice, the *Italian Constitutional Court* considers it necessary to draw heavily upon constitutional principles that are not directly enshrined in the country’s Constitution. Several implicit principles have therefore been formulated through relevant items of the Court’s case-law – notably the rights to a healthy environment, to information, and to a home as an expression of human dignity and minimum conditions for civil cohabitation. More recently, the Court has formulated the concept of “new rights” in reference to rights that are not expressly stated in the Constitution, yet inferable from it by interpreting the text of the basic law in a manner that is adapted to social developments.²⁸

Whilst the range of implicit principles examined by the courts differs substantially across jurisdictions, one may nevertheless note that ***the general principle of openness and that of proportionality*** are the two key concepts that are most frequently referred to as implicit constitutional principles.

²³ National Reports of Albania, Belarus, Croatia, Italy, Slovenia and Estonia.

²⁴ National Report of Italy.

²⁵ National Reports of Germany, Croatia, Portugal, the Czech Republic, Belarus, Belgium, Hungary, Italy, Latvia, Lithuania, Montenegro, Norway, Ukraine and Georgia.

²⁶ National Reports of Austria, Germany and the Czech Republic.

²⁷ National Reports of Montenegro, Belgium, Hungary, Latvia and Georgia.

²⁸ National Report of Italy.

i. The general principle of openness towards public international and European Union law

The general principle of openness is frequently cited as one of the implicit principles, which aim to open up domestic legal systems to the effects of public international law.²⁹ According to the German Federal Constitutional Court, openness does not imply the subordination of the German legal system, but rather seeks to increase respect for organisations that preserve peace and freedom as well as for public international law, without giving up the German state's final responsibility to ensure respect for human dignity and fundamental rights.³⁰ Similarly, the Constitutional Court of Italy refers to the implicit principle of openness towards EU law while expanding the protection of social rights.³¹

The Constitution of the *Republic of Moldova* goes further, and points out that the Court must interpret the provisions relating to fundamental rights and freedoms in accordance with international covenants and treaties. If there is a conflict between the treaties on fundamental human rights to which the Republic of Moldova is a party and the country's national laws, priority is given to international regulations.³²

ii. The principle of proportionality

Another widely acknowledged (yet unwritten) constitutional rule lies in the resolution of "eternal" conflicts between fundamental rights and freedoms by applying the principle of proportionality.³³ This principle is generally derived from the rule of law as well as from the essence of fundamental rights themselves, which are an expression of a citizen's general entitlement *vis-à-vis* the state, and thus can be restricted by public authorities only insofar as is indispensable to the protection of the public interest.³⁴

According to *the Constitutional Court of Bulgaria*, the principle of proportionality is a fundamental principle of EU law and is soundly entrenched in the jurisprudence of the European Court of Human Rights. Hence, even though the Bulgarian Constitution does not explicitly refer to proportionality, it can be inferred from the fundamental constitutional principle that the legislature is bound to comply with international instruments which have been ratified according to the constitutionally established procedure.³⁵ A similar approach is adopted by the *Former Yugoslav Republic of Macedonia*, where the principle of proportionality has been implicitly derived from the case-law of the European Court of Human Rights.³⁶

²⁹ National Reports of Germany, Bulgaria, Bosnia and Herzegovina, Croatia, Cyprus, Estonia, Portugal (according to which openness is an explicit principle), the Czech Republic, Norway, Republic of Moldova and Georgia.

³⁰ National Report of Germany.

³¹ National Report of Italy.

³² National Report of the Republic of Moldova.

³³ National Reports of Belgium, the Czech Republic, Italy, Croatia, Hungary, Latvia, Lithuania, Russia, Macedonia, Slovenia and Georgia.

³⁴ The following definition is provided by the German Federal Constitutional Court, which views proportionality as a core constitutional principle, explicit in the country's Basic Law. A similar approach resonates, however, throughout the other constitutions, which implicitly acknowledge the principle of proportionality.

³⁵ National Report of Bulgaria.

³⁶ National Report of Macedonia.

d) Methods of identification, formation and application of constitutional principles

The role of the constitutional court in the process of shaping and forming constitutional principles is conditioned by the court's status and by the powers it has been given. There is a general agreement that all constitutional courts play a role in either the creation or the determination of the specific content of constitutional principles.³⁷

Nevertheless, whilst the case-law of the *Constitutional Court of Belgium* refers to many principles of law – constitutional or otherwise – the Court limits itself when providing definitions. This can be explained by the fact that certain principles are universal and/or well-established, giving the Court the opportunity to refer to existing definitions.³⁸

On the contrary, the *Federal Constitutional Court of Germany* not only issues binding decisions applying and interpreting constitutional principles, but also goes further and establishes that this binding force extends to the operative part of the decision and to the basis upon which the latter is founded, insofar as they contain discussions on the interpretation of the Basic Law.³⁹

i. Methods of interpretation

Constitutional courts apply a variety of interpretative methods during legal proceedings, ranging from grammatical to historical or systemic and teleological. Although it would be difficult, if not impossible, to identify a universal or most effective method of interpretation, courts generally agree that within the area of fundamental rights, a “purely literal interpretation” would not be compatible with their specific character.⁴⁰ Even in the *case of Cyprus*, where it is a fundamental rule that any enactment, including the country's Constitution, must be interpreted literally, the courts try to formulate a balanced interpretation.⁴¹

Most of the reports under review revealed a common approach of weighing different interests against one another. This approach does not specifically focus upon attributing a normative meaning to the text of the norm, but mostly seeks to balance conflicting interests in a given case according to certain principles of interpretation.

However, the method of interpretation to be applied by the Court is sometimes conditioned by the subject matter under adjudication. For example, it is well established in the case-law of the *Constitutional Court of Austria* that the formal requirements of electoral regulations “must strictly be interpreted literally”. According to the specific content of this legal provision, the textual method of interpretation therefore has priority over others.⁴²

³⁷ The National Reports of the following countries refer to the power, in one form or another, to create or interpret norms: Andorra, Albania, Armenia, Austria, the Czech Republic, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Germany, Liechtenstein, Macedonia, Republic of Moldova, Montenegro, Poland, Italy, Russia, Turkey, Ukraine and Georgia.

³⁸ National Report of Belgium.

³⁹ National Report of Germany.

⁴⁰ The National Reports of the following countries mention this approach: Austria, Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Ireland, Latvia, Lithuania, Republic of Moldova, Poland, Portugal, Russia, Romania, Ukraine, Slovenia and Georgia.

⁴¹ National Report of Cyprus.

⁴² National Report of Austria.

Moreover, in addition to traditional methods of interpretation, there exist some unique ways of interpreting legal provisions. The *Constitutional Court of Italy* engages in combined methods of constitutional interpretation: historical, literal, evolutive and, above all, systemic. As clarified in the judgments no. 264 of 2012 and no. 85 of 2013, all the fundamental rights protected by the Constitution are in a relationship of mutual integration and it is impossible to identify one of them with absolute predominance of the others. Protection must always be systemic and not divided into a series of uncoordinated and potentially conflicting rules.⁴³

In Hungary, the Constitutional Court shall interpret the Fundamental Law in accordance with the National Avowal and the achievements of the Hungarian historical constitution. The Court has already applied this special rule on interpretation when determining the achievements of the historical constitution on the independence of judges. The Court argued that many statutes adopted in the 19th century formed a solid base for a modern State governed by the rule of law. The Court held that one of the achievements of the historical constitution of Hungary is the special status and special treatment of judges by the lawmaker. Independence and irremovability of judges are also achievements of the historical constitution that are obligatory for all and these principles are to be considered when interpreting other norms of the legal system⁴⁴.

ii. The value of travaux préparatoires of the constitution

The historical element of interpretation involves analysing *travaux préparatoires* in a way that may reveal the real or hypothetical will of the constituent legislator. Although it might be applied to delimit the types of questions to which the norm sought to provide a solution, usually it only serves as a secondary interpretative power.⁴⁵

In the context of *Bosnia and Herzegovina*, the Court examined additional documents that constitute the basis, inspiration or motive for enacting the country's Constitution, i.e. the Dayton Peace Agreement. While identifying the essence of the notion of "constituent peoples" and emphasising the interpretative importance of the text of the Agreement, the Court nevertheless concluded that a historical interpretation could not clarify the content of the given notion⁴⁶.

The only exception to the general approach features in the national reports of Estonia and France. In Estonia, the preparatory acts of the country's Constitution are considered to be an important source for its interpretation. The Supreme Court of Estonia still actively refers to the materials of the Constitutional Assembly when interpreting specific provisions.⁴⁷ Similarly, in France, when the text of the Constitution is too laconic to allow the scope of a provision to be inferred from the wording alone, the Constitutional Council will often prefer to resort to the *travaux préparatoires*.⁴⁸

⁴³ National Report of Italy.

⁴⁴ National Report of Hungary

⁴⁵ National Reports of Austria, Albania, Belarus, Bulgaria, Ireland, Latvia, Lithuania, Republic of Moldova, Poland, Portugal, Russia, Romania, Ukraine, Slovenia and Slovakia.

⁴⁶ National Report of Bosnia and Herzegovina.

⁴⁷ National Report of Estonia.

⁴⁸ National Report of France.

iii. The status of preambles

Constitutions are usually prefaced by a preamble, which lists a set of ideological and historical values and fundamental principles, upon which the Constitution itself is based. Among the states that refer to this preamble as a source of legal interpretation, two groups could be identified: certain states only attribute a declaratory or political value to the principles contained in the preamble,⁴⁹ whilst others consider the preamble to have both a political and legal value.⁵⁰

The *Federal Constitutional Court of Germany*, for example, attributes legal significance to the Preamble to the Basic Law when interpreting the Constitution. The intent of the German people, as set forth in the Preamble, to “promote world peace as an equal partner in a unified Europe” together with the constitutional norm that governs the transfer of sovereign powers to the European Union (Article 23 GG) has taken on a significance for the derivation of the Basic Law’s openness to European Union law.⁵¹

Finally, almost all national reports agree that the sets of values enshrined in the preambles to their constitutions define the main vector of development of the constitutional system and play an important role in defining constitutional principles.

III. A hierarchy of constitutional principles

a) Constitutional principles and provisions

As a general trend, the national constitutions do not explicitly refer to constitutional principles or norms having superior power over others. Instead, the absolute majority of states under review seem to attribute value to the entire text of the constitution, making it impossible to deduce any unequivocal indication of the existence of a formal hierarchy among constitutional norms or principles.⁵²

Nevertheless, some states still refer to the “special status” of or “special protection” afforded to constitutional principles that are considered to be a cornerstone of the entire constitution or to principles considered to be unamendable.⁵³

A clear example is provided by the *Federal Constitutional Court of Germany*, which strongly maintains the guarantee of human dignity by virtue of the latter guarantee being declared inviolable in the first sentence of Article 1, Section 1 of Germany’s Basic Law. The guarantee of human dignity is thus not only placed beyond the reach of constitutional amendment by the legislature, but is also protected from any form of interference from the executive or judiciary. Whilst the state may, under certain circumstances, interfere with other fundamental rights, human dignity is considered to be absolutely protected pursuant to the Constitution and the Court’s subsequent practise.⁵⁴

⁴⁹ National Reports of Portugal, Belarus, the Czech Republic, Monaco, Poland, Slovakia and Switzerland.

⁵⁰ National Reports of Germany, Croatia, Russia, Estonia, Albania, Armenia, Hungary, Lithuania, Macedonia, Republic of Moldova, Montenegro, Slovenia and Georgia.

⁵¹ National Report of Germany.

⁵² National Reports of Albania, Andorra, Armenia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Macedonia, Republic of Moldova, Monaco, Montenegro, Poland, Portugal, Romania, Slovakia, Slovenia, Ukraine and Georgia.

⁵³ Reference to the special status of some principles or values is mentioned in the National Reports of Armenia, Estonia, Hungary, Germany, Portugal, Italy and Croatia.

⁵⁴ National Report of Germany.

The Constitutional Court of Portugal also attributes a special degree of protection to certain constitutional provisions. This does not, however, mean that there is a formal ranking of constitutional norms (i.e. no norm is superior or inferior to another), but more substantial hierarchy. The fundamental principles are considered to represent the very identity of Portugal's Constitution and, are therefore specifically placed under "material limits of revision".⁵⁵

b) Interrelations between constitutional principles and international law

The vast majority of European constitutions are characterised by their marked openness to supranational and international legal orders in a spirit of peace and co-operation with other countries and international organisations.⁵⁶ In general, most constitutional courts favour this openness to international and European Union law as a means to support the interpretation of national legal provisions in line with those standards.⁵⁷

The application of international law as an interpretative tool is enabled by the fact that some national constitutions explicitly declare generally recognised (international) rules to be part of their national system,⁵⁸ or by the incorporation of international treaties into national legal systems.⁵⁹ Additionally, the case-law of the European Court of Human Rights and the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms are widely referenced as a source of international law.⁶⁰

Nevertheless, when considering the notion of hierarchical subordination, there is a general consensus in favour of considering the national constitution and the principles it contains to be supreme.⁶¹ In order to avoid potential conflicts between constitutional principles and international treaties, some states empower their constitutional courts to determine the compatibility with the constitution of international instruments prior to their entry into force.⁶²

According to the *Constitutional Court of Lithuania*, if an international treaty is incompatible with the Constitution, the Republic of Lithuania is duty-bound to resolve this incompatibility by either renouncing the country's obligations under the international treaty in the manner prescribed by the norms of international law, or by amending the Constitution accordingly.⁶³

⁵⁵ National Report of Portugal.

⁵⁶ National Reports of Italy, Portugal, Germany, Latvia and Austria.

⁵⁷ National Reports of the Czech Republic, Albania, Austria, Denmark, Germany, Hungary, Poland, Portugal, Republic of Moldova, Macedonia, Latvia, Slovakia, Romania and Georgia.

⁵⁸ National Reports of Austria, Belarus, Estonia, Lithuania, Russia and Portugal.

⁵⁹ National Reports of Armenia, Belarus, the Czech Republic, Croatia, Hungary, Lithuania, Romania, Republic of Moldova, Russia, Ukraine and Georgia.

⁶⁰ National Reports of Bulgaria, Belgium, Croatia, Macedonia, Lithuania, Italy and Slovakia.

⁶¹ National Reports of Croatia, Albania, Armenia, Austria, Bulgaria, Belarus, Belgium, the Czech Republic, France, Germany, Estonia, Lithuania, Slovenia, Portugal, Ukraine and Georgia.

⁶² National Report of Bulgaria; the National Report of Belgium also refers to the possibility of reviewing the compatibility of an act of assent with the Constitution, taking into account not only the assent law itself but also the content of the treaty; the Constitutional Court of Austria can also declare a treaty inapplicable if it contradicts the national constitution; Belarus, Estonia, Portugal and Germany.

⁶³ National Report of Lithuania.

Unlike most of the constitutions mentioned above, *the Constitution of Turkey* provides that no appeal shall be made to the Constitutional Court with regard to international agreements duly in force on the grounds that they are unconstitutional. Therefore, although the provisions of international agreements are not considered to be superior to constitutional principles, they cannot be claimed to be unconstitutional.⁶⁴

c) Constitutional principles and EU law

During their accession process, the EU member states have made great efforts to harmonise their legal systems and to accommodate the requirements of EU law. Some have even introduced necessary amendments to their national constitutions.⁶⁵ Although the general consensus therefore holds that national legal orders are open to the primacy of EU law,⁶⁶ when it comes to taking precedence over fundamental constitutional principles, some states still maintain the primacy of their national constitutions. For many countries, fundamental principles are seen as part of the “reserved powers” of their national constitutions.⁶⁷

The *Constitutional Court of Austria* considers that there is an “integration-proof core of the Constitution” that is part of Austrian constitutional law – i.e. that the fundamental principles are excluded from the primacy of Union law.⁶⁸

Similarly, according to the *Constitutional Court of the Czech Republic*, although the Constitution allows the delegation of certain powers of the Czech state to an international organisation, such delegation is only conditional and may only exist insofar as the delegated powers are exercised in a manner compatible with the state’s sovereignty and the substance of the material rule of law.⁶⁹

The *Constitution of Lithuania* goes further to explicitly establish a collision rule concerning EU law, entrenching the priority of the application of legal acts of the EU in cases where the provisions of EU law arising from the EU’s founding treaties compete with the legal provisions of Lithuanian legislative acts, with the exception of the Constitution itself.⁷⁰

d) A hierarchy among constitutional principles

One of the areas in which it may be assumed that national reports are in perfect agreement concerns the hierarchy of constitutional principles. Based on the convergence of the national reports, it could be generally stated that constitutional principles and norms form a harmonious system, and that there can therefore logically be no contradiction between them. It would thus be inaccurate to speak of any kind of hierarchy of such principles: implicit principles are not “less normative” in any way, and are neither less binding nor more important than those from which they were derived. Where there is a threat of conflict between constitutional provisions or principles, constitutional courts do not automatically favour one provision over another: instead,

⁶⁴ National Report of Turkey.

⁶⁵ National Report of Belgium. In order to accede to the European Union, Austria triggered a process of “total revision” of the country’s Constitution, Czech Republic.

⁶⁶ National Reports of Croatia, Italy, Belgium, the Czech Republic, Estonia, Latvia, Portugal and Lithuania.

⁶⁷ National Reports of Austria, Germany, Denmark, the Czech Republic, Portugal, Italy and Lithuania.

⁶⁸ National Report of Austria.

⁶⁹ National Report of the Czech Republic.

⁷⁰ National Report of Lithuania.

they either interpret the provisions and principles in such a way that they constitute a coherent whole, or they apply the theory of fair balance.⁷¹

IV. Constitutional amendments and judicial review

a) Procedures for amending the constitution

The effective exercise of state powers and protection of fundamental rights and freedoms as stable and predictable principles is curtailed by the legitimacy of the constitutional system. Amending the constitution therefore frequently requires complex procedures. Due to the legislative and systemic peculiarities of individual states, the processes by which their constitutions can be revised vary greatly across different jurisdictions, yet certain similarities and common features could nonetheless be observed.

The national reports generally agree that their constitutions contain specific provisions governing the amendment process.⁷² Another common feature of many constitutions is the great complexity (compared to the ordinary legislative process) of procedures for their amendment.⁷³

Overall, differences between constitutions in terms of amendment procedures can be grouped around several features. Firstly, the rules governing the right of initiative for constitutional amendment vary greatly from country to country. Secondly, different constitutions require different mechanisms for the adoption of amendments – e.g. the ordinary legislative process, a referendum or sometimes a combination of both. Lastly, some states refer to special limitations and/or procedures regarding certain eternal or unamendable clauses.

i. The right of initiative for constitutional amendment

Constitutional amendments can be triggered in many different ways, and different groups usually have the power to initiate the amendment procedure. However, most of the national constitutions of the countries under review reserve this right of initiative to the legislature.⁷⁴ In particular, a number of states grant the competence to submit constitutional amendments to parliament, usually specifying the threshold (percentage or number) required for the amendment to be adopted.⁷⁵ If the amendments concern fundamental constitutional principles, however, some states explicitly require a high proportion of members of parliament to initiate the process. For example, when a constitutional

⁷¹ National Reports of Andorra, Albania, Armenia, Austria, the Czech Republic, France, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Germany, Hungary, Ireland, Italy, Macedonia, Republic of Moldova, Montenegro, Norway, Portugal, Italy, Russia, Turkey, Ukraine, Latvia, Lithuania, Slovakia, Slovenia, Switzerland and Georgia.

⁷² National Reports of Albania, Armenia, Austria, the Czech Republic, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Macedonia, Republic of Moldova, Montenegro, Norway, Portugal, Italy, Russia, Turkey, Ukraine, Latvia, Lithuania, Slovakia, Slovenia, Switzerland and Georgia.

⁷³ National Reports of Albania, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Macedonia, Republic of Moldova, Montenegro, Norway, Portugal, Italy, Russia, Turkey, Ukraine, Latvia, Lithuania, Slovakia, Slovenia, Switzerland and Georgia.

⁷⁴ National Reports of Armenia, Albania, Austria, Croatia, Bulgaria, Cyprus, Belgium, Germany, the Czech Republic, Poland, Portugal, Romania, Ukraine, Latvia, Lithuania and Georgia.

⁷⁵ National Reports of Albania, Andorra, Armenia, Croatia, Belgium, Bulgaria, Cyprus, Norway, Portugal, Poland, Estonia, Russia, Romania, Lithuania, Republic of Moldova, Ukraine and Turkey.

amendment in *Ukraine* implies changing one of the “general principles” of the Constitution, a majority of at least two-thirds of the country’s parliament is required to initiate the process.⁷⁶

Additionally, the right to initiate constitutional amendment is also granted to either the head of state⁷⁷ or to the governments,⁷⁸ with some states envisaging a combination of those procedures.⁷⁹ Although this right of initiative is frequently the prerogative of national political actors, several constitutions provide for the possibility of citizens introducing proposals for constitutional amendment.⁸⁰

Unlike the majority of states under review, the *Constitution of Portugal* provides two distinct constitutional revision triggers – one ordinary, and one extraordinary. Ordinary reviews may take place every five years, at the initiative of the Members of the Portuguese Parliament (the Assembly of the Republic); the extraordinary mechanism may be used at any time, provided that the Portuguese Parliament assumes extraordinary review powers by a majority of four-fifths of its serving Members.⁸¹

ii. Parliamentary procedures

Whilst groups of individuals granted the competence to initiate constitutional amendments might vary from one jurisdiction to another, the absolute majority of the states unequivocally agree that the legislature is the primary body responsible for initiating and adopting constitutional amendments.⁸²

There are, however, some exceptions to this general rule. The *Constitution of Bulgaria*, for example, requires the establishment of a Grand National Assembly – a specialised body charged with adopting a new Constitution or with amending specific provisions of the country’s Basic Law. An additional requirement holds that once the Assembly has carried out its mandate and adopted certain constitutional amendments, new parliamentary elections must be held.⁸³

As a general feature, most states require multiple readings of proposed amendments, usually separated by a substantial period of time.⁸⁴ Equally, it could be assumed that national constitutions require a higher level of consensus for constitutional amendments, obligation of a qualified majority is a common rule.⁸⁵ The number of votes required also depends on the type of legislative body:

⁷⁶ National Report of Ukraine.

⁷⁷ National Reports of Armenia, Bulgaria, Belarus, Croatia, Cyprus, Latvia, Monaco, Montenegro, Macedonia, Romania, Russia and Ukraine.

⁷⁸ National Reports of: Belgium, Croatia, Cyprus, Latvia, Liechtenstein, Republic of Moldova, Montenegro, Macedonia, Slovenia, Russia, and Switzerland.

⁷⁹ National Reports of Austria, Belgium and Croatia.

⁸⁰ National Reports of Austria, Liechtenstein, Latvia, Lithuania, Republic of Moldova, Macedonia, Romania, Slovenia, Switzerland and Georgia.

⁸¹ National Report of Portugal.

⁸² National Reports of Albania, Armenia, Austria, the Czech Republic, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Germany, Hungary, Ireland, Italy, Macedonia, Republic of Moldova, Montenegro, Norway, Portugal, Italy, Turkey, Ukraine, Latvia, Lithuania, Slovakia, Slovenia, Switzerland and Georgia.

⁸³ National Report of Bulgaria.

⁸⁴ National Reports of Croatia, Estonia, Lithuania, Latvia, Macedonia, Italy, Montenegro, Republic of Moldova, Norway, Turkey and Georgia.

⁸⁵ National Reports of Albania, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, the Czech Republic, Estonia, Germany, Hungary, Ireland, Italy, Macedonia, Republic of Moldova, Montenegro, Portugal, Italy, Turkey, Ukraine, Latvia, Lithuania, Slovakia, Slovenia, Switzerland and Georgia.

whereas in a bicameral parliamentary system, a majority within both houses might be sufficient,⁸⁶ in unicameral systems the general rule is usually a two-thirds majority.⁸⁷

iii. Referral to referendums

According to some constitutions, a general referendum might be required (or be optional) in addition to legislative procedures.⁸⁸ The reasons for consulting citizens also vary greatly across jurisdictions: referendums are usually mandatory for any amendment that is passed by parliament,⁸⁹ are triggered whenever amendments concern special clauses of the constitution,⁹⁰ or are initiated by parliament or by the head of state.⁹¹

Adopting amendments generally requires a qualified majority, which is calculated differently in various countries. According to the *Lithuanian Constitution*, for example, “the State of Lithuania shall be an independent democratic republic”: this provision could, in theory, be altered if at least three-quarters of the citizens of Lithuania with the right to vote were to do so in favour of such an amendment.⁹²

iv. Unamendable/Eternal Provisions

In a number of states, the constitution explicitly identifies certain provisions or principles that are regarded as unamendable or “eternal”.⁹³ The rationale for these usually lies in the need to protect the material core of the constitution, i.e. the basic principles upon which the entire structure of the state is based. Arguably one of the most vivid examples of an eternal guarantee is Article 79.3 of the German Basic Law, which essentially prohibits the amendment of the principles of “human dignity” contained in Article 1 or that of “federation” envisaged under Article 20 of the Basic Law.

As long as Germany’s Basic Law remains in force, the principles mentioned in these articles cannot be amended under any circumstances. There is, however, a certain level of disagreement among German scholars over whether the original constitutional legislature (*pouvoir constituant*) is also bound in case the entire Basic Law were to be replaced.⁹⁴

Some states identify relevant constitutional provisions, which do not have the status of “eternal clauses,” but whose alteration would nonetheless trigger special procedures or a total revision of the constitution.⁹⁵ These principles protected by special procedures usually concern the fundamental democratic (or republican) form of government, the federal structure of the state, sovereignty, territorial indivisibility or other fundamental rights and freedoms.

⁸⁶ National Reports of Italy and Switzerland.

⁸⁷ National Reports of Albania, Croatia, Hungary, Korea, Latvia, Lithuania, Republic of Moldova, Montenegro, Norway, Portugal, Ukraine, Macedonia and Georgia.

⁸⁸ National Reports of Albania, Andorra, Austria, Croatia, Romania, Switzerland, Estonia, Latvia, Lithuania, Republic of Moldova, Montenegro, Poland, Russia, Ukraine, Liechtenstein, Slovenia, Italy and Turkey.

⁸⁹ National reports of Denmark, Ireland and Switzerland.

⁹⁰ National Reports of Austria, Liechtenstein, Estonia, Latvia, Lithuania, Republic of Moldova, Montenegro, Poland, Russia and Ukraine.

⁹¹ National Reports of Austria, Albania, Estonia, Italy, Liechtenstein, Slovenia and Turkey.

⁹² National Report of Lithuania.

⁹³ National reports of Belgium, Portugal, the Czech Republic, Cyprus, Germany, France, Italy, Luxembourg, Republic of Moldova, Romania, Russia, Turkey and Ukraine.

⁹⁴ National Report of Germany.

⁹⁵ National Reports of Albania, Austria, Azerbaijan, Belgium, Bulgaria, Canada, the Czech Republic, Estonia, Greece, Israel, Kazakhstan, Latvia, Lithuania, Republic of Moldova, Montenegro, Poland, Russia, Macedonia and Ukraine.

According to the *Constitution of Austria*, if amendments target fundamental principles of the Constitution, the procedure for total revision must be initiated. In such a case, the constitutional act is adopted by the two parliamentary chambers and must be submitted to a referendum (an additional procedural stage).⁹⁶ In addition, one of the most frequently referenced principles that were subject to change in the constitutional amendments, related to the member state's accession to the European Union.

b) Judicial review of constitutional amendments

In most of the countries this report focuses upon, constitutional amendment procedures are the exclusive responsibility of the legislative body, and constitutional courts or equivalent bodies have no mandate to adjudicate. Some states, however, still envisage the possibility of a judicial review of constitutional amendments.⁹⁷ Almost all the constitutional courts, which enjoy the competence to carry out such a review, derive their power to do so directly from their interpretation of the content of the relevant provisions of the constitution.⁹⁸

For example, the *Constitution of Portugal* explicitly states that the laws, which govern revisions of the Constitution, can be subject to a constitutional review by the Constitutional Court. To this end, the Court must receive a request for an *ex post facto* abstract review of the constitutionality of the law that operates the revision after its entry into force (see Article 282.1, taken in conjunction with Article 166.1 CRP).⁹⁹

According to Article 140.1 of *the Austrian Constitution*, the Constitutional Court can rule on the constitutionality of “a federal or *Land* law”. Although this Article does not mention the terms “constitutional laws” or “constitutional provisions”, the Court has interpreted the “federal law” (*Bundesgesetz*) to include not only “ordinary laws”, but also “constitutional laws” and “constitutional provisions”, thus enabling it to review constitutional amendments as well.¹⁰⁰

Similarly, the *Constitution of the Czech Republic* does not include explicit provisions for the judicial review of constitutional amendments, but the country's Constitutional Court reviewed the constitutionality of amendments referring to the notion of “law” embodied in Article 87 (1)(a) of the Constitution. The Court stated that, according to the latter provision, it has the competence to deliver decisions on the annulment of laws or their provisions if they are at variance with the constitutional order. With the aim of protecting the material core of the Constitution, the Court thus extended the scope of its review to also include laws denoted as “constitutional”.¹⁰¹

A number of states have also empowered their constitutional courts to engage in preventive judicial reviews of constitutional amendments.¹⁰² According to *the Constitution of Romania*, before a proposed constitutional amendment is submitted to Parliament in order to initiate the legislative procedure for the revision of the Constitution, the reason for this amendment, accompanied by an

⁹⁶ National Report of Austria.

⁹⁷ National Reports of Austria, Armenia, Belarus, Germany, Turkey, Portugal, Republic of Moldova, Ukraine, Romania and Italy.

⁹⁸ National Reports of Austria, Germany, Portugal, Romania and Turkey.

⁹⁹ National Report of Portugal.

¹⁰⁰ National Report of Austria.

¹⁰¹ National Report of the Czech Republic.

¹⁰² National Reports of Armenia (rule introduced in 2015), Belarus, Cyprus, Romania, Ukraine and the Republic of Moldova.

opinion of the Legislative Council, is submitted to the Constitutional Court, which has to adjudicate (by a two-thirds majority of its judges) on the revision's observance of constitutional provisions.¹⁰³

Constitutional courts also occasionally review amendments that have already been adopted.¹⁰⁴ As a general rule, states that foresee the possibility for judicial review do not generally limit their constitutional courts to procedural assessments, but also grant them the ability to carry out substantive reviews.¹⁰⁵

In this regard, the Constitutional Court of Italy has acknowledged that it is competent "to rule on the compatibility between laws amending the Constitution and other constitutional laws with the supreme principles of the constitutional system" because, if this were not the case, "it would lead to the absurd result of considering the system of judicial guarantees for the Constitution to be defective or not effective precisely in relation to its supreme value".¹⁰⁶

¹⁰³ National Report of Romania.

¹⁰⁴ National Reports of Austria, Germany, Portugal and Italy.

¹⁰⁵ National Reports of Austria, Belarus, Germany, Portugal, Romania and Italy.

¹⁰⁶ National Report of Italy.

Albania

Constitutional Court

Important decisions

Identification: ALB-2006-2-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 22.05.2006 / **e)** 14 / **f)** Constitutionality of the Law on High Council of Justice / **g)** *Fletore Zyrtare* (Official Gazette), 53/06, 1530 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 3.17. General Principles – **Weighing of interests.**
 4.7.4.1.4. Institutions – Judicial bodies – Organisation – Members – **Term of office.**
 4.7.4.1.6.1. Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities.**
 4.7.4.1.6.3. Institutions – Judicial bodies – Organisation – Members – Status – **Irremovability.**
 4.7.5. Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**
 5.3.13.15. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

Keywords of the alphabetical index:

Balance, institutional / Judge, mandate, termination, incompatibility / Judge, incompatibility.

Headnotes:

The principle of separation and balance of powers, set out in Article 7 of the Constitution, gives the three branches of government (legislative, executive and judicial) autonomy in the exercise of their functions. It allowed for mutual assistance where necessary, in order to achieve maximum efficiency, and resulted in power being distributed to several entities, with different tasks and functions. Irrespective of changes in government, the principle of the separation and balance of powers should remain constant.

The High Council is predominantly composed of judges, which helps to ensure judicial independence and to avoid interference from other state powers. It is desirable to keep the three branches of power separate so that they can assist each other in fulfilling

their respective constitutional mandates. There is no incompatibility between the mandate of a member of the High Council and the day to day exercise of the function of judge. The constitutional draftsmen took steps to ensure that this would not be the case, and accorded priority to the principle of judicial independence.

Summary:

I. Several members of the Albanian Parliament asked the Constitutional Court to assess the compliance with the Constitution of an amendment to the Law on the Composition and Working Practices of the High Council of Justice (hereinafter, the "HCJ"). They suggested that this infringed the principle of self-regulation of the judiciary and that it was in conflict with the regulations set out within the Constitution governing the composition and working practices of the HCJ. The change in the legislation meant that members of the HCJ who were also judges had to devote themselves to their Council work full-time and stop working as judges. They could resume their judicial work at a later stage. Parliament made this change with a view to avoiding a conflict of interest between the role of judge and that of Council member.

The Court went on to stress that judicial autonomy and independence constitute an effective guarantee for the rights of citizens. These guarantees are expressed within Article 147 of the Constitution. This article states that the regulation of the judiciary is within the remit of the HCJ. In effect, the HCJ is at the pinnacle of the organisational pyramid of judicial power. To this end, the High Council is predominantly made up of judges and is therefore very closely connected with the judiciary. The constitutional draftsmen intended to keep the courts independent of the legislative and executive powers.

Judicial self-regulation is only feasible if the principle of democracy is respected. Thus, note must be taken of the wishes of the sovereign. The sovereign not only approves the legislation governing the composition and working practices of the judiciary but also the appointment of members of the High Court and its President. In addition, three members of the HCJ are voted into place by the sovereign. A good example of the working relationship between the executive and the High Council is to be found in the context of disciplinary proceedings against judges. These are taken upon the initiative and with the participation of the Minister of Justice, and it is the Chairman of the Council who appoints the judges of the first and second instance courts.

Judicial independence has two components. These are the impartiality and independence of judges presiding over the cases put before them. Impartiality refers to the subjective position of the judge in connection with the case and with the parties to it. Independence in this context refers to the exercise of the judicial function, as well as relationships with other entities, especially the executive.

The Court concluded that the amendments and additions not only weakened judicial self-regulation, but that they were also at odds with the provisions within the Constitution governing the composition and working practices of the HCJ. The rationale behind the amendments was to avoid conflicts of interest for members of the High Council, so that they would have to devote themselves to this role full-time and relinquish the duty to preside over cases and direct the courts. Laudable though this aim may be, judicial independence must be paramount. Any conflict of interest which High Council members might experience, which could have an impact on their decision-making, can be avoided by law.

The Court ruled that there is no incompatibility between the exercise of the mandate of a High Council member and the everyday function of judge. The Constitution allows for the National Judicial Conference to elect nine judges who may also be High Council members. Article 147 of the Constitution speaks of judges, elected in the capacity of members of the HCJ. The amendments are accordingly in conflict with this article and with the Constitution as a whole.

The Court made the observation that exceptions to constitutional regulations cannot be decided by law. The Constitution already covers in a comprehensive fashion the role of those working for constitutional organs and their immunity. The amendment in question has added a regulation which was not been provided for by the Constitution. The Constitution does not provide for immunity for members of the High Council. Only judges are accorded immunity, due to the importance of their role. In the Court's view, therefore, a provision of law conferring immunity upon High Council members is unconstitutional.

The current law, as amended, obliges High Council members to choose between that role and that of a judge, and results in the forced abandonment of one or the other of these roles. As a result, it is in conflict with the Constitution, which provides that a judge's length of service cannot be limited. The amendment allows Council members to return to office in their original court once their term of office with the Council is over. The Court pronounced this unconstitutional. Another problem with the amendment is that High Court judges cannot return to their former duties. This

is a powerful disincentive for High Court judges to serve on the Council and this has an adverse impact on the constitutional formula for the composition of the Council.

The Court accordingly resolved to repeal Articles 3, 4, 5 and 6 of the Law on the Composition and Working Practices of the High Council, on the grounds that they were unconstitutional.

Languages:

Albanian.



Identification: ALB-2007-2-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 04.12.2006 / **e)** 26/06 / **f)** Decision on initiation of destitution's procedure of general prosecutor / **g)** *Fletore Zyrtare* (Official Gazette), 131, 5140 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 4.5.2.2. Institutions – Legislative bodies – Powers – **Powers of enquiry.**
 4.7.4.3.1. Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**
 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:

Parliament, inquiry, commission, appointment / Parliament, prosecutor, dismissal, review of individual cases / Prosecutor, power / Prosecutor, responsibility.

Headnotes:

A commission of inquiry is set up with a view to recognising and verifying a phenomenon, an event or activity in depth, in order to draw conclusions about the need to approve, amend or add to particular legislation. The exercise of this prerogative by the Assembly is subject to certain limitations. The inquiry should respect constitutional principles, such as separation of powers and the presumption of innocence. The Assembly does have the power to resolve to set up a commission of

inquiry to investigate certain issues. However, it should be careful to exercise this competence within the framework of its constitutional functions and to respect the constitutional principles that regulate the activity of the organ under investigation.

Summary:

I. A group of deputies called for the setting up of a commission of inquiry for the initiation of the procedure for relieving the Prosecutor-General of his post. The group put forward a number of reasons in support of a claim that the Prosecutor-General had broken the law whilst carrying out his duties. These violations included using his position to carry out political blackmail against the deputies, tampering with the charges in certain high profile cases, and undue delay in the investigation of serious crime against the person.

When the Assembly resolved to set up a commission of inquiry, it defined the object of inquiry as the verification of data, facts and circumstances about actions or omissions on the part of the Prosecutor-General that constituted serious violations of the law as well as legal justification for discharging him from his duty. The Prosecutor-General asked the Court to repeal, on unconstitutional grounds, decision no. 31, dated 2 May 2006, of the Assembly of Albania "On the initiation of the procedure of the discharge of the Prosecutor-General from duty," and to rule upon the conflict of powers.

II. The Court took note of the constitutional functions of the Assembly and of the prosecutor's office, especially those relating to its own commissions of inquiry, the constitutional position of the prosecutor's office within structure of the organs of the state and the constitutional and legal powers of the prosecutor's office. It also examined the development of the role, before, during and after the 1990s. As to the functioning of the Assembly and of its commissions of inquiry, the Court referred to its own case-law. A commission of inquiry is set up with a view to recognising and verifying a phenomenon, an event or activity in depth, in order to draw conclusions about the need to approve, amend or add to particular legislation. The exercise of this prerogative by the Assembly is subject to certain limitations. The inquiry should respect constitutional principles, such as separation of powers and the presumption of innocence. The Assembly does have the power to resolve to set up a commission of inquiry to investigate certain issues. However, it should be careful to exercise this competence within the framework of its constitutional functions and to respect the constitutional principles that regulate the activity of the organ under investigation.

The Constitution has attributed the functions of criminal prosecution and of representing the interests of the prosecution on behalf of the state to the Prosecutor-General's office. The Constitution also provides that prosecutors, in the exercise of their duties, should be subject to the Constitution and the law. In order to strengthen the independence of this office, the Constitution made changes to the procedure for appointing the Prosecutor-General and for relieving him of his duties. It also sets out reasons for discharge from duty.

There is a special constitutional link between the institutions of the Assembly and the Prosecutor's Office. This is demonstrated by the fact that, under Article 80.3 of the Constitution, the Prosecutor-General, to the extent permitted by law, is obliged to supply information and explanations to the Assembly or the parliamentary commissions about his or her activities. He or she is also obliged to keep the Assembly informed as to the situation of criminality (see Article 149.4 of the Constitution). However, although the Assembly gives its assent to the appointment of the Prosecutor-General (or proposes his discharge), this does not mean that he or she is directly responsible to the Assembly.

The Court observed that the Prosecutor-General, as director of the prosecutor's office, does not have political responsibility before the Assembly. This is so in order to bring about a prosecution service based on professionalism, with the Prosecutor-General a professional manager of the prosecutor's office, rather than a political manager. These characteristics ensure the professional independence of the office. One should not construe the obligation of the director of the prosecutor's office to keep the Assembly informed about its activity as a limitation of the independence in the exercise of its functions. Neither the Assembly, nor its commissions of inquiry, is empowered to review decisions made by the prosecutor's office or to compel it to change them. In this context, the Court noted that methods of parliamentary control over the Prosecutor's Office cannot be used as an instrument to examine and evaluate decisions taken by prosecutors on concrete cases. The Assembly can only influence the prosecutor's office through its legislative powers.

The purpose of a commission of inquiry should be to decide upon the need to amend legislation, to complete the legal framework surrounding a matter under investigation, or to define the responsibilities within the sphere in which the investigation is taking place. However, the object of investigation of a commission of inquiry created on this premise may give rise to certain constitutional difficulties, and may affect the constitutional principles and functioning of

the prosecution service. The Court accordingly concluded that the Assembly's decision was *ultra vires*. Not only did it fail to respect constitutional principles, it also encroached upon the competences of the prosecutor's office. Cases that are the object of parliamentary investigation, under the Constitution and the relevant legislation, fall within the sphere of functions of the prosecutor's office, which is the only authority with the power to verify them professionally and to take decisions. The Court held that no other institution, and especially not the Assembly, should interfere by checking and taking decisions on them.

The Court has stressed in its jurisprudence that a parliamentary investigation cannot be totally free from restrictions. For instance, the object of investigation must respect constitutional principles, it must have regard to the activity of the legislative power, and it is not to be used in an abusive manner. In this instance, there has been an encroachment by the legislative body into the constitutional and legal powers of the prosecution service, giving rise to a conflict of competences.

On the basis that constitutional jurisdiction covers conflicts of competences between powers in cases that are related to the exercise of their respective competencies, the Court rejected an argument evinced by one of the parties, that the Prosecutor-General does not have authority to set the Court in motion. It also pointed out that the necessary conditions existed, characterising disagreements of competences. The disagreement has arisen between organs that belong to different powers; the disagreement has arisen between competent organs that are the final arbiter of the will and power of the sphere to which they belong; the disagreement has arisen as to the determination of the sphere of competences defined by the constitutional norms for the relevant powers.

The Court therefore decided to resolve the disagreement of competencies between the Assembly and the Prosecutor-General's Office and to declare that the Assembly of Albania did not have the power to check and evaluate decisions by prosecutors related to the exercise of criminal prosecution and the representation of the prosecution in the name of state.

Cross-references:

- no. 18, 14.05.2003, in *Vendime të Gjykatës Kushtetuese* 2003, Tirana 2004, p. 84, Bulletin 2003/2 [ALB-2003-2-003].

Languages:

Albanian.



Identification: ALB-2007-2-003

a) Albania / b) Constitutional Court / c) / d) 21.12.2006 / e) 29/06 / f) Resolution of disagreements over powers between central and local government, interpretation of Article 13 of the Constitution / g) *Fletore Zyrtare* (Official Gazette), 140, 5533 / h) CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.2. Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

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

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

2.1.1.4.14. Sources – Categories – Written rules – International instruments – **European Charter of Local Self-Government of 1985.**

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

4.8.4.1. Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.4.2. Institutions – Federalism, regionalism and local self-government – Basic principles – **Subsidiarity.**

Keywords of the alphabetical index:

Autonomy, local / Powers, separation and interdependence, principle / *Res judicata*, definition / Local self-government, legislative power / Decentralisation, principle / Decentralisation, administrative / Decentralisation, financial.

Headnotes:

Conflicts of laws arising from issues related to disputes about power between constitutional organs are issues which should be resolved through the exercise of constitutional review.

Local government is established and should function on the basis of the principle of decentralisation of power. The principles of decentralisation of power and of the autonomy of local government are pivotal to the establishment and functioning of a democratic state under the rule of law. Abusive exercise of central power may lead to the impediment or reduction of competence that the Constitution has attributed to the local government authorities. The government may issue acts with the force of law, but it should be careful not to hinder the exercise of legal and constitutional competence by local government authorities. On the basis of the principle of devolution of power, the legislator may modify the competences assigned by it to local government, but it should be careful not to encroach upon the main competences that the Constitution has vested in local government.

Restrictions on the field of activity of local authorities carry the risk of substantially diminishing their status and role, which would run counter to the constitutional principles upon which the local government has been established and functions.

Summary:

The Municipality of Tirana referred a claim to the Court regarding disagreements in the exercise of constitutional competences between local and central government. The appellant had identified the exercise by several organs of central government of competences of the organs of local government in the field of planning and urban management, as well as supervision of the territory. The exercise of competences had come to light when some subordinate legislation was issued, bestowing upon the prefect the power to call a meeting of the Council of the Regulation of the Territory (CRT) at the municipality. The enactment of this legislation had blocked the activity of the Municipality of Tirana and the CRT and was at the root of disagreements of competences arising between the central and local government the field of city planning and supervision of the territory.

The Court began by analysing in depth the meaning of a disagreement of competences between the powers, (including disputes between central and local government), and to give an extensive definition of those subjects who have the right to start constitutional proceedings in these circumstances.

The Constitution provides that the Court should decide upon disagreements of competence between powers, including disagreements between central and local government. This includes disagreements arising in the sphere of the separation of powers

on the horizontal plane (legislative, executive and judicial) as well as the vertical plane (central and local government).

The separation of powers is essentially nothing more than a separation of competences. A competence is a right that is legally given to an organ or a power in order to decide on specific issues. For a disagreement of competence to be included in constitutional jurisdiction, it should arise between organs that belong to different powers. Each of them should ask the other separately to materialise the will of the power to which it belongs, issuing acts that it considers to belong to its own sphere of competences.

Disagreements of competence can arise where legislation attributes the same competence to two or more institutions, or where different legislation attributes the same competence to two institutions, or where legislation prescribes a competence but does not specify the organ which should exercise it.

According to the organic law, a complaint before the Court is brought by the subjects in conflict or by the subjects directly affected by the conflict. Referring to the principle of the decentralisation of power and local autonomy, the Court held that the Municipality of Tirana had *locus standi* to bring a case of this nature.

The Court dismissed the claim by another party that the case could not be re-examined because of the legal impediment created by the principle of *res judicata*. *Res judicata* is recognised as one of the three forms of effects that a judicial decision has in the abstract procedure of supervision of the constitutionality of legal norms. The Court concludes that, both in the formal aspect as well as in the substantial aspect, the case does not constitute *res judicata*.

The Municipality of Tirana and several authorities belonging to the central power had had a dispute, which resulted in failure to carry out their normal legal and constitutional activities. The Court took the view that the dispute had arisen because of a duality in the legislation designating the organs that should exercise competences in the field of city planning and supervision of the territory.

The Albanian normative system is not decentralised but hierarchical. In such a normative system, there is very precise detail of the separation of powers at local level. Local government slots into the system of a unitary state. The Albanian normative system is not based on the principle of devolution, which means granting of power by central government to the local units.

On the other hand, local governance means the right of people in a designated territorial community to govern their lives, either through bodies they themselves elect, or directly. The principle of decentralisation of power is pivotal to the establishment and functioning of local government, in a democratic state under the rule of law. It is exercised through the constitutional principle of local autonomy. The manner of organisation and functioning of local government, as well as the relationship that it has with the central power, depends on the constitutional and legal meaning given to the decentralisation of power, local autonomy and self-government.

Decentralisation is a process in which authority and responsibility for particular functions are transferred from central power to units of local government. The principle of subsidiarity is at the root of decentralisation. Under this principle, “the exercise of public responsibilities should, in general, belong more to the authorities that are closer to the citizens”. Decentralisation is political and includes the transfer of political authority to the local level through a system of representation based on local political elections. Through administrative decentralisation, responsibility is transferred for issues of the administration of several functions to local units, while financial decentralisation refers to the transfer of financial power to the local level.

The Constitution has adopted a concept of decentralisation, which refers to the restructuring or reorganisation of power and which makes possible the creation and functioning, under the principle of subsidiarity, of a system of joint responsibility of institutions of government at both the central and local level. This concept responds better to the need for substantial autonomy of local government, to the ability of the latter to facilitate central government, and to the beneficial resolution of local problems.

Autonomy is a legal regime in which the organs of local units operate independently in order to resolve those issues that fall within their competence, under the Constitution and the laws. Local government autonomy is most apparent in the separation of competences, in terms of the powers local government institutions have, or should have, to make their own decisions about problems within their jurisdiction.

Local self-governance is an institution by means of which the citizens’ political right of self-government, as their political right, is manifested. Local government institutions cannot be hindered in carrying out their duties; neither can their powers be reduced, as their field of activity is set out within the Constitution. Local self-government is at the root of a

democratic state under the rule of law, because of the role it plays in the separation and balance of powers.

The Court emphasised that local self-government is enshrined within the Constitution, and its independence is guaranteed through it. Local government can be described as the combination of *constitutional regime* with parliamentary devolution. The Constitution also connotes respect for two important criteria, exclusivity of competence and complementarity.

The Court viewed the legal provisions which had given rise to the dispute in the context of the constitutional concept of the principle of decentralisation of power and local autonomy and, specifically, against the background of the democratic standards recognised by the European Charter of Local Autonomy (hereinafter, “ECLA”). The purpose of ECLA is to create in its member states the necessary scope for local authorities to have a wide scope of responsibilities capable of being realised at a local level.

The Court noted that it would be considered a violation of the right to local self-government if the legislator, by removing power from local organs, were to weaken their role to such an extent that their existence or self-government became insignificant. The Court held that the polarisation of power to central government in respect of the approval of construction permits was out of line with constitutional principles and the standards of ECLA. The Court considered that Article 8 of the contested law was unclear and open to misinterpretation, as it did not give a clear technical and legal definition of the terms “important objects” and “city centres”. As a result, it created a confusion of competences between local and central government.

The Court decided to resolve the dispute as to competences by determining the organ that is competent to examine the issues that are the object of disagreement. The Court declared some legal provisions of the contested law to be incompatible with the Constitution and with the standards of ECLA.

Three members expressed a dissenting opinion.

Languages:

Albanian.



Identification: ALB-2013-1-001

a) Albania / b) Constitutional Court / c) / d) 06.02.2013 / e) 1/13 / f) Laws and other acts having statutory force / g) *Fletore Zyrtare* (Official Gazette) / h) CODICES (Albanian, French).

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

Keywords of the alphabetical index:

Home, unoccupied residential property / Necessity and urgency / Restitution / Tenant, capacity, right / Tenant, obligation to vacate apartment.

Headnotes:

The principle of certainty of the law is one of the fundamental elements of the principle of the rule of law which, in addition to the clarity, comprehensibility and stability of the standard-setting system, also includes confidence in the legal system, without acceding to every expectation that favourable legal situations will never be changed.

Weighing up limited rights against the public interest is an attempt by the legislature to strike a balance between the state's right to ensure public and social order, on the one hand, and the protection of individual rights and freedoms on the other.

Summary:

I. Under Article 101 of the Constitution of the Republic of Albania (hereinafter, the "Constitution"), the Council of Ministers published Normative Act no. 03 of 1 August 2012 on the expulsion of tenants holding homeless status housed in private properties formerly expropriated and currently restored to their legitimate owners, an Act approved by Parliament under Law no. 82/2012 of 13 September 2012, which provides for the eviction of tenants housed in private properties formerly expropriated and currently restored to their legitimate owners.

The appellant party, the Association of Tenants of Formerly Privately-Owned Public Housing, lodged a request with the Constitutional Court for revocation

of the Normative Act on the grounds that it infringed the principles of certainty of the law, of non-discrimination, of proportionality, of the hierarchy of legal standards and of the separation of powers, as well as the right to a fair trial.

II. The Court, drawing on the Association's statutes and founding deed and the nature of its activities, as well as the subject of the challenged Act, which is eviction and the restitution, before 1 November 2012, of housing units by tenants residing in the expropriated persons' former properties in accordance with the established conditions and criteria, considered whether there is also a vital link between the aim of the establishment of the association and the constitutional question raised.

The appellant party contended that the requirements of Article 101 of the Constitution were not met because the Council of Ministers promulgated the Normative Act in the absence of the necessity and urgency conditions which are explicitly laid down in the constitutional provision.

The Court recalled that the urgency element cannot exist *per se* without necessity, because urgency exclusively applies to a situation which brooks no further delay, whereas necessity indicates substance, points to a situation requiring a solution and evokes the social relationship which requires legal regularisation.

Drawing on the evidence produced during the plenary sitting and the parties' explanations, the Court considered that at the time of promulgation by the Council of Ministers of Normative Act no. 3 of 1 August 2012, the Albanian State was in a situation whereby the need to provide a final solution to conflicts between the public interest, i.e. the guarantee on property rights, and the interest of the social grouping of tenants in the formerly privately-owned residences, constituted a necessity. Notwithstanding the great importance of the tenants' interest in having permanent housing, in conditions whereby the balance between these interests is continually being reversed, beyond any reasonable deadline, given the excessive individual burden on the owners for the past 20 years, the prevailing situation required state intervention in order to implement prompt measures.

For this reason, the Court reached the conclusion that the Normative Act was promulgated under conditions of necessity and urgency.

In connection with the principle of certainty of the law, the Court stressed that, regardless of its importance, this principle cannot take precedence in all cases.

This means that if a different method of regularising a relationship is directly influenced by the public interest, with all its essential elements, this interest will clearly take priority over the principle of certainty of the law.

Having examined the historical background to the legislation regarding the case under examination, the Court noted that the Albanian Parliament has approved a series of laws concerning the treatment of tenants. After the adoption of the Council of Ministers' Normative Act, the Court considered it necessary to weigh up the different interests, *viz.* the interest of the tenants (housed in the formerly privately-owned residences which have now been restored to their owners) in having housing, and the legitimate owners' interest in enjoying their property undisturbed.

As part of the effort to achieve the requisite social goals, the state has a legitimate right to regulate the social protection system by developing and implementing social policies and strategies. In this sense, in accordance with the priorities of economic and social development, the legislature must independently assess the most appropriate means of balancing interests and at the same time, make reasonable distinctions, without infringing constitutional standards.

The Court noted that the social protection of the tenants housed in the formerly privately-owned residences which have now been restored to their owners has changed in accordance with the dynamics of general social change. Such change is the result of the state achieving its social goals. It is also the consequence of constitutional review of the laws which reflected actual social policies and strategies, regulating needs and expectations of social realities different from the current social reality.

To that extent, the Court considered that the context in which the right to housing of the tenants housed in the formerly privately-owned residences which have now been restored to their owners used to be addressed was different from that of the case under consideration, where the right to housing comes up against the tenants' legitimate right to enjoy their property in an unrestricted and undisturbed manner.

The Court considered that the criteria and measures provided for by the challenged act are proportional and reasonable in terms of restoring a fair balance between the requirements of the general interest of the community and the requirements of protecting the fundamental property rights of the legitimate owners, who, because of the limitation of the use of their property over a long period, bear an excessive individual burden which exceeds any reasonable impact and which could potentially infringe their basic right of ownership.

The Court reached the conclusion that the legislature's aim, namely, to guarantee property rights, is sufficiently important to justify restricting the right to housing.

Consequently, the Court held the appellants' contention that the principles of certainty of the law, of acquired rights and of non-discrimination have been infringed to be unfounded.

The appellant party also claimed that the act challenged violates the principle of separation and balance of powers. It contended that, in promulgating the Normative Act and providing for other categories of writs of execution, exceeding the terms of the Code of Civil Procedure, the Council of Ministers had exercised competences of the legislature. Moreover, the appellant argued that the obligation on the first-instance courts not to suspend writs of execution infringes the independence of the judiciary and the fundamental right to a fair trial, as secured under Article 42 of the Constitution and Article 6 ECHR.

With reference to the nature of the appellant's contentions, the Court recalled its position adopted in its previous decisions to the effect that the examination of disputes and analysis of incompatibility between two different laws or between laws and codes lies outside its jurisdiction.

In view of the above considerations, the Court considered that since there is no breach of such constitutional principles as certainty of the law, non-discrimination and proportionality, as the appellant party contends, the latter has no standing (*locus standi*) to request the review of the constitutionality of the act (law) by virtue of Articles 7 and 116 of the Constitution.

In conclusion, drawing on the analysis of the appellants' contentions, the Court held that the Normative Act (Law) is not contrary to the requirements of Articles 15, 17, 18 and 101 of the Constitution; of Articles 6 and 8 ECHR and Article 1 Protocol 1 ECHR; and of Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights.

For these reasons, the Court held that the appellant's request for the revocation of the Act (Law) under examination as being incompatible with the Constitution and the European Convention on Human Rights is unfounded and must consequently be rejected.

Languages:

Albanian.



Identification: ALB-2014-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 05.02.2014 / **e)** 5/14 / **f)** Laws and other acts having statutory force / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, French).

Keywords of the systematic thesaurus:

2.2.2.1. Sources – Hierarchy – Hierarchy as between national sources – **Hierarchy emerging from the Constitution.**

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

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

4.5.6. Institutions – Legislative bodies – **Law-making procedure.**

4.5.6.3. Institutions – Legislative bodies – Law-making procedure – **Majority required.**

4.5.6.4. Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

4.6.3.2. Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.6.9. Institutions – Executive bodies – **The civil service.**

Keywords of the alphabetical index:

Normative act / Civil servant / Public administration / “Qualified majority”, approval / Legislative procedure.

Headnotes:

The Normative Act no. 5, which was approved by the Assembly on 30 September 2013 and enacted by presidential decree, amended the new Law no. 152/2013 on “*the civil servant*” (hereinafter, the “new Law on Civil Servant”). The Normative Act postponed the application of the new Law on Civil Servant for six months, starting from the moment of its entry into force. The new Law would repeal the Law on the “Status of the civil servant” and every other provision in conflict with it.

The preamble of the Normative Act listed reasons justifying its approval. They included the impossibility of the new Law on Civil Servant to be implemented

because of the absence of subordinate legal acts and the general nature of the law, insufficient time to make legal regulations according to the legislative process, the need for institutional organisation, the financial effects on the state budget, and the economic and financial condition.

An amendment to or normative act of the Law on Civil Servant with the force of law must be carried out only through parliamentary procedure or otherwise be rendered unconstitutional as well as inapplicable.

Summary:

I. The Constitutional Court accepted the applicants’ request to review the constitutionality of the Normative Act, which amended the new Law on Civil Servant. The applicants raised issues about the approval and enactment of the Normative Act. They highlighted that a law pertaining to the “status of civil servants” must be approved by three-fifths of the votes of Assembly members, as expressed in Article 81.2 of the Constitution. The applicants added that, from a systematic reading of Article 83 of the Constitution, the drafters had excluded the laws provided by Article 81.2 of the Constitution from the government sphere through normative acts.

In light of the applicants’ contention, the Court also considered the legislative process to ratify laws, in light of the principle of the separation of powers expressed in Article 7 of the Constitution and the sources of law defined in Article 116 of the Constitution.

II. After reviewing the case, the Court provided the following response. It underscored that constitutional norms defining the legislative process cannot be interpreted in isolation but should be read in context with norms sanctioned by the principle of the sovereignty of the people and the rule of law.

The Court examined the entirety of the laws as to which the constitutional norms expressly require Assembly approval by a qualified majority. It noted that such approval is an exception to the general rule of decision-making by a simple majority of the Assembly. Concretely, the drafters of the Constitution have provided an exhaustive list in Article 81.2 of the Constitution.

In its case-law, the Court has constantly emphasised that ordinary laws cannot deal with issues that are dealt with by codes or organic laws. If the drafters of the Constitution had intended for them to be treated the same, Article 81.2 of the Constitution would not exist.

To the contrary, the drafters of the Constitution – notwithstanding that Article 81.2.a of the Constitution is a norm of a procedural nature – included the procedure in question to protect institutions provided by the Constitution because of the importance of the fields regulated by qualified laws. The purposes of such protection are manifold: ensure political stability, promote broad consensus from political forces represented in the Assembly and avoid the possibility for the ruling majority to undermine the fundamental principles of a functioning democratic society.

Furthermore, respect for the constitutional criterion of a “qualified majority” allows for legal certainty. This is an essential principle, as laws in their entirety should guarantee clarity, foreseeability and comprehensibility for the individual.

The Court pointed out that respect for the formal and substantive criteria imposed by the Constitution is essential during the law-making procedure in a state governed by the rule of law. The direct reference in the Constitution to the manner of approval of organic laws gives them a special legal force in comparison with the ordinary acts of the legislator. For this reason, they are ranked after the Constitution in the hierarchy of acts and before the ordinary laws of the Assembly.

The Court noted that the new Civil Servant Law, considering its object and purpose, indeed regulates the status of civil servants. Because it concerns civil servants mentioned in Article 81.2.g of the Constitution, the approval requirement of three-fifths of all Assembly members applies, as stipulated in Article 81.2 of the Constitution. Similarly, referring to the regulation of Article 83.3 of the Constitution, the Assembly is prohibited from approving such a law by an expedited procedure.

In this sense, the Court stipulated that the only meaning assumed by the procedural and subject matter requirements provided expressly in the above constitutional norms is that the regulation of the status of civil servants constitutes a field regulated exclusively by the Assembly. The Assembly realises this competence by approving a law with three-fifths of all its members, through a normal legislative procedure. Consequently, the examination and approval of any issue included in the sphere of regulation of this Law is reserved only to the Assembly.

The Court noted that the Normative Act to amend the new Civil Servant Law was issued by the Council of Ministers, which had invoked the exception under Article 101 of the Constitution. Regulation of civil servants, according to the Court, constitutes a competence belonging only to the Assembly.

In this sense, the law approved by the Assembly evaluating the normative act with the force of law formally and substantively is an instrument converting the former as a material law into a formal law, and the latter may not be only a simple law.

In light of requirements to ratify a normative act, the Court ruled that any amendment that might be made to the new Law on Civil Servant as a whole or in part cannot be done through a simple law, as in the instant case. Changes must be carried out through a qualified law, approved through a normal procedure by the Assembly, with at least three-fifths of all its members.

Under those conditions, the Assembly’s approval of the Normative Act by Law no. 161/2013 conflicts with the constitutional provisions of Article 81.2 of the Constitution. It did not respect the constitutional requirements to approve qualified laws and consequently to amend Law no. 152/2013, which regulates a field reserved only to the Assembly.

The Court underscored that the Assembly cannot delegate its law-making power. It has the constitutional obligation to meet the procedural and subject matter requirements for the approval of qualified laws according to Articles 81.2 and 83 of the Constitution, in relation to Articles 1, 2, 4, 7 and 116 of the Constitution. The Council of Ministers, even less, may not intervene with normative acts with the force of law in those fields, as the regulation of which, *expressis verbis*, constitutes the exclusive competence of the Assembly.

For these reasons, the Court found unconstitutional the Council of Ministers’ issuance of the Normative Act with the force of law, which regulates issues reserved only to the Assembly. It also concluded that the latter had failed to respect the procedure provided in Articles 81.2.e and 83.3 of the Constitution. Such shortcomings, the Court ruled, conflict with the principle of the separation and balancing of the powers in the meaning of Article 7 of the Constitution. This is one of the basic principles of the rule of law, where the law constitutes the basis and boundaries of the activity of the state.

The Court also decided whether the issuance of the Normative Act violated Article 101 of the Constitution in light of the exceptional nature of the competence of the Council of Ministers to issue a normative act with the force of law. The Court considered the hierarchy of the sources of law, the requirements that derive from the principle of the separation of and balancing among the powers and the values on which the rule of law is based. The Court ruled that the limits of government discretion in assessing an extraordinary

situation and the urgent need are defined and subjected to the constitutional requirements and the respective limitations.

In the concrete case, the Council of Minister's failure to respect the constitutional, procedural and subject matter criteria and limitations hindered the government's constitutional legitimacy to issue the Normative Act. It is also rendered the ratifying law that the Assembly approved inapplicable.

Languages:

Albanian.



Identification: ALB-2015-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 15.04.2015 / **e)** 19/2015 / **f)** Laws and other rules having the force of law / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.2.1.6. Constitutional Justice – Types of claim – Claim by a public body – **Local self-government body.**

3.8. General Principles – **Territorial principles.**

4.8.4.1. Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.5. Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries.**

Keywords of the alphabetical index:

Consultation, public / Local government / Territory, ordering.

Headnotes:

A law establishing a new administrative-territorial division of the units of local government, into municipalities and regions, is not unconstitutional due to the procedure followed for its enactment or the substance of its provisions. If the public has suffered no concrete negative consequence as a result of the reform, then the claim relates to the lawmaker's appropriate sphere of action, which cannot be the object of examination by the Constitutional Court. The

reform does not violate the equality of votes and the constitutional requirement to consult the public has been met.

Summary:

I. The applicant requested suspension of Law no. 115/2014 "On the administrative division of the units of local government in the Republic of Albania" (hereinafter, "Law no. 115/2014"), which established a new administrative-territorial division of the units of local government, comprising 61 municipalities and 12 regions. The Law provided that elections for the organs of local government for the year 2015 will be organised and conducted on the basis of the administrative-territorial division defined in this Law. The organs of local government constituted after the local elections of the year 2015 will be organised and will function based on the administrative-territorial division defined in this Law (Article 3 of the Law).

The applicant's first argument concerned the procedure followed in enacting the Law. The applicant claimed that the draft Law was examined in violation of the procedure for law-making set out in Articles 81.2.f, 83.3 and 75.2 of the Constitution. The legislative initiative for this Law had been deposited in the Assembly (parliament) on 23 July 2014, and was put on the agenda for approval in plenary session on 31 July 2014, although it was not included in the three-week work calendar of the Assembly for the period 4-25 July, outside of the determined order. This transformed the procedure of examination of this Law into an expedited procedure.

The applicant's principal substantive claim was that the impugned law conflicts with Articles 108.1 and 116 of the Constitution, because it abolishes the local unit "the commune" provided in the Constitution. Article 108.1 states: "Communes or municipalities and regions are the units of local government. Other units of local government are regulated by law." Article 116 of the Constitution states that norms produced by organs of local government only apply within the territorial jurisdiction of those organs. The applicant argued that the Law abolished an existing local unit foreseen at the constitutional level, which cannot be avoided by law, not even one approved by the qualified majority.

The applicant also argued that the Law might have adverse effects on State or social interests or those of individuals, and that serious or irreparable damage might be caused to State interests due to the holding of irregular elections not in conformity with the new standards, due to a lack of sufficient time to prepare them. The applicant contended that this would distort the voters' will and violate their constitutional rights.

The applicant argued that it is urgent to suspend the Law because the decree initiating the elections and preparation for elections begins long before the end of the mandate of the existing organs: a decision of the Constitutional Court enters into force after publication in the Official Journal and the local organs do not have sufficient time for preparing the elections. The applicant further claimed that the draft Law on administrative-territorial form was drafted without respecting the constitutional principle of obtaining the opinion of the community affected by it.

In addition, the applicant claimed that Law no. 115/2014 violates the constitutional principle of the equality of the vote, because the 2011 Census is an unlawful basis for calculating the population of the year 2014, in the service of the constitutional requirements for a review of the territorial boundaries of the self-governing units and securing equal representation of the population. Because of serious deformations in the demographic criterion, the different units have different territorial sizes that are not comparable with one another. This kind of inequality, both demographic as well as territorial, does not respect the principle of the equality of representation, that is, of the vote.

In response to the applicant's first procedural argument, the Assembly responded that, as an initiative of the Special Parliamentary Commission, the draft Law could not have been examined, and was not examined, with an expedited procedure. The examination and approval by the permanent commissions is made unnecessary when a special commission is created for an issue of special importance.

More generally, the Council of Ministers (the executive) set out the main reasons that spurred the governing majority to undertake a total reform of the administrative organisation of the country's territory. The demographic changes of the last decade had brought drastic changes in the size of the units of local government (hereinafter, the "ULGs"). The high level of fragmentation of the ULGs had hindered the further development of decentralisation, due to the incapacity of ULGs to offer services with high efficiency. This also impeded the accomplishment and deepening of decentralisation, creating serious and significant inequalities among the ULGs and leading to an increase of administrative expenses at the local level and the tendency of a considerable part of the ULGs to have a budget dominated only by personnel expenses. A large number of local units did not manage to collect any income of their own and were not in a condition to offer any services to their residents.

II. The Court took the applicant's request for suspension of the Law under examination on a preliminary basis and held that this request did not meet the criteria defined by Article 45 of Law no. 8577, dated 10 February 2000, "On the organisation and functioning of the Constitutional Court of the Republic of Albania".

In addition to the above assessments, the Court considered it important to recognise that the applicant had not argued how and to what extent it was affected in its parliamentary constitutionality rights, concretely, during the procedure held by the Assembly to put the examination and approval of Law no. 115/2014 on the agenda outside of the three-week working calendar of the Assembly or by the avoidance of prior examination and approval in the Commission on Legal Issues, Public Administration and Human Rights. The applicant had not taken part in the special commission, in the examination of the Law in the commission, or in the respective plenary sessions of the Assembly. For these reasons, the Court concluded that the claims of the applicant of a violation of Articles 81.2.f and 83.3 of the Constitution during the procedure of approving Law no. 115/2014, or the Rules of the Assembly, are unfounded.

The Court observed that Article 108 of the Constitution provides: "The units of local government are communes or municipalities and regions...". Article 1 of Law no. 115/2014 provides: "1. The units of local government in the Republic of Albania are: Municipalities – 61; Regions – 12". The new law has left the "communes" as a unit of local government outside the provision.

The Court considered that the possibility of having other local units, in addition to those provided in the Constitution (communes/municipalities) is open. What is important in the constitutional aspect is whether the organisation of local government into one, two or more local units is efficient or harmful. Before undertaking any reform to reduce or increase the number of ULGs, the lawmaker should consider whether it negatively affects local governance, and consequently, the community. If it turns out that there has been no concrete negative impact on the public as a result of the reform, then we are not dealing with a claim of a constitutional nature, but a case of the lawmaker's appropriate sphere of action, which cannot be the object of examination by this Court. Legal reforms are part of governmental programs, and as such they should be evaluated as to whether the lawmaker finds them opportune, so long as they do not violate constitutional principles.

Concerning the other claim, that the abolition of communes infringes on the electoral process because the electoral zones have been organised or divided taking the commune as the basic unit, the Court held that this claim cannot be the object of examination by it, because that issue is related to the Electoral Code and not with the law that is the object of this application. The latter has the purpose of organising local government and not organising the election, which is regulated by a special law.

Regarding the argument that the Law had been drafted without taking into consideration the views of the community affected by it, the Court considered that the ways to realise this obligation have been delegated by the Constitution-drafters to the ordinary legislator. These methods were followed for the purpose of performing the process of public consultation in connection with the new territorial-administrative division. From the above, the Court concluded that the process of taking an opinion was realised through the use of the greatest part of the methods provided by the relevant law (Law no. 8652/2000). In this sense, the Court held that the constitutional criterion of canvassing public opinion according to Article 108.2 of the Constitution was not violated.

As regards the argument claiming a violation of the equality of votes, the Court emphasised that considering the type of electoral system, the equality of the weight of each vote does not mean exact mathematical equality of the contribution of every vote in the final result of the elections. The weight of every vote is related to the mechanisms of the electoral system, and differences are unavoidable in the influence that each vote might have, depending on the mechanisms adopted.

The Court held that the arguments set out by the applicant were not of a constitutional level and for this reason they cannot give them a final response.

In conclusion, based on the above, the Court held that the application for the repeal of Law no. 115/2014 "On the administrative-territorial division of the units of local government in the Republic of Albania" should be refused as unfounded.

Languages:

Albanian.



Identification: ALB-2015-1-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 24.04.2015 / **e)** 23/2015 / **f)** Laws and other rules having the force of law / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 3.10. General Principles – **Certainty of the law.**
 3.16. General Principles – **Proportionality.**
 4.7.5. Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**
 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:

Judicial Council / Judicial Council, competence / Judicial Council, member, dismissal / Judiciary, self-government.

Headnotes:

One provision of a law amending provisions on the functioning and composition of the High Council of Justice is unconstitutional. The reasons provided in the offending provision for the discharge of the members of the Council are not clear and do not guarantee due process of law during a proceeding for their discharge. Under those conditions, this provision is not in harmony with the principle of legal certainty, concerning the clarity of the content of a legal norm, and as such it is unconstitutional and should be repealed. Other challenged provisions are not unconstitutional. The election of the deputy chairman of the Council solely from among members of the Assembly (parliament) reflects the practice of the Council, since its creation, of always selecting the deputy chairman from the ranks of the members elected by the Assembly. The automatic suspension of any judge who is a defendant in a criminal trial does not violate the presumption of innocence or the principles of due process, and serves the aim of preserving public trust in the administration of justice.

Summary:

I. On the proposal of a group of deputies, on 24 July 2014, the Assembly of Albania (hereinafter, the "Assembly") approved some amendments to Law no. 8811 dated 17 May 2001 "On the organisation and functioning of the High Council of Justice"

(hereinafter, the "HCJ"). This Law has 15 articles in all, which amend certain provisions of the basic law regarding the composition and functioning of the HCJ.

Concretely, the amendments affect issues such as the incompatibility of a member of the HCJ with other functions/duties, the prohibition of promotion of members of the HCJ during the time they hold that function, the manner of declaring the end of the mandate of a member of the HCJ, discharge of the members of the HCJ, the manner of election of the deputy chairman of the HCJ, suspension of a judge from duty by a decision of the HCJ in cases where he or she is a defendant in a criminal case, and also the procedure for appointment of court chairpersons when there are vacancies.

The applicant claimed that Article 4 of the Law, which provides for the discharge of HCJ members, violates the principle of the separation of powers and weakens the self-governance of the judiciary. The law does not make distinctions or specifications in connection with cases of a serious violation of law as a reason for the discharge of an HCJ member, leaving room for abuse and for failing to guarantee the preservation of the inviolability of this constitutional organ.

The applicant claimed that Article 7 of the Law, which provides for the election of the HCJ deputy chairman only from among the members elected by the Assembly, is a narrow interpretation of Article 147.3 of the Constitution and as such conflicts with it. The Constitution has sufficed itself merely with providing that he or she is elected from the ranks of HCJ members without making a distinction in the manner of their election. According to applicant, this goes beyond the constitutional provision. The HCJ also joins with this claim in its submissions.

Finally, the applicant claimed that the content of Article 10.2 of the Law, which provides for the automatic suspension of a judge from duty when he or she is taken as a defendant for a criminal offence, conflicts with the principle of the presumption of innocence and legal certainty, not guaranteeing due process of law. This directly affects the independence of the judiciary. This provision also bypasses the role of the HCJ, which has to suspend the judge automatically. The HCJ also joined in this claim.

II. The Court had previously noted that the HCJ, as a constitutional organ independent of the legislative and executive power, decides among other things on the transfer of judges of first instance and of appeal and their disciplinary responsibility, as well as proposing judicial candidacies to the President of the Republic

for appointment. The HCJ is the constitutional organ positioned at the apex of the organisational pyramid of the judicial power.

In order to accomplish the self-governance of the judiciary, the HCJ consists in its majority of judges, who, exercising their functions as such, provide the link of this Council with the judicial body. The Constitution-drafter has put a corporate spirit (self-governing) into the HCJ with the particular purpose of making the court independent from interventions of the legislative and executive powers (Article 147.4 of the Constitution). It has been conceived of as an independent organ, a quality that is characterised by the manner of its formation, with the participation of the head of state and the highest figures of the judiciary (the chairman of the High Court), the representatives of the executive (the Minister of Justice) as well as representatives of the legislative power (three members). This composition not only aims at its independence from all the other powers, but also reflects the separation and balancing of the powers in the HCJ.

The principle of the separation of powers, like the other constitutional principles, is not an end in itself, but has the function of assisting in the realisation of an objective, which is the distribution of power among several holders, thus representing different interests in order to secure reciprocally as great a balance as possible in the exercise of power. The joint action of the holders of power should assure the greatest chances for the taking of the fairest possible decisions for the community. Therefore, it is considered essential that the principle of the separation of powers remain dominant and not yield for unjustified reasons, regardless of a change of the political forces in power.

The Court held that the cases of the end of the mandate and those of discharge should be distinct from one another, because the causes that lead to the end of the official's function are also different. The end of the mandate of a functionary is normally related to the time during which he or she is to exercise the mandate or to events that make the further exercise of the mandate impossible, such as, for example, physical or mental incapacity, the official's taking on another duty, his or her resignation and so forth. On the other hand, cases of discharge are related to the official's behaviour, which might not be in harmony with the rules for exercising it, such as, for example, violation of law, failure to exercise duty as he or she should, commission of a criminal offence during the exercise of duty and so forth.

That is, in the first case the official's mandate ends for reasons that do not conflict with law or with the rules, but simply because of events that make it impossible for him or her to exercise his or her duty any more. In the second case, that is, of discharge, the official is penalised for his or her conduct, which is not in conformity with the law and rules. The law should be clear as to when it will refer to the case of discharge "because of the commission of a crime" and when to "a conviction by final court decision" as a reason for the end of the mandate.

In conclusion, the Court held that the reasons provided in Article 4 of the Law for the discharge of the members of the HCJ are not clear and do not guarantee due process of law during a proceeding for their discharge. Under those conditions, this provision is not in harmony with the principle of legal certainty concerning the clarity of the content of a legal norm and, as such, it is unconstitutional and should be repealed.

Regarding appointment of the HCJ deputy chairman, the Court considered it necessary to refer to its prior decision about the role and nature of the work of the HCJ members. The Court stated that the functionaries of the HCJ *ex officio*, the Chairman of the High Court, the Minister of Justice and the nine judges elected by the NJC because of holding other functions, cannot be elected deputy chairman of the HCJ.

The Court does not see any reason to change its prior practice related to this issue, because it has not been presented with different legal or factual circumstances. In addition, it takes account of the fact that the practice of the HCJ since its creation shows that the deputy chairman of the HCJ has always been chosen from the ranks of the members elected by the Assembly. Starting from this premise, and considering the inability of functionaries to hold two full time positions at the same time, the Court deems it that the conclusion follows that potential candidates for being chosen for the duty of deputy chairman of the HCJ are only the three members elected by the Assembly.

From the above, the Court concludes that the election of the deputy chairman of the HCJ only from the ranks of the members elected by the Assembly does not conflict with Articles 116 and 147.3 of the Constitution.

Concerning the automatic suspension of a judge who is a defendant in a criminal case, the Court held that imposing the measure of suspension of a judge from duty when a criminal proceeding begins against him or her was foreseen in Law no. 9877 dated

18 February 2008 "On the organisation and functioning of the judicial power". This Law, contrary to what the applicant claimed in its submissions, provides that when the judge is found not guilty by final court decision, he or she returns to work and earns full pay from the moment of his or her suspension.

The Court held that the provision of the situation in the Law on the judicial organisation in which suspension of the judge is ordered is a clear provision, providing not only suspension from duty, but also the consequences that ensue if the judge is found innocent, as a guarantee for the exercise of his or her duty. Since those guarantees have been provided in the Law for the organisation of the judicial power, which is also the specific law for judges and where their status is provided, reference for this purpose should be made to that Law.

The Court considered that the suspension of a judge from duty is in the service of increasing the trust of the public in the administration of justice. The right of the judge to exercise his or her duty unlimited in time, together with the other guarantees provided by Article 138 of the Constitution, are a constituent part of the status of the judge and as such serve the independence of the judiciary.

In addition to this aspect, the lawmaker should also seek the best possible functioning of the judicial power, in order to realise its mission, that is, the rendering of justice. Justice can only be credible and with integrity when it is administered by judges who do not raise doubts concerning their character.

The Court held that the claims of the applicant concerning the incompatibility with the Constitution of Article 4 of the Law under examination, amending Article 7 of Law no. 8811 dated 17 May 2001 "On the organisation and functioning of the HCJ" are well-founded and should be accepted.

Languages:

Albanian.



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.**
 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.**
 5.1.4. 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-2006-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 18.04.2006 / **e)** DCC-630 / **f)** On the conformity with the Constitution of Article 218 of the Armenian Civil Code, Articles 104, 106 and 108 of the Armenian Land Code and Decision of Government no. 1151-N of 01.08.2002 / **g)** to be published in *Tegekagir* (Official Gazette) / **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**.
 5.3.39.1. Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

Keywords of the alphabetical index:

Expropriation, guarantees / Expropriation, procedure / Expropriation, justification.

Headnotes:

The state shall set out within legislation the procedure of expropriation. The owner will be entitled to an explanation before the event of the reason for this interference with his right to property and of the specific needs of the state which provide the rationale behind the expropriation. In any case, where there is interference with the right to property, by implication there must be a fair balance between the overriding interests of society as a whole and the need for a guarantee of fundamental human rights.

If expropriation takes place outside a clear legislative framework and without regard for restrictions imposed by the Constitution on the procedure, then such interference with property will not be deemed proportionate.

Summary:

I. The Human Rights Defender of the Republic of Armenia applied to the Armenian Constitutional Court for a ruling upon the conformity of Article 218 of the Civil Code, Articles 104, 106 and 108 of the Land Code and the Decision of the Government of 2002, 1 August, 1151-N with Article 31 of the Constitution.

Article 31 of the Constitution bestows the universal right to dispose, use, manage and bequeath one's property at will. The right to property may not be exercised so as to cause damage to the environment or to infringe the rights and lawful interests of other persons, society, or the state.

No one may be deprived of private property except by a court in cases prescribed by law.

Private property may be expropriated for the needs of society and the state only in cases of exceptional and overriding public interest, with due process of law, and with prior equivalent compensation.

The Applicant argued that the legal norms in question were in conflict with the Constitution because:

1. There is no clear definition of "public and state needs" and "cases of exceptional and overriding public interest" in any of the challenged legislation. Legislation alone forms the basis for restriction of right to property. Furthermore, the articles of the Civil Code and Land Code mentioned above do not set out a sufficiently clear and rigorous procedure for taking parcels of land for "state needs".

2. There should be separate legislation to regulate this type of issue of public law. There is no specific definition within the existing law of property of "exceptional importance" and "expropriation", neither is there any mention of the type of state or public need which might be satisfied by the property which is seized.

II. In its interpretation of Article 31 of the Constitution, the Constitutional Court made the following observations:

- There are cases where rights are restricted, when the Constitution itself determines the criteria and framework of the restriction and does not bestow any competence upon the legislator. Property rights may only be restricted in cases prescribed by law. Any deprivation of property has to be carried out in a judicial manner as a compulsory act. "Expropriation of property" is a different concept from "deprivation of the property". It should be exercised on the basis of Article 31.3 of the Constitution.
- The Constitution provides for the possibility of restrictions on the right to property and expropriation of property.
- Expropriation may only be carried out for public and state needs which should be clearly expressed and directed at a particular property.
- These needs should be exceptional and in the overriding interests of the state or society.
- The procedure of expropriation should be determined by legislation.
- Advance compensation should be guaranteed when property is to be expropriated.
- The compensation should be of equivalent value.

Having regard to the law pertaining to human rights, to precedents within constitutional law and international law on the protection of the right to property and on expropriation of property for public needs and in view of the new legal requirements formulated as a consequence of the most recent amendments to the Constitution, the Constitutional Court ruled that the government should not be allowed to define through its decisions the procedure of expropriation of property for state needs. This is directly related to the question of restrictions on the right to property and guarantees should be in place to ensure a balance between public interest and individual property rights.

On the basis of the requirements of Articles 3, 5, 8, 31, 43 and 83.5 of the Constitution, the legal procedure and framework for the expropriation of property for public and state needs should be set out clearly in legislation. The basic premise of such legislation must be that the right to property may only

be restricted or terminated in cases prescribed in Article 31 of the Constitution.

The law shall determine the procedure of expropriation by specifying:

- a. the state agency which will decide whether expropriation should take place;
- b. the procedure for providing advance compensation of equivalent value (whether in kind or in monetary form) for the property which is to be seized;
- c. the procedure for appealing against the expropriation and the procedure under which it is carried out (for instance where there might be disagreement over the amount of compensation);
- d. the obligations and restrictions attached to the rights of the owner of the property to be seized;
- e. the procedure for legal execution following the expropriation and any new rights which may arise;
- f. instances where there may be different owners of the property for defined legal objectives.

According to the Constitutional Court, where property is seized with no consideration as to future ownership (whether the property should pass to the state, to the local community or to another natural or legal person), the legislation shall determine a guarantee for the use of this property for the needs of society on the basis of which the expropriation was carried out.

The legislation should also stipulate that the state or its appointed agent should enter into a contract with the owner as to the expropriation and the compensation to be paid. Bilateral obligations will be clearly set out, as well as a stipulation that compensation from such contracts is not to be regarded as taxable income.

The Constitutional Court went on to state that the legislative and government authorities have not created the legal norms within the Armenian legal system to implement the requirements of Article 31.3 of the Constitution. Where there is expropriation of property for reasons of the needs of the state, the requirements of Article 31 of the Constitution should form the basis of any legal act. Constitutional human rights should be considered as the superior value and as a directly applicable right.

The Court carried out a constitutional analysis of Article 218 of the Civil Code, Articles 104, 106, 108 of the Land Code, the Decision of the Government of the RA 1151-N as well as its own law-enforcement practice. It ruled that the legal norms mentioned above do not result in guaranteed constitutional

protection of property rights. They do not secure a fair balance between individual interests and property rights and public interests as defined according to the rule of law. Neither can the protection of property rights be guaranteed, based on the reasoning of "exceptional overriding public interests".

The Constitutional Court held that Article 218 of the Civil Code, Articles 104, 106 and 108 of the Land Code, and the Decision of the Government of 1 August 2002, 1151-N were not compatible with the requirements of Articles 3, 8.1, 31.3, 43, 83.5.1, 83.5.2 and 85.2 of the Constitution. The Constitutional Court also ruled that these legal norms would become invalid directly the new legislation governing expropriation of property for the needs of society as a whole came into force, but no later than 1 October 2006.

Languages:

Armenian.



Identification: ARM-2006-3-002

a) Armenia / **b)** Constitutional Court / **c)** Plenary / **d)** 07.11.2006 / **e)** DCC-664 / **f)** On the compliance of Article 35.1.3, second sentence, Article 35.1.4, and Article 36.1 of the Armenian Electoral Code with the Armenian Constitution / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

4.4.1. Institutions – Head of State – **Vice-President / Regent.**

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

4.9.1. Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting.**

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

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

Keywords of the alphabetical index:

Election, electoral commission, formation / Court, independence / Judge, impartiality / Judge, incompatibility.

Headnotes:

A judge's duties are not compatible with a job which has no bearing on the role of a judge. For example, a judge's right to administer justice is incompatible with the function of organising and holding elections. It is therefore not appropriate to include judges in electoral commissions as the Constitution suggests. This would conflict with the administration of justice and the independence of the judiciary. It could also result in conflicts of interest between judges, and make it difficult for judges and courts to remain impartial when resolving electoral disputes.

Summary:

I. A group of deputies to the Armenian National Assembly sought a ruling from the Constitutional Court, as to the compliance with the Constitution of provisions in the second sentence of Article 35.1.3 and 35.1.4 and Article 36.1 of the Electoral Code.

The provisions stated that, after parliamentary elections, authority to appoint members of the Central Electoral Commission would be vested in the Council of the Chairmen of the Armenian Courts. The Council consists of judges from the courts of general jurisdiction, and one judge from the Court of Cassation appointed by the Court of Cassation. The applicants argued that the provisions were in conflict with Articles 5.1, 19.1 and 98.1 of the Constitution.

They emphasised that the doctrine of separation of powers means that competences belonging to one branch of power cannot be implemented by another. They went on to say that if a citizen challenges decisions by Central or Precinct Electoral Commissions, then the state body whose representatives issued the legislation in point will be reviewing the complaint. Nevertheless, a court can be unbiased and independent, if it is separate from the body that has adopted the decision and if it played no part in the decision-making. They also argued that when a judge carries out his or her official duties, this is a professional occupation, and incompatible with an occupation not related to such duties.

The respondent argued that the provisions of the Electoral Code are not in conflict with Article 5.1 of the Constitution. The electoral commissions, as independent bodies, are not included within any

branch of state power and do not, in practice, exercise functions exclusively attributable either to the executive, legislative or judicial powers.

In the respondent's view, there is no inconsistency between the provisions of the Electoral Code and Article 19.1 of the Constitution. That would only be the case where a judge who is a member of the electoral commission presided over the resolution of the dispute. The point was also made that recent alterations to the Constitution have resulted in changes to the language of Article 98.1. On that basis, the articles in question now contradict Article 98.1 of the Constitution.

II. The Constitutional Court noted the stipulation within Article 32.1 of the Electoral Code, to the effect that "The electoral commissions ensure the realisation and protection of citizens' electoral rights. While exercising their functions electoral commissions are independent from the state and from the local government."

The function of the electoral commissions is to make sure that institutions of democracy are formed by means of the exercise and protection of citizens' electoral rights. A direct comparison cannot be drawn between this function and that of other state bodies. In this respect, the involvement of all government branches in the formation of the electoral commissions is justified, as there are robust safeguards in place, to guarantee the independence of the commissions. State bodies must not be allowed to develop powers which would jeopardise the effective and impartial exercise of their own powers or which could endanger the constitutional system of checks and balances.

The Constitutional Court also pointed out that although Article 33 of the Electoral Code prescribes that judges from courts of general jurisdiction work on a voluntary basis, the nature of their work means that they hold a state position in a state agency. Furthermore, according to Article 33.3, "The Chairman, Deputy Chairman and Secretary of the Central Electoral Commission work on a permanent basis and may not carry out other paid work, apart from scientific, tutorial and creative work." These requirements help to define the particular nature of membership of the Electoral Commission, and are significant in terms of guaranteeing the equal status of commission members.

The Court emphasised that Article 98.1 of the Constitution forbids judges and members of the Constitutional Court from being engaged in entrepreneur activities, holding public office in central government or local government, which is irrelevant

to their duties, positions within commercial organisations or any other paid work. The only exceptions are scientific, tutorial and creative work.

The rationale behind the provisions is to make sure that those administering justice devote their whole attention to this task, and perform it impartially. Their aim is also to avoid conflicts of interest and any undue influence on judges. The fact that the legislation precludes judges and members of the Constitutional Court from holding public office in central or local government which is not relevant to their duties is significant. It implies that the Constitution has defined the framework of a judge's term of office so that he will keep to his official duties. Any amendments to legislation pertaining to the status and powers of a judge would have to be made with due regard to this limitation, which has been imposed by the Constitution.

The Court also observed that the Constitution allows the Constitutional Court to preside over disputes arising from the outcome of Presidential and Parliamentary elections. Courts of general jurisdiction may preside over disputes which have arisen during the preparation and organisation of the elections, and infringements of provisions of the Electoral Code. During local government elections, the judicial protection of electoral rights lies with courts of general jurisdiction. In this case, a judge's right to administer justice is incompatible with the function of organising and holding elections. This will particularly be the case when judges are elected as chairpersons, deputy chairpersons or secretaries of electoral commissions, something which is not ruled out by the Electoral Code.

The Court drew attention to a document entitled "Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report" adopted by the European Commission for Democracy through Law (Venice Commission) on 18-19 October 2002, which stresses the need for an independent and impartial electoral system. According to Paragraph 3.1.d of the second part of the document, the Central Electoral Commission should include at least one member from the judiciary. Paragraphs 68-85 of the mentioned document set out the way electoral commissions should be organised, so as to ensure their impartial and independent functioning. According to the commentary to paragraph 75 of the Code: as a rule, the composition of the electoral commission, together with other members, should include "a judge or a law officer: where a judicial body is responsible for administering the elections, its independence must be ensured through transparent proceedings. Judicial appointees should not come under the authority of those standing for office."

In view of the points raised above, the Constitutional Court held that the presence of "a judge or law officer" member is clearly to ensure the impartiality and independence of commissions. The provision pertains to independent, impartial lawyers and to judges. The legislation of several member states of the Council of Europe provides for the inclusion of judges in electoral commissions.

Nonetheless, due to several provisions of the Electoral Code, as well as the Law on the Judiciary, over half of the total number of judges from the courts of general jurisdiction may become members of the electoral commissions, whereas less than half may challenge the decisions adopted by their colleagues. This affects the entire system of justice. According to the Law on Judiciary, the Armenian legal system has 101 justices from courts of the first instance of general jurisdiction and 17 chairmen of those courts, 24 justices from the appeal courts and two chairmen, the chairman of the Court of Cassation, two chairmen of the chambers and 10 justices. There is also a specialist economic court, consisting of a chairman and 21 justices. Altogether, there are 179 persons (157 persons not including the justices of the economic court). 84 of them can simultaneously become members of the electoral commission.

Article 40.14 of the Electoral Code provides that "Judges appointed to electoral commissions under the procedure set out in the Electoral Code, cannot resolve disputes arising from the activities (or inactivity) of the respective electoral commissions". This does not change the situation substantially. In addition, Articles 35 and 36, read in conjunction with paragraphs 1 and 2 of part 3.1 of Article 38 of the Electoral Code, set out the procedure for filling vacancies in the central and regional electoral commissions from the judiciary. Situations could arise, as a result, where the number of judges who could hold office in the electoral commission could exceed the total amount of the judges from the courts of general jurisdiction.

Taking into account the limited number of judges in Armenia, the balance between judges who are and who are not included in the electoral commissions, the way electoral disputes are resolved and various time limitations, there is evidently a conflict between the interests of establishing independent electoral commissions and of administering efficient and impartial justice. It may, therefore, be impossible to guarantee the rights enshrined within Article 19 of the Constitution.

The Court emphasised that the role of impartial and independent electoral commissions is vital, but that in “transitional countries” impartial judicial power is also of pivotal importance. This is why Article 98 of the Constitution prevents judges from holding any office which is not relevant to his official duties. Including judges in electoral commissions, as prescribed by the Electoral Code, is at odds with the administration of justice, with the independence of the judiciary, increases the possibility of conflicts of interest, and undermines the impartiality of judges and courts when resolving electoral disputes.

The Constitutional Court held that:

1. Articles 35.1.3, 35.1.4 and 36.1 of the Electoral Code, which allow for judges to be appointed to serve as members of central or regional electoral commissions, are in conflict with Articles 19.1 and 98.1 of the Constitution and null and void.
2. Those parts of Articles 35.2, 38.3.1.1 and 38.3.1.2 of the Electoral Code which set out the procedure for filling vacancies on central and regional electoral commissions from the ranks of the judiciary are in conflict with Articles 19.1 and 98.1 of the Constitution. They are null and void.
3. Other legislation which ensured the implementation of the void provisions is repealed upon the entry into force of the Constitutional Court's decision.

Languages:

Armenian.



Identification: ARM-2007-1-002

a) Armenia / **b)** Constitutional Court / **c)** Plenary / **d)** 16.02.2007 / **e)** DCC-678 / **f)** On the compliance of the last sentences of Article 35.3 and 35.4, Article 49.e.2, the last sentence of Article 112.4 and 112.5 of the RA Law on Rules of Procedure of the National Assembly of the Republic of Armenia with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

3.3. General Principles – **Democracy.**

4.5.2. Institutions – Legislative bodies – **Powers.**

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

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

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

Keywords of the alphabetical index:

Media, television / Media, broadcasting, public broadcasting company / Parliament, power, nature / Parliament, session, broadcasting, obligatory.

Headnotes:

The Constitution contains exhaustive provision for decision-making powers on the part of the National Assembly, in terms of its relationships with other bodies. The phrase “issues of organising its activities” cannot and must not allow the Assembly to impose obligations on the Public Television and Radio Company, or to relieve it of them.

Summary:

I. The President of the Republic requested a review of the compliance with the Constitution of various provisions set out in the Law on the Rules of Procedure of the National Assembly. He suggested that these provisions were out of line with the Constitution, as they did not fully guarantee the independence of the Public Broadcaster. Under the Constitution, the state must guarantee the existence and activities of an independent public radio and television service offering a variety of informational, cultural and entertaining programmes.

The President emphasised that Article 62 of the Constitution requires the powers of the National Assembly to be defined by the Constitution. As a result, the National Assembly has no constitutional power to make a binding decision requiring the broadcast of its sessions by the Public TV and Radio Company, whether live or recorded. Moreover, Article 62 of the Constitution clearly defines the scope of issues to be regulated by the Law on Rules of Procedure of the National Assembly. The Rules of Procedure shall define the procedures of the activities of the National

Assembly and its bodies. No other relationships are to be regulated by the Rules of Procedure.

The President observed that the independence of the Public Broadcaster is largely based on editorial independence, including the freedom to define programme policy and schedule. It is also based on the prohibition of state and political influence over these processes.

The respondent explained that Constitutional Amendments in this area required certain changes to the law, aimed at harmonising the provisions of the Law on Rules of Procedure of the National Assembly and the regulations on public telecommunications with the Constitutional Amendments and with the international obligations of the Republic of Armenia.

The respondent also emphasised that guaranteed publicity of the activities of the National Assembly is a democratic achievement and should not be abolished. The Assembly did not define in legislation the dates and times for the broadcasting of its sessions, but it did have the power to make decisions on the time of the broadcast and how much should be included.

The respondent contended that the freedom of this particular Section of the media ought not to be absolute, as this would collide with other parties' absolute rights in this sphere, which would result in conflicts of interest. The right of the public to receive information and opinions through the auspices of the Public TV and Radio Company is not absolute; certain restrictions apply, for the purposes set out in Article 43 of the Constitution. Article 27.3 of the Constitution guarantees freedom of media and broadcast, but this has to be viewed against the right of every individual to receive information on the coverage of Parliament's activities.

II. The Constitutional Court noted that Article 27 of the Constitution on the one hand guarantees universal right to freedom of speech, and on the other hand attaches importance to the freedom of mass media and other means of information as a guarantee for the fulfilment of these rights. It drew particular attention to the sentence "The state shall guarantee the existence and activities of an independent and public radio and television service offering a variety of informational, cultural and entertaining programmes".

The Court emphasised that the freedom of mass media in particular implies independence and freedom to define programming policy, content and direction, as well as the exclusion of state or political influence over those processes. For these reasons, and also to meet Armenian international obligations,

amendments to the Constitution introduced the regulation of mass media as a Constitutional Function. Article 83.2 of the Constitution states that "To ensure the goals of freedom, independence and plurality of broadcasting media, an independent regulatory body shall be established by the law..."

Article 27 of the Constitution and Recommendation R(96)10 on the Guarantee of the Independence of Public Service Broadcasting of the Committee of Ministers of the Council of Europe covers the issue of freedom of information and freedom of public broadcasting. Recommendation R(96)10 emphasises the importance of freedom of mass media within a democratic society. It recommends that Council of Europe member states put in place legislation, to secure the independence of public broadcasting. The independence of public service broadcasters is crucial. State funding should not prejudice their independence in programming matters.

The Constitutional Court also drew attention to the approach adopted by Recommendation 1641 (2004) 1 of the Parliamentary Assembly of the Council of Europe. This recommendation draws a distinction between public service broadcasting and broad-casting for purely commercial or political reasons, due to public service broadcasting's specific remit, to operate independently of those holding economic and political power.

The Court emphasised the legal status of public television in Armenia, which is stipulated by Article 28 of the Law on Television and Radio Broadcasting. This defines the public television service as a state enterprise with a special status, provided by the State in order to guarantee the constitutional rights of people to receive political economic, educational, cultural, children's, teenagers', scientific, Armenian language and history, sport, entertainment and other popular information. Clearly, this provision is aimed at ensuring the rights of the individual to receive information freely and the means of achieving this purpose is to endow a television and radio company with a special status. The Constitutional Court noted, however, that the above law was enacted on 9 October 2000 and the National Assembly has not yet brought its provisions into compliance with the requirements of the Constitutional Amendments.

The Constitutional Court pointed out that the issue of the constitutionality of the disputed provisions is not connected with either the public significance of the object of legal regulation or with the expedience of broadcasting as such – the importance of these is not argued – it is rather connected with the legitimacy of regulation of legal relations between different entities. The legislature has, in this instance, interpreted the term "issues of organising its activities" – stipulated

by part 1 of Article 62 of the Constitution – with the help of a provision of a law. If this interpretation is scrutinised in the light of Article 5, Article 6 Part 2, and Article 62 of the Constitution, it is demonstrably not legitimate, as the National Assembly's decision-making powers in terms of its relationships with other bodies is covered exhaustively in the Constitution. The phrase “issues of organising its activities” cannot and must not allow it to impose obligations on the Public Television and Radio Company, or to relieve it of them.

The Constitutional Court noted the special role of the legislature within the democratic development of every country. The culture of parliamentarianism is one of civilised pluralism and dialogue, manifested when governance is exercised through representative bodies. Approaches towards the regulation of social relations and the legislature's open and public implementation of its supervisory powers are vital guarantees for the establishment of the civil society. However, the European Court of Human Rights has emphasised several times that the activities of the authorities in democratic systems must be open to public scrutiny.

Over the past fifteen years, transparency of the legislature has also been established as a stable tradition of the Republic of Armenia. Guaranteeing such wide transparency is a principle of a democratic state under the rule of law, and shall be provided for on legal and organisational grounds. These grounds must be legitimate and in line with the doctrine of separation of powers. They must not violate the requirement for functional and structural independence of Constitutional institutions. Meanwhile, amendments to the Armenian Constitution set out new requirements for guaranteeing the freedom and independence of mass media. The National Assembly must now comply with them, by bringing its media legislation in line with the Constitution. The relevant laws are the Law on Television and Radio, adopted on 9 October 2000, the Law on Mass Information, adopted on 13 December 2003, the Law on Rules of Procedure of the National Assembly and relevant provisions within other legislation.

The Constitutional Court stated that the establishment of public service television and radio was not yet sufficient, under Armenia's international obligations. The issue needs swift resolution, as the problem is not fully solved by constitutional review of this or the other provisions. International practice shows that the way forward is to provide maximum publicity to parliamentary activities, whilst carefully preserving the independence of the media. It is up to the legislature to determine the way to achieve this.

Languages:

Armenian.



Identification: ARM-2008-2-006

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 13.05.2008 / **e)** DCC-753 / **f)** On the conformity with the Constitution of Article 53.2 of the Law on Television and Radio / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.10. General Principles – **Certainty of the law.**
 3.12. General Principles – **Clarity and precision of legal provisions.**
 3.13. General Principles – **Legality.**
 4.6.3.2. Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

Keywords of the alphabetical index:

Media, broadcasting, fee.

Headnotes:

Certainty and clarity are vital components of the rule of law, and must be freely available. Parties to legal proceedings should be able to discern the legal norms that will apply to them. Legal norms cannot be described as “law” if they are insufficiently clear. Clarity can assist legal and natural persons to adjust their behaviour, in line with the law. They should be able to predict the consequences that may flow from their behaviour. The presence and absence of contradictions in various regulations is an essential factor in assessing the predictability of law.

Summary:

The applicant, Radio Haj Limited, expressed concern over provisions of the Law on Television and Radio, which obliged television and radio companies to pay annual over-the-air fees for using broadcasting frequencies. The calculation of the fee was based upon necessary expenses for serving the frequency. In its decision aimed at implementing the above norm, the Government had authorised the Ministry of

Transport and Communication to calculate and approve the amount of the over-the-air fee for using broadcasting frequency.

The applicant suggested that the provision lacked clarity, and that it infringed Article 45 of the Constitution in that it did not stipulate an amount for the annual over-the-air fee for using broadcasting frequency, neither had it appointed a specific body to consider the amount of such an annual fee. Article 45 of the Constitution states that everybody must pay taxes, duty and other compulsory fees "in conformity with the procedure prescribed by the law".

In its deliberations on the above complaint, the Constitutional Court decided to examine the content of the notion "compulsory fee" specified in Article 45 of the Constitution, together with the content of the notion of "over-the-air fee" described in the disputed norm.

The Constitutional Court, having analysed the relevant tax legislation, stated that the compulsory fees described in Article 45 of the Constitution had "public law content", that is, they were established and paid within the scope of public relations with socio-legal content. It further observed that they are to be paid into the state or community budget.

It went on to describe the "over the air fee" as a goods usage charge to be exacted, which meant that the fee was an element of civil legal relations. The contract signed by the owner of radio frequencies, namely the state, and the user of radio frequencies constitutes the legal basis for exacting such fee.

As far as television and radio companies are concerned, procedures for establishing and exacting similar fees are regulated in such an indefinite manner that it is impossible to arrive at any accurate conclusion, either on the aims behind exacting such a fee or its content. This gives rise to a situation of uncertainty and unpredictability, in turn raising questions over the legality of exacting the fee, so that certain obligations provided for by the law might not be fulfilled.

Certainty and clarity are vital components of the rule of law, and must be freely available. Parties to legal proceedings should be able to discern the legal norms that will apply to them. Legal norms cannot be described as "law" if they are insufficiently clear. Clarity can assist legal and natural persons in adjusting their behaviour to "law". They should be able to predict the consequences that may flow from their behaviour. The presence and absence of contradictions in various regulations is an essential factor in assessing the predictability of law.

The Constitutional Court noted the various contradictions in the legal regulation of radio frequency usage, the uncertainty of the provision in dispute, and the implementation of the norm that stemmed from an incorrect interpretation of the norm due to that very uncertainty. It ruled that the norm did not allow economic organisations to deduce the aim of exacting over the air fees, the content of the fee and the legality of the duty to pay it. The norm was therefore incompatible with the requirements of the Constitution.

Languages:

Armenian.



Identification: ARM-2008-3-010

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 25.11.2008 / **e)** DCC-780 / **f)** On the conformity with the Constitution of several provisions of the Civil Code, Law on Taxes, and Articles 15 and 118 of the Administrative Procedural Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.10. General Principles – **Certainty of the law.**
 3.12. General Principles – **Clarity and precision of legal provisions.**
 4.7.9. Institutions – Judicial bodies – **Administrative courts.**
 5.3.13. Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
 5.3.13.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
 5.4.6. Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Freedom of enterprise / Administrative justice / Effective remedy.

Headnotes:

Under the Armenian Constitution, the universal right to freedom of enterprise (provided this is not prohibited by law), comprises all legal remedies creating preconditions for an individual to make his or her own decisions on economic activity. It includes fair competition, the opportunity to set up economic enterprises without restriction, to change the format and direction of one's activity, to wind up existing businesses and to sign contracts. A vital component of the right to freedom of enterprise is the opportunity for somebody wishing to engage in business to enter or leave the market without any artificial obstacles.

The Constitution allows the legislator the discretion to create a court of appeal within the framework of administrative justice. Nonetheless, in exercising this discretion, the legislator should be guided by the necessity to protect fundamental human and civil rights provided by the Constitution and by international treaties. The rights to judicial protection and to appeal require special safeguarding.

Judgments by the specialised administrative court could not be reviewed by the court, where there is no appropriate specialised judicial chamber. Guarantees under the Constitution of the existence of the chambers within the Cassation Court will make sense once the Cassation Court has its own specialised chamber with the power to examine the facts of a given case and make a decision on it.

Summary:

The applicant argued that the uncertainty of the notion of "entrepreneurial activity" and the wording determined in various normative acts were open to different interpretations, as they allowed an individual's activity to be considered both entrepreneurial and non-entrepreneurial.

In its analysis of the legislation, the Constitutional Court noted that the legislator had outlined the basic features of the notion of "entrepreneurial activity" and had placed no restrictions on the inclusion of additional features. The Cassation Court, within the scope of its function of ensuring uniformity in the implementation of the law and within the scope of its authority to contribute to the development of law, had interpreted the legislative meaning of the notion and the ambit of the features.

The Constitutional Court found no uncertainty in the disputed norms.

The applicant also challenged the norms of the Administrative Procedural Code, according to which judgments of the Administrative Court are final and binding from the moment they are handed down, and the procedure of bringing an administrative case before the Cassation Court and proceedings of that case in front of the Cassation Court were regulated by the relevant norms of the Civil Procedural Code.

Systematic analysis of the Administrative Procedural Code led the Constitutional Court to pinpoint the following elements of the legal regulation on the lodging of an appeal against judgments of the Administrative Court:

- judgments of the Administrative Court become binding from the moment they are handed down and cannot be brought before the Appeal Court;
- judgments of the Administrative Court can only be brought before the Cassation Court;
- as it is not possible to bring judgments of the Administrative Court before the Appeal Court, they can be brought before the Cassation Court on the same basis as judgments of the Civil Court of Appeal;
- the criteria of admissibility of appeals against judgments of the Administrative Court are the same as those governing appeals against judgments of the Civil Court of Appeal;
- the Cassation Court examines appeals against the judgments of the Administrative Court within the same ambit as appeals against judgments of the Civil Court of Appeal and exercises the same authority.

The Constitutional Court made reference to the fundamental legal opinion expressed consistently in the case-law of the European Court of Human Rights, under which the European Convention on Human Rights does not compel contracting states to create appeal courts or cassation courts. However, if they are created, those involved must exercise all the guarantees enshrined in Article 6 ECHR. In the case under review, the Constitutional Court began by examining whether the legal provision for appeal against administrative court judgments could safeguard the effective exercise of the right to a fair trial within the administrative justice system.

The Constitutional Court found that the effectiveness of exercising the right to a fair trial within administrative justice primarily hinged upon the two-tier system of administrative justice of the Republic of Armenia and the effectiveness of that system. The efficiency of and access to the Cassation Court were particularly important, given that this was the only court to which an appeal could be lodged.

The Constitutional Court observed that the disputed norms of Article 118 of the Administrative Procedural Code, without taking into account the features of administrative justice and the features of determination of disputes in public law, had extended the regulations on the Cassation Court within the three-instance system of civil procedure to appeals against administrative court judgments, including the criteria for appealing to the Cassation Court and the criteria of admissibility of an appeal. This restricted access to the Cassation Court. Because there was no recourse to the Appeal Court in administrative cases, the Constitutional Court deemed it inadmissible to use the same basis for appealing against administrative court decisions and criteria for the admissibility of an appeal, within the three-instance system of civil procedure. The Constitutional Court called for a clear definition within the Administrative Procedural Code of the procedure for lodging appeals against decisions by administrative courts, the basis for bringing an appeal before the Cassation Court, and rules of appellate procedure. Reference should be made to other laws only if such references fell within the general constitutional principles of the judicial system.

The Constitutional Court emphasised that the provision in Article 115.1 of the Administrative Procedural Code underlined the inefficiency of the current two-instance system of administrative justice. Under this provision, the judgments of the Administrative Court deciding the case in point become binding from the moment they are handed down. The Constitutional Court found that taking administrative court judgments to the Cassation Court under such circumstances not only makes the protection of rights inefficient in the Cassation Court, but also violates the principles of legal certainty and security. These are elements of a democratic state governed by the rule of law, and are enshrined in Article 1 of the Constitution.

The Constitutional Court noted that it is not possible to file an appeal against a decision by the Cassation Court which declared the case inadmissible. This differs from the situation governing decisions by the Appeal Court to declare a case inadmissible. This has an impact on access to and efficiency of the two-instance system of administrative justice. Thus, in instances of an appeal being declared inadmissible by the Cassation Court, an individual is not only deprived of the opportunity to file an appeal against that decision (and therefore any effective remedy against that decision), but the right to a fair trial is effectively only available within the Court of First Instance.

The Constitutional Court also commented that the requirement that appeals before the Cassation Court can only be lodged through accredited advocates is a factor that restricts access to the Cassation Court. Yet this is the only judicial instance available for appeals against administrative court acts.

The Constitutional Court observed that in the sphere of administrative specialised justice the right to a fair trial is only effective where there is access to an efficient Cassation Court. A specialised chamber is also needed, for effective judicial protection, in the form of a separate specialised chamber vested with the power to examine facts, and to organise the examination of cases according to the features of administrative justice.

The Constitutional Court pronounced the disputed norms of the Administrative Procedural Code contrary to the Constitution and accordingly null and void.

Within the framework of the given case, the Constitutional Court also touched upon another manifestation of imperfection of the institute of specialised administrative justice, which is set out in Article 135 of the Administrative Procedural Code. The latter has included the subject of the constitutional justice in the sphere of the administrative justice, setting out that the Administrative Court deals with the issue of conformity of the departmental normative legal acts with the Constitution.

The Constitutional Court, touching upon the issue of separation of the functions and competence of the Constitutional Court and the Administrative Court, mentioned that the Constitution makes a distinction between the constitutional and common jurisdictional functions in Article 93 directly prescribing the constitutional justice function to the Constitutional Court. Such a separation of the constitutional and common jurisdiction functions, which is set out in the Constitution, ensures the functional dynamic balance of the whole system. Moreover, it is in the competence of the Constitutional Court to ensure the supremacy of the Constitution and direct action in the legal order through constitutional justice. In turn, the specialised body of administrative justice is called to ensure the legality of the activity of the administrative bodies, by implementing the right of judicial protection of the physical and legal entities against the administrative and normative acts, actions and inactions of the state and bodies of local self-governmental and their officials, as well as the examination of the claims of administrative bodies and their officials against physical and legal entities.

The Constitutional Court held that the given confusion of the administrative and constitutional justice in the law-enforcement practice can create different approaches in the interpretation of constitutional norms, which can seriously jeopardise the supremacy of the Constitution and its direct action, as well as the implementation of a united policy of constitutionalisation of public relations.

Languages:

Armenian.



Identification: ARM-2009-1-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 24.02.2009 / **e)** DCC-792 / **f)** On the conformity with the Constitution of Articles 113.1.9 and 114.4.5 of the Labour Code / **g)** To be published in *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

5.2.1.2.1. Fundamental Rights – Equality – Scope of application – Employment – **In private law.**

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

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

Keywords of the alphabetical index:

Employment, contract, termination, conditions / Age, retirement.

Headnotes:

Freedom of choice of employment prescribed in Article 32 of the Constitution affords everybody the opportunity for free expression of their professional and other capacities and entry into the workforce without discrimination.

Articles 14.1 and 32 of the Constitution prescribe the free and non-discriminatory realisation of the right to work in all spheres of labour relations.

Conditions such as appropriateness or other subjective factors should not be imposed on

employers' rights to dissolve employment contracts. Instead, the implementation of such a right should follow a fair, definite and lawful aim in accordance with the constitutionally prescribed principles of the right to work.

Summary:

The judge at the general jurisdiction court lodged an application with the Constitutional Court challenging various provisions of the Labour Code, the application of which arose during a specific case. The provisions in question allow early dissolution of employment contracts where the employee has reached pension age – this being 65 for the purposes of the Code. The applicant raised concern that such a legal regulation violates the constitutional principle of equality before the law, which forbids discrimination on the basis of the age or personal, social or other circumstances.

The Constitutional Court stated that freedom of choice of employment prescribed in Article 32 of the Constitution affords everybody the opportunity for free expression of their professional and other capacities and entry into the workforce without discrimination.

Under Articles 14.1 and 32 of the Constitution, the free and non-discriminatory realisation of the right to work shall be guaranteed in all spheres of labour relations.

Freedom of choice of employment is conditional upon the availability of distinct legislative guarantees surrounding the formation and termination of employment contracts, on the basis of bilateral expression of will, which are necessary for the realisation of the individual's right prescribed in Article 32.1 of the Constitution, and the development of free and comprehensive market relations of management in accordance with the principle prescribed in Article 8.2 of the Constitution.

Employment contracts are formed on the basis of the free expression of will; consequently, parties to these contracts are free to end them. The contractual nature of the regulation of labour relations demands not only the realisation of the right, but also the necessity to implement duties. The implementation of the right of the parties (especially that of the employer) to terminate an employment contract should not be made conditional on appropriateness or other subjective factors. Rather, it should follow fair, lawful and definitive goals, in accordance with the constitutionally prescribed principles of the realisation of the right to work.

Pursuant to Article 3.2 of the Constitution, the state shall ensure the protection of fundamental human and civil rights and freedoms in accordance with the principles and norms of international law.

In view of the international experience of free, non-discriminatory choice of employment and the realisation of this right, the Constitutional Court stated that any discrimination (including that on the grounds of age), or illegal restrictions of freedom of employment in domestic legislative practice contravene the fundamental principles of the democratic and social state, based on the rule of law.

Languages:

Armenian.



Identification: ARM-2011-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 25.02.2011 / **e)** DCC-943 / **f)** On the conformity with the Constitution of Article 426.3, Part 1, Point 4, Article 426.4, Part 1, Point 1 of the Code of Criminal Procedure and Article 69, Part 12 of the Law on the Constitutional Court / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Constitutional Court, decision, recognition.

Headnotes:

Failure to recognise as a new circumstance decisions of the Constitutional Court, in the operative part of which it is stated that the challenged norm is recognised as constitutional within the framework of the Constitutional Court's legal position, does not provide the opportunity of restoration and protection of violated human rights and freedoms.

Summary:

On 25 February 2011, the Constitutional Court, having considered various individual complaints, held that Point 4, Part 1, Article 426.3 of the Code of

Criminal Procedure was in conformity with the Constitution within the framework of the prescribed limits of the Decision in question.

Point 1, Part 1, Article 426.4 of the Code of Criminal Procedure, in the context of the practice of law enforcement, did not allow for the possibility of restoring human rights violated as a result of the implementation of the Law with an interpretation which differed from the Constitutional Court's legal positions, by means of the reviewing of the case on the basis of new circumstances. The Constitutional Court found this state of affairs to be out of line with the requirements of Articles 3, 6, 18, 19 and 93 of the Constitution.

The Constitutional Court stressed in the above Decision that when it finds an act to be in conformity with the Constitution, in its interpretation of the challenged legal norms, it reveals their constitutional-legal contents and acknowledges in the operative part of the Decision the conformity of the norms concerned with the Constitution or their conformity with the Constitution in the framework of concrete legal positions.

It draws attention to legal frameworks where the perception and implementation of the norms ensures their constitutionality and to legal frameworks where the implementation and interpretation of the given norm could lead to unconstitutional consequences, as well as the constitutional/legal standards which the relevant bodies of public power must consider, in their additional legal regulation of the fully-fledged implementation of the norm in question.

The Constitutional Court started from the basic premise that the meaning of constitutional justice guarantees the supremacy of the Constitution and its direct application. Certain procedural norms, when inaccurately formulated, can stand in the way of the realisation of the constitutional function and the rule of law.

The Constitutional Court noted that failure to recognise as a new circumstance decisions of the Constitutional Court, in the operative part of which it is stated that a norm is recognised as constitutional in the framework of the legal position of the Constitutional Court, does not allow for human rights and freedoms which have been breached to be restored and protected. Such decisions relate to cases where an unconstitutional state of affairs has arisen, not because of *lacuna* or ambiguity of the norm, but because the norm has been implemented with an interpretation contradicting the Constitution. These situations highlight the implementation of the principle of the rule of law and the supremacy of the Constitution.

Languages:

Armenian.



Austria

Constitutional Court

Important decisions

Identification: AUT-2014-2-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 27.06.2014 / **e)** G 47/2012, G 59/2012, G 62,70,71/2012 / **f)** / **g)** / **h)** www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

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

2.1.1.4.18. Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

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

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

Keywords of the alphabetical index:

Database / Data, personal, collecting, processing / Privacy, balance between rights and interests.

Headnotes:

Data retention may be a suitable means to control serious crime. However, whether it conforms with the requirements of data protection and with the right to respect for privacy depends on the conditions for the storage of such data, requirements governing their deletion, and measures in place to access the retained data.

Summary:

I. Article 102a of the Telecommunication Act of 2003 (*Telekommunikationsgesetz* 2003) obliged providers of public communication services to store certain categories of data from the time of generation or processing up to six months after the communication is terminated. The data were to be stored solely for the purpose of investigating, identifying and prosecuting criminal acts, which shall require,

due to the severity, an order pursuant to Article 135 of the Code of Criminal Procedure (*Strafprozessordnung*) (hereinafter, the “CCP”).

According to Article 135 CCP, the information contained in such data must be given to prosecution authorities in specific cases and in accordance with national laws. The situations include: if the provision of such information was expected to help investigate a wilfully committed criminal act that carried a sentence of more than six months and the owner of the technical device which was or would be the source or target of data communication granted explicit consent. The data must also be surrendered to competent authorities if such information was expected help investigate a wilfully committed criminal act carrying a sentence of more than one year and it could be assumed based on given facts that the provision of such information would allow data about the accused to be ascertained. Alternatively, if, based on given facts, it was expected that the whereabouts of a fugitive or an absent, accused person who was strongly suspected of having wilfully committed a criminal act carrying a sentence of more than one year could be established.

According to Article 53.3a of the Security Police Act (*Sicherheitspolizeigesetz*), police authorities are entitled to request information concerning the name and address of a user who was assigned an IP address at a particular time from providers of public communication services. They can make the request if the data serve as an essential prerequisite to counter a concrete danger to the life, health or freedom of an individual in the context of the first general obligation to render assistance, a dangerous attack or a criminal association, “even if the use of retained data is required for this”.

Pursuant to Article 53.3b of the Security Police Act, police authorities are further entitled to require from providers of public telecommunication services information about location data and the international mobile subscriber identity (IMSI) of the carried equipment of a person in danger or a person accompanying the person in danger, “even if the use of retained data is required for this”.

In spring 2012, subscribers to various communication services within the meaning of Article 102a of the Telecommunication Act of 2003 filed a request for constitutional review with the Constitutional Court. They maintained that the provisions governing data retention breached their constitutionally guaranteed rights. The applicants criticised that these provisions required the operator of their communication networks to store specified data without any concrete suspicion, irrespective of technical requirements or billing purposes, and regardless of, or even against, their will.

II. In November 2012, the Constitutional Court stayed its constitutional review proceedings. It referred to the Court of Justice of the European Union for a preliminary ruling as to the question whether the Data Retention Directive of 2006 was compatible with Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union. The reason for this request was that the Directive, if implemented into national law, would be incompatible with the fundamental rights to respect for private life pursuant to Article 8 ECHR and to protection of personal data set out in Article 1 of the Data Protection Act of 2000 (hereinafter, “CPA 2000”, *Datenschutzgesetz* 2000). As a result, the Constitutional Court could be precluded from reviewing the legal regulations on data retention. On 8 April 2014, however, the Court of Justice of the European Union ruled that the Data Retention Directive was invalid. Consequently, there was no obstacle for the Constitutional Court to assess the provisions under review against the measure of the fundamental right to protection of personal data.

Pursuant to Article 1 CPA 2000, every person is entitled to secrecy for personal data concerning him or her, especially with regard to his or her private and family life, insofar as he or she has an interest worthy of such protection. Any restriction to this right must be based on laws necessary for the reasons stated in Article 8.2 ECHR. Going beyond Article 8.2 ECHR, Article 1.2 CPA 2000 requires that any law providing for the use of data worthy of special protection must provide suitable safeguards for the protection of the private interest in secrecy.

The Constitutional Court held that both the storage of personal data of the users of public communication services and the obligation to provide information about this data to police and prosecution authorities constitute an interference with the fundamental right to data protection and the right to respect for private and family life.

The Constitutional Court agreed that the provisions concerning the retention of data and information on retained data were, in principle, suitable to achieve the objectives mentioned in Article 8 ECHR, particularly the maintenance of public peace and order and the protection of rights and freedoms of others.

However, as the provisions under review did not establish any limitation relating to the seriousness of the offence that would justify interference with the fundamental rights of the individuals concerned, the Constitutional Court found that this interference was not proportionate to the aim pursued.

Moreover, the Constitutional Court established that the retention of personal data failed to satisfy the requirement of proportionality. The Court pointed out that this measure was particularly burdensome, given that, first, it concerned the exercise of fundamental rights, particularly the freedom of expression, information and communication. Secondly, the vast majority of the individuals affected were without previous criminal conviction. Lastly, a vast number of people could potentially have access to the stored data, which posed an increased risk of unauthorised access and abusive use of personal data.

However, the statutory rules regarding the data retention lacked appropriate measures to alleviate this interference, such as criminalising any improper use of retained data and ensuring that individuals affected could exercise their right to erase *vis-à-vis* providers of public communication services effectively.

Finally, with a view to the right of erasure, the national law did not provide any specifics that would address the requirement of a statutory regulation within the meaning of Article 1.2 CPA 2000. In particular, it was unclear if the data had to be deleted in such a way that the recoverability of the data was excluded.

Cross-references:

Court of Justice of the European Union:

- nos. C-293/12 and C-594/12, 08.04.2014, *Digital Rights Ireland Ltd et al.*

Languages:

German.



Identification: AUT-2015-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11.12.2014 / **e)** G 119-120/2014 / **f)** / **g)** / **h)** www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

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

2.1.1.4.18. Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

5.2.2.11. Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

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

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

Keywords of the alphabetical index:

European Convention on Human Rights, applicability / Couple, same-sex / Discrimination, sexual orientation / Equality / Adoption, homosexual partners, discrimination.

Headnotes:

Excluding same-sex partners in registered partnerships *a priori* from jointly adopting a child breaches the principle of equality.

Summary:

I. According to Article 8.4 of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz*), registered same-sex partners may neither jointly adopt a child nor adopt the adopted children of the other partner. Article 191.2 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides that, adopting a child by more than one person either simultaneously or subsequently is only permitted if the adopting partners are married, with the exception of biological children of the other registered partner (“stepchild”), who shall be adopted.

The applicants, two women living in a stable relationship, had entered into a registered partnership in 2011. In 2012, one partner gave birth to a daughter who had been conceived by medically assisted reproduction. According to the Civil Code, this child was allowed to be adopted by the other partner. The applicants wished to have another child, in addition to their first one, by adoption. However, unlike married couples, they were barred by the above-mentioned provisions from jointly adopting a child.

The applicants lodged a constitutional complaint against Article 8.4 of the Federal Act on Registered Partnership as well as Article 191.2 of the Civil Code, claiming that they were discriminated against merely on grounds of their gender and sexual orientation. They maintained that the challenged provisions were contrary to the constitutional principle of equality, as laid down in Article 2 of the Basic Law on Fundamental Rights of the Citizens

(*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*), Article 7 of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*), as well as Article 14 ECHR in conjunction with Article 8 ECHR.

The applicants submitted that the different treatment of same-sex registered partners and heterosexual married couples regarding the joint adoption of children neither pursued a legitimate goal nor was it necessary. In particular, they considered that there was no apparent justification for generally forbidding registered partners to jointly adopt a child and to preclude *a priori* a court review of the applicants' suitability for a joint adoption in light of the child's best interests, whereas married couples were *per se* considered suitable as adoptive parents.

II. At first, the Constitutional Court turned to the question of applicability of Article 14 ECHR, according to which the enjoyment of the rights and freedoms set forth in the Convention shall be granted without discrimination. Following established case-law of the European Court of Human Rights, the European Convention on Human Rights, specifically Article 8 ECHR, did not provide for a right to adoption. However, as the existing legal provisions permitted adoption by individual persons irrespective of their sexual orientation as well as simultaneous parenthood of same-sex partners *vis-à-vis* a child with a view to adopting a stepchild, the Court found that the legal provisions governing adoption fell within the scope of application of Article 8 ECHR. As a consequence, these provisions had to satisfy the requirements of Article 14 ECHR.

Both the principle of equality and Article 14 ECHR, according to the case-law of the European Court of Human Rights, required convincing and weighty reasons to justify unequal treatment based on gender and sexual orientation.

The Constitutional Court observed that, according to the Civil Code, adopting a child was not exclusively reserved to spouses (together or individually, if the requirements were satisfied), but also possible for individuals – irrespective of their sexual orientation – whether they lived in a partnership or registered partnership or not, with the court approval of the adoption contract. In detail, the law allowed both unmarried heterosexual partners as well as registered partners to become the legal parents of a child, without that child descending from both partners.

Against this legal backdrop, the Court found that the challenged provisions created unequal treatment between registered partners as adopting parties in an adoption contract as against registered partners or (same-sex or heterosexual) partners in the case of

stepchild adoption. Whereas the challenged ban precluded joint adoptive parenthood of registered partners, even if both had a foster child or one partner had already adopted the child, the law allowed for simultaneous legal parenthood of the biological and the adoptive parent in stepchild adoption by adding the contractual adoption relationship for the same child.

The Court established that neither Article 8 ECHR in conjunction with Article 14 ECHR, nor Article 7 of the Federal Constitutional Act provided for an objective justification to exclude registered partners *per se* as joint contracting parties to an adoption contract. In particular, the interests of the child could not serve as justification; in a way these interests were, on the contrary, even counteracted by such exclusion.

As a result, the Court found that the general exclusion by law of registered partners from jointly adopting a child as contracting parties to an adoption contract, while allowing the joint parenthood of registered partners in other constellations, was inconsistent and could not be justified on the grounds of protecting the child's best interests.

Cross-references:

Constitutional Court:

- nos. G 16/2013, G 44/2013, 10.12.2013, *Bulletin* 2013/3 [AUT-2013-3-004].

European Court of Human Rights:

- *X and others v. Austria*, no.19010/07, 19.02.2013, *Reports of Judgments and Decisions* 2013.

Languages:

German.



Identification: AUT-2016-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 01.07.2016 / **e)** W I 6/2016 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.9.3.1. Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

4.9.9.6. Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

4.9.11.1. Institutions – Elections and instruments of direct democracy – Determination of votes – **Counting of votes.**

4.9.11.2. Institutions – Elections and instruments of direct democracy – Determination of votes – **Electoral reports.**

4.9.12. Institutions – Elections and instruments of direct democracy – **Proclamation of results.**

4.9.13. Institutions – Elections and instruments of direct democracy – **Judicial control.**

5.3.41.3. Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting.**

5.3.41.4. Fundamental Rights – Civil and political rights – Electoral rights – **Secret ballot.**

Keywords of the alphabetical index:

Election, leak, influence outcome / Election, vote, procedure, protocol / Election, voting, secrecy / Electoral law, infringement.

Headnotes:

The system of postal voting is in conformity with the constitutional principles of voting in person and secrecy of ballots. However, votes may only be handled and counted by the collegiate election boards, the representative composition of which is seen as a specific guarantee for a transparent and impartial carrying out of elections.

If state authorities transmit results of the vote count prior to the closing of the election, this runs counter to the principle of freedom of voting.

A challenge to an election must be allowed if proven infringements of legal provisions aiming to prevent manipulations affect a decisive number of votes, regardless of whether or not manipulations have actually occurred.

Summary:

I. Pursuant to Article 141 of the Federal Constitution, the Constitutional Court was requested to review the second round of the presidential elections of 22 May 2016. The complaint was made by the representative of the candidate defeated, Mr Norbert Hofer, claiming that the provisions regarding postal voting were

unconstitutional, and that the election results had been affected by widespread irregularities.

II. In 1985, the Court had held that postal voting is contrary to the constitutional principles of secrecy of ballots and of voting in person. However, in 2007, the Constitution was amended to the effect that postal voting may take place. Therefore, postal voting must be seen as an exception to the principle of voting in person; as regards secrecy of ballots, the Constitution (as amended in 2007) must be interpreted as expecting the voter to assume greater responsibility for protecting the secrecy of his or her ballot.

When creating a legal structure specifying postal voting, the legislator must both try to comply with the constitutional principles of voting and make sure that the constitutional provisions allowing postal voting are not frustrated by complicated and impractical safety regulations.

The Court could not find that the legal provisions on postal voting go beyond what is absolutely necessary to enable this method of voting. In particular, the Constitution (as amended in 2007) cannot be interpreted in such a way as to allow postal voting only where voters are virtually not able to cast their vote in person at a polling station on election day. As a consequence, although voters are required to specify a reason for requesting a voting card, these reasons need not be verified by the municipal authorities issuing the card.

Finally, the Court conceded that there may be a (theoretical) risk of voting cards being manipulated during delivery; this risk, however, does not affect the constitutionality of the law as such.

The Court recalled that legal provisions on elections aiming at preventing abuse or manipulation must be applied strictly in accordance with their wording. After testimony from about 90 witnesses had been heard, it turned out that irregularities in dealing with the postal ballots had occurred in several election districts:

According to Article 14a Act on the election of the Federal President (*Bundespräsidentenwahlgesetz*) (as amended in 2015), the head of the District Election Board, in the presence of the other members of the Board, shall examine whether the voting cards received are not damaged. If cards are found to be damaged, they shall be separated. Afterwards, the head of the District Election Board shall open the voting cards (not damaged), remove the inner envelopes containing the ballots and put them into a box. Finally, after having mixed these envelopes thoroughly, the District Election Board shall open the inner envelopes, remove the ballots and count them.

The Court insisted that any activities directly related to the counting of votes must be performed by the election board as a collegiate body, i.e., in the presence of all members of the board duly invited to take part in the board meeting. Under the relevant electoral law, all political parties are expressly entitled to nominate members of the boards. Therefore, this specific collegiate structure of the election authorities is meant to ensure transparency and impartiality in the establishment of the election result.

Auxiliary staff who are not members of the election board may support the board in performing its tasks, but they may only do so in the presence of the collegiate body of the board. By no means must they be allowed to count votes without being supervised.

The District Election Board, acting as a collegiate body, is also responsible for opening (ripping open) the voting cards. If voting cards have already been opened by unauthorised persons, it will no longer be possible to determine whether these cards may be included in the counting of votes.

The Court found that the said provisions (aiming to prevent manipulations) had not been complied with in fourteen election districts (Innsbruck-Land, Südoststeiermark, Villach, Villach-Land, Schwaz, Wien-Umgebung, Hermagor, Wolfsberg, Freistadt, Bregenz, Kufstein, Graz-Umgebung, Leibnitz, Reutte). These infringements violated both the relevant electoral law and the constitutional principle of secrecy of ballots.

As the winner of the election, Mr Alexander Van der Bellen, had been elected by a very slim margin of some 30.000 votes, these irregularities (which concerned some 77.000 postal ballots, of which some 41.000 votes were for Mr Van der Bellen) may have had an influence on the election result.

In this context, the Court recalled that if it is proven that the law has been infringed to an extent that these infringements may have had an influence on the election result, it is of no relevance if manipulations have actually occurred or not.

The Court ruled that although the infringements of the law governing the postal voting system had occurred in some election districts only, the second round of the presidential elections had to be repeated in Austria altogether.

The reason for this ruling was that citizens who have applied for a voting card can exercise their voting right in various ways: by mail, but also in person at their own local polling station, at another polling station in their own district, or at a polling station in a

district other than their own. As a result, the votes counted in the various election districts are mixed.

To give an example: If someone has applied for a voting card in Linz, but casts his or her vote in person in Salzburg, this vote counts as a valid vote cast in Salzburg. If the Court were to rule that the election has to be repeated in Linz only, the voter could again apply for a voting card, but may this time use it to cast his or her vote in person at his or her local polling station in Linz. In that case, the voter would have cast two valid votes: the first vote counted in Salzburg (because in this district the election is not repeated and the result remains valid) and the second valid vote counted at the repeat election in Linz.

However, one and the same person must be prevented from voting twice. Therefore, a repeat election only for postal voters, or only in certain election districts, had to be ruled out.

Finally, the Court also agreed with the applicant that the principle of freedom of voting had been violated by government bodies transmitting information received on the results of the count of votes to the Austrian Broadcasting Corporation (ORF), the Austrian Press Agency (APA), other media and research bodies before the closing of the election.

The Court noted that if such information is spread systematically, a situation may occur in which results of the count and reports thereon are leaked and disseminated rapidly, especially via social media. In the present case, the Austrian Press Agency had sent out a report, hours before the closing of the election, implying that Mr Hofer was likely to win the election and that a turnaround of the result was no longer considered probable.

In view of the close result of the election, reports on the probable outcome of the election, based on counting results transmitted by official bodies, may have had an influence on the election result.

For this reason as well, the runoff election of the Federal President had to be repeated in its entirety in all of Austria.

The Court made it clear that the Ministry of the Interior (which is in charge of carrying out federal elections) has to ensure that such infringements do not occur in future elections. Therefore, the practice of transmitting results of the count prior to the closing of the election is to be discontinued.

Languages:

German.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2007-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 27.12.2006 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyaya Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Limitation period / Convictions, repeated.

Headnotes:

The Azerbaijan Criminal Code defines repeated and serial crimes. However, there is insufficient provision within the legislation for the inter-relationship between certain crimes. Questions arising from the statute of limitation have also been left open, giving rise to some difficulties in practice.

Summary:

At the request of the Prosecutor's Office, a review was carried out of Article 74.2 of the Criminal Code. It was found that the provision contained insufficient definition of the inter-relationship between certain crimes committed in Azerbaijan. Questions arising from the statute of limitations were also left open, giving rise to some difficulties in practice.

A request was made, in view of the above, for the interpretation of Article 75 of the Criminal Code in connection with the crimes enumerated in Article 74.2 of the Code.

The main purpose of the Criminal Code is to provide peaceful, secure living conditions, to protect human rights and freedoms, property rights, economic activity, public order and security, the environment and constitutional order of the Azerbaijan Republic. Its purpose is also crime prevention. To this end, the Code defines the basic principles of criminal responsibility and determines whether certain activities which pose a danger to individuals, the community or the state should be considered as crimes. It also determines the type of penalty such activities will incur, as well as other measures of a criminal and legal nature.

One such measure is set out in Article 75 of the Code. It deals with the issue of release from responsibility for crime, and other related matters. Specifically, a person will be deemed to be released from responsibility:

- Two years after the perpetration of a crime which does not represent a great danger to the public;
- Seven years after the perpetration of a crime of lesser importance;
- Twelve years after the perpetration of a serious crime;
- Fifteen years after the perpetration of an especially grave crime.

The limitation period begins to run from when the crime is committed until the time the court sentence comes into force. If the person then commits another crime, the limitation period for each crime will be calculated independently (see Article 75.2 of the Code).

If sufficient facts are available, criminal proceedings can be set in motion. If the limitation period has elapsed, a criminal prosecution cannot take place, and indeed any criminal prosecution or proceedings currently under way will have to be discontinued (see Article 39).

If the suspect is missing, the criminal prosecution may be suspended by the investigating authority, under Article 277 of the Criminal Code, so that it can try to trace him or her. If the circumstances justifying suspension of the proceedings no longer exist, they may be resumed by a decision by the investigating authorities, under Article 279. The limitation period will start to run again from the point of detention, appearance or confession of the suspect (see Article 75.3).

It should be noted that Article 75.2 deals with repeated or serial offences, which do not end with perpetration of one crime. The doctrine of serial

offences is well-known, and does not necessarily belong within Article 74.2 of the Criminal Code. However, the failure to provide regulations to cover such conduct results in uncertainty in calculating the limitation period. As a result, such crimes are not dealt with in accordance with normative legal acts. This is out of line with various constitutional principles, including the judicial guarantee of rights and freedoms under Article 60 of Constitution.

The European Court of Human Rights attaches particular importance to limitation periods. In its decision in *Coeme and others v. Belgium*, regarding Article 7 ECHR (no punishment without law), the European Court noted that limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (see paragraph 146 of the decision).

The Plenum of the Constitutional Court decided that application of Article 75 of the Criminal Code to continuous and serial offences within the Criminal Code is in line with the Constitution.

Languages:

Azeri (original), English (translation by the Court).



Identification: AZE-2010-2-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 09.07.2010 / **e)** / **f)** / **g)** *Azerbaijan, Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Right to personal liberty / Freedom, deprivation, measure.

Headnotes:

A court of first instance had, of its own initiative, substituted house arrest for arrest as a measure of restriction.

The Constitution guarantees a universal right of personal liberty, which may only be restricted as specified by law, by way of detention, arrest or imprisonment.

Summary:

A district court in Baku City decided on 28 January 2010, under Article 206.1 of the Criminal Code to place the accused under arrest as a measure of restriction for a period of two months. The Court, by its own initiative, changed the given measure of restriction to house arrest.

In its decision, the Court made reference to the Criminal Procedure Code (hereinafter, the "CPC").

The judicial board on cases of administrative offences of the Appeal Court of Baku City asked the Constitutional Court for an interpretation of Article 157.5 of the CPC, from the perspective of the requirements of Articles 154.4, 156.2 and 163.2 of the CPC, in view of the availability in judiciary practice of different approaches as to the question of replacement of arrest by house arrest, at the initiative of the Court or on the basis of a petition of advocacy. In order to determine the question, the Constitutional Court considered explain the essence of the measure of restriction, and the positions of Articles 154, 156, 157, 163 and 164 of the CPC on measures including arrest and house arrest, and the order of consideration of these measures by courts.

The Constitution provides that everyone has the right to personal liberty, and that this can only be restricted as specified by law, by way of detention, arrest or imprisonment.

The universal right to personal liberty and the right to personal immunity are also enshrined in the international acts devoted to the rights and freedom of the person, including Article 3 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political Rights and Article 5 ECHR.

The Court emphasised that in cases of deprivation of liberty, it is particularly important that the general principle of legal certainty be satisfied. A clear definition of the conditions for deprivation of liberty under domestic and/or international law is essential, and the law itself must be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention.

Criminal procedure legislation, which is based on constitutional requirements and international legal acts, has established the legal procedures governing criminal prosecution and the defence of suspects or accused persons as provided for by criminal law (Article 1.1 of the CPC). Under criminal procedure legislation, the right to liberty may only be restricted in cases of detention, detention on remand or imprisonment in accordance with the law (Article 14.1 of the CPC).

The types of measures of restrictions are specified in Article 154.2 of the CPC. It is evident from the content of this article, and that of Article 154.3 and 154.4 of the CPC, that measures such as arrest, house arrest or bail may only be applied to an accused person. Other measures of restriction may be applied both to accused and to suspected persons.

Criminal procedure legislation has established that house arrest and bail may serve as alternatives to arrest and can be applied in its place once a court decision has been made to arrest the accused (Article 154.4 of the CPC). From this position, it follows that the basis of application of house arrest as a measure of restriction is identical to the basis of application of a measure of restriction in the form of arrest. Consequently, when a measure of restriction is being chosen, the requirements of Article 155.1-155.3 of the CPC should be strictly observed.

In the view of the Constitutional Court, the requirements of Articles 154.4, 156.2 and 163.2 of the CPC should also be strictly observed when Article 157.5 of the CPC is being applied. When deciding upon a measure of restriction, the Court may substitute house arrest for arrest at the request of the defence if, in its opinion, there is no need to isolate an accused person from society by detaining him or her on remand.

Languages:

Azeri (original), English (translation by the Court).



Identification: AZE-2014-2-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 04.04.2014 / **e)** / **f)** / **g)** *Azerbaijan, Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality**.
5.3.39. Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Private property, equal protection.

Headnotes:

The restrictions that may be placed on the right to property in the Constitution are subject to limits under the Constitution. The restriction of the right to property should be executed with reference to the principle of proportionality. As regards the disposal and sale of property in common ownership, the rights of some owners in connection with the possession, usage and disposal of the property cannot be considered above the rights of others. The possibility of exercising the right to property has to be equal for all parties.

Summary:

I. The Court of Appeal of Ganja city requested an interpretation from the Constitutional Court of a number of provisions of Articles 220.6 and 221 of the Civil Code with reference to Articles 13 and 29 of the Constitution and Article 1 Protocol 1 ECHR concerning the right to property.

By a decision of the Agstafa Region Court each of the five heirs of the late F. Mehdiyev was allocated a one-fifth part and ownership rights of 0.12 hectare backyard land and an individual dwelling house located at Dag Kesemen village in Agstafa Region. Four of the heirs filed a claim in court against the fifth heir, seeking a decision from the court to order the sale of the disputed house.

The Agstafa Region Court did not uphold the claim. One of the claimants brought an appeal against the judgment of the court of first instance, seeking cancellation of that court's decision and full satisfaction of the claim.

The appellant noted that Articles 220.3-220.5 of the Civil Code establish rules for the division of property in common ownership and for the apportionment of property shares.

The Court of Appeal of Ganja city sought interpretation from the Constitutional Court of two relevant provisions, as to their compatibility with Articles 13 and 29 of the Constitution and Article 1 Protocol 1 ECHR. First, a provision of Article 220.6 of the Civil Code, which states: "in the event of obvious inability to resolve the division of common property or the separation of a share from it according to Articles 220.3-220.5 of this Code, a court may take a decision on the sale of property at public auction and division of the sale proceeds among the owners of common ownership in proportion to their shares". Second, a provision of Article 221 of the mentioned Code, which states: "in the event participants cannot come to an agreement on the type of termination of their property rights, property shall be physically divided, and where such division is not possible without significant depreciation of the property's value it shall be sold at public auction or auction with the participation of just the owners."

II. The Constitutional Court *en banc* in its judgment observed that property is inviolable and protected by the state. Everyone has the right to own property. The law protects the right to property, including the right to private property. Everyone may have movable and immovable property. The right to property includes the right to possess, use and dispose of property individually or jointly with others.

According to the Civil Code, property may be in common ownership with the establishment of shares of each of the owners (shared ownership) or without the establishment of such shares (joint ownership).

In contrast to owners possessing the right of an entire private property, owners of shared property are not free in exercising their powers over the property.

The applicable civil legislation grants to the owner of shared property the right to divide or apportion that part belonging to him or her from the general property. This right is one of the ways the right to dispose of a share in common ownership can be implemented.

The owner of shared property may demand the separation of his or her share in kind in a court order in the event the owners of the shared property cannot come to an agreement on procedures and conditions for the division of that property or the separation of a share from it. In the event that a separation of a share in kind is not permitted or where it is not possible

without causing disproportionate damage to the property in common ownership, the separating owner has the right to receive compensation from the other owners for the value of his or her share.

Deprivation of the right to one's share of common property is possible only in exceptional cases. The issue of the existence of an essential interest in the use of the general property of an owner of common property in each case is resolved by the courts by research and through the assessment of evidence presented by the parties.

The Civil Code does not envisage the deprivation of the property right of an owner who does not claim separation of his or her share from the common property, by means of payment of compensation by the other owners against the will of that owner. Such an approach would contradict the principle of the inviolability of ownership rights.

The Constitutional Court attached importance to the setting of limits of possible restrictions on the right of ownership stipulated in the Constitution.

The restriction of the right to property is permitted under the observance of the following specified principles. The rights of some of the owners in connection with the possession, usage and disposal of the property cannot be considered above the rights of the others. The possibility of exercising the right to property has to be equal for all parties. In this regard, it is important to note that the judgment concerning the sale of property through a public auction was adopted with the purpose of ensuring the rights of the other owners.

The Constitutional Court held that the restriction of any right stipulated in the Constitution, including the right to property, should be executed with reference to the principle of proportionality.

In the absence of any opportunity for the other participants of payment of compensation or a refusal of payment of compensation, the issue concerning the sale of property through an auction based on a court judgment can be considered. At the same time, where it is impossible to apportion of a share in kind and the owner refuses to accept monetary compensation for a share, this owner cannot demand the sale of the property through a public auction. One of the owners of a common property also has no right to demand a sale of the direct property through a public auction.

The Constitutional Court considered that according to Articles 220.6 and 221 of the Civil Code the decision of the court of first instance on the sale of

the property from the public auction without the consent of all owners and the division of the money received from the sale between owners of the general property in proportion to their shares cannot be regarded as an unlawful restriction of the property right. The sale of property in common ownership through a public auction and the division of the money received from the sale between the owners in proportion to their shares on the basis of a court judgment are possible after the consecutive application of the provisions provided in Article 220.3-220.4 of the Civil Code.

Languages:

Azeri, English (translation by the Court).



Identification: AZE-2015-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 12.02.2015 / **e)** / **f)** / **g)** Azerbaijan, Respublika, *Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.2.3. Constitutional Justice – Types of claim – **Referral by a court.**
 1.4.8.7. Constitutional Justice – Procedure – Preparation of the case for trial – **Evidence.**
 1.4.8.7.1. Constitutional Justice – Procedure – Preparation of the case for trial – Evidence – **Inquiries into the facts by the Court.**
 2.1.1.1.1. Sources – Categories – Written rules – National rules – **Constitution.**
 3.4. General Principles – **Separation of powers.**
 3.12. General Principles – **Clarity and precision of legal provisions.**
 4.7.3. Institutions – Judicial bodies – **Decisions.**
 5.3.13.1.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**

Keywords of the alphabetical index:

Criminal, legislation, proceedings / Evidence, operative search, inspect, investigate.

Headnotes:

Some provisions of Articles 137 and 445.2 of the Criminal Procedure Code provide for judicial control in the sphere of examining and determining the use of materials obtained during operative search activities as evidence.

Summary:

I. The Gabala Region Court requested the Constitutional Court to clarify some provisions of Articles 137 and 445.2 of the Criminal Procedure Code (hereinafter, the "CPC"), specifically the limits of judicial control concerning materials extracted as a result of operative-search activity.

The resolution of 8 July 2014 "On carrying out of operative-search activity" and two protocols "On holding an inspection" carried out on the same day was brought by the Gabala Regional Office of Police to the Gabala Region Court's attention according to requirements of Article 445.2 of the CPC.

Recognition and use of materials seized during operative-search activities as evidence are allowed only if these materials are presented and examined according to criminal procedure requirements (Article 137 of the CPC). Article 445.2 of the CPC provides not only for submission of the resolution on carrying out of operative-search activity to the court for information, but also for the court to examine the legality of the relevant operative-search activity as a result of which the materials were obtained. However, the issue is that rules for granting and examining operative-search materials in the criminal procedure legislation are not yet established.

II. The Constitutional Court noted that judicial and legal reforms are among top priorities in Azerbaijan's development as a constitutional state. The court's role is especially important in guaranteeing a person and citizen's rights and freedoms, which are supreme values according to the Constitution. Restriction on human rights is possible only by law. Control of the legality, proportionality and justice of the restriction is carried out by courts.

In criminal procedure legislation, the judiciary generally has functional duties at the stage of pre-judicial procedure. Judicial control is one of the independent forms of judicial activity within criminal trial that serves to prevent illegal intervention in a person and citizens' rights and freedoms and to restore rights violated by the activity of the investigator or the prosecutor controlling the preliminary investigation. The legal value of judicial

control is established by the Constitution and interstate contracts to which Azerbaijan is a party.

According to the Constitution, legal protection of the rights and liberties of every citizen is ensured. Everyone is entitled to appeal to the court in connection with decisions and activity (or inactivity) of state bodies and state officials.

The legality of a court's restriction on a person and citizen's rights and freedoms follows from Part VII of the Constitution. Thus, the court shall resolve disputes connected with violation of such rights and freedoms. Any lawful prosecution by government bodies shall be controlled and scrutinised by independent judicial authority.

Judicial control during pre-judicial production has recently been incorporated into criminal procedure legislation. Judicial control is directed at preventing subjects of preliminary investigation during pre-judicial procedure from breaching a person and citizen's rights and freedoms. While the public prosecutor's supervision is generally directed at verifying the respect of the rule of law during activity of inquiry by operative-search bodies, judicial control is aimed at verifying the validity, proportionality, expediency, and urgency of the restriction on the person's rights and freedoms.

Under the principle of division of procedural functions, the court does not have complete duty to control the legality of all activities of subjects of operative search or preliminary investigation. Registering information of a crime and resolving issues at the beginning of preliminary investigation or procedural measures untied with restriction of other rights and freedoms of the person are not within the court's judicial control.

In contrast to the public prosecutor's supervision, the judiciary examines the legality and validity of decisions made by inquiry, investigation and prosecutor bodies in connection with a guarantee of the rights and freedoms of the person and citizen.

Article 442.2 of the CPC, acting since 1 September 2000, defines the object of judicial control. It specifies that during a procedure of judicial control, the court shall consider the following: applications and submissions concerning the compulsory conduct of investigative procedures, the application of coercive procedural measures or the conduct of search operations which restrict individual freedom, the inviolability of premises, personal inviolability and the right to privacy (including that of family life, correspondence, telephone conversations, post, telegraph and other information) or which concern information containing state, professional and

commercial secrets; complaints against the procedural acts or decisions of the prosecuting authorities.

The results of operative search activity used in criminal trial can be received by two ways:

1. as a result of actions carried out with court consent;
2. as a result of actions carried out without prior court consent but under a condition to subsequently notify the court concerning the specified measures.

In the first case, the problem of the volume (limits) of judicial control over operative search activity via preliminarily received judgment does not create any disputes. According to Article 446.4 of the CPC, documents corroborating the need for compulsory investigative procedure, coercive procedural measure or the search operation shall be attached to the application. If these documents are not sufficient, the prosecutor in charge of the procedural aspects of the investigation or the judge exercising judicial supervision has the right to require them.

The legislator had set out the requirements for the petition of the head of the body carrying out the operative search activity. For example, the petition must justify the necessity of the action, specify the goals and explain why these results cannot be achieved by other ways and means, term, place and other important information.

The provisions specified in the petition are then presented to the prosecutor. After reviewing the materials, the prosecutor determines whether to issue a reasonable decree on refusal of protection of the petition. Alternatively, the prosecutor may forward the materials in the petition to the court for pronouncement of the relevant decision.

According to Article 448 of the CPC subsequent to the results of court session, concerning issues related to implementing the operative search action, the judge decides whether to authorise the operative search activity. The decision is provided to the body that initiated the operative search action and the presented materials are returned. At the same time, the decision made by the court has to be completely based on the judge.

While the Plenum of the Constitutional Court's was considering this inquiry, it was established that after carrying out the urgent measures, the order of the court notification on measures carried out under judicial control was put into practice differently. The reason is that it was a completely formalistic

approach to the requirements of a norm by law applying subjects. In this case, an authorised official of a body conducting search operation should within 48 hours of carrying out of the search submit the reasoned decision on the conduct of the search operation to the court exercising judicial supervision.

The specified norm of the CPC demands that the body carrying out the operative search action, within 48 hours after the action, must formally submit only the motivated resolution on carrying out the measure to the court exercising judicial control. In case of a formalistic approach, the court has to adopt the relevant decision, having only checked the necessity of the carried-out action and that it was according to the law. The copy of this decision is forwarded to the body carrying out the activity and to the prosecutor charged with managing the preliminary investigation. In the future, at trial on the merits, results of this operative measure are considered in the general order. That is, as well as other proofs, the results of the operative search actions are also checked and estimated.

During the process of collecting evidence, courts have the right, at the request of parties to the criminal proceedings or on their own initiative, to require presentation of documents and other items of significance to the prosecution by individuals, legal entities, officials and authorities which carry out search operations. Courts can also require checking and inspections by authorised authorities and officials.

Judicial control expands during the process of collecting proofs. Carrying out operative search actions under judicial control provides grounds to use the results of this measure as proof in a criminal procedure order. In the future, for the purpose of ensuring effective and objective use of proofs, courts during the pre-judicial stage have to be authorised to provide a comprehensive function of judicial control.

Limits on judicial control over operative search actions are invariable, whether results of these actions were obtained, as provided by legislation, as a result of events held with consent of court or without prior consent of court (but with subsequent notification to the court). In turn, courts make relevant decisions after inspection carried out in the framework of judicial control. From this point of view, the courts as judicial control – after verifying the legality, validity, proportionality, expediency and urgency of carrying out of the action from the point of view of a guarantee of rights and freedom – can make a decision according to Article 448 of the CPC.

At receipt in court of the resolution to carry out an operative search action according to Article 445.2 of the CPC, its legality and validity from the point of view of ensuring the rights and freedoms of person has to be verified by a court, which also can demand materials extracted as a result of operative search activity (keeping confidential). If materials obtained on the basis of the resolution are received according to the Law "On Operative Search Activity", presented according to requirements of the CPC and comprehensively inspected by the court, according to requirements of the Article 137 of this Code, they can be recognised as proof for criminal prosecution.

Languages:

Azeri, English (translation by the Court).



Identification: AZE-2016-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 14.11.2014 / **e)** / **f)** / **g)** Azerbaijan, Respublika, *Khalg gazeti*, *Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Labour code / Pension, workplace, legislation.

Headnotes:

Provisions of the legislation governing work pensions which specify that certain workers (and not others) will receive extra pensions (in line with their length of service) are not in breach of the principle of equality and of the inviolability of property.

Summary:

I. The Supreme Court took issue in its application to the Constitutional Court with certain aspects of the Law on Labour Pensions, pointing out in particular that Article 20b of this Law provides for additions to

pensions for length of service for certain specified persons. These additions and the pension in itself represent the scale of the pension. Under Article 37.2 of the Law, payment of pension is to be carried out together with the additions and according to the rules on payment of pensions.

Article 37.3.4 provides that those persons indicated in Article 20.1.1, 20.1.10 and 20.1.14 of the Law on Labour Pensions will receive an additional 50% to their pension. In other cases the extra pension will be paid in full. Under Article 37.3.4, only those persons indicated in Article 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of the Law (with a length of service of at least 25 years in these organisations) will receive the extra payment; it does not extend to persons working in other positions.

In the applicant's view, the rules governing the payment of additional pensions are out of line with certain provisions of Constitution, because they contravene the principle of equality before the law. Non-payment of additions to pensions leads to deprivation of earned property, which is in breach of the principle of inviolability of property enshrined in Article 29 of the Constitution.

II. The Plenum of the Constitutional Court observed that the right to social protection is one of the basic socio-economic rights fixed in the Constitution; under Article 38.1 of the Constitution, everyone has the right to social protection. Under Article 38.3, everyone is entitled to social protection once they have reached a specific age noted in the legislation. This right is reflected in the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights.

The Plenum of the Constitutional Court had noted in an earlier decision that, although the Constitution contains a guarantee that social rights will be protected in an identical order and on a par with other rights fixed in the Constitution (personal, economic, political and cultural), the ensuring and realisation of these rights has a number of specific characteristics. The rational realisation of social rights differs from other categories in that it is bound to the financial ability of the State.

The European Court of Human Rights has also observed on several occasions that "Article 1 Protocol 1 ECHR does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme" (*Stec and others v. The United Kingdom*) and "the Court in fact excludes Article 1

Protocol 1 ECHR ... that consequently it applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions" (*Marckx v. Belgium*), and "if legislation of state did not provide the certain law, then the mentioned norm of Convention in itself did not provide any kind of pension or guarantee of right of receiving of pension in a certain rate" (*Maria Elisabeth Puricel v. Romania*).

The Plenum also noted that additions to pensions for length of service fall within the remit of Article 1 Protocol 1 ECHR on condition that all terms set out in the legislation on the receiving of pension are met.

The rationale behind Article 37.3.4 of the Law on Labour Pensions is that receipt of additional pensions at the rate of 50% for length of service by a number of persons who are working whilst receiving a pension is conditioned by leaving their official capacity. Non-payment of additional pensions to persons who are working whilst receiving pensions cannot be considered a violation of the principle of inviolability of property. The Plenum of the Constitutional Court also expressed the view that gradual improvement by the legislator of the rules surrounding additions to occupational pensions for long service rendered for those persons identified in Article 20.1.1-20.1.10 and 20.1.14-20.1.21 of the Law on Labour Pensions would serve to strengthen the stability and constancy in the activities of the government bodies specified in the above provisions.

Cross-references:

European Court of Human Rights:

- *Stec and others v. The United Kingdom*, nos. 65731/01, 65900/01, 12.04.2006, *Reports of Judgments and Decisions* 2006-VI;
- *Marckx v. Belgium*, no. 6833, 13.06.1979, Series A, no. 31;
- *Puricel v. Romania*, no. 20511/04, 14.06.2011.

Languages:

Azeri, English (translation by the Court).



Identification: AZE-2016-1-002

a) Azerbaijan / b) Constitutional Court / c) / d) 14.05.2015 / e) / f) / g) Azerbaijan, Respublika, *Khalq gazetesi*, *Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / h) CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.1.1. Sources – Categories – Written rules – National rules – **Constitution**.

4.10.4. Institutions – Public finances – **Currency**.

4.10.5. Institutions – Public finances – **Central bank**.

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

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

Keywords of the alphabetical index:

Loan, agreement, contract, obligations / Party, foreign person or legal entity / Currency / Payment, calculation, rate, term.

Headnotes:

There is a constitutional requirement that monetary obligations between Azerbaijani residents must be denominated in manats, but the requirement does not apply to obligations arising out of loan agreements. Where the payments under foreign currency denominated loans (principal and interest) are made in the parties' agreed currency, the loan may be repaid in manats at an exchange rate at the place and time of payment.

Summary:

I. The applicant (Commissioner for Human Rights) requested the Constitutional Court to consider whether provisions of Article 439.1, 439.2 and 439.7 of the Civil Code comply with Articles 19.III, 149.III and 149.VII of the Constitution, as well as Article 25 of the Constitutional Law "On Normative Legal Acts".

Article 439.1 of the Civil Code stipulates that "a monetary obligation shall be expressed in manats. If any of the parties is a foreign private person or legal entity, then the parties, if permitted by law, shall determine the obligation in foreign currency as well". Article 439.2 of the same Code states that "in the event the obligation determined in foreign currency has to be paid in the Republic of Azerbaijan, it will be paid in manats, except for the cases where payment in foreign currency is agreed", unless prohibited by

Article 19.III of the Constitution. Article 439.2 of the Civil Code further specifies that if the payment will be made in Azerbaijan, it should be recalculated based on the exchange rate at the time and at the place of payment, in accordance with the provisions of Article 149.VII of the Constitution.

To the applicant, the aforementioned provisions contradict Article 439.7 of the Civil Code, which stipulates that the recalculation shall be carried out "in accordance with the exchange rate as of the time of the obligation". The inconsistency challenges Article 25.1 of the Constitutional Law "On Normative Legal Acts", which specifies that "normative legal acts should be coordinated intuitively, set up logically and be matched according to the technique needs of establishment of norm".

The applicant also requested the Court to interpret Article 439.7 of the Civil Code, particularly the meaning of "maturity" of the monthly interest payment on the loan agreement, to contain the payment according to the term of the loan agreement or "from the time of the commitment". The applicant interpreted them to mean the monthly interest on payment day, the payment day of the credit amount or the day to conclude the loan agreement. The applicant also requested the Court to interpret "exchange rate", specifically what constitutes the change in rate.

According to Article 19.1 of the Constitution, the currency is the manat. According to Part III of the same Article, "other monetary units besides the manat as a means of payment within the territory of the Republic of Azerbaijan are prohibited". The concept of "money" in the Law "On Banks" includes foreign currency. Thus, in accordance with the Law, the bank loan is cash lent for a certain amount of money secured or not secured, but must be repaid in accordance with the agreement for a certain period of time (with the right to extend the period) and with payment of interest rates (fees).

Article 136 of the Civil Code determines the ability of the items to be the subject of civil law relations. This Article is divided into three groups of items:

- Non-usable items;
- Limited civil circulation articles; and
- Civil circulation.

There are no restrictions on the circulation of foreign currency in both laws. This proves, according to the applicant, that in case of failure to repay the agreed foreign currency, the obligation may be alienated or passed from one person to another. According to Article 739.2 of the Code, any amount of money that

is the subject of a loan agreement is called the "loan agreement".

II. Based on the abovementioned provisions of the legislation, the Plenum of the Constitutional Court concluded that:

- a. Article 19.III of the Constitution implies that "means of payment" is the exchange of the work done, the service, sold merchandise and etc. for the payment, as well as the obligatory payments (taxes, social insurance, etc.);
- b. Manat along with a means of payment is considered to be goods, such as a physical object (Article 135.1 of the Civil Code);
- c. Foreign exchange as well as exchange of goods may pass freely from one person to another or alienated (Articles 135.1 and 136.1 of the Civil Code);
- d. Money made available for loan or deposit contracts (manat or foreign currency), besides being the subject of the contract, acts not as a means of payment, but rather as the property that should be returned (Article 739.1 of the Civil Code).

The Plenum of the Constitutional Court considered that, in view of these results, Article 439.1, 439.2 and 439.7 of the Civil Code should be assessed on the substance of the paragraphs. It was guided by Article 130.VI and 130.VII of the Constitution and Articles 52, 60, 62, 63, 65-67 and 69 of the Law "On Constitutional Court".

The Court ruled that provisions Article 439.1 and 439.2 of the Civil Code do not conflict with the requirements of Article 19.III of the Constitution. According to Article 19 of the Constitution, "means of payment" means the exchange of the work done, the service, sold merchandise etc. for the payment, as well as the obligatory payments (taxes, social insurance, etc.). The provision of Article 439.1 of the Civil Code, specifically "the commitment of money should be specified in manats", means that the subject of agreement of credit (loan) obligations could be also held in a foreign currency and are not subject to the same obligations.

In accordance with Article 439.2 of the Civil Code, the credit (loan) agreement on the principal and interest is paid, if agreed, on the loan agreement in the currency specified in the contract. In the absence of such a condition in the contract, the debtor has the right to pay the principal and interest on the loan based on the payment applicable exchange rate of manat.

Article 439.7 of the Civil Code shall apply to the obligations of the money in manats but this time, the provision “maturity” means the defined period of execution of the liability in the contract terms. The provision arising from the contract, namely “the obligation of the time”, means the time of conclusion of the contract. Taking into account the interests of the population, the extension of credit on loans in foreign currency, interest rates and the implementation of other appropriate measures for favourable conditions shall be carried out depending on the financial status of banks.

Languages:

Azeri (original), English (translation by the Court).



Belarus Constitutional Court

Important decisions

Identification: BLR-2011-3-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 04.10.2011 / **e)** D-627/2011 / **f)** On some issues of legal regulation on granting parental leave / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2011 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.5. General Principles – **Social State**.
3.21. General Principles – **Equality**.
5.2.2.1. Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.4.14. Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

Keywords of the alphabetical index:

Law, incorrect application, equality, right / Family allowance / Parental leave allowance, father / Discrimination, indirect.

Headnotes:

The right of the father or another relative of a child to social parental leave is not derived from the mother's right to the specified social leave. The right of the working father or other relative of the child, who is actually caring for the child, to social parental leave and state allowance is a separate right.

Summary:

The Constitutional Court considered the issue of granting social parental leave to the father of a child.

According to the relevant provisions of the Labour Code the employer shall grant parental leave to working women, regardless of their seniority, at their request after the interruption in work due to childbirth. This leave is granted until the child reaches the age of three years, with a monthly payment of the state allowance. It is noted in the appeal that, in practice, the parental leave to care for a child up to three years

old is not granted to the father or other relatives if the mother of the child works as a self-employed entrepreneur.

According to the explanation of the Ministry of Labour and Social Protection, where the applicant (the mother of the child) is a self-employed entrepreneur and she is not entitled to parental leave to care for a child up to three years old by virtue of the labour legislation, such leave may not be granted to the father of the child.

1. In accordance with the Constitution the Republic of Belarus is a democratic, social state based on the rule of law (Article 1.1 of the Constitution), in which the individual, his or her rights, freedoms and guarantees to secure them are the supreme value and goal of the society and the State; the State shall assume responsibility for the citizen to create the conditions for free and dignified development of his or her personality (Article 2 of the Constitution). The constitutional provision stated in Article 21.2 of the Constitution on the right of everyone to a decent standard of living, including appropriate food, clothing, housing and a continuous improvement of conditions necessary to attain this complies with features of the social state. Article 47 of the Constitution, which stipulates that citizens of the Republic of Belarus shall be guaranteed the right to social security in instances specified by law, is aimed at achieving this level.

The principle of legal equality of all before the law, enshrined in Article 22 of the Constitution, and the principle of proportionality of restriction of personal rights and freedoms arising from Article 23.1 of the Constitution comply with the requirements for a state based on the rule of law.

The Constitution provides for the protection of marriage, family, motherhood, fatherhood, and childhood by the State; parents or persons acting as parents have the right and are obliged to raise their children and to take care of their health, development and education (Article 32.1 and 32.3 of the Constitution).

The Constitutional Court noted that working as a self-employed entrepreneur is one way of realising the citizen's constitutional right to work, guaranteed by the state. Its realisation should not entail any negative consequences for the family of the self-employed entrepreneur. The family at its own discretion appoints the parent member or other relative of the child who will actually care for the child until he or she is three years old. Thus, such a person will become entitled to social parental leave.

According to Article 22 of the Constitution all shall be equal before the law and have the right to equal protection of their rights and legitimate interests without any discrimination. This principle of legal equality is one of the most important principles of the state based on the rule of law and the Republic of Belarus as a state based on the rule of law is obliged to respect it when carrying out public functions including rule-making and law-enforcement.

Article 23 of the Constitution permits restriction of personal rights and freedoms only in the instances specified by law, in the interests of national security, public order, protection of the morals and health of the population as well as rights and freedoms of other persons.

The implementation of these constitutional provisions makes it necessary to respect the principle of proportionality of restriction of personal rights and freedoms so that the scope of restriction of a right does not distort the essence of the limited right and meets the constitutionally protected values and goals.

The Constitutional Court found the approach applied in practice unlawful, in that it views the right of the father or another relative of the child to social parental leave as derived from his mother's right to the specified social leave. The right of the working father or other relative of the child, actually caring for the child, to social parental leave is a separate right. The exercise of this right is guaranteed by the provisions of the Constitution.

The Constitutional Court notes that not-granting parental leave until the child reaches the age of three years to a working father, other relatives of the child, in case the mother of the child is an individual entrepreneur, is not based on constitutional principles and rules characterising the Republic of Belarus as a social state based on the rule of law, but caused by a legal gap in the regulation of relations in this field that results in violation of the rights and legitimate interests of individuals.

The Constitutional Court recognised the necessity to fill the said gap in the legal framework by legislating for the right of the working father and other relatives of the child, actually caring for the child, to be granted the specified parental leave where the child's mother is a self-employed entrepreneur.

The Constitutional Court proposed that the Council of Ministers would, using its legislative initiative, prepare a draft law introducing the relevant alterations and *addenda* to the Labour Code, the Law "On State Allowances for Families with Children", and submit it

under the established procedure to the House of Representatives of the National Assembly.

Languages:

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



Identification: BLR-2012-1-001

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 16.02.2012 / **e)** D-681/2012 / **f)** On legal regulation of relief from criminal punishment or mitigation of punishment in case of disease / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 1/2012 / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.10. General Principles – **Certainty of the law.**
 3.12. General Principles – **Clarity and precision of legal provisions.**
 3.21. General Principles – **Equality.**
 3.23. General Principles – **Equity.**
 5.1.1.4.3. Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**
 5.2.2.8. Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**
 5.3.13.1.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
 5.4.19. Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

Detention, after conviction / Remission of sentence, loss / Sentence, serving / Punishment / Illness, serious.

Headnotes:

The principles of justice and humanity are core principles of the criminal law and of criminal liability and apply to both a system of penalties under the Criminal Code and to the ordering of their execution. The legislator is required to set out the possibility for the relief of a person from serving a sentence of

imprisonment or for reduction of a sentence of imprisonment due to a serious disease that prevents the person from serving the sentence, regardless of the time of the occurrence of such disease.

Summary:

The Constitutional Court considered in court session the appeal of an applicant on the gap in the criminal legislation concerning regulation of the relief of a convicted person from serving a sentence of imprisonment due to a disease.

In evaluating the approaches of the legislator to the regulation of relieving or reducing a punishment on the grounds of a serious disease suffered by the detained person, the Constitutional Court noted that the implementation of the principles of justice and humanity, which are two core principles of the criminal law and of criminal liability, applies to a system of penalties under the Criminal Code, and to the ordering of their execution.

Article 92.2 of the Criminal Code provides for a court to relieve a detainee from serving a sentence of imprisonment or to reduce that sentence where after the verdict the detainee falls ill with a serious disease (except a psychiatric illness) that prevents the person from serving the sentence, that is, if the convict develops a disease of such severity that physical relief from the suffering associated with the manifestation of the disease is impossible while serving a sentence. In this case the severity of the offense, the personality of the detainee, the nature of disease and other circumstances are taken into account.

According to the Constitutional Court, analysis of the constitutional-legal content of Article 92 of the Criminal Code reveals that the intention of the legislator was to express humanitarianism from the State to a person with a serious disease that prevents the further serving of a sentence, and therefore provided the possibility for a court to relieve the person from serving a sentence or to reduce the sentence. Article 92 sets down a time condition in relation to the occurrence of a serious disease, i.e. the medical criteria under which a person may be relieved from serving a sentence or according to which it may be reduced, if that person developed a disease after the verdict. The presence of legal uncertainty derives from the fact that, in some cases, it will not be possible to establish the time of occurrence of the disease.

The Constitutional Court considered that the uncertainty of the content of the legal rule implies the possibility of ambiguity in the understanding and application of the rule in practice, as pointed out by the

applicant's appeal to the Constitutional Court, which could lead to a violation of the constitutional principles of equality before the law and the rule of law.

On the basis of the constitutional principle of equality before the law, individuals suffering from a serious disease that impedes on their ability to further service the punishment should be guaranteed judicial review of the possibility of their release from serving punishment or mitigation of punishment taking into account the gravity of the crime, the personality of the convicted person, the nature of the disease and other factors regardless of the time of development of a disease: before or after sentencing.

Equality before the law can be ensured only if legal rules are uniformly interpreted and applied in practice. This implies the requirement of clarity and certainty of legal regulation of social relations in a particular field.

According to the Constitutional Court, the removal of a legal uncertainty in the regulation of relief from serving a sentence of imprisonment or reduction of a sentence due to a disease that prevents the serving of a sentence, will ensure realisation of the constitutional principles of the rule of law, equality before the law, justice and humanity.

The Constitutional Court considered it necessary to introduce changes to Article 92 of the Criminal Code to allow for the relief of a person from serving a sentence or the reduction of a sentence due to a serious disease that prevents the serving of a sentence, regardless of the time of the occurrence of such disease.

Languages:

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



Identification: BLR-2014-3-006

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 08.12.2014 / **e)** D-952/14 / **f)** On the conformity of the Law of the Republic of Belarus "On Making Addenda and Alterations" to the Law "On Combating Trafficking in Human Beings" to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2014; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 5.1.3. Fundamental Rights – General questions – **Positive obligation of the state.**
 5.3.1. Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.3. Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**
 5.3.5.2. Fundamental Rights – Civil and political rights – Individual liberty – **Prohibition of forced or compulsory labour.**

Keywords of the alphabetical index:

Human dignity, violation, trafficking in human beings / Child, trafficking, protection / Trafficking in human beings, criminalisation / Trafficking in human beings, human dignity, violation / Exploitation, criminalisation.

Headnotes:

The introduction by the legislator of additional criteria in the terms "trafficking in human beings" and "exploitation" is intended to criminalise a wider scope of socially dangerous acts related to various forms of exploitation of an individual. The amendment prescribing that the term "trafficking in human beings" covers all acts committed with the purpose of exploitation of minors – regardless of using such means as the deception, abuse of confidence, threat or use of force – is aimed at the protection of interests of minors and safeguards their well-being.

Summary:

1. The Constitutional Court in the exercise of obligatory preliminary review considered the constitutionality of the Law "On Making Addenda and Alterations" to the Law "On Combating Trafficking in Human Beings" (hereinafter, the "Law"). Obligatory preliminary review (i.e., abstract review) is required for any law adopted by the Parliament before it is signed by the President.

1. First, the Constitution establishes that the Republic of Belarus, as a state based on the rule of law, ensures the legality and legal order (Article 1.1 and 1.3 of the Constitution); the individual, his or her rights, freedoms and safeguards of their realisation are the supreme value and goal of the society and the state; the state shall assume responsibility before the citizen to create the conditions for free and dignified development of his or her personality; the citizen shall assume responsibility before the state to strictly discharge the duties imposed by the Constitution

(Article 2 of the Constitution); and the state shall safeguard the rights and freedoms of citizens of Belarus enshrined in the Constitution, laws and state international obligations (Article 21.3 of the Constitution). The Republic of Belarus acknowledges the supremacy of the generally recognised principles of international law and ensures the compliance of legislation therewith (Article 8 of the Constitution).

The Constitutional Court noted that the Law is aimed at the implementation of these constitutional provisions as well as at the performance of international obligations assumed by the Republic of Belarus.

The Republic of Belarus acceded to the most significant international legal acts in the sphere of combating trafficking in human beings, including the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 (entered into force for the Republic of Belarus on 1 March 2014) based on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime of 15 November 2000 (entered into force for the Republic of Belarus on 25 December 2003); provisions thereof are reflected in the Law.

Article 1.1 of the Law sets out definitions of “trafficking in human beings” and “exploitation”. The Constitutional Court is of the view that the introduction by the legislator of additional criteria in determining the mentioned terms is intended to criminalise a wider scope of socially dangerous acts related to trafficking in human being and various forms of exploitation of individuals, including their formerly unpunishable manifestations. It aims to strengthen the rule of law and legal order and complies with the constitutional obligations of the state to protect the life of every individual against any unlawful infringements and safeguard personal liberty, inviolability and dignity (Articles 24.2 and 25.1 of the Constitution).

The extension of content of the term “trafficking in human beings” by indication of acts committed with the purpose of exploitation of minors regardless of use of such means as deception, abuse of confidence, threat or use of force is aimed at the protection of interests of minors and insurance of the highest possible safeguards for their well-being. It conforms to the rule of Article 32.1 of the Constitution prescribing that childhood is placed under the protection of the state as well as ensuring due execution by the Republic of Belarus of commitments assumed under the Convention on the Rights of the Child (the Republic of Belarus is a Contracting Party) adopted by UN General Assembly Resolution of 20 November 1989.

At the same time the Constitutional Court draws the legislator's attention to the necessity of making timely amendments to the Criminal Code of the Republic of Belarus in order to specify criteria of appropriate *corpus delicti* with the view of guaranteeing an unambiguous understanding of the terms introduced by the Law and ensuring a uniform application of the law.

The need to introduce such clarity is conditioned by the requirement to respect the principle of the rule of law established by Article 7 of the Constitution which implies the principle of legal certainty providing for mandatory mutual harmonisation of normative legal acts, systematic and comprehensive legal regulation of social relations and the use of unified terminology.

2. Second, the Law enshrines a definition of identification of victims of trafficking in human beings as a complex of actions carried out with the purpose of obtaining data on the commission of trafficking in human beings and related crimes with regard to individuals (Article 1.1). At the same time the Law “On Combating Trafficking in Human Beings” is supplemented by Article 17.1 “Identification of victims of trafficking in human beings” (Article 1.4 of the Law).

Provisions on the identification of victims of trafficking in human beings implement rules of the Council of Europe Convention on Action against Trafficking in Human Beings which requires that a State Party to the Convention shall adopt such legislative or other measures as may be necessary to identify victims (Article 10.2); and shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim (Article 13.1).

The Constitutional Court considered that the legislator while assigning appropriate powers related to the identification of victims of trafficking in human beings to competent state bodies and organisations creates necessary conditions for the due execution of regulations of the said Convention as well as for making a grounded decision within the recommended time.

The Constitutional Court recognised the Law On Making Addenda and Alterations to the Law On Combating Trafficking in Human Beings to be in conformity with the Constitution.

Languages:

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



Identification: BLR-2015-2-003

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 02.07.2015 / **e)** D-989/2015 / **f)** On the Right of Witnesses in Criminal Proceedings to Legal Assistance / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2015; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law**.
 3.10. General Principles – **Certainty of the law**.
 5.3.13.27.1. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance**.

Keywords of the alphabetical index:

Witness, legal assistance, right / Criminal proceedings, witness, legal assistance, right.

Headnotes:

According to the Criminal Procedure Code all persons participating in criminal proceedings shall have the right to legal assistance for protection of their rights and freedoms, including the right to legal assistance of lawyers and their other representatives. The right of a witness to legal assistance during investigative and other procedural actions shall not depend on the discretionary powers of the preliminary investigation bodies and shall be ensured at all stages of the criminal procedure and cannot be restricted under any circumstances.

Summary:

The Constitutional Court considered the case on existence of a legal gap concerning regulation of the right of witnesses in criminal proceedings to legal assistance. The proceedings were initiated by the Constitutional Court in accordance with Article 158 of the Law “On the Constitutional Proceedings” on the basis of the application submitted by the National Human Rights Public Association “Belarusian Helsinki Committee” on the necessity to eliminate a legal gap and to enshrine in the legislation the right of individuals acting as witnesses in criminal proceedings to legal assistance. The applicant points

out the absence of rules on legal assistance for witnesses in the procedural legislation. In practice this fact often leads to the refusal to deliver legal assistance to witnesses and to violation of the rights guaranteed by the Constitution.

When considering the case the Constitutional Court proceeded from the following. The right of everyone to legal assistance to exercise and protect his or her rights and freedoms, including the right to make use, at any time, of assistance of lawyers enshrined in Article 62.1 of the Constitution is one of the most important principles of a democratic state based on the rule of law.

This constitutional provision confirms the commitment of the Republic of Belarus to the generally recognised principles of international law in the field of administration of justice concerning persons charged with a criminal offence and corresponds to the international instruments which extend the scope of the right to qualified legal assistance to other participants in the criminal proceedings, including witnesses.

By virtue of the Law “On Legal Practice and Advocacy in the Republic of Belarus” any individual or legal entity on the territory of Belarus has the right to seek legal assistance from a lawyer of their choice in order to protect their rights and interests before the courts, state bodies and other organisations that are competent to settle such legal issues and before other individuals (Article 6.2); the Court, state body, organisation or official cannot refuse to recognise the right of a lawyer to represent the rights and interests of an individual or legal entity seeking legal assistance, except in the cases stipulated by legislative acts (Article 17.3).

The Criminal Procedure Code (hereinafter, the “CPC”) stipulates that all individuals participating in criminal proceedings shall be equal before the law and shall have the right, without any discrimination, to equal protection of their rights and legitimate interests; everyone has the right to legal assistance in criminal proceedings in order to exercise and protect the rights and freedoms, including the right to use legal assistance of lawyers and other representatives in the cases and according to the procedure established by Article 20.1 and 20.4 of the CPC; restriction of the rights and freedoms of individuals participating in criminal proceedings shall be permitted only on the grounds and according to the procedure established by Article 10.2 of the CPC.

The constitutional principle of legality, specified in the CPC rules, means that the court, the criminal prosecution body in the criminal proceedings, shall be

obliged to precisely observe the requirements of the present Code; violation of the law in the care of criminal proceedings shall be inadmissible and shall result in liability under the law and recognition of decisions as void (Article 8.1 and 8.2 of the CPC); a witness, in turn, shall be obliged: to appear before the body conducting criminal proceedings when summoned; to give all truthful information on the case and to answer the questions; not to divulge information about circumstances of the case which became known to him or her, if he or she is warned about it by the criminal prosecution body or by the court; to obey lawful orders of the body conducting criminal proceedings (Article 60.4 of the CPC).

However, the CPC does not contain provisions enshrining directly the right of witnesses to competent legal assistance, although the witnesses' testimony is an important source of evidence and failure to perform obligations provided for by the CPC may result in criminal liability.

The absence in the CPC of a rule enshrining obligation of the body conducting criminal proceedings to allow a lawyer to participate in criminal proceedings as a representative of a witness does not permit to realise properly the constitutionally guaranteed right to legal assistance, including during the investigation and other procedural actions with the participation of the witness.

The necessity to provide this right to the witness is conditioned by the fact that the knowledge of his or her basic procedural rights and obligations is essential not only for the due conducting of the criminal proceedings, but also serves as an additional guarantee of observance by the official of the body conducting criminal proceedings, as well as by the witness of legal requirements the violation of which could result in criminal liability of those involved in criminal proceedings.

In addition, the testimony of a witness given in the presence of a lawyer, according to the Constitutional Court, will have a greater degree of certainty and legal significance for taking a lawful and well-grounded decision upon the criminal case.

Thus, the criminal procedure law which is aimed at enshrining the due legal procedure of conducting the criminal process, contributing to the formation of respect of the human rights and freedoms, the strengthening justice, does not provide for the mechanism of exercising the witness' right to legal assistance.

In its decision the Constitutional Court stated that the right to legal assistance shall not depend on the discretionary powers of the preliminary investigation bodies and shall be ensured at all stages of the criminal procedure and cannot be restricted under any circumstances.

Thus, in order to:

- a. to ensure the constitutional principle of the rule of law providing for the necessity of the timely elimination of gaps, collisions and legal uncertainty in normative legal acts, the formation of a legal system is necessary in which normative legal acts shall be correlated, coherent with each other, and which ensures clarity, accuracy, consistency and a logical coherence of legal rules;
- b. to implement the constitutional right of everyone to legal assistance to exercise and protect his or her rights and freedoms, including the right to make use, at any time, of assistance of lawyers the Constitutional Court recognised it necessary to eliminate a legal gap in the CPC concerning legal regulation of the exercise by witnesses in criminal proceedings of their right to qualified legal assistance.

The Constitutional Court proposes that the Council of Ministers prepare an appropriate draft law on making alterations and addenda to the CPC aimed at regulation of the right of a witness to make use of legal assistance of a lawyer during investigative and other procedural actions and submit it to the House of Representatives of the National Assembly.

Languages:

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



Identification: BLR-2015-3-004

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

Keywords of the systematic thesaurus:

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

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

3.13. General Principles – **Legality.**

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

5.3.13.3.1. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law.**

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

Keywords of the alphabetical index:

Prosecution, private / Criminal prosecution.

Headnotes:

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

Summary:

I. This case, concerned a legal gap in the legislation regulating the initiation by a prosecuting body of private criminal prosecution in the absence of information about a person who committed a crime as well as the initiation of private criminal prosecution in case of the death of the victim of the crime on the basis of submissions by his or her next of kin. The proceedings were initiated *ex officio* by the Constitutional Court in accordance with Article 158 of the Law “On the Constitutional Proceedings”.

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

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

A criminal case of private prosecution shall be initiated by an individual affected by the crime, his or her legal representative or a representative of a legal

entity by submitting an application on the offence committed against him or her to the district (city) court. This application shall contain, among others, information about the person who has committed the offence. In the absence of such information, the Court shall return the application to the applicant (Articles 426.1, 426.2 and 427.1 of the CPC).

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

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

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

By virtue of the constitutional provisions stipulating that the State and all the bodies and officials thereof shall operate within the confines of the Constitution and acts of legislation adopted in accordance therewith, that represents the essence of the constitutional principle of legality, the state shall provide access to justice for every victim of crime and in case of the death of the victim of the crime, the state shall guarantee judicial protection of his or her dignity and honour.

In order to ensure the constitutional principles of the rule of law and exercise the constitutional right of everyone to judicial protection, the Constitutional Court has recognised the need to address the aforementioned legal gap in constitutional and legal regulation. The Council of Ministers shall prepare a draft law on making amendments and addenda to the CPC and submit it to the House of Representatives of the National Assembly, in accordance with the established procedure.

Languages:

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

*Identification:* BLR-2015-3-005

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

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Citizenship, acquisition, conditions.

Headnotes:

The sovereign right of the State to regulate citizenship provides the legislator free discretion to determine the principles, grounds, terms and procedures for the acquisition and loss of Belarusian citizenship. The constitutional principle of the rule of law becomes crucial to legislation on citizenship, which should be developed on the basis of the Constitution and in line with the generally recognised principles of international law and international obligations of the State. The legislator's application of the *jus sanguinis* principle in granting citizenship to a child in respect of whom Belarusian parenthood has been established is recognised by the Constitutional Court. This approach aims to avoid conflicts of law and promotes uniform law enforcement.

Summary:

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

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

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

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

Based on the supremacy of the Constitution, the Constitutional Court believes that the sovereign right of the Republic of Belarus to regulate, at the level of the law, relations involving citizenship provides for free discretion of the legislator to establish the principles, grounds, terms and procedures for acquiring and terminating Belarusian citizenship. Here, the constitutional principle of the rule of law becomes crucial: it suggests that legal regulation in this area shall be based on the provisions of the

Constitution and shall be in line with the generally recognised principles of international law and international obligations of the Republic of Belarus.

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

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

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

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

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

Therefore, the new version of Article 27.4 of the Law on Citizenship provides that a child, who is a foreign national or stateless, shall become a citizen if it has been established that one of his or her parents is a

Belarusian citizen; the child acquires Belarusian citizenship from the day of such establishment.

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

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

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

Languages:

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



Belgium

Court of Arbitration

Important decisions

Identification: BEL-2005-3-014

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 05.10.2005 / **e)** 152/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 17.10.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

3.16. General Principles – **Proportionality.**

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

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

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

Keywords of the alphabetical index:

Church, autonomy / Age, limit, church, functions.

Headnotes:

The placing of a maximum age limit (75 years) on members of church councils constitutes an interference with the recognised right of religions to regulate their functioning autonomously, but does not in itself entail an unwarranted restriction of freedom of religion and freedom of worship (Articles 19 and 21 of the Constitution and Article 9 ECHR), provided that it enables the administration to involve new members, who might be able to contribute to the desired rationalisation and modernisation of the management of the assets by the “church fabrics”, whose losses are borne by the public authorities.

However, the introduction of an age limit which applies without exception excludes a category of elderly believers, who are increasingly more important in the religious community, from playing any part in the management of the assets of that community. The measure is therefore disproportionate to the objective pursued by the legislature

and, accordingly, contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Summary:

By decree of 7 May 2004, the Flemish Region introduced a maximum age limit for members of church councils which administer the “church fabrics”: those members, whether appointed or elected, are deemed by operation of law to have resigned when they reach the age of 75 years. “Church fabrics” are institutions governed by public law which are responsible at local level (in each parish) for the physical management of the Roman Catholic and Anglican religions and also for the administration of the temporals (the secular income of the church).

Introducing new blood into the members of the church councils is one of the measures adopted by the Executive (see Supplementary information) with a view to ensuring the efficient and rational management of the material possessions of the religious communities.

A number of persons sought the annulment of that measure, which in their view was contrary to freedom of religion and which also led to discrimination on the basis of age.

The plea alleging violation of freedom of religion (Articles 19 and 21 of the Constitution, Article 9 ECHR and Article 18 of the International Covenant on Civil and Political Rights) was rejected: after defining the scope of freedom of religion (by reference, *inter alia*, to the European Court of Human Rights, 26 October 2000, *Hassan and Tchaouch v. Bulgaria*, paragraph 62), the Court observed that freedom of religion and freedom of worship do not preclude the authority from adopting positive measures which permit the effective exercise of those freedoms. The Executive's desire to create institutions governed by public law which are responsible for the physical aspects of the recognised religions and the management of the temporals is capable of contributing to the effective enjoyment of freedom of worship. In order to be compatible with freedom of religion and with freedom of worship, however, the measures must be subject to sufficiently accessible and precise regulation, they must pursue a legitimate objective and they must be necessary in a democratic society. The interference must correspond to a “pressing social need” and there must be a reasonable link of proportionality between the legitimate aim pursued and the restriction of those freedoms. The Court considered in the present case that the reducing the age of the church councils might allow the administration to involve new members,

who might contribute to the desired rationalisation and modernisation of the management of the assets by the “church fabrics”, whose losses are borne by the public authorities. The Court concluded that the measure did not entail an unwarranted restriction of freedom of religion or freedom of worship.

The applicants also claimed that there had been a violation of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). The Court replied that the placing of an age limit on members of the “church councils” was based on an objective criterion, namely the age of members of the “church councils”. That measure was relevant to ensuring the Executive's objective of reducing the age of members of those councils with a view to the efficient and rational management of the assets of the religious communities. However, in the Court's view the measure was disproportionate to the objective pursued by the Executive: the measure proceeded from the presumption that persons who have reached the age fixed by the Executive are thereby wholly incapable of having the qualities needed to ensure such management. Even if, in spite of their age, they did not have a record of service in “church fabrics” and if they were involved in the administration for the first time, they would not be deemed capable of ensuring a rational and modern management of the physical possessions of their religious community, in accordance with the provisions of the decree on the material organisation and functioning of the recognised religions.

In the Court's view, the introduction of an age limit which applies without exception excludes a category of elderly believers, who are increasingly important in the religious community, from playing any part in the management of the assets of that community.

The Court concluded that the contested legislative provisions must be annulled on the ground that they violated Articles 10 and 11 of the Constitution.

Supplementary information:

Under the Special Law of 13 July 2001, the regions (the Flemish Region, the Walloon Region and the Brussels-Capital Region) were given competence (including legislative competence in the form of decrees and orders), with effect from 1 January 2002, for the church fabrics and the institutions responsible for the management of the temporals of the recognised religions. The Decree of 7 May 2004 regulates that competence for the Flemish region. The recognition of religions and also the salaries and pensions of ministers of religion continue to be a matter for the Federal Government.

Languages:

French, Dutch, German.



Identification: BEL-2006-2-006

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 10.05.2006 / **e)** 71/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.07.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 3.14. General Principles – ***Nullum crimen, nulla poena sine lege.***
- 3.19. General Principles – **Margin of appreciation.**
- 3.20. General Principles – **Reasonableness.**
- 3.21. General Principles – **Equality.**
- 5.2. Fundamental Rights – **Equality.**

Keywords of the alphabetical index:

Harassment, protection / Worker, protection / Penalty, proportionality / Harassment, interpretation.

Headnotes:

The principle that criminal offences and the corresponding punishments must be strictly defined by law (*nullum crimen, nulla poena sine lege*) derives from the idea that criminal law must be framed in terms enabling everyone to know, upon adopting a form of conduct, whether it is punishable. The requirement that an offence must be clearly defined by law is met where it is possible for people to infer from the wording of the relevant provision, if necessary based on its interpretation by the courts, which acts or omissions render them criminally liable.

Choosing a scale of penalties is a matter for legislative discretion but the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) may be breached where the choice made by parliament entails an inconsistency resulting in a clearly unreasonable difference in treatment between comparable offences.

Summary:

Article 442bis of the Criminal Code penalising harassment, which was introduced by an Act of 30 October 1998, provides:

“Anyone who has harassed someone and who knew, or should have known, that this conduct would seriously disrupt that person's peace of mind, shall be liable to a prison sentence of between fifteen days and two years and a fine of fifty [euros] to three hundred [euros] or to only one of these penalties. The offence established in this article can be prosecuted only where the person alleging to have been harassed has filed a complaint.”

A number of criminal courts before which cases of harassment were pending asked the Court whether the *nullum crimen, nulla poena sine lege* principle (Articles 12 and 14 of the Constitution) was breached, firstly, by the lack of a legal definition of the essential element of the offence established in the article under consideration and, secondly, by the fact that the definition of the mental element of the offence allowed the courts too much discretion.

Basing its reasoning on Articles 12 and 14 of the Constitution, Article 7.1 ECHR and Article 15.1 of the International Covenant on Civil and Political Rights, the Court to begin with pointed out that this principle required lawmakers to specify in sufficiently precise, clear terms, affording legal certainty, what acts were punishable, firstly so that someone adopting a particular line of conduct could adequately weigh in advance what the criminal consequences of that conduct would be and secondly so that the courts were not given too much discretion. However, the principle did not prevent the law from allowing the courts some degree of discretion.

The Court then explained in detail, in the light of the wording of Article 442bis of the Criminal Code and the preparatory work on this legislation, how the different elements of the offence of harassment should be construed. The Court thus concluded that there had been no breach of the *nullum crimen, nulla poena sine lege* principle.

One of the preliminary questions also concerned the distinction drawn between the above-mentioned Article 442bis, which established a penalty of up to two years' imprisonment and/or a fine of up to 300 euros for the offence of seriously disrupting another person's peace of mind, and Section 114.8.2 of the Act of 21 March 1991 on reform of certain public economic undertakings, whereby anyone who used a means of telecommunication to pester another person was liable

to up to four years' imprisonment or a fine of 50,000 euros. The Court concerned asked whether the heavier penalties imposed in the second case constituted discrimination.

The Court replied that determining the degree of gravity of an offence and the severity with which it should be punished was a matter for legislative discretion, although, where the legislature's decision entailed an inconsistency resulting in a clearly unreasonable difference in treatment between comparable offences, an assessment in the light of the constitutional principle of equality and non-discrimination was nonetheless possible.

The Court observed that, in the case under consideration, the two comparable offences doubtless differed on certain points. However, it was not apparent why these differences, in particular the use of a means of telecommunication, should justify such far harsher penalties. The Court accordingly held that the aforementioned Section 114.8.2 breached Articles 10 and 11 of the Constitution in this respect.

A preliminary question was also raised as to whether Section 81.1 of the Act of 4 August 1996 was compatible with the principle that criminal offences and the corresponding punishments must be strictly defined by law, in that it provided that a criminal penalty would be imposed for breaching Sections 5.1.1 and 5.1.2.i of this Act. Section 5.1 required employers to “take the necessary measures to promote their employees' wellbeing in the performance of their work” and to “apply a number of general principles of prevention, as defined by law”.

The Court again examined the tenor of these provisions on the basis of their wording and context, notably in the light of Directive no. 89/391/EEC of the European Council of 12 June 1989, which parliament had sought to implement through the Act of 4 August 1996. The Court nonetheless found that the fact that parliament was implementing a European directive did not dispense it from abiding by the *nullum crimen, nulla poena sine lege* principle when it drew up the provisions establishing these offences.

Following a detailed examination, the Court reached the conclusion that the particularly vague terms used in Sections 5.1.1 and 5.1.2.i of the Act of 4 August 1996 could not be sufficiently clarified by the other relevant provisions of this Act, the preparatory work on it or the international legislation on which it was based. Since it penalised all breaches of this Act, Section 81.1 did not permit the persons at which it was aimed to know, upon adopting a form of conduct, whether that conduct was punishable. The Court held that it violated Articles 10 and 11 of the Constitution in this respect.

Languages:

French, Dutch, German.

*Identification:* BEL-2007-2-004

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 07.06.2007 / **e)** 81/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.07.2007 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.1.4.18. Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

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

3.16. General Principles – **Proportionality.**

3.19. General Principles – **Margin of appreciation.**

3.26. General Principles – **Fundamental principles of the Internal Market.**

5.2. Fundamental Rights – **Equality.**

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

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

Keywords of the alphabetical index:

Fine, right to property / Circumstance, mitigating, consideration, impossible / Community law, enforcement by member state, penalty under national law / Criminal law, mitigating circumstance / Penalty, individualisation / Customs, penalty / Court, powers / Penalty, mitigation / Penalty, disproportionate / Penalty, minimum / Penalty, maximum / Penalty, proportionality / Right to a fair trial, court, power to take account of a mitigating circumstance.

Headnotes:

The constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in conjunction with the right to a fair trial (Article 6.1 ECHR), are violated by a legislative provision requiring the courts to impose fines equivalent to ten times the amount of excise duties evaded, doubled for a repeat offence, in that the provision does not permit the criminal courts to

reduce the fine in any way in the event of mitigating circumstances and may have disproportionate effects, since it fails to set a maximum fine or a minimum fine.

Summary:

I. Defendants were being tried in the criminal court for theft of diesel in breach of the law of 22 October 1997 concerning the structure and rates of excise duties on mineral oil on the ground that, by reason of the theft, they also evaded paying the excise duties. Under Section 23 of that law the penalty for these offences was a fine equivalent to ten times the amount of excise duties evaded, but no less than 250 euros.

The criminal court, whose discretion was fettered by this provision, since it set no minimum and maximum limits on the penalty between which it could decide and it was unable to take account of mitigating circumstances, raised three preliminary questions before the constitutional court as to whether the provision violated the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) and Article 6 ECHR, taken together.

II. The Constitutional Court first noted that the provision was part of criminal-customs law, which is a special branch of criminal law, through which parliament sought, on the basis of a specific system of investigation and prosecution of offences, to combat the extent and frequency of fraud in a particularly technical field concerning activities often of a cross-border nature and governed in large part by numerous European regulations.

In its constitutional review, the Court argued that it was in principle for parliament to determine whether it was desirable to oblige the courts to be strict with respect to offences which are particularly harmful to public interests, especially in a sphere susceptible, as in the instant case, to large-scale fraud. Such strictness could be applied not only to the level of the fine, but also to the courts' possibility of reducing the fine below the prescribed limits where there are mitigating circumstances. The Court added that it could denounce such a decision only if it was clearly unreasonable or the effect of the contested provision was to deprive a category of defendants of the right to a fair hearing before an impartial and independent court, as guaranteed by Article 6.1 ECHR.

The Court began by answering the second preliminary question, which called for a comparison between the obligation for the criminal court to impose a fine equivalent to ten times the amount of duties evaded, without being able to take account of mitigating circumstances, and the situation under

Section 263 of the General Customs and Excise Law, whereby the authorities were allowed to bargain with a defendant (until reaching agreement on the amount of the fine) where mitigating circumstances existed. As in a number of earlier judgments, the Court held that this difference in treatment contravened the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) and the right to a fair trial guaranteed by Article 6 ECHR, taken together.

The Court then jointly examined the first and the third preliminary questions. The first of these questions concerned the difference in relation to ordinary criminal law, which indeed set minimum and maximum penalties and allowed the criminal courts to determine a sentence below the legal minimum to take account of mitigating circumstances. The third preliminary question concerned the difference between the type of fine imposed under the contested provision (invariably equivalent to ten times the amount of duties evaded) and the type of fine provided for under Section 239 of the General Customs and Excise Law (which could vary according to certain conditions).

The Court noted that the law of 22 October 1997 to which the impugned provision belonged, had been passed pursuant to Community law. It pointed out that Article 10 EC establishing the European Community [...] provided that member states should take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations, while, if necessary, establishing effective, proportionate, dissuasive penalties under national law. In this respect, the Court referred to a number of judgments of the Court of Justice of the European Communities. It added that the member states were obliged to exercise this competency in accordance with Community law and its general principles and, consequently, in keeping with the principle of proportionality, set out *inter alia* in Article 49.3 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ C 364, p. 1), whereby “the severity of penalties must not be disproportionate to the criminal offence.” The Court recognised that this Charter was not legally binding per se but added that it reflected the principle of the rule of law on which the Union was founded, by virtue of Article 6 of the Treaty on European Union, and constituted an illustration of the fundamental rights, as guaranteed by the European Convention on Human Rights and resulting from the constitutional traditions common to the member states, which the Union was bound to respect as general principles of Community law. It followed that penalties imposed for offences against provisions of Community law must not be disproportionately severe (the Court referred to

the judgment of the Court of Justice of the European Communities of 3 May 2007, C-303/05, ASBL (non-profit making association) “*Advocaten voor de wereld*”, §§ 45 and 46).

In its arguments, the Court also relied on the right to respect for property, guaranteed under Article 1 Protocol 1 ECHR. It argued that a fine set at ten times the amount of the evaded excise duties could, in certain cases, be so severely detrimental to the financial situation of the person on whom it was imposed that it might be disproportionate to the legitimate aim being pursued and constitute a violation of the right to respect for property guaranteed under Article 1 Protocol 1 ECHR (in this connection the Court referred to the European Court of Human Rights' *Mamidakis v. Greece*, Judgment of 11 January 2007).

The Court held that a provision that prevented a court from avoiding a violation of this article disregarded the right to a fair trial guaranteed by Article 6.1 ECHR.

It ruled that the impugned legislative provision breached the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in conjunction with Article 6.1 ECHR, since it prevented the criminal courts from reducing the fine provided for therein in any way in the event of mitigating circumstances and could have disproportionate effects since it failed to institute a maximum fine and a minimum fine.

Languages:

French, Dutch, German.



Identification: BEL-2008-3-011

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 03.12.2008 / **e)** 171/2008 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

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

3.21. General Principles – **Equality.**

5.2. Fundamental Rights – **Equality.**

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

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

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

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

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

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

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

Keywords of the alphabetical index:

Preliminary question, judge of the court below / Confidentiality / Interpretation, principle / Labour inspection, access, premises, inhabited / House searches, judicial guarantees.

Headnotes:

The right to respect for one's home has a civil-law nature within the meaning of Article 6.1 ECHR. Given that the exercise of the right to enter inhabited premises constitutes interference with this right, disputes regarding the latter must be dealt with in accordance with the guarantees laid down in this provision.

The guarantees set out in Article 6.1 ECHR include respect for the principle of adversarial proceedings. This principle generally involves the right of litigants to take cognisance of and discuss all items of evidence or observations produced in court.

However, the rights of the defence must be weighed against the interests covered by Article 8 ECHR. For instance, exceptional situations may arise in which

specific items in the case-file should be exempt from the adversarial principle.

Summary:

The Constitutional Court was called on to consider a number of preliminary questions from Ghent Court of First Instance on a provision of the Law of 16 November 1972 relating to labour inspection. This provision authorises welfare inspectors, carrying documentary evidence and acting in an official capacity, to freely enter, at any time of day or night without prior notice, any workplace or other premises subject to their supervision in which they have reasonable grounds to believe that persons subject to the legislation whose application they are responsible for monitoring may be working. The provision specifies that inspectors can only enter inhabited premises with the prior authorisation of the judge of the district court.

Ghent Court of First Instance interprets this provision as authorising access to inhabited premises on the basis of documents and verbal explanations which are not included in the criminal case-file. It asks the Constitutional Court about the compatibility of this provision with the constitutional right to inviolability of the home (Article 15 of the Constitution) in conjunction with Article 8 ECHR (first question). It also asks the Court about its compatibility with the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution), in conjunction with Article 6.1 ECHR, given that the lawfulness of the authorisation given by the judge of the district court cannot be verified by any other judge, whereas search warrants issued by an investigating judge can be challenged before the trial court (second question).

Where the second preliminary question is concerned, the Court first of all points out that where it is called upon to verify compliance with the principle of equality and non-discrimination, in conjunction with a contractual provision guaranteeing a fundamental right, it is sufficient to note that this provision has been violated in order to conclude that the category of persons in respect of whom this fundamental right has been violated has been discriminated against as compared with the category of persons for whom this fundamental right is guaranteed.

The Court then notes that the interpretation of the provision in question by the judge of the Court below was based on a Court of Cassation judgment of 9 March 2004. Furthermore, it points out that since the exercise of the right to enter inhabited premises gave rise, in the case considered by the judge of the Court below, to criminal proceedings, it confined its analysis to this specific matter.

In connection with the second preliminary question, the Court firstly notes that the prior intervention of an independent and impartial judge is a major safeguard against the risk of abuse or arbitrariness, but that the mere fact of the authorisation to enter inhabited premises being issued by a judge cannot be deemed a sufficient guarantee, given that the person concerned cannot secure a hearing. In fact, the efficacy of the measure would be seriously undermined if this person were informed of it in advance. The Court refers in this context to several judgments of the European Court of Human Rights.

The fact is that the guarantees set out in Article 6.1 ECHR require the persons concerned to enjoy effective *de facto* and *de jure* judicial supervision of the lawfulness of the decision authorising access to the inhabited premises, as well as any measures based on this decision. The Court therefore concludes that, in the interpretation of the judge of the lower court to the effect that the provision in question precludes any judicial review of the lawfulness of the authorisation granted by the district court, this provision does not comply with the requirements of Article 6.1 ECHR and therefore constitutes a violation of the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution). The Court considers, however, that the provision is amenable to an alternative interpretation, viz to the effect that it does not preclude challenging before the Criminal Court the authorisation given by the district court, and is therefore in conformity with the Constitution.

In connection with the first preliminary question, the Court recalls the substance of the principle of adversarial proceedings secured by Article 6.1 ECHR and the weighing up of the rights of the defence and the interests covered by Article 8 ECHR. Exceptional situations might conceivably arise exempting specific items of evidence from the adversarial principle.

However, only measures restricting the rights of the defence which are absolutely necessary are legitimate under Article 6.1 ECHR. Moreover, any difficulties encountered by either of the parties in exercising his or her defence owing to a restriction of his or her rights must be offset by the guarantee provided by the judicial proceedings.

Conversely, infringements of private life deriving from judicial proceedings must as far as possible be confined to those which are strictly necessary because of the specific nature of the proceedings, as well as the particular configuration of the dispute. In this context the Court refers to several relevant judgments of the European Court of Human Rights.

The Court goes on to specify that in the interpretation of the judge of the Court below, the authorisation given by the district court to enter the inhabited premises may be based on documents and declarations which have not been included in the criminal case-file. It adds that Article 15.c of ILO Convention no. 81 on labour inspection in industry and commerce, approved by a Belgian law, requires labour inspectors to treat as absolutely confidential the source of any complaint of a defect in installations or a breach of legal provisions, and to refrain from disclosing to employers or their representatives that they conducted their inspection as a result of a complaint.

According to the Court, the rights of the defence would be disproportionately restricted if the documents and declarations substantiating the district court's authorisation to enter the inhabited premises were completely exempted from the principle of adversarial proceedings. On the other hand, the protection granted by Article 8 ECHR is sufficiently respected if none of the items enabling the identity of the person who submitted the complaint or denunciation to be deduced are included in the case-file. It is not necessary to exempt the complaint or denunciation itself from the adversarial principle in order to protect these interests.

The Court concludes that under the interpretation of the provision in question to the effect that the documents and declarations substantiating the district court's authorisation to enter the inhabited premises are completely exempt from the principle of adversarial proceedings, this provision does not meet the requirements of Article 6.1 ECHR and leads to arbitrary interference with the right to the inviolability of the home as secured under Article 15 of the Constitution and Article 8 ECHR.

The Court considers, however, that the provision in question can be interpreted in a manner compatible with the Constitution, in that it is not the complaint or denunciation itself but solely the data enabling the identity of the person who submitted the complaint or denunciation to be deduced that is exempt from the adversarial principle.

The Court incorporates all four interpretations into its judgment, i.e. the two which it deems unconstitutional and the two considered compatible with the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2015-1-002

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 05.02.2015 / **e)** 13/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.02.2015 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

1.4.9.4. Constitutional Justice – Procedure – Parties – **Persons or entities authorised to intervene in proceedings.**

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

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

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

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

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

Keywords of the alphabetical index:

Tax fraud, serious, notion / Tax, fraud, penalty, proportionality / Constitution and treaty, similar provisions / Criminal law, penalty, proportionality / Constitution and treaty, combination.

Headnotes:

Providing for an aggravation of the penalty for punishable offences which must be regarded as “serious” tax fraud is not incompatible with the principle of legality in criminal matters, which is enshrined both in the Constitution and in several treaties.

Summary:

I. The non-profit-making association the “*Ligue des Contribuables*” (Taxpayers’ League) applied for the provisions of the Law of 17 June 2013 which relate to the “fight against tax fraud” to be set aside. These

provisions amend several laws so as to provide for an aggravation of the penalty when punishable offences must be regarded as “serious tax fraud”.

The “*Orde van Vlaamse balies*” and a lawyer asked to intervene in the proceedings in support of the application.

The applicant and the intervening party argued that the notion of “serious” tax fraud was too vague and hence incompatible with the principle of legality in criminal matters. They submitted that there had been a breach of Article 12.2 of the Constitution, and Article 14 of the Constitution, read in conjunction with Article 7.1 ECHR and Article 15.1 of the International Covenant on Civil and Political Rights.

The Council of Ministers, whose task it is to defend the federal law contested before the Court, began by raising several objections of inadmissibility.

II. The Court accepted, in accordance with its established case-law, that an association whose aims according to its statutes included defending taxpayers’ interests and which pursued, in particular, respect for the principle of legality in tax matters, had a sufficient collective interest in contesting a provision which could affect the social goal of this association directly and unfavourably.

In the Court’s opinion, the interest of the “*Orde van Vlaamse balies*” and a lawyer in intervening was not sufficiently direct.

The Court noted firstly that Articles 12 and 14 of the Constitution and Article 7.1 ECHR and Article 15.1 of the International Covenant on Civil and Political Rights had a similar scope and therefore formed an indissociable whole in that they required that all offences be prescribed by the law.

By assigning the legislature the power to determine in which cases criminal proceedings were possible, Article 12.2 of the Constitution guaranteed to all citizens that their conduct could only be punished in accordance with rules adopted by a democratically elected deliberative assembly.

In addition, the principle of legality in criminal matters, which derived from the aforementioned constitutional and international provisions, stemmed from the idea that the criminal law had to be framed in terms which enabled everyone to know, when he or she adopted a form of conduct, whether it was punishable. It required that it be stated in legislation, in sufficiently clear and detailed terms affording legal certainty, what acts would be punished, firstly so that someone adopting a particular form of conduct could

satisfactorily assess in advance what the criminal consequences of that conduct would be and, secondly, so that courts were not granted too much discretion.

However, the principle of legality in criminal matters did not prevent the law from granting the courts some discretion. Account had to be taken of the general nature of laws, the diversity of situations to which they applied and new developments in the types of conduct they were designed to punish.

The Court noted that the impugned provisions formed part of the action taken following a parliamentary inquiry into some major cases of tax fraud and that the fight against tax fraud was, according to the preparatory work for the impugned law, one of the main social objectives of modern Western societies.

The impugned provisions had not created a new offence. They simply provided for an aggravation of the penalty when conduct whose punishable nature had already been established could be classed as "serious". Furthermore, only the maximum length of the prison sentence could be increased to five years. The impugned provisions did not affect the minimum length of prison sentences or the possible amounts of fines.

The Court found that although the impugned provisions granted courts a considerable amount of discretion, they did not give them the kind of independent power to define offences which would encroach on the powers of the legislature. The legislature could, without fear of breaching the principle of legality, instruct the courts to assess the degree of seriousness beyond which punishable conduct could lead to an aggravation of the penalty.

Bearing in mind the diverse situations liable to arise in practice, courts were required to assess the seriousness of punishable conduct not according to subjective notions which would make the application of the impugned provisions unforeseeable but taking into consideration objective aspects and taking account of the specific circumstances of each case and the restrictive interpretation which prevailed in criminal law.

According to the Court, the impugned provisions did allow the perpetrators of tax fraud to know enough about what the criminal consequences of their conduct would be.

The Court added that the principle of legality required the penalty to be proportionate to the seriousness of the misconduct. In this respect the Court referred expressly to the case-law of the European Court of

Human Rights and the Court of Justice of the European Union (see, *mutatis mutandis*, ECHR, 11 January 2007, *Mamidakis v. Greece*, paragraphs 44-48; CJEC, 27 September 2007, *Collée*, C-146/05, paragraph 40; Constitutional Court, 4 February 2010, no. 8/2010, B.12; CJEU, 3 December 2014, *De Clercq and Others*, C-315/13, paragraph 73).

The Court concluded that the impugned provisions were not in breach of the principle of legality in criminal matters and dismissed the application.

Supplementary information:

In a subsequent case, the Court, in Judgment no. 41/2015 of 26 March 2015, dismissed applications against the provisions whereby the notion of "serious, organised tax fraud making use of complex mechanisms or international processes" was replaced by several laws combating money laundering through "organised or non-organised, serious tax fraud".

Cross-references:

Constitutional Court:

- no. 8/2010, 04.02.2010, B.12.

European Court of Human Rights:

- *Mamidakis v. Greece*, no. 35533/04, 11.01.2007.

Court of Justice of the European Union:

- C-146/05, *Albert Collée v. Finanzamt Limburg*, 27.09.2007;
- C-315/13, *De Clercq e.a. v. Belgium*, 03.12.2014.

Languages:

French, Dutch, German.



Identification: BEL-2015-2-007

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 11.06.2015 / **e)** 84/2015 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.08.2015 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

3.16. General Principles – **Proportionality.**

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

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

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

Keywords of the alphabetical index:

Crime, means of prevention, private data, collection / Serious crime, fight against / Personal data, collection / Personal data, storage / Communication, recording / Internet, interference / E-mail, interference / Communication, telephone, interference / Personal data, protection / Charter of Fundamental Rights.

Headnotes:

In imposing the blanket retention of all data on traffic relating to telephone communications (landline and mobile), access to the Internet, e-mail and telephone communications via the Internet, covering everyone and all means of communication regardless of any link with the objective of combating serious crime, the law of 30 July 2013 constitutes a discriminatory and disproportionate violation of the right to privacy and the protection of personal data, and breaches the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), read in conjunction with the right to respect for private life and the protection of personal data and the principle of proportionality (Articles 7, 8 and 52.1 of the Charter of Fundamental Rights of the European Union).

This law partially transposes into Belgian law the European “Data Retention” Directive which the Court of Justice of the European Union declared invalid in its judgment of 8 April 2014 (C-293/12 and C-594/12).

Summary:

I. The not-for profit associations “*Liga voor Mensenrechten*” and “*Ligue des Droits de l’Homme*” filed an application for the partial (Article 5) or total setting aside of the law of 30 July 2013 amending

Articles 2, 126 and 145 of the Electronic Communications Act and Article 90*decies* of the Code of Criminal Procedure.

Principally, they argued that the contested provisions violated the private life of users of telecommunications and electronic communications by obliging operators to retain all communication traffic data for a period of up to two years.

II. The Court observed that the law at issue constituted the partial transposition into Belgian law of the European “Data Retention” Directive and Article 15.1 of the Directive on privacy and electronic communications, but noted that in its Grand Chamber judgment of 8 April 2014, in response to the request for preliminary rulings from the High Court (Ireland) and the Austrian Constitutional Court (CJEU, C-293/12, *Digital Rights Ireland Ltd* and C-594/12, *Kärntner Landesregierung e.a.*), the Court of Justice of the European Union had declared the “Data Retention” Directive invalid. The CJEU had held that Articles 3 and 6 of Directive 2006/24/EC, which obliged providers of publicly available electronic communications services and providers of public communications networks to retain for a given period data on the private life of individuals and their communications, as indicated in Article 5 of that Directive, constituted interference with the right to respect for private life guaranteed by Article 7 of the Charter”.

The Court of Justice had also held, in paragraph 35 of the judgment, that “the access of the competent national authorities to the data constitutes a further interference with that fundamental right (see, as regards Article 8 ECHR, European Court of Human Rights, *Leander v. Sweden*, 26 March 1987, paragraph 48, Series A, no. 116; *Rotaru v. Romania* [GC], no. 28341/95, paragraph 46, ECHR 2000-V; and *Weber and Saravia v. Germany* (dec.), no. 54934/00, paragraph 79, ECHR 2006-XI). Accordingly, Articles 4 and 8 of Directive 2006/24 laying down rules relating to the access of the competent national authorities to the data also constitute an interference with the rights guaranteed by Article 7 of the Charter.

This interference by the Directive was described as being particularly serious (paragraph 37), even though the Directive did not authorise acquisition of knowledge of the content of the electronic communications as such (paragraph 39). The Constitutional Court then cited the grounds given in paragraphs 48 to 66 of the CJEU judgment, relating to the review of the proportionality of the contested interference.

The Court held that there was no distinction between the contested law and the Directive. The categories of data which were to be retained were identical to those listed in the Directive, and no distinction was made as to the individuals concerned or in terms of any special rules to be introduced in the light of the objective of combating the crimes enumerated in Article 126.2 of the law of 13 June 2005 replaced by the law at issue. As the Court of Justice had found with regard to the Directive (paragraph 58), the law also applied to individuals for whom there was no evidence to suggest that their conduct might have a link, even an indirect or remote one, with the crimes listed in the contested law. Similarly, the law applied without exception to individuals whose communications were covered by professional secrecy.

In the Court's view, the contested Article 5 did not, any more than the Directive did, require there to be any relation between the data to be retained and a threat to public security. Neither did it limit the data in question to a particular time period or geographical area, or to a group of individuals liable to be involved in an offence referred to in the law, or to persons whose data thus retained could help prevent, identify or prosecute such offences.

The Court further found that the law laid down no substantive or procedural condition regarding access to the data. Furthermore, with regard to how long the data should be retained, the law made no distinction between the categories of data as to their potential usefulness for the objective pursued, and no distinction according to the individuals concerned.

For the same reasons that had led the Court of Justice of the European Union to declare the "Data Retention" Directive invalid, the Court found that in passing Article 5 of the contested law, the legislature had exceeded the limits imposed by the principle of proportionality under Articles 7, 8 and 52.1 of the Charter of Fundamental Rights of the European Union. Article 5 of the law therefore violated Articles 10 and 11 of the Constitution read in conjunction with those provisions.

The Court concluded that it was also necessary to annul Articles 1 to 4, 6 and 7 of the contested law of 30 July 2013, on account of their inseparable nature with Article 5, and consequently the entire law.

Cross-references:

Constitutional Court of Romania:

- no. 461/2014, 16.09.2014, *Bulletin* 2014/3 [ROM-2014-3-006].

European Court of Human Rights:

- *Leander v. Sweden*, no. 9248/81, 26.03.1987, Series A, no. 116, paragraph 48;
- *Rotaru v. Romania* [GC], no. 28341/95, paragraph 46, 04.05.2000, ECHR 2000-V;
- *Weber and Saravia v. Germany* (dec.), no. 54934/00, paragraph 79, 29.06.2006, ECHR 2006-XI.

Court of Justice of the European Union:

- C-293/12, *Digital Rights Ireland Ltd* and C-594/12, *Kärntner Landesregierung e.a.*, 08.04.2014.

Languages:

French, Dutch, German.



Identification: BEL-2015-3-011

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

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

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

Headnotes:

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

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

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

Summary:

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

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

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

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

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

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

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

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

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

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

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

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

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

Cross-references:

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

Languages:

French, Dutch, German.



Bosnia and Herzegovina

Constitutional Court

Important decisions

Identification: BIH-2000-1-002

a) Bosnia and Herzegovina / b) Constitutional Court / c) / d) 30.01.2000 / e) U 5/98 / f) / g) *Sluzbeni Glasnik Bosne I Hercegovine* (Official Gazette of Bosnia and Herzegovina) 25/99, 15.12.2000 / h).

Keywords of the systematic thesaurus:

1.2.1.1. Constitutional Justice – Types of claim – Claim by a public body – **Head of State.**

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

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

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

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

2.1.1.4.10. Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969.**

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

3.8. General Principles – **Territorial principles.**

4.8.4. Institutions – Federalism, regionalism and local self-government – **Basic principles.**

4.8.4.1. Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.7. Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**

4.8.8.2.1. Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae.***

4.8.8.5. Institutions – Federalism, regionalism and local self-government – Distribution of powers – **International relations.**

4.10.5. Institutions – Public finances – **Central bank.**

Keywords of the alphabetical index:

Ambassador, nomination / Monetary policy, powers / Extradition, powers / Asylum, powers / Border, definition / Constitutional autonomy, relative / Representation, international.

Headnotes:

The constitutionally established jurisdiction of the Constitutional Court of Bosnia and Herzegovina covers the Entity's constitutions, since according to Article VI.3.a of the Constitution the Constitutional Court has exclusive jurisdiction to review whether any provision of an Entity's constitution or law is consistent with the Constitution of Bosnia and Herzegovina. On 29 and 30 January 2000, the Court declared with a partial decision some provisions or parts of provisions of the Constitutions of the *Republika Srpska* and of the Federation of Bosnia and Herzegovina null and void on the ground that they were not in conformity with the Constitution of Bosnia and Herzegovina.

Summary:

On 12 February 1998 Mr Alija Izetbegovic, Chair of the Presidency of Bosnia and Herzegovina, requested the Constitutional Court of Bosnia and Herzegovina to evaluate the constitutionality of some provisions of the Constitutions of the Federation of Bosnia and Herzegovina (the "Federation Constitution") and of the *Republika Srpska* (the "RS Constitution").

The Court found that the request was admissible, since it was submitted by the Chair of the Presidency, who is among the institutions entitled to refer disputes to the Constitutional Court under Article VI.3.a of the Constitution of Bosnia and Herzegovina.

According to Article 31 of the Vienna Convention on the Law of Treaties it is necessary to clarify the terms used in the Constitution of Bosnia and Herzegovina by interpreting them in the context of the entire General Framework Agreement for Peace (signed in Paris on 14 December 1995). It followed from an analysis of these texts that there was a consistent terminology, according to which "border" and "boundary" are given different meanings: Article III of the General Framework Agreement refers to "the boundary demarcation between the two Entities", but the term "border" is used in Article X when referring to frontiers between states. In such circumstances, the use of a different terminology in the RS Constitution cannot be considered consistent with the Constitution of Bosnia and Herzegovina and Article 2.2 of the RS Constitution was declared unconstitutional in so far as the term "border" is used in the wrong context.

According to Article III.1.g of the Constitution of Bosnia and Herzegovina, the institutions of Bosnia and Herzegovina are responsible for international and inter-Entity criminal law enforcement.

Article 6.2 of the RS Constitution, as supplemented by Amendment XXX, refers to citizenship, exile and extradition. The Court found that there is no doubt that extradition of persons against whom the authorities of another state are proceeding for an offence or who are wanted by the said authorities to carry out a sentence or detention order is covered by the term international law enforcement. Article 6 of the RS Constitution thus regulates a matter which lies within the responsibility of the institutions of Bosnia and Herzegovina. The Court must, therefore, conclude that the words "or extradited" Article 6.2 of the RS Constitution are inconsistent with the Constitution of Bosnia and Herzegovina.

With regard to the challenged provision of Article 44.2 of the RS Constitution, the Entities cannot regulate the "asylum policy", since according to Article III.1.f of the Constitution of Bosnia and Herzegovina asylum policy and regulation are responsibilities of the institutions of Bosnia and Herzegovina.

With regard to the protection of fundamental rights in the RS Constitution, the question arises whether the Constitution of Bosnia and Herzegovina can be interpreted as prohibiting provisions in the Entity constitutions that are more favourable to the individual.

It is generally recognised in federal states that component entities enjoy "relative constitutional autonomy" granting their constitutions the right to regulate matters in such a way that they do not contradict the wording of the constitution of the respective state. The same principle can be seen as an inherent principle underlying the entire structure of the Constitution of Bosnia and Herzegovina.

Moreover, Article 53 ECHR (the former Article 60) provides that the protection granted by the European Convention on Human Rights is only a minimum protection and that States are not prevented by the Convention from granting the individual more extensive or favourable rights and freedoms. The same principle must apply to the interpretation of the Constitution of Bosnia and Herzegovina, which indeed makes the European Convention on Human Rights directly applicable in Bosnia and Herzegovina and grants it priority over all other law.

It follows from what has been stated that the Entities are free to provide for a more extensive protection of human rights and fundamental freedoms than

required under the European Convention on Human Rights and the Constitution of Bosnia and Herzegovina. Amendment LVII, item 1, to the RS Constitution is therefore not in conflict with the Constitution of Bosnia and Herzegovina.

The Court found that the Entities have a right to establish representations abroad as long as this does not interfere with the power of Bosnia and Herzegovina to be represented as a State. Moreover, the Entities may propose their own candidates to be elected as ambassadors and other international representatives of Bosnia and Herzegovina; however such proposals must be regarded as nothing more than proposals and cannot restrict the right of the Presidency of Bosnia and Herzegovina to appoint either the persons proposed by the Entities' institutions or persons who have not been proposed by them.

Hence the contested provisions of Articles 80 and 90 of the RS Constitution concerning the power to appoint and recall heads of missions of *Republika Srpska* in foreign countries and the establishment of missions abroad are in conformity with the Constitution of Bosnia and Herzegovina.

With regard to the contested provisions of Article 98 of the RS Constitution the Court found that since the power for issuing currency and for monetary policy through Bosnia and Herzegovina is given by Article VII of the Constitution of Bosnia and Herzegovina to the Central Bank of Bosnia and Herzegovina, there is no power left in this respect for the Entities under Article III.3 of the Constitution of Bosnia and Herzegovina.

Hence, the challenged provisions of Article 98 of the RS Constitution must be declared unconstitutional.

Moreover, the Court found that Article 76.2 of the RS Constitution is also not in conformity with the Constitution of Bosnia and Herzegovina, because the Central Bank is vested with the exclusive responsibility to make legislative proposals in the field of "monetary policy" as referred to above.

According to Article VI.3.a of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina has "exclusive jurisdiction", when serving as a protective mechanism in "any dispute". Moreover, Article 75 of its Rules of Procedure allows for preliminary measures to be granted by the Court, and therefore there is no room left for unilateral measures to be taken by institutions of the *Republika Srpska*. The Court thus found that Article 138 of the RS Constitution, as modified by Amendments LI and LXV, is unconstitutional.

With regard to the contested provisions of Amendment VII to Article II.A.5 of the Federation Constitution, the Constitutional Court found that the wording of this amendment simply refers to the citizenship requirements prescribed by Article I.7.a and I.7.d of the Constitution of Bosnia and Herzegovina. This contested provision must, therefore be considered to be in conformity with the Constitution of Bosnia and Herzegovina.

With regard to the power to appoint heads of diplomatic missions in the Federation of Bosnia and Herzegovina, as it has already been stated above, Article V.3.b of the Constitution of Bosnia and Herzegovina vests the power to appoint them in the hands of the Presidency of Bosnia and Herzegovina without limits to its decision-making. Therefore, the Court found that the provisions of Article IV.B.7.a.i and IV.B.8. of the Federation Constitution clearly contradict the Constitution of Bosnia and Herzegovina since the contested provisions, unlike those of the RS Constitution, vest the power to make such an appointment in the President of the Federation.

Languages:

Bosnian, Croatian, Serb, English.



Identification: BIH-2000-3-003

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 01.07.2000 / **e)** U 5/98 / **f)** / **g)** *Sluzbeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina) 23/00 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.3. Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**
 1.3.5.8. Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**
 2.1.1.1.1. Sources – Categories – Written rules – National rules – **Constitution.**
 2.1.1.4. Sources – Categories – Written rules – **International instruments.**
 2.1.1.4.10. Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969.**

3.1. General Principles – **Sovereignty.**

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

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

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

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

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

5.3.45. Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

People, constituent / Constitution, entity / Self-determination, right / Preamble, character / Citizenship / Statehood.

Headnotes:

According to Article VI.3.a of the Constitution of Bosnia and Herzegovina, the Constitutional Court has exclusive jurisdiction to decide whether any provision of an Entity's Constitution or law is consistent with the State's Constitution.

Summary:

On 12 February 1998, Mr Alija Izetbegovic, then Chair of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court for the purpose of evaluating the consistency of some provisions of the Federation Constitution and the *Republika Srpska* Constitution with the Constitution of Bosnia and Herzegovina.

The Court adopted two partial decisions on the case: the first on 29 and 30 January 2000 (Official Gazette of Bosnia and Herzegovina, no.11/00, Official Gazette of the *Republika Srpska*, no.12/00, and *Bulletin* 2000/1 [BIH-2000-1-002]), and the second on 18 and 19 February 2000 (Official Gazette of Bosnia and Herzegovina, no. 17/00, Official Gazette of the Federation of Bosnia and Herzegovina, no. 26/00 and Official Gazette of the *Republika Srpska*). In its third partial decision, adopted on 30 June and 1 July 2000, the Constitutional Court declared the following provisions unconstitutional: paragraphs 1, 2, 3 and 5 of the Preamble of the *Republika Srpska* Constitution and some provisions of Article 1, and part of Article I.1.1 of the Federation Constitution.

As far as the *Republika Srpska* Constitution is concerned, the applicant requested the Court evaluate the compatibility of its Preamble with the Preamble of the State Constitution, and with Articles II.4, II.6 and III.3.b of the Constitution of Bosnia and Herzegovina, insofar as the *Republika Srpska* Preamble refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people. Moreover, the applicant argued that Article 1, which provides that *Republika Srpska* is “the State of the Serb people and of all its citizens”, was not compatible with Article I.3 of the Constitution of Bosnia and Herzegovina, which refers to the Federation and the *Republika Srpska* as “Entities” and not national states.

The Court was asked to evaluate the conformity of Article I.1 of the Federation Constitution, insofar as it refers to Bosniacs and Croats as constituent peoples, with the last paragraph of the Preamble, and Articles II.4 and II.6 of the Constitution of Bosnia and Herzegovina.

The first legal issue the Constitutional Court had to decide was whether or not the Preamble of the State Constitution and the Constitution of *Republika Srpska* had a normative character. The Court pointed out that it was not within its competence to adjudicate legal opinions *in abstracto* concerning the normative character of preambles of constitutional provisions as such.

According to Article 31 of the Vienna Convention of the Law on Treaties, an international agreement has to be interpreted taking into consideration all its parts. Therefore, as the Preamble of the Constitution of Bosnia and Herzegovina was part of an international agreement (The General Framework Agreement for Peace in Bosnia and Herzegovina), it was considered by the Court as an integral part of the text of the same Constitution. As a result, the Constitutional Court concluded that any provision of an Entity's Constitution had to be consistent with the Constitution of Bosnia and Herzegovina, including its Preamble, as long as the latter contained “constitutional principles” that were not merely descriptive, but were also invested with a normative powerful force, and could, thereby, serve as a sound standard of judicial review for the Constitutional Court.

The same holds true for the Preamble of the *Republika Srpska* Constitution, as modified by Amendment XXVI and LIV, but for different reasons, since it states *expressis verbis* that “these amendments form an integral part of the Constitution of *Republika Srpska*”.

The Court observed that, since the Preamble of the *Republika Srpska* Constitution spoke in express terms of a “right of the Serb people”, and of “state status” and “independence” of *Republika Srpska*, it could not be seen as having a merely descriptive character. In fact, these constitutional provisions, if read in conjunction with Article 1 of the *Republika Srpska* Constitution, obviously determined collective rights and the legal political status of *Republika Srpska*.

Accordingly, the Constitutional Court declared paragraphs 1, 2, 3 and 5 of the Preamble of the *Republika Srpska* Constitution unconstitutional, insofar as their provisions violated Article I.1 and I.3, in conjunction with Article III.2.a and III.5 of the Constitution of Bosnia and Herzegovina, which provide for the sovereignty, territorial integrity, political independence, and international personality of the State.

The Court did not find it necessary to review the other contested provisions of the Preamble of the *Republika Srpska* Constitution in light of the text of the Preamble of the State Constitution, in particular its paragraph referring to Bosniacs, Croats and Serbs as “constituent peoples”.

As far as the challenged provision of Article 1 of the *Republika Srpska* Constitution is concerned, which defines *Republika Srpska* as “the State of the Serb people and all its citizens”, the applicant argued that the said provision was not in line with the last paragraph of the Preamble and with Article II.4 and II.6 of the State Constitution, according to which all the three peoples (Bosniacs, Croats and Serbs) are constituent peoples of the whole territory of the State. The applicant also alleged that the privileged position given to the Serb people by Article 1 of the *Republika Srpska* Constitution, which distinguishes between the Serb people and citizens, would “reserve” certain rights for the Serb people only: the right to self-determination, cooperation with Serb people outside the *Republika Srpska*, the privileged position of the Serb language and of the Orthodox Church, etc.

In its final analysis of the case, based on the text of the Preamble of the State Constitution in connection with the institutional provisions of the Dayton Constitution, the Constitutional Court found that the provision of Article 1 of the *Republika Srpska* Constitution violated the constitutional status of Bosniacs and Croats designated to them through the last line of the above mentioned Preamble, as well as the positive obligations of the *Republika Srpska*, which follow from Article II.3 and II.5 of the Constitution of Bosnia and Herzegovina. In the

Court's opinion, the regulation of Article 1 of the *Republika Srpska* Constitution, in particular in connection with other provisions, such as the rules on the official language (Article 7 of the *Republika Srpska* Constitution) and the fact that the Serb Orthodox Church is the Church of the Serb people (Article 28.3 of the *Republika Srpska* Constitution), which both lead to a constitutional formula of identification of Serb "state", people and church, put the Serb people in a privileged position which cannot be justified and therefore violates the express designation of "constituent peoples" made in the Constitution of Bosnia and Herzegovina.

Therefore, the Court stated that the wording "State of the Serb people" of Article 1 of the *Republika Srpska* Constitution violated the right to liberty of movement and residence, the right to property and the freedom of religion in a discriminatory way, on the grounds of national origin and religion, as guaranteed by Article II.3 and II.4 in connection with II.5 of the Constitution of Bosnia and Herzegovina.

As far as Article I.1.1 of the Federation Constitution is concerned, the applicant claimed that it was not in conformity with the last paragraph of the Preamble and Article II.4 and II.6 of the Constitution of Bosnia and Herzegovina, insofar as these provisions define all the three groups as "constituent peoples" of the entire territory of the State.

The Constitutional Court declared the wording "Bosniacs and Croats as constituent people along with the Others", as well as "in the exercise of their sovereign rights" of Article I.1.1 of the Federation Constitution, unconstitutional. In its decision the Court emphasised that the designation of Bosniacs and Croats as "constituent peoples" in Article I.1.1 of the Federation Constitution not only had a discriminatory effect, but also violated the right to liberty of movement and residence, and the right to property, as guaranteed by Article II.3 and II.4, in connection with Article II.5 of the Constitution of Bosnia and Herzegovina. Moreover, the aforementioned provision of the Federation Constitution violated Article 5.c of the Convention on the Elimination of All Forms of Racial Discrimination and the right to collective equality, provisions which are applicable in Bosnia and Herzegovina according to Annex I of the State Constitution.

Supplementary information:

Some aspects of the case have been decided in the fourth partial decision which was adopted on 18 and 19 August 2000 and will be published in the next *Bulletin*.

Languages:

Bosnian, Serbian, Croat, English, French.



Identification: BIH-2001-3-009

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 28.09.2001 / **e)** U 26/01 / **f)** Request of 25 representatives of the National Assembly of Republika Srpska for the evaluation of conformity of the Law on the Court of Bosnia and Herzegovina (Official Gazette no. 29/00) with the Constitution of Bosnia and Herzegovina / **g)** *Sluzbeni Glasnik Bosne / Hercegovine* (Official Gazette of Bosnia and Herzegovina) 04/02 / **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.**
 3.3. General Principles – **Democracy.**
 3.9. General Principles – **Rule of law.**
 4.7.1. Institutions – Judicial bodies – **Jurisdiction.**
 4.8.8.2.1. Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae*.**
 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:

Distribution of powers, principle / High Representative for Bosnia and Herzegovina / State, institution, new, establishment / Venice Commission, opinion / Council of Europe, Venice Commission / Legal remedy, effective.

Headnotes:

Bosnia and Herzegovina is competent to establish a Court of Bosnia and Herzegovina in order to fulfil its constitutional obligations, especially deriving from the principles of democracy and the rule of law.

Summary:

The applicants, a group of representatives of the National Assembly of *Republika Srpska*, requested the Court under Article VI.3.a of the Constitution of Bosnia and Herzegovina to evaluate the constitutionality of the Law on the Court of Bosnia and Herzegovina. This law had been enacted by the High Representative for Bosnia and Herzegovina (High Representative) and published in the Official Gazette of Bosnia and Herzegovina. It established the Court of Bosnia and Herzegovina and regulated its competences as well as procedural matters. A working group, chaired by the Ministry for Civil Affairs and Communications, and composed of members of this Ministry, the Ministries of Justice of the Federation of Bosnia and Herzegovina and of the *Republika Srpska*, and of the Office of the High Representative, had previously agreed on a draft law on a Court of Bosnia and Herzegovina. However, the law had failed to be adopted through the regular procedure. According to the Office of the High Representative the law corresponded not only to the constitutional obligation of Bosnia and Herzegovina, expressed in the opinion of the Venice Commission of the Council of Europe, to establish a Court at state level in Bosnia and Herzegovina, but also to a request of the Peace Implementation Council.

The applicants claimed that the challenged law violated Article III of the Constitution of Bosnia and Herzegovina which regulates the responsibilities of and the relations between Bosnia and Herzegovina and the Entities. They pointed out that the Constitution of Bosnia and Herzegovina did not provide that a judicial system is the responsibility of Bosnia and Herzegovina, but that the organisation of the judicial system was the responsibility of the Entities. Furthermore, they argued that the implementation of the Law on the Court of Bosnia and Herzegovina required the adoption of a number of laws of substantive and procedural nature for which there was no legal basis in the Constitution of Bosnia and Herzegovina.

The Court declared the Law on the Court of Bosnia and Herzegovina to be in conformity with the Constitution of Bosnia and Herzegovina.

With reference to its previous jurisprudence (U 9/00, *Bulletin* 2000/3 [BIH-2000-3-004], U 16/00, *Bulletin* 2001/2 [BIH-2001-2-001], and U 25/00, *Bulletin* 2001/2 [BIH-2001-2-004]), the Court found itself to be competent to review the challenged law although it had been enacted by the High Representative whose mandate derived from Annex 10 of the General Framework Agreement for Peace, the relevant resolutions of the United Nations Security Council and

the Bonn Declaration. The Court recalled that while the mandate and the exercise of the mandate were not subject to the control of the Court, it considered itself competent to review acts of the High Representative when he substituted the domestic authorities, thereby acting as an authority of Bosnia and Herzegovina, and the laws enacted by him being, by their nature, domestic laws of Bosnia and Herzegovina.

The Court found that the challenged law did not violate Article III.3.a of the Constitution of Bosnia and Herzegovina ("All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."). It argued that Bosnia and Herzegovina needed and therefore was competent to establish a Court of Bosnia and Herzegovina, fundamentally on the basis of the principles laid down in Article I.2 of the Constitution of Bosnia and Herzegovina ("Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.") and of its internal structure established pursuant to item 3 of the same article. Starting from there, the Court held, that the Constitution of Bosnia and Herzegovina conferred on Bosnia and Herzegovina certain responsibilities in order to ensure its sovereignty, territorial integrity, political independence and international personality (e.g. Articles I.1, II.7, III.1.a, III.5.a, IV.3.a), the highest level of internationally recognised human rights and fundamental freedoms (e.g. Article II.1 of the Constitution of Bosnia and Herzegovina as well as Annexes 5-8 General Framework Agreement for Peace) and free and democratic elections (Articles IV.2 and V.1 of the Constitution of Bosnia and Herzegovina).

The Court emphasised that apart from the responsibilities enumerated in Article III.1 of the Constitution of Bosnia and Herzegovina, there were other constitutional provisions assigning competences to Bosnia and Herzegovina such as Articles I.7, IV.2 and V.1 of the Constitution as well as Article II of the Constitution of Bosnia and Herzegovina.

Moreover, the Court drew attention to Article III.5.a of the Constitution of Bosnia and Herzegovina which established that Bosnia and Herzegovina should assume responsibility for:

1. such other matters as were agreed by the Entities;
2. matters that were provided for in Annexes 5 through 8 to the General Framework Agreement; and
3. matters that were necessary to preserve the sovereignty, territorial integrity, political

independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina, and that additional institutions could be established as necessary to carry out such responsibilities.



The Court especially pointed out that Bosnia and Herzegovina and both Entities should ensure the highest level of internationally recognised human rights and fundamental freedoms (Article II.1 of the Constitution of Bosnia and Herzegovina), and that the rights and freedoms as set forth in the European Convention on Human Rights were to be applied directly in Bosnia and Herzegovina and should have priority over all other law (Article II.2 of the Constitution of Bosnia and Herzegovina). The Court had particular regard to the general principle of the rule of law being inherent in the European Convention on Human Rights and, more particularly, to the principles of a fair court hearing and an effective legal remedy (Articles 6 and 13 ECHR). The establishment of the Court of Bosnia and Herzegovina, the Court argued, could be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina acted in conformity with the rule of law and in satisfying the requirements of the European Convention on Human Rights as regarded fair hearings before a court and effective legal remedies. Until the Court of Bosnia and Herzegovina would start functioning, there would have been no possibility in the legal system of Bosnia and Herzegovina to challenge decisions issued by the institutions of Bosnia and Herzegovina before an organ which fulfilled the requirements of an independent and impartial tribunal.

The Court also noted that, according to Article VI.3 of the Constitution of Bosnia and Herzegovina, the decisions of the Court of Bosnia and Herzegovina would be subject to review by the Constitutional Court as to their constitutionality.

Cross-references:

- U 9/00, 03.11.2000, *Bulletin* 2000/3 [BIH-2000-3-004];
- U 16/00, 02.02.2001, *Bulletin* 2001/2 [BIH-2001-2-001];
- U 25/00, 23.03.2001, *Bulletin* 2001/2 [BIH-2001-2-004].

Languages:

Bosnian, Croat, Serb (translations by the Court).

Identification: BIH-2004-2-004

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 25.06.2004 / **e)** U 68/02 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 38/04 / **h)** CODICES (English, Bosnian).

Keywords of the systematic thesaurus:

3.8. General Principles – **Territorial principles.**
 3.25. General Principles – **Market economy.**
 4.8.1. Institutions – Federalism, regionalism and local self-government – **Federal entities.**
 4.8.2. Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**
 5.1.3. Fundamental Rights – General questions – **Positive obligation of the state.**
 5.2.1.1. Fundamental Rights – Equality – Scope of application – **Public burdens.**
 5.3.43. Fundamental Rights – Civil and political rights – **Right to self fulfilment.**
 5.4.6. Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Free movement of goods, obstacle / Tax, excise, local / Tax, luxury / Tax, refund / Market, unity / Protectionism, administrative.

Headnotes:

Any measure that would impede the movement of goods in the entire territory of the state without reasonable justification amounts to a violation of the constitutional principle of free movement of goods, services, capital and persons.

Summary:

The Deputy Speaker of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina submitted a request to the Constitutional Court for a review of the provisions of Articles 41 and 48 of the Law on Excise Tax and Turnover (Sales) Tax of the *Republika Srpska*. The applicant claimed that the provision of Article 41.3 of that Law discouraged trade between the Entities and the Brcko District because it put a foreign importer of goods to the *Republika Srpska* in a more favourable position as to excise tax

than a supplier of the same goods from the other Entity or the Brcko District. The applicant argued that a distinction had been made between a foreign importer and a supplier from the other Entity or the Brcko District: an importer was obliged to make payment of excise tax within the time limit and in the manner envisaged for payment of customs duties and other import fees, whereas a supplier of goods produced in the Federation of Bosnia and Herzegovina (hereinafter, the "Federation") or the Brcko District was obliged to make payment of excise tax prior to transporting the goods. Such a legal position led to the creation of three separate economic areas in Bosnia and Herzegovina.

Furthermore, the applicant contended that the provision of Article 48.1.2 of the Law interfered with the free movement of goods subject to the payment of excise tax between the Entities and the Brcko District, since the obligation to pay the tax arises according to the location of the office of the purchaser in the *Republika Srpska*. Goods subject to payment of excise tax that were purchased in the Federation and in the Brcko District would be subject to double taxation, resulting in an increase in the price of the goods.

Pursuant to Article III of the Constitution of Bosnia and Herzegovina, the regulation of payment of excise tax and turnover tax on goods subject to payment of excise tax is a competence of the Entities in Bosnia and Herzegovina.

Having examined the said regulations, the Constitutional Court noted that imposition of an obligation to make payment of the excise tax represents a measure of administrative protectionism of a fiscal nature and allows for an additional collection of budget revenues from turnover of luxury goods. An obligation to make payment of the excise tax exists in both Entities and in the Brcko District, and it includes the overall turnover of these goods, regardless of whether they are imported from abroad, produced locally or exchanged between the Entities.

There are three categories of persons under the obligation to make payment of the excise tax in both Entities and in the Brcko District:

1. a producer of goods subject to payment of excise tax;
2. an importer of goods subject to payment of excise tax; and
3. a buyer of goods subject to payment of excise tax from a supplier from the other Entity or the Brcko District.

The place of payment of the excise tax and turnover tax is the office of the producer or the importer, i.e. the office of the purchaser for products procured in the other Entity or the Brcko District. Excise tax on inter-Entity turnover is ultimately paid in the Entity where the final consumption takes place. However, the allocation of excise tax to the Entity of final consumption by its very nature involves payment of excise tax by both the seller and the purchaser, but with the seller receiving a refund of the excise tax on products sold for final consumption in the other Entity.

The constitutional principle of "single market" imposes an obligation on the state to implement its goals: full freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina. The Entities are obliged not to prevent the fulfilment of this principle although this does not restrict the state from acting positively so as to accomplish its goal. The concept of "single market" implies that the internal market of Bosnia and Herzegovina should be created by repealing all technical, administrative and other measures which constitute barriers to or controls on the free movement of goods. Full freedom of movement of goods presupposes free exchange of goods in the entire and single customs territory of the state.

In order to guarantee the constitutional principle of the single market efficiently, it would be necessary to link it with Article II.4 of the Constitution, which prohibits discrimination. The concept of prohibition of discrimination may entail the adoption not only of technical measures, but also of positive legislation and a positive obligation of the state to guarantee institutional protection of prohibition of discrimination. Furthermore, the prohibition of discrimination encompasses both formal and substantive discrimination.

The facts that the state must ensure an efficient single market (Article I.4 of the Constitution) and that the Entities regulate certain areas do not automatically mean that the principle of a single market has been compromised. To that end, the state has a wide margin of appreciation as to how to organise a single market within its borders in the most adequate way. Although the constitutional division of competences under Article III of the Constitution allocates certain competences to the Entities that may influence the creation of a single market in accordance with the state's obligation, the autonomous status of the Entities is subject to the hierarchically superior competences of the state, which include protection of the Constitution and its principles. In the particular case, primacy had to be given to the principle of the single market and the exercise of its related freedoms, and to the principle

of state sovereignty. In that respect, the supremacy of the state over the Entities and the Brcko District, which follows from Article III.3.b of the Constitution, allows it to take appropriate measures to enable all persons to enjoy constitutional rights.

Moreover, the Constitutional Court found that the treatment of the “inter-Entity purchaser and seller” of goods subject to payment of excise tax, lacks affirmation. Namely, excise tax is paid in inter-Entity trade in the Entity of final consumption. However, the very manner of allocation of excise tax toward the Entity of final consumption includes payment of excise tax by the seller and the purchaser, the seller then receiving a refund of the excise tax paid in respect of products sold in the other Entity. In this way, the turnover of goods are burdened at one point with two payments of excise tax and two procedures of collection. Furthermore, the possibility of obtaining a refund of excise tax paid is complicated by the need for submission of evidence of the purchaser's subsequent payment in another territorial unit. In this way, the state avoids in part its obligation to organise an effective excise tax collection system, placing responsibility instead on the seller. If the seller cannot obtain the evidence to establish all the facts, the seller cannot obtain a refund of the money paid. Finally, goods intended for consumption are not treated in the same way as goods which are not being sold to the end consumer, although the principle of final consumption should be applied to both categories. In this way, the various parts of the chain of movement are treated differently. Such a system represents an administrative obstacle that impedes access to the market of Bosnia and Herzegovina because it does not create equal conditions actors who appear on the market, which represents one of important conditions of a single market, and because it is not in line with Article I.4 of the Constitution.

Languages:

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



Bulgaria Constitutional Court

Important decisions

Identification: BUL-1998-S-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 26.11.1998 / **e)** 29/98 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 141, 01.12.1998 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 5.1.1.4.1. Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**
 5.2.1.3. Fundamental Rights – Equality – Scope of application – **Social security.**
 5.4.14. Fundamental Rights – Economic, social and cultural rights – **Right to social security.**
 5.4.19. Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

Health system, financing / Health insurance, contributions / Medical care, access, equality, minors.

Headnotes:

Citizens contribute to the National Health Insurance Scheme proportional to their earnings. The expectation that the high earning family member contributes to this scheme for family members unable to pay (e.g., minors) is constitutional.

Summary:

I. The Constitutional Court considered the applicants' (fifty-two Members of the 38th National Assembly) request to review the constitutionality of Articles 37.1.1, 37.1.2 and 41.3 of the Health Insurance Law (hereinafter, the “HIL”)) *Darzhaven Vestnik*, no. 70/1998.

Article 37.1.1 and 37.1.2 require from the compulsory insured persons to pay sums that are a percentage of the national minimum salary to the medic who treats them.

Article 52.2 of the Constitution lists the financial sources of the health service. The list is followed by “other sources” that are subject to a law together with the conditions and procedures for raising needed funds. Although small, sums under Article 37 of the HIL are to be counted among “other sources” which are to be defined by the Constitution.

II. In compliance with Article 52 of the Constitution, the HIL reads that all Bulgarian citizens who pay contributions in proportion to their earnings shall be covered by the National Health Insurance Scheme. This creates a social health protection system with maximum access to medical care and equal availability for all.

The obligation to pay the sums pursuant to Article 37.1.1 and 37.1.2 of the HIL does not affect the Constitution’s principles, which guarantee access to health service. The needed medical care, medicines and services during treatment are determined solely by the health status and the nature of the disease and not by the amount of contributions.

Article 27.2 of the HI excludes all persons who cannot afford to pay the sums required by Article 37.1 and thus their access to medical care is restricted. The health insurance contributions of people with financial difficulties shall be covered by the national or municipal budgets.

Article 41.3 of the HIL requires, from an insured member of the family with higher income, to pay the health insurance contributions for minors and non-working members of the family if they have not signed up as being unemployed. Protection of the family and children is a fundamental principle in Article 14 of the Constitution. The State is not expected to cover all expenses of children. Article 47.1 of the Constitution reads that the raising and upbringing of children shall be a right and obligation of parents. Priority is given to the parental function and the State only assists. Therefore it is not in contravention to the Constitution to make parents pay for the health insurance contributions of the minor and underage members of the family.

Languages:

Bulgarian.



Identification: BUL-2006-3-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 13.09.2006 / **e)** 06/06 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 78, 26.09.2006 / **h)**.

Keywords of the systematic thesaurus:

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

4.1.1. Institutions – Constituent assembly or equivalent body – **Procedure.**

4.1.2. Institutions – Constituent assembly or equivalent body – **Limitations on powers.**

4.4.3.3. Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.5.2. Institutions – Legislative bodies – **Powers.**

4.5.8. Institutions – Legislative bodies – **Relations with judicial bodies.**

4.7.4.1.5. Institutions – Judicial bodies – Organisation – Members – **End of office.**

4.7.4.3.5. Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **End of office.**

4.7.5. Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

4.7.7. Institutions – Judicial bodies – **Supreme court.**

4.7.16.2. Institutions – Judicial bodies – Liability – **Liability of judges.**

Keywords of the alphabetical index:

Judge, dismissal, by parliament / Constitution, fundamental principle, protection / Judiciary, independence / Parliament, power, restriction / Parliament, exclusive right to amend Constitution.

Headnotes:

The three independent branches of government are the legislature, the executive and the judiciary. The way they function can only be changed by the Grand National Assembly, not by amendment of the Constitution by the ordinary National Assembly.

Summary:

Proceedings were instituted at the instigation of the plenary Court of Cassation, alleging the unconstitutionality of Article 6.1 of the Act amending the Constitution, introducing a new Article 129.4. This amendment of the Constitution concerned the form of State government, an area where any amendment of the Constitution is in fact the prerogative of the Grand National Assembly.

It should be noted first of all that the Constitution of 1991 expresses the desire of the majority of Bulgarian society for Bulgaria to occupy its rightful

place among European countries which set an example both morally and economically. The law grants relative inviolability to the subject matter of Article 158 of the Constitution by stipulating that only the Grand National Assembly can modify this part of the fundamental law. The Bulgarian Constitution thus follows the tradition whereby certain subjects are too important to be amended by a qualified majority in the ordinary National Assembly. This self-restriction in the Constitution serves to guarantee stability and respect for the established constitutional order. If the ordinary National Assembly had the power to make changes and amendments to the Constitution, the Constitution would not occupy the special place it occupies today in the country's legal system. Changing essential chapters of the Constitution without following the special procedure provided for in Article 158 could expose the Constitution to hasty amendments or passing interests. It would be difficult to legitimise a political system if the amendment at its origin were the fruit of improvisation, an arrangement or misguided outside pressure.

The new Article 129.4 of the Constitution stipulates that in the event of serious breaches of their official obligations, or of activities likely to harm the prestige of the judiciary, Supreme Court Presidents and the Chief Prosecutor may be dismissed from office not only by the Supreme Judicial Council but also by the President of the Republic at the request of two thirds of the parliament.

Article 158.3 of the Constitution stipulates that questions concerning the form of state structure and the form of government are to be resolved by the Grand National Assembly. Provisions directly concerning the form of state structure and of government are to be found in Chapter One of the Constitution, on "Fundamental Principles". This chapter contains other principles, such as national sovereignty, the rule of law, the supremacy of the Constitution, the separation of powers, and political plurality. All these principles are of fundamental importance for any modern state. It would therefore be unacceptable for the ordinary National Assembly to be able to amend this part of Chapter One.

The sole subject of this decision is a constitutional principle without which the state could not function according to the rules of civilisation, namely the fundamental principle of the separation of powers between the legislature, the executive and the judiciary.

Fundamental principles for the normal functioning of society, such as the separation of powers, mutual deterrence, and interaction and co-operation are the fruit of historical traditions and subjective attitudes,

and contain ideas which have not actually been realised in the normal manner. In this particular case, in order to determine whether the law in question is in accordance with the fundamental principles of the form of state structure and government, the Court must take the Constitution into account.

The desire of the legislator to give each branch of government the power to act independently in its respective field is evident; only the National Assembly passes the budget, which determines the remuneration of law officers, and elects the eleven members of the Supreme Judicial Council. The members of that Council are responsible, in their turn, for supervising the behaviour of senior justice officials. The impugned provision, which concerns one of the most important aspects of the organisational independence of the judiciary, highlights the imbalance between the three branches of government. Accordingly, the Court considers that there has been a breach of the three-way separation of powers enshrined in the Constitution.

The impugned provision is also at variance with the rule of law. It is a well-established fact that in the continental tradition the content of this notion is linked to the provisions of the law regarding the structure, form and functioning of the State.

Following the amendments made to it, the Constitution provides for Parliament and the Supreme Judicial Council, under the same conditions and for the same reasons, to be able to take decisions independently. This state of affairs could give rise to insurmountable problems. When more than one body is responsible for taking the same decisions they tend to avoid doing so. The result could be legal chaos.

The proper procedure for dismissing a judge should give the interested parties a say in the decision. In other words the procedure should provide from the outset for the possibility of challenging the findings of the parliament. It is inadmissible that in respect of this essential part of the Constitution, *preventive* measures are rejected in favour of *post factum* appeals to the Constitutional Court.

In the light of the above, the Court considers it necessary to protect the Constitution against amendments not in keeping with its fundamental principles and declares the impugned decision in violation of the Constitution.

Languages:

Bulgarian.



Identification: BUL-2010-3-003

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 11.11.2010 / **e)** 12/10 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 91, 19.11.2010 / **h)**.

Keywords of the systematic thesaurus:

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

2.1.1.4.6. Sources – Categories – Written rules – International instruments – **European Social Charter of 1961.**

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

2.1.1.4.18. Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

3.5. General Principles – **Social State.**

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

5.2.2.13. Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis*.**

5.3.38.3. Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Social law.**

Keywords of the alphabetical index:

Employment / Paid leave, right, limitation / Retrospective effect.

Headnotes:

The law amending and supplementing the Labour Code cannot have retrospective effect, especially where a fundamental constitutional right, such as the right to paid leave, is at stake. When a right is created under the authority of the legal system and when the retrospective effects of a later law give rise to legal consequences that are unfavourable for the owners of that right, the fundamental principles of the rule of law enshrined in the Constitution are infringed.

The limitation of the right to paid leave is not unconstitutional, as long as it only produces effects in the future.

Summary:

I. The Court received two independent applications from the President of the Republic and 51 members of Parliament, seeking to establish the unconstitutionality of paragraph 3.e of the transitional provisions of the Labour Code (hereinafter, “TPLC”), paragraph 8.a of the transitional and final provisions of the law on state officials (hereinafter, “TFPLSO”), Articles 176.3 and 224.1 of the Labour Code (hereinafter, “LC”) and Articles 59.5 and 61.2 of the law on state officials (hereinafter, “LSO”) and the non-conformity of some of these norms with treaties to which Bulgaria is party (the Universal Declaration of Human Rights (hereinafter, “UDHR”), the International Covenant on Economic, Social and Cultural Rights (hereinafter, “ICESCR”), Convention no. 52/1936 of the International Labour Organisation (hereinafter, “ILO”), the European Social Charter (revised) (hereinafter, “ESC”), the EU Charter of Fundamental Rights and Directive 203/88/EC of the European Parliament and the Council).

II. Given the nature of the two cases the Court joined them for examination at the same time.

Paragraph 3.e of the TPLC provides that all paid annual leave granted in respect of the previous calendar years and not taken at 1 January 2010 may be taken up to 31 December 2011.

As of 1 January 1993, the three-year time limit for the taking of paid annual leave was abolished. Employees were able to use untaken paid annual leave until termination of the employment relationship. Certain mechanisms ensured that such leave was taken in due course. The accumulation of untaken leave is due to the law not being strictly applied.

Paragraph 3.e of the TPLC governs the use of untaken leave prior to the entry into force of that law.

It relates to rights already acquired because the entitlement to paid annual leave was created under another set of legal rules. It opens the way for a new legal assessment of the effects produced by a right introduced by a previous law. In this case, there is an infringement of the fundamental principle of the non-retrospective effect of the law, according to which a law may not have the retrospective effect of revoking rights. The time limit set for employees to use their untaken paid annual leave accrued from previous years is not sufficient.

Paragraph 3.e of the TPLC introduces a limitation of a right that is contrary to Article 57.1 of the Constitution, which stipulates that fundamental rights are inalienable. It also infringes the constitutional provisions of Article 16, under which the right to work is guaranteed and protected by the law, of Article 48.1, enshrining the right to work, and of Article 48.5, governing the right to leave. Consequently, the owners of that right are restricted in its exercise.

When a fundamental civil right cannot produce the legal effects provided for in the legislation in force at the time of its creation and the retrospective effect of a later law produces unfavourable consequences for the holders of that right, there is a violation of the principles of legal security and predictability, which are essential components of the rule of law. Paragraph 3.e of the TPLC is therefore contrary to Article 4 of the Constitution.

It infringes the principles of the welfare state, by introducing a restriction of a social right, which is prohibited by indent 5 of the Preamble to the Constitution.

Paragraph 8.a of the TFPLSO governs the conditions in which state officials may take their paid annual leave accrued during previous calendar years. It is identical in content to paragraph 3.e of the TPLC. The arguments of unconstitutionality of paragraph 8 are therefore the same and, on that basis, it is contrary to Articles 48.5; 16; 48.1; 57.1; 4 and indent 5 of the Preamble to the Constitution.

Article 176.3 of the LC stipulates that the right to paid annual leave lapses upon expiry of a time limit of two years following the year for which the leave was granted. Where leave is postponed, this time limit commences as from the end of the year during which the grounds preventing the employee from taking it disappear.

As a general legal mechanism, the stipulation appeared in the LC up until 1 January 1993.

Extinctive limitation provides for a period of inactivity on the part of the owner of a right. Article 176.3 of the LC therefore provides for the extinction of the exercise of the right to leave and not of the right itself.

Stipulating an extinctive limitation period is a question of state legal policy. The limitation provided for in Article 176.3 of the LC has no retrospective effect and its role is to encourage the exercise of that right. As a result, it does not contravene the Constitution and the Court dismissed the application.

Article 59.5 of the LSO is identical to Article 176.3 of the LC in terms of content and governs the extinction of the exercise of the right to paid annual leave of state officials. The Court dismissed the application of the members of parliament seeking to establish the unconstitutionality of this provision on the basis of the same arguments and conclusions as those set out above.

Under Article 224.1 of the LC, upon legal termination of the employment relationship, the worker or official is entitled to a payment to compensate for untaken paid leave granted for the current calendar year which is proportional to the years taken into account for the calculation of length of service and leave not taken owing to the employer's actions or because of maternity, to which entitlement is not extinguished by limitation.

Analysis of Article 224.1 of the LC shows that the limitation of the right to a compensation payment relates only to the current calendar year and leave postponed in accordance with Article 176 of the LC. There may be many reasons for not taking paid annual leave. The law states that, in such cases, the right to leave must be exercised before 31 December of the respective year. Article 224.1 of the LC contradicts Article 176.3 of the LC, which provides for a period of limitation of two years. This contradiction between the two provisions is crucial and sufficient justification to rule that Article 224.1 is unconstitutional because it infringes the principles of the rule of law. It is also contrary to Article 48.5 read in conjunction with Articles 16 and 48.1 of the Constitution. The Constitutional Court ruled that the passage in Article 224.1 of the LC reading "...granted for the current calendar year which is proportional to the years taken into account for the calculation of length of service and untaken leave, postponed in accordance with Article 176..." was unconstitutional.

Article 61.2 of the LSO is similar to Article 224.1 of the LC and is therefore open to the same arguments of unconstitutionality.

The international treaties that have entered into force in respect of Bulgaria are part of domestic law and have primacy over domestic legislative provisions which run counter to them (Article 5.4 of the Constitution).

International legal instruments define the general framework governing the right to leave. Under Article 24 of the UDHR everyone has the right to periodic leave with pay. Paragraph 3.e of the TPLC and paragraph 8.a of the TFPLSO deprive workers and officials of the possibility of exercising their right to paid annual leave, which conflicts with Article 24 of the UDHR.

They also run counter to the requirements of Article 2.1 of the UDHR which stipulates that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind.

Paragraph 3.e of the TPLC and paragraph 8.e of the TFPLSO do not comply with Articles 7.d and 2.2 of the ICESCR, which recognises, respectively, the right to periodic paid leave and the obligation of States to guarantee that those rights are exercised without discrimination.

Nor do they comply with Article 2 of ILO Convention no. 52 on holidays with pay.

Article 224.1 of the LC and Article 61.2 of the LSO do not comply with Article 6 of ILO Convention no. 52 with respect to the payment of compensation for paid annual leave not taken upon termination of the employment relationship, whereas the right to such compensation may not be exercised in all cases where the entitlement to leave is not extinguished by limitation. Bulgarian labour legislation provides for the payment of compensation for untaken paid leave in all cases where the employment relationship is terminated and not only for termination for a reason imputable to the employer as stipulated by Article 6 of the Convention.

Under Article 2.3 of the ESC (revised) the contracting Parties undertake to provide for a minimum of four weeks' annual holiday with pay. Articles F.1 and G.1 of the ESC provide that derogations from that requirement are possible in time of war or public emergency. Paragraph 3.e of the DTFCT and paragraph 8.a of the TFPLSO prevent the effective exercise of the right to leave, in the absence of grounds justifying such a restriction of this right and therefore clash with the above-mentioned provisions of the ESC.

Paragraph 3.e of the DTFCT and paragraph 8.a of the TFPLSO contravene Article 31.2 read in conjunction with Article 52.1 of the EU Charter, providing that all workers have a right to an annual period of paid leave. Any restriction of fundamental rights set forth in the Charter must take account of the principal content of those rights. The relevant argument in this case is that the workers and officials are deprived of a right to leave that they had already acquired. The challenged provisions are therefore contrary to Article 7 of Directive 2003/88/EC of the European Parliament and Council concerning certain aspects of the organisation of working time, which obliges all Member States to take the measures necessary to ensure that every worker is entitled to minimum paid annual leave which may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

Languages:

Bulgarian.



Identification: BUL-2011-S-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 04.05.2011 / **e)** 4/11 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 36, 10.05.2011 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.16. General Principles – **Proportionality.**
 4.9.5. Institutions – Elections and instruments of direct democracy – **Eligibility.**
 5.3.41.1. Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**
 5.3.41.2. Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Election, Electoral Code, Constitution / Election, residency period, requirement / Election, local election, European Parliament elections.

Headnotes:

The Electoral Code may not lay down provisions on matters that are exhaustively stipulated in the Constitution.

In principle, the requirement for a voter in local elections to have resided in a particular electoral district for a certain period of time, respectively EU Member State in the case of European Parliament elections, is constitutional and consistent with international legal standards although the length of the requisite period must be reasonable.

Summary:

I. The Constitutional Court has been requested by the applicants, fifty-three Members of Parliament (MPs), to declare certain provisions laid down in the Electoral Code (IK) (enacted in the State Gazette (SG),

no. 9/2011) unconstitutional on the grounds of being contrary to the universally recognised standards of international law and the international treaties to which the Republic of Bulgaria is a party.

II. The Court finds the application admissible for the following reasons:

The applicants contest the provisions according to which the candidates for Members of the European Parliament (MEPs) running in elections for mayors and local councillors as well as voters must have resided in Bulgaria or in an EU member State for at least two years prior to the elections (so-called residency requirement).

The Constitutional Court finds the application admissible only in part.

The right of citizens to elect representatives in central and local government (i.e. active suffrage) is a fundamental right. According to the modern legal doctrine, suffrage is a subjective, universal right. This means that any additional requirements (restrictions) apply solely to the act of voting. According to Article 42.1 of the Constitution, citizens vote in furtherance of the interests of society. In other words, a link exists between a voter and the community to which he or she belongs and which elected members of local or central government govern. This is the traditional rationale underlying the requirement for a voter to be a citizen of the country the government of which is to be elected; of an EU Member State in the case of European Parliament elections; or of a certain area in the case of local elections.

This warrants the conclusion that the requirement incorporated into the Electoral Code does not effectively “overwrite” the Constitution insofar as the provisions governing the election of local authorities and MEPs require certain residency conditions to be satisfied. In particular, the exercise of the right to vote is subject to a requirement for voters to have resided in a given area, respectively Member State of the European Union, for a certain period. It should be noted that in the past, different forms of residency requirements were a standing feature of national electoral law. Indeed, there is a long tradition of linking the place where a voter may exercise his or her active electoral right and a set of formal criteria, which have changed and evolved over time in line with the rules governing civil registration matters. In principle, the requirement does not contravene the recognised standards for free and fair elections laid down in international law and the conventions to which the Republic of Bulgaria is a party. The Code of Good Practice in Electoral Matters adopted at the 51st Plenary Session of the Venice Commission for

Democracy through Law to the Council of Europe (5-6 July 2002) expressly notes that the requirement for residency in an area or country for a certain period prior to elections is lawful.

The Constitutional Court finds that the contested requirement does not amount to censure as argued in some of the opinions received. In essence, the residency requirement concerns the place where a citizen may vote.

Nevertheless, a legal requirement for residency periods can be excessive, i.e. twelve months and two years (see Article 3.4-3.5 and Article 4.3-4.4 of the Electoral Code, respectively). In such case, the condition to be satisfied indeed becomes censorious, preventing citizens to vote. The length of the stipulated periods violates the constitutional principle of proportionality of the requirements for exercising fundamental rights, such as the right to vote. In other words, the length of the residency period as a condition that entitles a citizen to vote is unreasonable and unnecessary.

The standards and recommendations for good practices in electoral matters, developed by the Venice Commission of the Council of Europe, set out the principles of European electoral heritage, including universal suffrage (Code of Good Practice in Electoral Matters). The cited standards set out a recommendation for the length of the period of residency in an area or country prior to elections not to exceed six months. A further consideration to take into account is that the twelve, respectively twenty-four month periods, are not in line with the freedom of movement of people – a fundamental freedom within the European Union.

Languages:

Bulgarian.



Identification: BUL-2014-3-003

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 04.11.2014 / **e)** 12/14 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 95, 18.11.2014 / **h)**.

Keywords of the systematic thesaurus:

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

2.1.1.2. Sources – Categories – Written rules – **National rules from other countries.**

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

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

3.16. General Principles – **Proportionality.**

4.5.2. Institutions – Legislative bodies – **Powers.**

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.**

5.3.17. Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

Keywords of the alphabetical index:

Powers, restriction, legislator / Conflict, administration / Appeal, limitation, administrative acts.

Headnotes:

The legislator cannot declare certain administrative acts exempt from appeal before the courts by availing itself solely of the possibility provided in Article 120.2 of the Constitution. Its discretion is limited by criteria which are not explicitly mentioned in the Constitution but follow from the spirit and the fundamental principles thereof.

Access to the courts may be limited, without being completely denied, in rigorously defined cases, that is where it affects a higher public interest recognised by the Constitution and justified by the need to protect the foundations of the constitutional order, which include national sovereignty, separation of powers and the form of the state's structure and of its government.; or because of the need to guard against encroachments on the country's defence and security, as well as for the sake of fulfilling the principles and aims of its foreign policy.

The legislator, when introducing the exemption of an administrative act from appeal, must comply with the principle of proportionality including the international rules of access to a court. Exemption from appeal

secures the constitutive effect of the act in question, but does not prevent the injured person, under another procedure, from pleading its unlawfulness in all respects in order to be compensated for the damage sustained through its execution.

Exemption of an administrative act from appeal can in no circumstances limit the ability which the person concerned has to invoke before the court the defects which vitiate it owing to serious infringements of the legal system established by the Constitution which render it totally invalid, as for example the lack of jurisdiction of the authorities issuing this act, or non-compliance with the procedure prescribed by law.

Summary:

A group of members of parliament requested an interpretation of Article 120.2 of the Constitution permitting the legislator to declare certain administrative acts exempt from appeal. The Constitutional Court had to answer the question whether constitutional limitations existed to the legislator's power to pass laws exempting administrative acts from appeal.

The right to a defence proclaimed by Article 56 of the Constitution was a fundamental right securing to every person the possibility of defending their legal sphere against any violation or threat. It served as a guarantee for the exercise of the other fundamental rights and for the protection of the legitimate interests of subjects of law.

The right to a defence has committed the state bodies to ensuring that those whose rights have been violated or threatened can overcome the consequences of it. However, relations between the administration and the citizens do not always result in redress of damage. This is why everyone must have free access to an independent and impartial tribunal. Though not explicitly set out in the fundamental law, the right to a defence was mentioned in the more general formulation of Article 56 of the Constitution and consequently must be considered a principle of the rule of law.

The Constitution stipulated the inalienability of fundamental rights; it outlawed abuse of rights and their exercise to the detriment of another's legitimate rights or interests (Article 57). Abusing the right of access to a court or exercising it to the detriment of a third party are inadmissible concepts. In a democratic, law-based state, the court's integrity as impartial arbiter of the relations between subjects of law could not be called into question, while the principles of justice guaranteed that a judicial act would not affect the rights and legitimate interests of those not involved in the proceedings.

It could therefore be inferred that access to a court as a self-sufficient fundamental right might be limited only if it interfered with a higher public interest recognised by the Constitution. The first legitimate reason for such a limitation was to preserve the foundations of the constitutional order, such as national sovereignty, separation of powers and the state structure and the form of its government. Another reason justifying limitation of access to justice was to protect particularly important interests of society such as national defence and security, as well as to achieve the aims of foreign policy.

The provision in Article 120.2 of the Constitution laid down the principle of the right to appeal against all administrative acts infringing the legitimate rights and interests of subjects of law. However, it made provision by way of an exception for the exemption of certain acts from appeal to be introduced by law without explicitly defining the criteria thereof. Thus the restrictions on access to the courts permitted limitation of a fundamental right such as the right to a defence.

Besides the scope of the judicial review referred to by the Constitution, there was the question of the legislative expediency justifying decision-making by the competent administrative authority. The courts were authorised to verify the legality of acts originating from administrative bodies, not to assess the discretionary power properly vested in the latter.

Likewise, criminal orders issued by the administrative authorities were excluded from the scope of Article 120.2, as they are judicial acts and thus subject to review of legality.

Where the right to appeal against certain administrative acts was limited, legislative expediency was also limited by the above criteria for restriction of fundamental rights, given that exemption from appeal was only justified in order to protect particularly important interests of society with constitutional value. Thus, the protection of national security could justify restriction of appeal against administrative acts with repercussions on the country's defence capability or its foreign policy principles and aims. The position that the law may only declare exempt from appeal acts not affecting the citizens' fundamental rights was untenable. The constitutional rules laying down the criteria for restriction of rights, fundamental rights included, must absolutely be observed.

The Court upheld its earlier case-law in which it restrictively interpreted the legislator's right to introduce exemption from appeal. It was still of the view that such an exception was justified only in order to protect particularly important interests of the

citizens and society, and applicable to a strictly defined category of acts. Accordingly, the legislator could not declare certain administrative acts exempt from appeal by having regard solely to the issuing authority, without adverting to their substance.

The Constitutional Court considered that the exemption from appeal provided for in Article 120.2 of the Constitution did not permit the legislator to prevent injured persons from contesting invalid administrative acts whose legality was challenged because they prejudiced the foundations of the administrative system established under the Constitution and developed by legislation (issuing authority's lack of jurisdiction or non-compliance with the procedure prescribed by law). Persons affected by such acts must have access to a court in order to plead the defects of invalidity vitiating the acts because of serious infringements of the legal system. They would then have an effective remedy enabling them to terminate the constitutive effect of completely vitiated administrative acts, and even to be compensated should they have sustained damage due to the execution of the acts. Otherwise, a blatant trespass would be committed against the foundations of rule of law within the meaning of Article 4 of the Constitution.

In accordance with the principle of rule of law, any limitation introduced by the law must comply with the requirement of proportionality, i.e. it must be appropriate, as lenient as possible, and effective enough to allow attainment of the constitutionally justified objective. "Prohibition of excess" as a component of the rule of law was linked with the stipulations of Article 14.1 of the International Covenant on Civil and Political Rights and with Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with Article 6.2 of the Treaty on European Union. The case-law of the European Court of Human Rights must also be taken into account. It was unacceptable that the exception made in Article 120.2 of the Constitution should contradict the country's international undertakings in terms of guaranteeing everyone access to an independent and impartial tribunal which would determine their rights and obligations.

The exemption of administrative acts from appeal secured, in practice, the constitutive effect of the acts concerned, which sufficed to achieve the constitutional aim sought. However, it would be immoderate and unjustified to accept that exemption from appeal could cause a subjective right like the right to a defence to be not only limited but also nullified. Consequently, to comply with the principle of proportionality, in particular the international rules of

access to a court, the legislator must contemplate the possibility of indirect judicial review to allow the administrative act in question to have its legal effects, and the persons concerned to challenge the illegality of the act under another procedure and to seek compensation for the damage sustained. Otherwise the provision in Article 7 of the Constitution that the state shall be held liable for the damage caused by acts originating from its bodies would become a mere declaration.

Languages:

Bulgarian.



Identification: BUL-2016-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 07.07.2015 / **e)** 13/2014 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 55, 21.07.2015 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

1.1.1.2. Constitutional Justice – Constitutional jurisdiction – Statute and organisation – **Independence.**

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

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

4.7.5. Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

Keywords of the alphabetical index:

Independence, judiciary / Competence, Supreme Judicial Council.

Headnotes:

The Constitution specifies that the Supreme Judicial Council shall manage the judiciary and uphold the independence of judges, prosecutors and investigating officers so that they can perform their functions, protecting the rights and legitimate interests of citizens, corporate entities and the State.

The Supreme Judicial Council's administration activity shall ensure the efficient performance of its Constitution-assigned functions in relation to the personnel, budget and organisation. The assignment of this activity to institutions outside the judiciary would violate the principles of the separation of powers and judicial independence.

Summary:

I. A panel of the Supreme Administrative Court requested the Constitutional Court to review the constitutionality of sentence two of Article 16.1 of the Judiciary Act. The panel challenged that the contested provision entrusting the Supreme Judicial Council (hereinafter, "SJC") with the administration of the judiciary's proceedings conflicts with sentence one of Article 117.2 of the Constitution, which stipulates that the judiciary shall be independent of all the other powers. Further, the panel claimed that Article 16 of the Judiciary Act was inconsistent with Article 130.6 of the Constitution, as the provisions on the SJC's powers make no mention of functions to be performed so as to organise the judiciary's operations and to direct its activities.

II. The Constitutional Court dismissed the request on the following grounds:

Principle of judicial independence and the separation of powers

Each of the three powers in the Constitution exercises its prerogatives. Therefore, the mechanism of interaction between and among them precludes enforcement of actions or prescription of acts that might divest the institutions of their constitutionally guaranteed independence and discretion to exercise their prerogatives.

The Constitution expressly underscores that independence is the most essential trait of the judiciary. The functional independence of any judicial authority requires measures to rule out dependencies on and prescriptions or instructions by state institutions or political entities in law enforcement in any specific case. Functional independence guarantees that a conviction is freely formed and based on the law and evidence gathered for the case.

Functional independence encompasses, *inter alia*, court activities that do not involve the dispensation of justice but court administration, such as authorising or prohibiting the use of wireless tapes, the contract of civil marriage between juveniles, the disposition of the assets of mentally incapable persons, etc. The judge must refer to the applicable law.

Concerning the Supreme Judicial Council and the administration of the judiciary

While the Constitution does not expressly define the legal status of the SJC, it describes the Council as the authority that manages the judiciary. An earlier decision of the Constitutional Court defines the SJC as:

“... a new institution that is modelled on an institution in some European states to be installed in the state organisation of the Republic of Bulgaria. By definition the SJC is an arm of the judiciary. The SJC prerogatives make it clear that it is not a body that administers justice, it is a supreme administrative body that manages the constituents of the judiciary...”.

A review of the evolution of the Constitution and legislation shows a steady trend whereby the SJC prerogatives have been extended to clarify its role as a body that manages the judiciary. This trend justified the fourth amendment to the Constitution in 2007. The justification indicates, “... in contrast to the provisions so far new provisions are proposed whose purpose is, first and foremost, to underscore the role of the SJC as a body that takes the major decisions about the management of the judiciary...”. The Constitutional Court has, on several occasions, defined the SJC as a body of administration and the arms of the judiciary, as it is comprised of bodies that are managed and subject to the SJC acts.

Given the description as the body that manages the judiciary, the SJC should be able to exercise prerogatives for its functioning and be provided conditions and settings to enable it to respectively facilitate the activity of the judicial bodies to perform their constitutionally assigned duty to protect the rights and legitimate interests of the citizens, corporate entities and the State. Being structurally and organisationally standalone arms of the judiciary to apply various ways and means to carry out the activity, it was imperative to have in place a special institution, namely the SJC, to guide, direct and manage the organisational activity of any of the bodies included in the structures of the judiciary and to co-ordinate the interaction of these bodies.

Staffing of the judiciary is extremely important. The process comprises of the selection, appointment, dismissal and disciplinary sanctions. In general, the process includes the career development of the judges, prosecutors and investigating officers who exercise the prerogatives of the judiciary. Typical management functions such as direction, organisation, administration, co-ordination and control are observed as the SJC engages in these activities and

draws up and spends the judiciary's autonomous budget. In the Constitutional Court's understanding, the administration should not be viewed as a specific prerogative of one institution or another; it should be seen as a more general category manifested in any of the forms of State power with its specific characteristics. Therefore, there exists no legal definition, at a constitutional level, of the notion “administration” whose substance is described by the competence as provided to the relevant State institutions.

To take the view that the Constitution restrains the SJC from exercising solely and exclusively the prerogatives that are expressly enumerated in Article 130.6 and 130.7 means that the managerial functions required to exercise these prerogatives will be assigned to institutions other than those of the judiciary. Thus, the principles of the separation of powers and independence of the judiciary will be infringed upon.

The judiciary is a State power and the arms of the judiciary, the SJC included, are State institutions. The exercise of judicial power by its arms should be seen as a component of the running of the State. However, the administration of the judiciary has distinctive features compared to the government administration.

The administration of the judiciary, a function that is performed by the SJC, does not employ a *modus operandi* for the judiciary structures that is identical to the one used for the Executive structures. Furthermore, though the SJC is the authority that manages the judiciary, it is not a body that may perform the functions of the judiciary relevant to the protection of the rights and legitimate interests of the citizens, corporate entities and the State. Hence there is no subordination in the SJC-judiciary authorities' relationship in their capacity as State authorities, as judges dispense justice and prosecutors supervise to make sure that the law is abided by and the investigating officers investigate criminal cases. The principle of functional independence (Article 117.2 of the Constitution) as applied in the verification of facts and in the interpretation and enforcement of the law shall preclude any possibility for the SJC to give the judicial authorities orders, commands or instructions, respectively, to direct and oversee these authorities and control their rulings.

By the contested provision of sentence two of Article 16.1 of the Judiciary Act, the legislator has expressly removed the part of the judicial authorities' activities potentially affecting their functional independence (i.e., activities termed as dispensation of justice and oversight to ensure law abidance from the province of the SJC's administration). Thus

protection is extended over the independence of the SJC judges, prosecutors and investigating officers. Therefore, the Constitutional Court ruled that the contested part of Article 16 of the Judiciary Act's was not discordant with Article 117.2 of the Constitution.

Article 130.6 of the Constitution provides for the SJC's key prerogatives concerning the construction of the judiciary in line with the principle of the separation of powers. By virtue of constitutionally delegated power, the legislator has made a primary law that clarifies the SJC's work, which are summarised as personnel, disciplinary, organisational, budgetary/financial, managerial and controlling activities. For the purpose of execution, it is only natural for the legal framework to provide for executive prerogatives not provided for in the Constitution, but pertaining directly to and deriving from the prerogatives set out in Article 130.6 and 130.7 of the Constitution.

Direction and control are likewise elements of the administration of the SJC. The Constitutional Court's Interpretative Decision no. 9/2014 recognised that the SJC shall have the power to pass sub delegated legislation as it performs its constitutionally assigned functions as per Article 130.6 of the Constitution and the passage of such legislation is a typical decision-making activity, which does not impinge on the judiciary authorities' functional independence. The control that the SJC exercises has to ensure the efficiency of the dispensation of justice, e.g., hand down court rulings within a reasonable time. The findings of control are needed for the SJC to make fair decisions on its constitutionally granted powers pertaining to the career development and disciplinary liability of the judges, prosecutors and investigating officers.

Languages:

Bulgarian.



Identification: BUL-2016-1-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 29.09.2015 / **e)** 4/2015 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 78, 09.10.2015 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

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

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

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

4.5.6. Institutions – Legislative bodies – **Law-making procedure.**

4.5.6.4. Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

Keywords of the alphabetical index:

Ratification Act, constitutionality, amendment / Republic, parliamentary / Law-making, voting procedure, prior consent / Bill, amendment, proposal, supplement.

Headnotes:

The National Assembly shall not amend an international agreement by a ratification act. The passage of the bill by the first vote “as a whole and in principle” precludes proposed amendments and supplements regarding the bill’s underlying elements within the framework of the second vote procedure. It is not binding for the decision to approve an act by two votes within one sitting to be taken before the first vote. However, such *modus operandi* should not be detrimental to the pluralism of opinions and more specifically, should not curtail the right of a Member of Parliament to propose amendments and supplements to the bill debated. To check an act that ratifies an international agreement for compliance with the Constitution is to see to both – the formal ratification requirements and the text of the agreement in question.

Summary:

I. A group of Members of Parliament challenged the constitutionality of the Ratification Act (hereinafter, the “Act”) for the Dealer Agreement and the Agency Agreement between the Republic of Bulgaria (“issuer”) and several corporate entities (“organisers”, “dealers”, “agents” and “underwriters”) under the Global Medium-Term Note (GMTN) Programme of the Republic of Bulgaria for bond issues worth 8 billion Euros.

During the vote on the challenged Act, the Members of Parliament asserted they were deprived of the opportunity to introduce changes to the bill, which was approved by the first vote. The deprivation violated the principles of the rule of law, political pluralism and the parliamentary form of state government as well as the constitutional requirement

that the National Assembly shall exercise legislative power. Further it was insisted that the decision to vote twice within a single sitting should be taken by the National Assembly before the first vote. A reason was given to the effect that the ratified international agreement had been concluded in the absence of the National Assembly's prior consent that the Constitution requires.

II. The Constitutional Court dismissed the challenge based on the following reasons:

Members of Parliaments' right to propose texts between the first and the second vote of a bill.

The law-making process is subject to the imperative rule that submitted bills shall be debated and passed by two voting processes. Usually these two voting processes are defined as "crucial phases" to make a bill an act. On its part, the codification of the required second vote pre-sets the conclusion that between the two votes on any bill that has been approved "as a whole and in principle", the Constitution guarantees each and every Member of Parliament the right to propose amendments and supplements to the bill. The same holds true of the ratification acts, as they are legal acts too, though their content is more particular.

However, the bill to ratify an international agreement shall not amend the text of the agreement upon approval of a proposed text on second reading. This rule is justified because of the way in which international agreements are concluded and the effect of such agreements. Moreover, proposed changes may be other than technical. Other amendments and supplements may also be proposed. Examples vary. Specifically, whenever the terms and conditions of an international agreement allow for reservations, the proposed text of the bill may be amended or supplemented. When amendments or supplements are proposed, they should not distort the international agreement's text.

The Members of Parliament's right to propose amendments and supplements to a bill between the first and the second vote of a bill is restrained by the very logic of the legislative process. In other words, the proposed amendments or supplements that a Member of Parliament may introduce shall conform to the stage of progress of the legislative process, i.e. the stage of the first or of the second vote.

In the case under discussion here, all three propositions made after the bill's approval by the first vote concern a problem of principle inasmuch as they are relevant to key parameters and the subject of the ratification bill to be addressed by the first vote.

Therefore, it is wrong to allege that the Members of Parliament were deprived of the right to propose an amendment or a supplement during the passage of the challenged ratification act. The approval of the ratification bill on first voting "as a whole and in principle" leaves no chance to propose amendments or supplements that may refer to the bill's underlying elements within the framework of the bill's second vote procedure.

Timing of the decision to discuss and enact a bill by two votes taken at a single sitting

The Constitution provides for an exception where the National Assembly may resolve that both votes be taken at a single sitting. The National Assembly's Standing Orders make this option contingent on the provision that it shall only apply if, during the deliberations on the bill, no amendments or supplements have been proposed. The wording of this constitutional provision leads to the conclusion that the National Assembly is authorised to judge whether or not to decide to take both votes in the same sitting and when to make the decision. The kind of bill, e.g. a ratification act; the nature of the change, e.g. clerical only; the absence of proposed amendments or supplements in the course of the first vote, etc. do not have the characteristics of absolute conditions that may predetermine decision-making. Yet the Constitution reads that the passage of bills by two votes that are taken at a single sitting shall be by exception only. In other words, the application of sentence two of Article 88.1 of the Constitution – precisely because it should be "by exception" – shall be made contingent on a similar decision to the effect that other constitutionally enshrined values, principles and rules shall not be infringed upon. In an earlier decision of the Constitutional Court, it determined that such an option should not restrain the pluralism of opinions in the National Assembly and, in particular, should not curtail the right of a Member of Parliament to introduce proposed amendments or supplements to a bill under debate. Thus in this context, the Constitutional Court opines that no definite point in time can be fixed when a decision of this sort would guarantee that the decision complies with the Constitution. To make the decision contingent on a requirement to take it, especially before the first vote of the bill, might also affect the pluralism of opinions in the National Assembly and curtail a Member of Parliament's right to propose amendments or supplements to a bill debated. The decision is not just a matter of the National Assembly's freedom of judgment; in addition, the decision is always concrete so as to guarantee the pluralism of opinion.

The National Assembly should give its consent to conclude sovereign loan agreements, that the ratification should correlate with the consent and that the ratification instrument should be checked for compliance with the Constitution.

The challenged Act before the Constitutional Court ratifies two dealer agreements and a deed of covenant. The agreement has the features of a loan by the issue of bonds, known also as a bond issue agreement. It is subject to Article 84.9 of the Constitution, which stipulates that the National Assembly shall grant its consent to conclude government loan agreements and shall grant it in advance.

What is special in the case concerned is that the loan is not a one-off loan, in other words, the agreement does not involve a onetime operation. As the case stands, a number of agreements are involved where the assets and liabilities will be valid over a fixed period of time. With such performing agreements, the Republic of Bulgaria has already exercised its right to issue bonds worth a negotiated sum and shall be free, by a fixed date in the future, to issue bonds again, up to the maximum negotiated amount.

Prior consent is a general power that the National Assembly enjoys and therefore does not constitute a requirement to ratify international agreements that imply government debt. As elsewhere, the legislator's consent to conclude a definite agreement is treated as part of the system to maintain the balance between the legislator and the executive. An element of the requirement that external debts incurred by the Republic of Bulgaria be transparent to the public is to be in line with Article 84.9 of the Constitution. For that reason, consent granted is not a formality, less so a power, which must be exercised or else is optional whereon it shall slip out of constitutional control.

Prior consent to conclude a loan agreement is a standalone power of the National Assembly with respect to the right to ratify an international agreement, which imposes financial obligations on the State (Article 85.1.4 of the Constitution). Besides the different subject that the two powers possess, they have a legal action of their own in domestic and international law. Therefore, it is not appropriate to term the one power general and the other power specific.

Moreover, inasmuch as conclusions are drawn about the balance between the consent under Article 84.9 of the Constitution and the ratification, they cannot be exercised if they do not comply with the existing legal regime. For an international government loan agreement to be approved by the Council of Ministers, it is

expressly required to attach the National Assembly's prior consent to enter into the agreement to the report that substantiates the agreement. By doing so and if ratification follows, the consent subject to Article 84.9 of the Constitution will be recognised. The consent to conclude deeds of covenant under which the Government promises to make payments on external debt is part of a procedure that closes with the ratification, provided ratification is required.

The two powers should not be treated as absolutely unrelated to each other. It is beyond doubt that the National Assembly, being the legislator, is free to condition its consent on the ratification of the agreement concluded. Such a practice invites yet another important conclusion, namely, that there should be no reason to refrain from a debate on consent to be granted to work out an external sovereign debt agreement whenever a ratification act, which is seen as unconstitutional, is challenged.

In the Constitutional Court's view, the constitutionality of any act that ratifies an international agreement may be reviewed, as the Court has jurisdiction to pronounce on any petition to establish the unconstitutionality of laws and other acts. It is of no relevance whether the purpose of the ratification is to give the State's consent to enter into an international agreement or, in the context of Article 5.4 of the Constitution, the ratification acts in its capacity as an instrument that ensures an international agreement becomes a part of the domestic legislation.

Whenever a ratification act is checked for compliance with the Constitution, in particular when the act allows the State to enter into a certain agreement (e.g., international agreement in the strict sense of the word or an agreement governed by private law and made with a party that is a foreign person), this verification covers, in addition to the formal ratification-related requirements, the specific agreement. Inasmuch as ratification is the acceptance of an agreement to be entered into, the verification cannot ignore the text of the agreement. Inconsistency, if any, of an international agreement with the Constitution is not to be tolerated given the fact that the underlying postulation is that the Constitution shall reign supreme. Therefore whenever the Constitutional Court is approached, invoking Article 149.1.2 of the Constitution, with a challenge of a legally ratified international agreement, it is inappropriate to insist that the only relevant question is how the agreement was adopted and that the question of what has been agreed is irrelevant. The argument that the compliance of international agreements with the Constitution can be ensured, but prior to their ratification (Article 149.1.4 of the Constitution), is weak where a text to make such verification binding is missing. Moreover, such control

ex ante is unacceptable especially if it is to be exercised over agreements that are governed by private law. After all, as the Constitution itself allows amending or denouncing ratified international agreements according to the procedure specified in the agreements (Article 85.3 of the Constitution), there should be no reason against amendments or denouncements based on a Constitutional Court decision. The National Assembly will have to approve texts to address the legal implications of a Constitutional Court decision that declares amendments or denouncements unconstitutional, just as it will have to enact legislation that is intended to amend or denounce such agreements or, to the extent possible, to adopt appropriate reserves.

As the case stands, the Dealer Agreement, the Agency Agreement and the Deed of Covenant that have been ratified by the challenged Act with the Constitutional Court were signed on 6 February 2015. As a foregoing move, a National Assembly's decision of 19 November [2014] sanctioned preparations to incur external sovereign debt amounting up to BGN 3,000,000,000 in 2014. Almost in parallel, Article 68 of the 2014 State Budget Act of the Republic of Bulgaria was amended to give the Council of Ministers the legitimate right to incur external sovereign debt to a ceiling of BGN 6,900,000,000 and to take action to prepare for incurring external sovereign debt subject to subsequent ratification in 2015. This course of action was put into the 2015 State Budget Act of the Republic of Bulgaria. Given the facts, it should be assumed that the National Assembly has given its prior consent [to the Government] to enter into an international sovereign loan agreement. The consent as per Article 84.9 of the Constitution may be worded in the form of a decision, however, drawing on *argumentum a fortiori* (argument based on stronger reason), it may equally be codified.

Languages:

Bulgarian.



Croatia

Constitutional Court

Important decisions

Identification: CRO-2000-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.01.2000 / **e)** U-I-902/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 14/2000 / **h)**.

Keywords of the systematic thesaurus:

4.6.3.2. Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**
 4.6.8.1. Institutions – Executive bodies – Sectoral decentralisation – **Universities.**
 5.4.21. Fundamental Rights – Economic, social and cultural rights – **Scientific freedom.**

Keywords of the alphabetical index:

University, autonomy / University, supervising authority / Teaching staff, appointment.

Headnotes:

The constitutional provision which guarantees autonomy to universities and independence in their organisation and work is violated by the provisions of a law which authorise the Minister of Science and Technology to determine in detail the conditions for studies concerning the number and structure of teaching staff, space and equipment, necessary financial resources and the carrying out of educational programmes.

The authority of the Ministry of Science and Technology to approve the capacities of each higher educational institution is not constitutional. In addition, the authority of the Governing Council to select from among candidates for the position of rector those which it proposes to the Senate instead of presenting the names of all candidates is unconstitutional. The autonomy of universities is also violated by the provisions which provide that members of the Governing Council are appointed by the founder and that the appointment of a dean is approved by the Governing Council which also requires the rector's opinion on the issue.

Summary:

The disputed Law on Higher Educational Institutions was reviewed from the point of view of Articles 67, 68 and 16 of the Constitution (autonomy of universities, freedom of scientific, cultural and artistic creativity, constitutional restriction of freedom and rights). The Court held that university autonomy means autonomy in relation to bodies outside universities and the autonomy of each university towards other universities. It also covers the autonomy of each faculty within a university and the autonomy of all persons dealing with a certain subject within the scientific system. Certain restrictions on this autonomy exist due to the fact that universities are dependent on certain subjects as founders of universities, their supporters and bodies which supervise professionally their functioning.

The subject of review concerned all provisions of the Law on the organisation, functioning and government of higher educational institutions, the appointment of teaching staff and the competence of various bodies in this connection, and the normative function of universities, including the university's statute.

Supplementary information:

The effects of the decision were postponed until 1 August 2000.

According to the acts regulating institutions in general, and universities in particular, a public institution may be founded by the Republic of Croatia, a municipality, a county and the City of Zagreb, a natural or legal person if it is expressly provided by law and by units of local self-government.

All the four universities which currently exist in Croatia were founded by the Republic. They were established by an Act of parliament and their founder is the parliament. The relevant law allows the possibility for domestic and foreign natural and legal persons to found universities but until now no such universities have been established.

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:

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

3.16. General Principles – **Proportionality.**

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

5.3.39.3. 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).



Identification: CRO-2000-1-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 15.03.2000 / **e)** U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 31/2000 / **h)**.

Keywords of the systematic thesaurus:

1.3.1.1. Constitutional Justice – Jurisdiction – Scope of review – **Extension.**
 2.1.3.2.1. Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**
 3.9. General Principles – **Rule of law.**
 4.7.4.1.2. Institutions – Judicial bodies – Organisation – Members – **Appointment.**
 4.7.4.1.6.2. Institutions – Judicial bodies – Organisation – Members – Status – **Discipline.**
 4.7.5. Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

Keywords of the alphabetical index:

Judge, relief of duty / Judge, appointment.

Headnotes:

The State Judicial Council is a body that deals with the appointment of judges and the termination of their judicial duties whereas the presidents of courts are appointed for internal management and court administration and their position belongs to the realm of administrative rather than judicial functions.

The law regulating the functioning of a state body has to determine its scope and powers, to lay down the procedure according to which it will act and to determine the ways to control the functioning of this body.

Decisions on the disciplinary responsibility of judges and public attorneys are to be passed only by the State Judicial Council itself, not by its bodies of first and second instance.

Summary:

The Constitutional Court, accepting proposals to review the constitutionality of the Law on the State Judicial Council, repealed seven provisions of the law. It also used its powers under Article 36 of the Constitutional Act on the Constitutional Court and decided to institute proceedings to review the constitutionality of all the provisions of the law dealing with presidents of courts.

The legal effects of the decision were postponed until 31 October 2000.

Cross-references:

European Court of Human Rights:

- *Sunday Times v. the United Kingdom*, no. 6538/74, 26.04.1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-001];
- *Silver & Others v. the United Kingdom*, nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 25.03.1983, *Special Bulletin – Leading cases ECHR* [ECH-1983-S-002];
- *Malone v. the United Kingdom*, no. 8691/79, 02.08.1984, *Special Bulletin – Leading cases ECHR* [ECH-1984-S-007].

Languages:

Croatian, English (translation by the Court).



Identification: CRO-2009-3-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.11.2009 / **e)** U-IP-3820/2009 and Others / **f)** / **g)** *Narodne novine* (Official Gazette), 143/09 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.3. General Principles – **Democracy.**
3.5. General Principles – **Social State.**

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

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

5.2.1.1. Fundamental Rights – Equality – Scope of application – **Public burdens.**

5.3.38.4. Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law.**

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

Keywords of the alphabetical index:

Tax law, special contribution / Economic stability / Tax, purpose / Tax, differentiation.

Headnotes:

The Constitutional Court is not competent to judge whether the general taxation system or particular forms of tax in the Republic of Croatia are appropriate and justified.

The constitutional guarantee of equality of all before the law, which is a special expression of equality as the highest value of the constitutional order, does not require every citizen to contribute equally to meeting public expenditure. Rather, it requires that every citizen should finance general state and public affairs in the same way, in accordance with his or her economic capabilities.

The Special Tax Act allows for the possibility for the preservation of the achieved level of social benefits in conditions of economic crisis, including those that are financed from the government budget, which are an expression of the state's care for the socially most vulnerable individuals and groups.

It is not possible to achieve complete proportionality, equality and equity in any tax system.

Summary:

The Constitutional Court refused a request put forward by the President of the Republic for the constitutional review of Articles 1.1, 3 and 5.1 of the Special Tax on Salaries, Pensions and Other Incomes Act (hereinafter, the "Act"). It did not accept proposals put forward by several thousand natural and legal persons (the proponents) to review the constitutionality of the Act.

During the proceedings the Constitutional Court requested and received reports from Parliament, Government and written scientific opinions from expert advisers. It also held a consultative session and *ad hoc* consultative working meetings.

Under the Act, in force from 1 August 2009 to 31 December 2010 (Article 13), salary, pensions and other income from residents were to form a tax base on which tax would be paid at a rate of 2% on the total amount exceeding HRK 3,000.00 and 4% for incomes higher than HRK 6,000.00 (Article 5.1). At the same time the adjustment of pensions under the Pension Insurance Act was to be suspended between 1 January 2010 and 31 December 2010 (Article 1.2). The special tax was paid at the same time as the salary, pension and other incomes (Article 6), and the person liable to be assessed, to withhold and pay the special tax on salaries, pensions and other incomes was the payer of the salaries, pensions and other income (Article 3). The special tax was a temporary tax introduced as a result of a national economic crisis (Article 1.1).

One of the concerns raised about the Act was that Article 3 breached the constitutional principle of entrepreneurial and market freedom (Article 49.1 and 49.2 of the Constitution), and that the tax rates introduced had not guaranteed residents equality before the law (Article 14.2 of the Constitution). This is so because the tax burden is not proportional to the citizens' income and has a particular impact on the poorest members of society, thereby also conflicting with the principle of equality and equity of the tax system (Article 51.1 of the Constitution). It was suggested that the Constitutional Court pronounce Articles 1.1, 3 and 5.1 of the Act in breach of the Constitution, and order their repeal.

The proponents disputed other provisions of the Act and the Act in its entirety. They argued, that it violated the constitutional guarantee of equality of all before the law (Article 14.2 of the Constitution) as it exempted certain taxpayers from paying the taxes and of the principle that Croatia is a social state (Article 1 of the Constitution) because it endangers the existence of the poorest citizens. It was also suggested that the suspension of the adjustment breached the rule of law under Article 3 of the Constitution. The point was made, too, that the Act is an organic law that was not passed by the statutory majority of all the members of the Parliament and that it is retroactive in effect, which is prohibited under Article 89.4 of the Constitution. They proposed that the Constitutional Court order certain provisions of the Act to be repealed, or repeal the Act in its entirety, for breaching the Constitution.

The Constitutional Court began by examining the material that the Act regulates and its normative content. It observed that it would be legally and practically impossible to find that only some provisions of the Act contravene the Constitution and to direct a partial repeal. It also stressed that in the

constitutional review of tax regulations, the Constitutional Court is not competent to judge whether the general taxation system or particular forms of tax in the Republic of Croatia are appropriate and justified.

The Constitutional Court examined, against the background of the constitutional concept of the Republic of Croatia as a social state (Article 1 of the Constitution), the compliance of the Act with the fundamental principles and highest values of the constitutional order. Of most relevance to these proceedings were equality, social justice and the rule of law (Article 3 of the Constitution); prohibition of discrimination and equality of all before law (Article 14 of the Constitution), tax equality and equity (Article 51.1 of the Constitution), the general principle of proportionality (Article 16.1 of the Constitution), and the special principle of proportionality in the defrayment of public expenses (Article 51.1 of the Constitution).

The Constitutional Court found that the constitutional guarantee of equality of all before the law, which is a special expression of equality, as the highest value of the constitutional order, does not require equal contributions from every citizen to the defrayment of public expenses. Rather, it requires all citizens to finance general state and public affairs in the same way, in accordance with their respective economic capabilities.

The proponents had alleged that a certain group of taxpayers had been exempted from paying the special tax due to the existence of a national economic crisis. The Court noted that on 24 September 2009, Parliament passed the Special Separate Tax on Incomes from Independent Activities and Other Incomes Act, which covered the group of taxpayers not included in the Act under dispute, and which placed an identical tax burden in an equal time period on that group. It held that the entry into force of this Act removed any serious concerns over the unconstitutionality of the disputed Act which might otherwise have necessitated a finding that the disputed Act was not in conformity with Article 14 of the Constitution, and to its repeal.

The Constitutional Court emphasised that the content of the concept of social state, the principle of social justice and the social rights guaranteed in the Constitution are abstract in nature, although of different levels of abstraction, and that the constitutional provisions on the social state and social justice, and constitutionally recognised social rights, cannot be applied directly. In order for them to be applicable, they must first be elaborated in a law.

The Constitutional Court noted the large number of taxpayers who are exempt from paying the separate tax due to modest salaries and pensions, and the fact that the special tax introduced by the Act also serves to preserve the achieved degree of social benefits under conditions of economic crisis (the aim was to preserve various social benefits that are financed from the state budget, which are an expression of the state's care for the socially most vulnerable individuals and groups, those who have been hindered in their personal or social development due to social neglect). This could be perceived as an expression of social sensitivity on the part of the legislator. It found the Act to be in compliance with the requirements those drafting the Constitution had in mind when they defined the Republic of Croatia as a social state and social justice as the highest value of its constitutional order.

The Constitutional Court found that the Act did not satisfy the principle whereby the amount of the tax due must not exceed the amount of the increase of the tax base which led to the taxation. The burden of the special tax was unequally distributed in the "boundary" area, at the margins of tax brackets, among those taxpayers whose incomes under Article 5 of the Act are on the borderline. This was not, however, overly onerous for any group of the addressees of the Act, even for those whose incomes are at the boundary area at the transition of tax brackets (e.g. 3,000.01 HRK). After payment of the special tax, their income would still be HRK 2,940.80, in excess of HRK 2,800.00 which is the amount of the statutorily guaranteed minimum salary. The Constitutional Court did not rule out the possibility that the Act might create an excessive tax burden among certain of those addressees. An assessment of such a burden would need to be carried out against the background of the particular circumstances of each case. In such proceedings relating to protection of individual human rights, standards would be applied developed by the European Court of Human Rights in its jurisprudence on the protection of human rights under Article 3 ECHR (see the first part of the sentence of Article 23.1 of the Constitution).

The Act challenged is highly significant for the stability of national public expenditure and this presently takes priority over the requirements for achieving absolute equality and equity in levying the special tax. The temporary levy of the special tax is based on a qualified public interest (preservation of the stability of the national financial system under conditions of economic crisis by acting on the revenues of the state budget for a short time). In the absence of such measures, the state would be unable to perform the tasks with which it was charged under the Constitution. The differences the Act

created among its addressees may attract some criticism, but are not sufficiently serious at this juncture to warrant the Act being pronounced in breach of the Constitution.

It follows from the above that the Act may be retained temporarily in the national legal order in its existing form.

The end of the period of the Act's effectiveness (and therefore the deadline for levying the special tax) has been set reasonably at 31 December 2010. Before that, the Government should, monitor on a continual basis, whether the legislation is still needed or whether it could be amended or repealed early.

The Act does not impinge upon or disturb entrepreneurial or market freedom for taxpayers and entrepreneurs, nor does it affect their participation in business relations. In addition, it poses no threat to the right of employers and entrepreneurs to determine salaries independently, whether they do so under the Labour Act or the Companies Act.

The Act introduced a temporary suspension of adjustment of pension growth. This measure does not contravene the Constitution, because it has a legitimate goal in the public or general interest. It will maintain pensions at their existing levels in the case of a decrease in the gross salaries of all the employees in the Republic of Croatia and a decrease of consumer prices, on which the assessment of the actual amount of the pension depends.

As the Act was passed by a majority of the members of Parliament, the need did not arise during the constitutional review proceedings to assess whether or not the Special Tax Act is an organic law.

The relationship between the Pension Insurance Act and the Act is the relationship between a general and a special law. It should be viewed in accordance with the principle "*lex specialis derogat legi generali*".

The Act accepts the general principle of taxing income as provided for by the Income Tax Act. The special tax was applied to salaries, pensions and other incomes for July 2009 (before its entry into force on 1 August 2009), but salaries, pensions and other incomes that will be earned in December 2010, and which will be paid in January 2011 or later, will not be subject to this taxation. This has ensured balance in the period for assessment and payment of the special tax. The Act does not therefore have a retroactive effect in a way that would be prohibited by Article 89.4 of the Constitution.

The Constitutional Court found the disputed Act to be in compliance with the Constitution.

Two judges of the Constitutional Court who found the Act to be in breach of the Constitution gave a joint separate opinion.

Languages:

Croatian, English.



Identification: CRO-2011-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 06.04.2011 / **e)** U-I-722/2009 / **f)** / **g)** *Narodne novine* (Official Gazette), 44/11 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Legal aid, free, requirement / Legal aid, free, discretionary power, limits / Legal aid, free, equal access / Legal aid, free, purpose / Legal aid, free, right.

Headnotes:

The requirements of legal certainty and the rule of law in Article 3 of the Constitution demand that a legal norm must be accessible to and foreseeable by those to whom it applies, so that they are aware of their real and specific rights and obligations and can act accordingly. This is only possible if the legal norm is sufficiently clear and precise.

The positive meaning of clarity and precision of legal norms is that their wording must allow citizens to know their specific rights and obligations so that they can behave accordingly. This positive meaning is not fulfilled if citizens speculate about their meaning and content, and those applying it have different approaches to their interpretation and application.

The negative meaning of the requirement for clarity and precision of legal norms, with reference to a government body, is that its wording must be binding on that body and must not allow it to act outside the purpose its content determines. This is important both in terms of the conduct of government and public administration and that of the judicial authorities.

Summary:

I. The Croatian Bar Association submitted a proposal for the review of constitutionality of the Free Legal Aid Act (hereinafter, the “FLAA”).

The Constitutional Court accepted the proposal for the review of constitutionality of Articles 5.2, 8, 10.2, 37 and 53.2 FLAA, and repealed these articles.

It did not, however, accept the proposal for the review of the constitutionality of the Act in its entirety or the proposals for the review of Articles 1, 9, 11.4, 29, 40, 41, 53, 54, 55, 56, 57, 58, 59, 60 and 64, which it found to be ill-founded.

II. The Constitutional Court reviewed the constitutionality of Articles 5.2, 8, 10.2, 37 and 53.2 of the FLAA and the quality of these legal norms in the context of the rule of law.

Beginning with Article 5.2, the Constitutional Court noted that the FLAA defines legal aid users as a circle of natural persons who “cannot pay for the expenses of legal aid without endangering their existence” (Article 7.1). However, besides “danger to the user’s existence” it also added the condition that the case in which the “existentially vulnerable” user is applying for legal aid must be one that “decides on the existential questions of the users” (Article 5.1).

In the view of the Constitutional Court, the concept of “existential questions” in Article 5.2 of the FLAA is an indefinite legal term which needs to be brought into line with the requirements for the clarity and precision of legal norms.

The Constitutional Court also noted that the criteria in Article 5.2 of the FLAA distance the administration’s conduct in granting free legal aid from the requirement that this aid should be legally bound by an objective legal norm.

Article 5.2 of the FLAA was therefore found to be out of line with the requirements of legal certainty and to contravene the procedural rules deriving from the right of access to court and the right to a fair trial.

The Constitutional Court then turned to Article 8 of the FLAA, which stipulates that a person will be deemed unable to cover the expenses of legal representation without becoming existentially vulnerable if he exercises rights from the social welfare system and other forms of aid, or the right to living costs allowance under the Rights of Croatian Defenders from the Homeland War and Members of their Families Act and the Protection of Military and Civilian War Invalids Act, or if the means of the applicant of the request and the adult members of his household comply with certain pecuniary conditions and standards.

Because of problems in the application of Article 8 of the FLAA, the Ministry of Justice issued an instruction to the offices of public administration. According to the Constitutional Court, this instruction directly contravenes Article 8 of the FLAA which does not leave public administration entities any freedom to grant the applicant's request unless it complies with the conditions in Article 8. However, if this freedom did exist, it would enable the public administration to act inconsistently and arbitrarily.

The Constitutional Court concluded that Article 8 of the FLAA does not comply with the requirements for the clarity and precision of legal norms.

Article 10.2 of the FLAA indicates that free legal aid may only be denied in cases provided for in the Act on the Legal Profession. However, this Act makes no specific provision for the refusal of free legal aid, and the relevant provisions of that Act do not meet the requirement of predictability for users of free legal aid.

The Constitutional Court therefore found that Article 10.2 of the FLAA did not meet the requirements of legal certainty and the rule of law.

Article 37 of the FLAA places users of free legal aid under an obligation to return the sum received to the state budget under the calculated order if the proceedings are successful and the court awards them property or money. The Constitutional Court found this to be ambiguous, as it refers to the realisation of the main demand in the proceedings. Furthermore, it simply establishes the duty to pay the amount of "legal aid granted under the calculated 'order' into the state budget"; it does not regulate the tariff (for free or chargeable legal assistance) according to which the user should pay the expenses of representation, or even the user's obligation to pay the attorney the sum that was adjudicated to him under the heading of expenses.

This deficiency of the legal norm in Article 37 of the FLAA poses a considerable obstacle to a predictable and functional system for protecting the right of access to court. It therefore infringes the right to a fair trial.

Article 53.2 of the FLAA stipulates that the means of organising and providing legal aid may also be derived from the funds of local and regional self-government, donations and other sources in accordance with law, and that of the total amount of the legal aid ensured, up to 50% shall be granted on the grounds of competitions to associations and institutions of higher education for the work of law clinics, and 50% shall be ensured for other forms of legal aid.

The Constitutional Court noted that it is difficult to discern what is covered by "the other 50%". If associations and institutions are granted less than 50% of the funds, one might assume that the remaining "excess" in the distribution of funds will not be spent according to the purpose of the act. By positioning the words "up to" in front of the words "50% shall be granted on the grounds of competitions to associations and institutions of higher education" runs counter to the principle of clear and unambiguous law, whereby an equal amount of money would be put aside to finance all forms of legal aid. Article 53.2 of the FLAA was accordingly found to be ambiguous and contrary to the very purpose of the Act.

Cross-references:

Constitutional Court:

- no. U-I-1805/2000 *et al*, 30.04.2008.

European Court of Human Rights:

- *Sunday Times (no. 1) v. The United Kingdom*, no. 6538/74, 26.04.1979;
- *Beian v. Romania*, no. 30658/05, 06.12.2007;
- *Airey v. Ireland*, no. 6289/73, 09.10.1979;
- *De Haes and Gijssels v. Belgium*, no. 19983/92, 24.02.1997;
- *McVicar v. The United Kingdom*, no. 46311/99, 07.05.2002;
- *Steel and Morris v. The United Kingdom*, no. 68416/01, 15.02.2005;
- *Ashingdane v. The United Kingdom*, no. 8225/78, 28.05.1985.

Federal Constitutional Court of Germany:

- 1 BvR 370/07, 27.02.2008, 1 BvF 3/92, 03.04.2004, 1 BvF 3/92, 03.03.2004.

Languages:

Croatian, English.

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a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.11.2013 / **e)** SuS-1/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 138/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.3. Constitutional Justice – Jurisdiction – **Advisory powers.**

4.9.2. Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

Keywords of the alphabetical index:

Referendum, amendment to Constitution / Referendum, constitutional, supervision / Referendum, decision to organise, effects / Referendum, pre-condition / Referendum, preliminary communication / Referendum, national.

Headnotes:

From a substantive law perspective, it is relevant that Croatia legally recognises both marriage and common-law marriage, and same-sex unions, and that Croatian law is today aligned with the European legal standards regarding the institutions of marriage and family life.

Any supplement to the Constitution by provisions to which marriage is defined as the union for life between a woman and a man may not have any influence on the further development of the legal framework of the institution of common-law marriage and same-sex unions, in line with the constitutional requirements that everyone has the right to respect and legal protection of their personal and family life, and their human dignity.

The incorporation of legal matters into the Constitution must not become a systematic occurrence, and exceptional individual cases must be justified by being linked, for example, with deeply rooted social and cultural characteristics of society.

Summary:

The Constitutional Court adopted the Communication on the citizens' constitutional referendum on the definition of marriage.

At a session held on 8 November 2013, the Parliament adopted the Decision to call a national referendum (hereinafter, the “Decision”). The Decision was based on the request by the civil initiative “In the Name of the Family,” requesting the calling of a national referendum to amend the Constitution whereby the definition of marriage would be included in the Constitution as the union for life between a man and a woman (hereinafter, “referendum on the definition of marriage”).

The institution of a national referendum, including those called by the Parliament based on a citizens' constitutional initiative, that is, when it is requested by ten percent of the total number of voters (hereinafter, “citizens' constitutional referendum”) is subject to a constitutional review. The mechanism by which the constitutional order is initially protected from citizens' constitutional initiatives that do not conform to the Constitution is prescribed in Article 95 of the Constitutional Act on the Constitutional Court (hereinafter, the “Constitutional Act”). The Article provides, *inter alia*, that at the Parliament's request, the Constitutional Court shall establish whether the question of the referendum is in accordance with the Constitution and whether the requirements for calling a referendum have been met. The Parliament's request takes places only if at least ten percent of the total number of voters calls for a referendum.

Pursuant to these provisions, the Constitutional Act indicates that there are questions about which it is prohibited to hold a referendum by force of the Constitution. The Constitutional Court establishes these in each specific case.

By rendering a decision to dismiss the proposal for the Parliament to act on Article 95 of the Constitutional Act and then by adopting the Decision, the Parliament expressed its legal will that it deemed the content of the referendum question on the definition of marriage to conform with the Constitution. It confirmed that the constitutional requirements had been met to call a referendum on that question.

Pursuant to Articles 125.9 and 2.1 of the Constitution in conjunction with Article 87.2 of the Constitutional Act, the Constitutional Court has the general constitutional task to guarantee respect of the Constitution. The Court also oversees the conformity of a national referendum with the Constitution, right up to the formal conclusion of the referendum procedure.

Accordingly, after the Parliament rendered a decision to call a national referendum on the basis of a citizens' constitutional initiative and it had not prior to that acted on Article 95.1 of the Constitutional Act, the Constitutional Court's general supervisory authority over the conformity with the Constitution of a referendum called in this way does not cease.

However, out of respect for the constitutional role of the Parliament as the highest legislative and representative body in the state, the Constitutional Court believes that it is only permissible to make use of its general supervisory authorities in exceptional situation. This includes situations when it establishes the formal and/or substantive unconstitutionality of a referendum question, or a procedural error of such severity that it threatens to destroy the structural characteristics of the constitutional state. That is, its constitutional identity, including the highest values of the constitutional order (Articles 1 and 3 of the Constitution). The primary protection of those values does not exclude the authority of the framer of the Constitution to expressly exclude some other question from the circle of permitted referendum questions.

In that light, the Constitutional Court has found it is necessary to reply to several questions regarding the citizens' constitutional referendum on the definition of marriage.

Today, in all relevant international documents on human rights, it is still generally accepted that marriage and family life are not synonymous and not identical legal institutions. It is sufficient to recall two documents on human rights that are legally binding and directly applicable: Article 12 ECHR and Article 9 of the Charter of Fundamental Rights of the European Union.

A review of domestic legislation (Articles 35 and 61 of the Constitution, the Family Act, the Act on Same-sex Civil Unions and the Anti-discrimination Act) shows that the existing regulation on marriage is defined as a union for life between a woman and a man. This definition is alongside the simultaneous legal recognition and the appropriate legal effects, of same-sex civil unions, within the framework of today's European legal standards.

Sexual and gender diversity are protected by the Constitution. The rights of all persons are also protected, regardless of gender and sex, to respect and legal protection of their personal and family life and their human dignity (Article 35 of the Constitution). These legal facts are today considered to be the permanent values of the constitutional state.

Accordingly, regarding the referendum on the definition of marriage, the Constitutional Court emphasises that this is not a referendum on the right to respect for family life. The right to respect for family life is guaranteed by the Constitution for all persons, regardless of gender and sex, and is under the direct protection of the Constitutional Court and the European Court of Human Rights.

The referendum question on the definition of marriage in terms of its content is a positive legal provision contained in the Family Act. Article 5 of that Act reads:

“Marriage is a legally governed life union between a woman and a man.”

The Constitutional Court recalled the standpoint of the Venice Commission, the advisory body of the Council of Europe for constitutional matters. Specifically, it recalled the unacceptable systematic “constitutionalisation” of legislation in a democratic society, in view of the fact that this undermines the democratic principle of “checks and balances” and the principle of separation of powers.

The Constitutional Court in this sense pointed out that the incorporation of legal matters into the Constitution must not become a systematic occurrence, and exceptional individual cases must be justified by being linked, for example, with deeply rooted social and cultural characteristics of society.

Cross-references:

Constitutional Court:

- Warning no. U-VIIR-5292/2013, 28.10.2013, *Bulletin* 2013/3 [CRO-2013-3-015];
- Ruling no. U-VIIR-4696/2010, 20.10.2010;
- Ruling no. U-VIIR-5503/2013, 14.11.2013;
- Decision no. U-VIIR-72/2012 *et al.*, 16.01.2012.

European Court of Human Rights:

- *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/097, 07.11.2013;
- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010.

Languages:

Croatian, English.



Identification: CRO-2015-2-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 24.07.2015 / **e)** U-III-4149/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 27/15 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

3.18. General Principles – **General interest.**

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.**

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

Keywords of the alphabetical index:

Criminal code / Crime, elements / Crime, involving dishonesty and moral turpitude / Crime, perpetrator, prime minister / Crime, qualification / Criminal law, accepting a bribe / Criminal law, war profiteering / Criminal law, limitation period / Criminal law, retroactive / Criminal law, more lenient / Criminal liability, elements, precision / Criminal offence, essential elements / Law, retroactive effect / Statute of limitations, prosecution.

Headnotes:

It is a general rule of substantive criminal law that the law applied against a perpetrator is the law that was in force at the time the criminal offence was committed. It is only when, after the commission of a criminal offence, and before the issuing of a final judgment, the law is amended one or more times that the law which is more or the most lenient for the perpetrator is

applied. The statement of reasons of court sentences must include serious, sufficient and relevant grounds based on which it is possible, on a case-by-case basis, to establish with certainty whether the rule of the more lenient law was respected.

From the point of view of constitutional law, in a democratic multiparty system, it is not permitted to equate state political functions with party political functions, because doing so eliminates the distinction between state and party politics.

Summary:

In this decision the Constitutional Court did not examine whether the applicant is guilty of the criminal offence of war profiteering and criminal offence of accepting a bribe for which he was convicted by a final judgment, since the said issue is not within the jurisdiction of the Constitutional Court. Rather, the Constitutional Court examined whether in the applicant's case the legislative framework of the state was respected, and in particular whether the said framework was interpreted in accordance with the Constitution and the ECHR and whether, within the limits guaranteed for accused persons by the Constitution and the ECHR, the applicant was provided with all the guarantees of a fair trial and all the legal protection mechanisms provided for by the Croatian legislation currently in force.

The Constitutional Court emphasised that this decision, whereby the judgments of criminal courts (i.e. the County Court in Zagreb, along with the Supreme Court of the Republic of Croatia which confirmed that the first-instance proceedings were duly conducted and that the legal positions of the first-instance court in the cases Hypo and INA-MOL were correct) in the Hypo and INA-MOL cases were quashed, must not be taken as proof that the applicant was a victim of political persecution or judicial conformism, as claimed unfoundedly in the constitutional complaint.

Criminal courts have exclusive jurisdiction to examine whether the applicant is guilty of the criminal offences with which he is charged in the Hypo and INA-MOL cases, and they have the obligation to abide by the legal views of the Constitutional Court expressed in this decision.

Regarding both cases, the applicant lodged a constitutional complaint against the judgments of criminal courts. He believed that the judgments violated his constitutional rights guaranteed by Articles, 28, 29, 31 and 14 of the Constitution, as well as Article 6 ECHR and Article 1 Protocol 1 ECHR.

The Hypo Case

The applicant was declared guilty by a final judgment of having committed a criminal offence against official duty – by abuse of power and authority (hereinafter, “crime/31-1”) with the features of war profiteering (hereinafter, “WP and TP crime/31-4”).

Crimes/31-1 are the criminal offences within the meaning of Article 31.1 of the Constitution that were prescribed and legally established in the 1977 Criminal Code (in force until 1 January 1998; hereinafter, “CCRC/1977-1991”) and the 1997 Criminal Code (entry into force on 1 January 1998; hereinafter, “CC/1997”) in the period from 30 May 1990 to 15 January 1998, set out in the 2011 Act on Exemption from the Statute of Limitations of Crimes of War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatisation (hereinafter, the “Act on Exemption”).

WP and TP crimes/31-4 are the criminal offences of war profiteering and crimes committed in the process of ownership transformation and privatisation within the meaning of Article 31.4 of the Constitution (WP = war profiteering; TP = transformation and privatisation).

According to the final judgment, the perpetrator committed the criminal offence in the Hypo case during the Homeland War in Croatia in Zagreb and in the Republic of Austria in the period from the end of 1994 to 22 March 1995.

The crime/31-1 consisted of the fact that the applicant as deputy foreign minister of the Republic of Croatia, further to an order issued by his superior (the minister), in a period during the preparation of a credit transaction with Austrian Hypo Bank, represented the Government of the Republic of Croatia (hereinafter, the “Government”) as negotiator concerning the terms and conditions of a loan agreement (by which Hypo Bank would grant a loan to the Government for the purchase of embassy buildings for the Republic of Croatia throughout the world). The applicant, with the intention of generating considerable financial gain during the negotiations, and taking advantage of his position as negotiator, agreed that the bank in question should pay him a commission fee in cash – in an amount equivalent to 5% of the granted loan – for taking part in the negotiations and as a return favour for its entry on the Croatian market, and the deal was carried through.

The Constitutional Court examined two questions of constitutional law: one was related to the rule of the more lenient penalty (more lenient law) and the other one related to the legal establishment of the criminal offence of war profiteering.

1. Rule of the more lenient penalty (more lenient law)

Article 31.1 of the Constitution prescribes that “no one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by law. If a less severe penalty is determined by law after the commission of said act, such penalty shall be imposed”.

It is a general rule of substantive criminal law that the law applied against a perpetrator is the law that was in force at the time the criminal offence was committed. It is only when, after the commission of a criminal offence, and before the issuing of a final judgment, the law is amended one or more times that the law which is more or the most lenient for the perpetrator is applied. The statement of reasons of court sentences must include serious, sufficient and relevant grounds based on which it is possible on a case-by-case basis to establish with certainty whether the rule of the more lenient law was respected.

In connection with the rule of the more lenient law, the Constitutional Court found that Articles 31.1 and 29.1 of the Constitution were breached for the following reasons.

First, the County Court in Zagreb applied CC/1997 as the applicable substantive criminal law.

Second, the Supreme Court of the Republic of Croatia, by reference to the rule of the more lenient law, applied the 2011 Criminal Code (entry into force on 1 January 2013; hereinafter, “CC/2011”) as the applicable substantive criminal law.

Third, neither of the two laws was in force at the time the crime was committed (from the end of 1994 to 22 March 1995).

At the time the crime was committed, the law in force was CCRC/1977-1991.

CCRC/1977-1991 is not mentioned in the first- or in the second-instance judgment.

The disputed first-instance judgment does not include an explanation of why CC/1997 was applied in the criminal proceeding before the County Court in Zagreb instead of CCRC/1977-1991 – which was in force at the time the criminal offence was committed.

The disputed second-instance judgment does not include an explanation of why, in the appellate

proceedings, the Supreme Court, by applying the rule of the more lenient law, put CC/2011 in correlation with CC/1997, but not (also) with CCRC/1977-1991.

Fourth, as it was consequently not possible to establish with certainty whether the rule of the more lenient law was respected in terms of the applicant, the following rights of the applicant were breached: the rules of the more lenient law together with the constitutional guarantee of the more lenient penalty in Article 31.1 of the Constitution; and the constitutional right to a court judgment that includes a statement of reasons in the part relating to the rule of the more lenient law (Article 29.1 of the Constitution).

2. Legal establishment of the criminal offence of war profiteering

Article 5 of the fourth change of the Constitution of the Republic of Croatia (Official Gazette 76/10), which entered into force on 16 June 2010 (hereinafter, "Change of the Constitution/2010") amends Article 31 of the Constitution by adding a new paragraph 4, which prescribes:

"The statute of limitations shall not apply to the criminal offences of war profiteering, nor any criminal offences perpetrated in the course of economic transformation and privatisation and perpetrated during the period of the Homeland War and peaceful reintegration, wartime and during times of clear and present danger to the independence and territorial integrity of the state, as stipulated by law..."

The criminal offences of war profiteering relate to perpetrators who, in the period from 30 May 1990 to 15 January 1998, generated disproportionate financial gain illegally by abusing the state of war through criminal offences enumerated in the Act on Exemption (for example, by fraud, tax evasion, money laundering, embezzlement, abuse of position and authority, bribery, etc.). All such offences, enumerated in the Act on Exemption, were already prescribed in the legislation as criminal offences also in the period from 30 May 1990 to 15 January 1998 (these are referred to as: crimes/31-1).

The Act on Exemption prescribes in Article 7.1 that the crimes/31-1 become the criminal offences of war profiteering (WP and TP crimes/31-4) "if they were used to generate disproportionate financial gain by raising prices in the case of product shortages, selling state property at a price much lower than its value, or in some other way taking advantage of the state of war and the immediate danger to the independence and territorial integrity of the state". Thus, the Act normatively expresses strict condemnation of all

perpetrators of such criminal offences on the grounds that they contributed to the general destruction of the national economic system, unscrupulous devastation of national property and global impoverishment of the nation during the most sensitive period of Croatia's recent history.

Acknowledging the requirement imposed by the rule of law that states may not interfere retroactively in cases barred by the statute of limitations related to criminal prosecution, the Constitutional Court established in its decision that the new Article 31.4 of the Constitution had allowed – with *pro futuro* effect – unlimited temporal possibilities for the criminal prosecution of perpetrators of the crimes/31-1 even after they become barred by the statute of limitations related to criminal prosecution, provided that the offences in question are not barred by the statute of limitations on the day of the entry into force of the Change of the Constitution/2010 (16 June 2010) and that they meet the legal requirements prescribed in Article 7.1 of the Act on Exemption.

In view of the failure of the courts to legally establish if in the Hypo case existed the criminal offence of war profiteering, the Constitutional Court found that the constitutional rights of the applicant set out in Article 31.1 and Article 31.4 in conjunction with Article 31.1 of the Constitution were breached for the following reasons.

First, neither the County Court in Zagreb nor the Supreme Court examined whether the crime/31-1 (i.e. the criminal offence of abuse of position and authority with which the applicant was charged) was barred by the statute of limitations on the date of the entry into force of the Change of the Constitution/2010 (16 June 2010).

Thus, they actually failed to determine whether it was at all possible to conduct criminal prosecution, to try and to punish the applicant in the Hypo case. Namely, if on the date of the entry into force of the Change of the Constitution/2010 the crime/31-1 was barred by the statute of limitations, it would not be possible to pursue criminal prosecution for the criminal offence of war profiteering within the meaning of Article 7 of the Act on Exemption.

Second, neither the County Court in Zagreb nor the Supreme Court examined whether the Hypo case was marked, along with the characteristics of the crime/31-1, by other legal characteristics of the criminal act of war profiteering set out in Article 7.1 of the Act on Exemption. This primarily relates to "disproportionate" financial gain that, along with other characteristics set out in Article 7.1 of the Act on Exemption, constitutes an important characteristic of the criminal offence of war profiteering.

Third, the “disproportionality” of financial gain generated in such a manner must be the result of conscious exploitation of the state of war (it refers to a state of war or immediate danger to the independence and territorial integrity of the state); and it must also always be generated at the expense or to the detriment of the material living conditions of the population during war, the economic potential of society, or at the cost or to the detriment of state property or other financial interests or well-being of a state at war. Namely, when by legal or actual activities, ventures or actions within the meaning of Article 7.1 of the Act on Exemption the crime/31-1 is committed, resulting in considerable financial gain through exploitation of the state of war (thus making the material living conditions of the population more difficult, destroying the economic potential of society or weakening the property-related substrate of the state), then such illegally generated considerable financial gain has to (additionally) also be “disproportionate” to enable the realisation of the criminal offence of war profiteering. In relation to which values this disproportionate financial gain is measured and examined depends on the circumstances of each individual case, determined by the criminal courts in judicial proceedings.

In the Hypo case, the Criminal Court went no farther than “considerable” financial gain generated by the crime/31-1; it derived the existence of the criminal offence of war profiteering from the legal concept of financial gain (as “considerable”), which is included in criminal laws, but not in the Act on Exemption. The Criminal Court did not mention anywhere in the disputed judgment the new legal concept of financial gain (as “disproportionate”) in the case of the criminal offence of war profiteering.

Fourth, the Act on Exemption states in Article 7.1 that disproportionate financial gain can also be generated “in some other way” (other than by the ways expressly stated in the provision concerned). Thus, any incriminated legal or factual transactions, ventures or actions must be placed in correlation with the required disproportionality of the unlawfully generated gains.

The Criminal Court interpreted the provision in a way that it did not place such “other way” in any correlation with the required “disproportionality” of the generated gains (which, as previously stated, must always be the result of the conscious exploitation of the state of war at the cost or to the detriment of the material living conditions of the population, the economy, or well-being of a state at war).

The Case of INA-MOL

The applicant was found guilty and sentenced by a final judgment for having committed a criminal offence against official duty by accepting a bribe, described and punishable under Article 347.1 of CC/1997.

According to the final court judgment, in early 2008 the applicant, as the prime minister of the Government, and Zsolt Tamás Hernádi, chairman of the board of the Hungarian oil company MOL, agreed in Zagreb that for the amount of EUR 10 million (EUR 10,000,000.00) he would use his best efforts to bring about the conclusion of an Amendment to the (2003) Shareholders' Agreement relating to INA, by having the Republic of Croatia ensure for MOL a majority interest in INA and conclude an agreement on the exclusion of gas operation from INA in the part causing losses to INA, which would be assumed in full by the Republic of Croatia. The Criminal Court held that the Government thus adopted a decision against the interests of the Republic of Croatia, because the concluded contracts resulted in the dependence of a company of special interest for the Republic of Croatia on a foreign legal person.

The Constitutional Court examined two questions of constitutional law: one that related to the Prime Minister and President of a political party as “official persons” – persons accepting a bribe and the other one related to the proof of accepting a bribe: assessment of the Criminal Court that the contracts concluded with MOL by the Government are contrary to the interests of the Republic of Croatia.

1. The Prime Minister and President of a political party as “official persons” – persons accepting a bribe

The criminal offence against official duty by accepting a bribe belongs to a group of *delicta propria*, i.e. special criminal offences which can be committed only by persons having a certain capacity. To commit the criminal offence against official duty by accepting a bribe, the following criteria must be fulfilled:

- a. the offence was committed in the capacity of official or responsible person;
- b. the person accepted a gift or some other financial or non-financial benefit (hereinafter, “bribe”), or accepted the promise of a bribe;
- c. the person accepted a bribe or the promise of a bribe to perform an official or other action within the limits of his authority that he should not perform.

If a person does not have the capacity of an “official or responsible person”, then all the characteristics of the criminal offence of accepting a bribe are not met as a condition for establishing other elements of the criminal offence, especially unlawfulness and guilt.

The term official person was defined in Article 89.3 CC/1997. The said provision lists exhaustively state officials who may have the capacity of “official person”. The prime minister of the Government of the Republic Croatia is not listed. Nevertheless, the Criminal Court applied Article 89.3 CC/1997 to the applicant as the prime minister, without stating any reasons.

The Constitutional Court found in the INA-MOL case with respect to the determination of the applicant as an “official person”, breach of Article 29.1 of the Constitution, in the part relating to the absence of an explanation of the application of Article 89.3 CC/1997 to the applicant as prime minister; and breach of Article 31.1 of the Constitution, in the part of the INA-MOL case relating to the activity of the applicant as the president of a political party.

Reasons for the above-mentioned violations were the following:

First, in the INA-MOL case, a person who performed the office of prime minister was indicted and sentenced for the first time in Croatian legal history. Considering this was the first such case, the Criminal Court was obliged to interpret and explain why it held that a prime minister should be covered by Article 89.3 CC/1997, even though a prime minister was not listed. Bearing in mind that this is a field of criminal law, the authority of a body of criminal prosecution and the Criminal Court to automatically apply Article 89.3 CC/1997 to state officials, although they are not listed, cannot be self-explanatory, and even less justified in terms of constitutional law, where not a single word on the matter is mentioned in the court judgment, especially because the capacity of “official or responsible person” is a constitutive element of the criminal offence of accepting a bribe as stated in Article 347 CC/1997.

Since a full court clarification of the relevant issue is missing, the constitutional right to a court decision that includes a statement of reasons was breached in the part concerning the application of Article 89.3 CC/1997 (and consequently Article 347.1 CC/1997) for the applicant in his capacity as prime minister.

Second, the Criminal Court also sentenced the applicant for actions taken in the INA-MOL case as the then president of a political party, although the president of a political party is not and cannot be an

“official person” within the meaning of Article 89.3 CC/1997, and cannot commit the incriminating official act. From the point of view of constitutional law, in a democratic multiparty system (Article 3 of the Constitution) it is not permitted to equate state political functions with party political functions, because doing so eliminates the distinction between state and party politics.

Therefore, the constitutional right of the applicant to the legal establishment of the criminal offence of accepting a bribe within the meaning of Article 31.1 of the Constitution was breached in the INA-MOL case in the part relating to the applicant's actions as the president of a political party.

2. Proof of accepting a bribe: assessment of the Criminal Court that the contracts concluded with MOL by the Government are contrary to the interests of the Republic of Croatia

On 29 January 2009, the Government issued its approval and, on 30 January 2009, it concluded two agreements with MOL: the First Amendment to the (2003) Shareholders' Agreement relating to INA and the Main Agreement on Gas Operation.

While hearing the evidence, the Criminal Court examined, as the first “disputable” question, whether the contracts were “contrary to the interests of the Republic of Croatia”. The Criminal Court then used its own assessment of the prejudicial nature of the contracts for the Republic of Croatia as evidence that the applicant had accepted a bribe.

Given that in the criminal proceedings the acceptance of a bribe was subject to a hearing of evidence through the preliminary assessment that the contracts concluded between the Government and MOL were contrary to the interests of the Republic of Croatia, the Constitutional Court found that the lines between the criminal responsibility of the applicant for accepting a bribe and the political responsibility of the Government for contracts concluded were blurred and that Article 29.1 of the Constitution was breached because the Criminal Court used an inadmissible method for proving the individual guilt of the accused for accepting a bribe.

Reasons for the above-mentioned violations were the following:

First, in criminal proceedings, where a prime minister is tried for an act of corruption that involves the acceptance of a bribe with the aim of influencing the conclusion of a legal transaction within the competence of the Government, the question whether the legal transaction was “contrary to the interests of the

Republic of Croatia” is not “disputable question” which needs to be proven in the criminal proceedings.

The very fact that a person performing the office of prime minister offers or accepts a bribe to influence the conclusion of a legal transaction within the competence of the Government – within the limits of his authority – makes the legal transaction concerned corruptive *a priori* in the substantive sense, and its very corruption is proven *prima facie*. Therefore, each such transaction is *per definitionem* contrary to the interests of the Republic of Croatia, regardless of whether by its effects or dominant political assessments it was (more or less) advantageous or disadvantageous for, or extremely prejudicial to the Republic of Croatia.

Therefore, in the criminal proceeding, the existence of the corruption agreement should be shown (it refers to an arrangement between the person offering and the person accepting a bribe, as established in the jurisprudence of the Supreme Court), i.e. that the prime minister accepted a bribe, or the promise of a bribe, to influence the conclusion of a particular legal transaction within the competence of the Government. In view of the constitutional position and functions of the prime minister, that would also prove that the legal transaction concerned was contrary to the interests of the Republic of Croatia.

Second, in the INA-MOL case, the Criminal Court – in order to show that the applicant was guilty of accepting a bribe in this case – set up a presentation of evidence in a way that the question of whether the contracts between the Government and MOL were contrary to the interests of the Republic of Croatia was declared “disputable”. Thus, the said question became an independent question that should be subject to proceedings where evidence is presented; and so the Criminal Court first subjected the question to a presentation of evidence in the criminal procedure.

Thus, in the criminal proceeding, in which the individual criminal responsibility of the prime minister for accepting a bribe should have been the exclusive subject matter of deliberation, the Criminal Court assumed the authority of a “democratic Croatian State” to examine whether the contracts are “prejudicial to its economic interests” (*Stran Greek Refineries and Stratis Andreadis v. Greece*, 1994, paragraph 72). Further, the assessment of the Criminal Court was basically the result of a free judicial assessment of the evidence presented within the framework of the criminal proceedings, and not the “public interest test” built in the case-law of the European Court of Human Rights, in which the Act on the Privatisation of INA – by which the Croatian Parliament set out the limits of the interests of the

Republic of Croatia in relation to INA – would occupy the central position.

By proving, in the criminal proceedings, that the contracts concluded between the Government and MOL were contrary to the interests of the Republic of Croatia, at the same time not taking into account the protected area of the interests of the Republic of Croatia set out in the Act on the Privatisation of INA (where the courts had not even dealt with the issue of whether the activities of the Government were legal, that is, whether the disputed contracts were contrary to this Act), the courts in the INA-MOL case unnecessarily opened up questions such as: are the criminal justice bodies allowed to interfere in such a way in the constitutional tasks of the legislative and executive branches (Article 4 of the Constitution), and where does the criminal responsibility for accepting a bribe of the prime minister of the Government end, and where does the political responsibility of the Government for concluding disputable contracts begin?

Third, after it proved, in the criminal proceedings, that the contracts concluded with MOL by the Government were contrary to the interests of the Republic of Croatia, the Criminal Court used its assessment as evidence that the applicant had accepted a bribe.

Along with signifying the using of state interests for the purpose of proving the individual guilt of the accused person for accepting a bribe, the said approach created a strong external impression that the prime minister was being incriminated, along with the criminal offence he was indicted and sentenced for (acceptance of a bribe), also for a much graver crime, i.e. for deliberate actions against the interests of the Republic of Croatia. However, it should be taken into account that the applicant in the INA-MOL case was never incriminated for any other criminal offence than acceptance of a bribe. Further, the criminal prosecution authority dropped the charges that the applicant in the case of INA-MOL committed the criminal offence of abuse of office and official authority as prime minister. However, at the same time, the criminal prosecution authority kept in the indictment (which only stated the offence of accepting a bribe) the description of facts related to the offence as it was described in the order to conduct investigation (which stated two offences, that is, accepting a bribe, and abuse of office and official authority). The County Court accepted the same legal qualification of the offence as established by the criminal prosecution authority in the indictment (only accepting a bribe).

The procedure for proving the specific criminal offence of accepting a bribe (by proving that the contracts between the Government and MOL were contrary to the interests of the Republic of Croatia) was set up in a

way that ultimately compromised the entire procedure of presenting evidence to an extent that must be qualified as a violation of the applicant's right to a fair trial referred to in Article 29.1 of the Constitution.

Fourth, in view of the way in which the entire procedure of presenting evidence was compromised as described above, it was not necessary in the Constitutional Court proceedings to deal with objections filed by the applicant concerning the admission and examination of certain pieces of evidence in the conducted criminal proceedings.

In terms of the arbitration procedure in the PCA Case no. 2014-15 before the Geneva Arbitral Tribunal further to the complaint filed by the Republic of Croatia against MOL of 17 January 2014, the data which were provided to the Constitutional Court by the competent ministry show that the statement of claim of the Republic of Croatia is directed at declaring null and void the Main Contract on Gas Operation of 30 January 2009 and the First Amendment to the Shareholders' Agreement INA-MOL of 30 January 2009, which was not the subject matter of the judicial criminal proceeding against the applicant or of the proceedings before the Constitutional Court.

The subject matter of this decision of the Constitutional Court was not a review of the conformity of the concluded contracts (the contract between INA and MOL of 17 July 2003, the First Amendment to the Shareholders' Agreement INA-MOL of 30 January 2009, the Main Agreement on Gas Operation of 30 January 2009, and the First Amendment to the Main Agreement on Gas Operation of 16 December 2009) with the applicable Croatian laws and other legislation, rules and benchmarks of the European Union and the European standards in the field of national and international commercial law and other related legal fields.

Decisions by national courts, including those by the Constitutional Court, cannot in general have an impact on arbitration proceedings initiated or conducted by the Republic of Croatia in the field of international commercial law. It is a general principle that arbitral tribunals are not bound by final judgments of national courts, or decisions issued by national constitutional courts, because such judgments and decisions are regarded as facts by arbitral tribunals. Such tribunals examine matters in the case before them on their own.

Languages:

Croatian, English.



Czech Republic Constitutional Court

Important decisions

Identification: CZE-2013-2-004

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 29.05.2013 / **e)** Pl. ÚS 10/13 / **f)** Church Restitution / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

4.5.6. Institutions – Legislative bodies – **Law-making procedure.**
5.3.39. Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Restitution / Church / Legitimate expectation / Compensation, redress / Legislative process.

Headnotes:

The approach to restitution matters must consider the fact that parties to whom property is being returned had suffered a number of injustices, including those concerning the property. Through restitution laws, the democratic society attempts to at least partly mitigate the consequences of past property injustices and other injustices that arose from 25 February 1948 to 1 January 1990. Thus, under the restitution laws, the state and its bodies are required to proceed in accordance with the justified interests of the parties to whom harm was caused under the totalitarian communist regime. This harm is, now, at least partly compensated. The guiding principle must always be the abovementioned purpose of restitution. It is necessary that the restitution laws be interpreted as favourably as possible in relation to the entitled persons, in the spirit of the attempt to mitigate certain injustices, as a result of which property was expropriated.

Summary:

I. On 29 May 2013, the Plenum of the Constitutional Court ruled on a petition initiated from a group of senators during a proceeding on the annulment of statutes and other legislative regulations. The Court

annulled Article 5.i of Act no. 428/2012 Coll., on Property Settlement with Churches and Religious Societies and Amending Certain Acts. The parts of the proposal directed against Articles 19-25 of the Act were denied as manifestly unfounded; the remainder of the petition was dismissed.

II. The Court considered in detail all of the objections. However, the majority of the Plenum found only one provision of the Act to be unconstitutional, namely Article 5.i of the Act. This provision includes among the facts considered to be a property crime – nationalisation or expropriation of property without payment of fair compensation.

The Plenum concluded that it is necessary to annul the word “fair” in this provision. The reason is that it is neither obvious in the full context what amount of compensation would be considered fair nor the basis or criteria (whether historical or contemporary) for the assessment. Moreover, it is impermissible for the obligated party to decide whether the compensation was fair. The Court emphasised that the phrase “fair compensation” also did not appear in the previous restitution legislation. The remaining parts of the petition were dismissed or denied.

At the beginning, the Court rejected the petitioner’s claim that the Act was adopted in a legislative procedure that was unconstitutional. Regarding substantive objections, the Court emphasised its review of Act no. 428/2012 Coll. was based on its existing case-law. That is, beginning as early as 2005, the Court reminded the legislature that the “blocking” provision of Article 29 of Act no. 229/1991 Coll. established the legitimate expectation of religious legal entities. The case-law continued with Judgment file no. Pl. ÚS 9/07 of 1 July 2010, when the Court found the legislature’s inactivity to be unconstitutional. Subsequently, in several panel judgments, it opened the door to individual complaints that it described as restitution complaints because the established legitimate expectation had long since reached its figurative “age of majority.” Therefore, the Court concluded that it would now be at least surprising if it annulled a statute that fulfils the legitimate expectation and performs restitution.

The Court also considered the petitioners’ general and historically-oriented objections that the property regime of churches rules out a possible renewal of their ownership rights. The reason is that in the past, churches were not and could not be the owners of the original property, or their ownership was subject to public law regulation.

Through a very detailed analysis of texts, period doctrine and case-law, the Court concluded, on the contrary, that church entities essentially had full capacity to own property, and were the subjects holding property rights to individual things that were part of church property. It determined that church property was not subject to so-called public ownership and that this property was not excluded from property rights regulation under the General Civil Code and entrusted to church entities exclusive on the basis of public law entitlement. On the contrary, from the doctrine and case-law of courts after 1948, the Court decided that in this period as well, church property was not of a public law nature and was, on the contrary, considered to be private property (in contrast to socialist ownership), not state property. Church property was also treated as private property in the case-law of the courts after 1989, including the case-law of the Court. Regarding entitled persons’ claims for the release of things under the contested statute, the Court stipulated that one can speak of renewal of property rights in the true sense of the word, as it was understood in the former General Civil Code and the present Civil Code.

The Court also considered objections to individual provisions of the Restitution Act. It did not find unconstitutional the aim of the legislation, i.e. the mitigation of property injustices, which the Court itself had called for in its previous case-law. Nor did it consider unconstitutional the definition of the decisive period, which it designated as a political decision. Regarding the determination or definition of original property in Article 2.a of the Act, the Court acknowledged that a sentence in it is semantically overloaded and that it is not clear what term the word “pertained” applies to.

However, the majority of the Plenum concluded that a constitutionally conforming interpretation can be found, namely the word “pertained” applies only to property rights and other property values, not to things. Regarding the determination of entitled persons, the Court stated that in the past, restitution also applied to certain legal entities, without raising any constitutional law questions. The Court also reviewed individual “types” of property injustices, the regulation of which it found, as stated above, unconstitutional only in the word “fair” (compensation) in Article 5.i of the Act.

The Court also considered objections concerning the legislative framework for financial compensation and settlement agreements. It stated that these must be assessed in the context of the fact that the Act is presently implementing a transition to a new regulation of the church-state relationship. In any case, the restitution legislation alone did not connect

the attempt to renew property relationships exclusively to the beginning of the decisive period, but also took into account the current political and public interest. As a starting point, the Court noted the financial compensation is of a mixed character, not a purely compensatory character. Through it, the legislature is partially balancing the position of the affected churches, including vis-à-vis the Roman Catholic Church, which, in view of the separation of church and state, the Court considers completely legitimate.

Regarding the individual compensation amounts, which the petitioners asserted did not correspond to the scope of the original and unissued property, the Court emphasised that the subject matter of the proceeding cannot be the parties' presentation of proof of the exact property sizes and their valuations. The reason is that these facts are not tied to the constitutionality of the contested Act. It is obvious that the size of the original property, on which the background report was based (and previous negotiations between the state and churches), if it measures the rationality or constitutionality of Article 15.1 and 15.2 of the Act, does not exhibit signs of arbitrariness or error on the part of the legislature. However, it has a reasonable and appropriate connection to the available historical data. The Court also did not find the legislative framework for agreements between the state and the affected churches to be unconstitutional.

The Court did not find that Act no. 428/2012 Coll., the subject matter of which is the mitigation of property injustices and the separation of church and state, in anyway deviates from the religious neutrality of the state. The Court also explained why, in the hearing on 29 May 2013, it did not grant the proposal presented and did not adopt a resolution whereby it would submit a preliminary question to the Court of Justice of the European Union.

III. Dissenting opinions to the verdict and the reasoning of the judgment were submitted by Judges Jaroslav Fenyk, Vojen Guttler, Jan Musil and Pavel Rychetský.

Languages:

Czech.



Identification: CZE-2013-3-009

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 22.10.2013 / e) Pl. ÚS 19/13 / f) Reimbursement Decree for 2013 / g) / h) <http://nalus.usoud.cz>; CODICES (Czech).

Keywords of the systematic thesaurus:

3.10. General Principles – **Certainty of the law.**
 3.12. General Principles – **Clarity and precision of legal provisions.**
 5.4.6. Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**
 5.4.19. Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

Public health care, free / Medical care / Business licence, conditions / Medical practitioner, participating in health insurance scheme / Health, insurance company / Byelaw.

Headnotes:

If the application of a legal regulation requires the combination of several mathematical operations, this does not mean that the legislation is unpredictable or incomprehensible, especially if these norms are directed at a limited circle of subjects who are expected to have expert knowledge of the subject matter.

It is inconsistent with the principle of predictability and the prohibition of arbitrariness if a health care provider is penalised for exceeding the limits for the volume of care provided, because it cannot estimate or affect the scope in which care will be provided.

As a result of the level of reimbursements, if health care providers after exceeding the volume of care in a calendar year are forced to provide care even though the reimbursement does not cover even only the essential expenses, the right to engage in commercial activity and the right to protection of health and to free health care are violated.

Summary:

I. A group of senators of the Parliament submitted a petition to the Constitutional Court seeking annulment of the Ministry of Health decree no. 475/2012 Coll., on setting the value of points, the level of reimbursement of covered services, and regulatory limits for 2013 (the “reimbursement decree”). The petitioners found the

decree unconstitutional in that it exceeded the statutory authorisation for issuing a reimbursement decree and in the unpredictability of the legislative framework, resulting from the complex formulas and criteria for calculating reimbursement for health care services. The petitioners also objected that the decree reduced reimbursements compared to 2011, although actual expenses for health care increased. They also considered unconstitutional the fact that health care service providers are penalised under the decree if the specified amount of covered health care is exceeded.

The petitioners believe that this framework unjustifiably penalises health care service providers for the fact that they provide health care, and is inconsistent with the right to engage in commercial and other economic activity. The petitioners made a similar assessment of the reduced reimbursement in the event of provision of “urgent” care by a health care provider that has not concluded an agreement with the patient’s health insurance company. As a result, all the cited reductions of reimbursement are violations of the right to protection of health under Article 31 of the Charter of Fundamental Rights and Freedoms (hereinafter, the “Charter”).

II. The Constitutional Court did not recognise the objection to exceed the statutory authorisation, because the statutory term “level of reimbursements” includes setting the value of points and regulatory restrictions as means for determining it. It accepted only partly the objection that the contested legislation is non-predictable, incomprehensible, and uncertain. The Constitutional Court stated that a combination of several mathematical operations does not alone make legislation unforeseeable or incomprehensible, especially if these norms are directed at a limited circle of subjects who are expected to have a certain expert knowledge of the subject matter. It found unpredictability and room for arbitrariness only in the case of “regulatory” withholding, which is applied if a health care provider prescribes medicines and health care aids in a scope higher than the level of reimbursements in 2011.

In the Constitutional Court’s opinion, the limits of these deductions are not in accordance with the limits for the volume of health care provided. Thus, with a substantial segment of providers, there is then room for exercising these deductions as a consequence of the fact that the provider fulfils its obligations and prescribes medicines so that the treatment will be effective. In the case of requested care, the provider is not at all capable of estimating or influencing the scope in which care will be provided and whether it will not be provided in a scope greater than that in which it was requested. Nevertheless, the provider is penalised for exceeding the limits.

The Constitutional Court also did not agree with the objection that the overall coverage of the level of reimbursements compared to 2011 is a violation of the right to engage in commercial activity and the right to protection of health. In its opinion, this reduction does not affect the essence and significance of these rights. However, it noted that under certain circumstances, the reduction of the volume of care could come into conflict with the right to protection of health and that the exercise of that right may require increasing the funds for public health insurance.

In contrast, the Constitutional Court found that limiting the level of reimbursement when the volume of health care provided was exceeded, violated the right to engage in commercial activity and the right to protection of health and free health care. Health care providers cannot refuse to provide care but at the same time, they are forced, when the volume of care in a calendar year is exceeded, to provide it in a situation where the reimbursement does not cover even only necessary expenses. This situation would not be a problem in terms of Article 26 of the Charter, if the cause of the loss was the provider’s own business decisions.

However, it is unacceptable if it arises as a necessary consequence of the setting of the level of reimbursements. Health care providers cannot predict the overall scope of health care services that they will be required to provide during the year. They certainly cannot affect whether there will be a marked increase as a result of extraordinary events, e.g. mass accidents, epidemics, etc. Thus, the fundamental problem is that the reimbursement decree does not distinguish between exceeding the volume of care as a result of real waste or overuse of care or as a result of the health care provider’s fulfilling its obligations. In the second case, the decree lacks an entitlement for settlement or compensation. Therefore, the contested legal framework is inconsistent with Article 26 of the Charter and simultaneously threatens the right to protection of health under Article 31 of the Charter. The reason is that it forces health care providers, in their own economic interest, to limit the health care they provide.

The Constitutional Court also found unconstitutional the unequal position of contractual and non-contractual providers in the payment of reimbursements for urgent care provided. If a provider of urgent care does not have a contract with the insured person’s insurance company, it has a claim against that health insurance company for material fulfilment at the level of 75% of the value of a point. Thus, a non-contractual provider unjustifiably finds itself in a significantly worse position than a contractual provider.

The Constitutional Court postponed the annulment of the decree to 31 December 2014. It was led to do so primarily by an interest in preserving legal certainty and the stability of the system for financing health care.

III. The judge rapporteur was Jirí Nykodým. Dissenting opinions were filed by judges Stanislav Balík and Vladimír Kurka.

Languages:

Czech.



Identification: CZE-2014-2-007

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 10.07.2014 / **e)** Pl. ÚS 28/13 / **f)** Judges' Salaries – setting the base salary at a 2.75 multiple of the average monthly salary / **g)** <http://nalus.usoud.cz/> / **h)** CODICES (Czech, English).

Keywords of the systematic thesaurus:

1.6.5.3. Constitutional Justice – Effects – Temporal effect – **Limitation on retrospective effect.**

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

4.5.6. Institutions – Legislative bodies – **Law-making procedure.**

4.7. Institutions – **Judicial bodies.**

Keywords of the alphabetical index:

Judge, remuneration, change / Judge, remuneration, guarantee / Judge, remuneration, reduction / Judge, salary, judicial independence / Legislative procedure.

Headnotes:

The right of judges to remuneration for their work takes precedence over the interest in proper legislative procedure, including observation of the rules for publication of legal regulations, if a derogatory intervention concerning a contested legal regulation were to lead to even greater interference in judicial independence and would thus prevent effective protection of constitutionality.

Intervention in the material security of judges, guaranteed by law, may not be an expression of legislative arbitrariness, but must be based on the proportionality principle, justified by exceptional circumstances, e.g. by the state being in a duly documented burdensome financial situation, and even if that condition is met, the different functions of judges and representatives of the legislative and executive branches, especially state administration, must be taken into account. Moreover, in order for the legislature to impose salary restrictions, it should obtain the relevant opinion from representatives of the judicial branch.

Summary:

I. The plenum of the Constitutional Court granted a petition from the Brno Municipal Court seeking annulment of the words “a 2.75 multiple” in Article 3.3 of Act no. 236/1995, on the Salary and other Benefits Connected with the Office of State Authorities and Certain State Bodies and Judges and European Parliament Representatives (hereinafter, the “Salaries Act”), as amended by Act no. 11/201, which concerns judges of district, regional, and high courts, the Supreme Court, and the Supreme Administrative Court.

The Brno Municipal Court first objected that the legal framework for calculating the salaries of judges in the general courts was unconstitutional; under this framework, the base salary is a 2.75 multiple of the average nominal monthly wage of natural persons in the non-entrepreneurial sphere, according to the published data from the Czech Statistical Office for the next to last calendar year. Second, the petitioner contested defects in the legislative process (specifically, failure to fulfil the conditions for declaring a state of legislative emergency) and objected to the impermissible retroactivity of Act no. 11/2013, which was published on 17 January 2013, but went into effect on 1 January 2013.

II. The majority of the Constitutional Court considered that it was already clear from its previous decision, in which the Court had reviewed the reduction of the base salary from a 3 times multiple to a 2.5 multiple, that in view of the long-term legislative freeze and *de facto* reduction of the salaries of general court judges, that it is necessary to return the legislative framework of judges' base salary to the original 3 times multiple. Thus, in these circumstances, the legislature's discretion was limited, even though the Constitutional Court stated that the judicial branch does not exist outside the economic reality of the state and this relationship is not a constitutionally untouchable value. However, the Court stated that there must be very strong arguments for interfering with it, which,

however, it did not find in that case, where it did not accept the reduction of the base salary of judges to a 2.75 multiple on the grounds of an unspecified excessive burden on the state budget. On the contrary, the Constitutional Court's judgment documents that the salaries of judges were subject to a considerable real decline in value (evidently unlike any other group of employees paid out of the state budget) as a result of intervention in the years 2002-2010, when there were no austerity measures in the area of remuneration in the public sphere that would be manifested in the data on average salaries in the non-entrepreneurial sphere. According to publicly available data from the Czech Statistical Office, the average gross monthly salary in the non-entrepreneurial sphere in the years 2000-2013 (adjusted numbers) did not decline in even one year, even during the years designated as a crisis period.

Based on the foregoing, the Constitutional Court concluded that the base salary of judges, reduced since 2013 from a three times multiple to a 2.75 multiple, i.e. by 8.3%, falls outside the moderate growth of the average salary in the non-entrepreneurial sphere (adjusted numbers) according to data from the Czech Statistical Office in the same period, and is not at all in correlation to the approximately 4.6% growth of the median average salary of the highest state officials between the years 2012 and 2013. The Constitutional Court also pointed out that, in addition, judges' salaries are set as fixed amounts, and, unlike those of state officials, they cannot be increased by awarding any bonuses. The considerable limitation on any possibility of acquiring other income also distinguished judges, because of their office, from other constitutional officials. Therefore, the Court stated that the contested legislative framework is disproportionate interference in the material securing of judicial independence.

The Constitutional Court also found as unconstitutional the manner in which Act no. 11/2013 was adopted, and generally criticised the fact that the judicial branch, represented by two supreme courts, is not consulted by political representatives when they intervene in the remuneration of judges. Furthermore, the Constitutional Court also held that Article II of Act no. 11/2013, which stated that the reduced base salary is to be applied to judges' salaries for the first time in January 2013, is unconstitutional. As this Act was not promulgated in the Collection of Laws until 17 January 2013, in the Constitutional Court's opinion setting the effective date of the Act on 1 January 2013 constituted impermissible true retroactivity. Nonetheless, although the Constitutional Court found the foregoing provision and the legislature's actions to be unconstitutional, it did not annul it, as that would lead to even greater interference in the

constitutionally protected value of judicial independence, that is, it would remove the legal basis for the material provision for judges in the month of January 2013.

Finally, the Constitutional Court explained that its conclusions would apply only *pro futuro*, and that they therefore cannot be applied in lawsuits that have been conducted by judges against the state in the general courts since January 2013, even in the case from which the present petition seeking annulment of the legislative framework originated. The Constitutional Court did this in view of the fact that retroactive payment of these amounts would be an unforeseen intervention in the state budget, which would necessarily lead to increased tension between the society and judges. Therefore, in this regard the Constitutional Court appealed to judges, as a group that should represent the true elite of society, to exercise a higher degree of generosity and helpfulness.

The Constitutional Court accordingly found that the contested part of the provision is inconsistent with Article 1.1 in connection with Article 82.1 of the Constitution, and annulled it as of 31 December 2014. The Constitutional Court rejected the part of the petition concerning annulment of Article II of Act no. 11/2013 Coll., which amends the Salaries Act, as amended by later regulations, and certain other acts.

III. The judge rapporteur in the case was Miroslava Tomková.

A dissenting opinion to the decision of the majority was filed by Judges Jan Musil, Vladimír Sládeček and Radovan Suchánek. In their opinion it could not be considered arbitrary that the government justified the proposed coefficient of 2.75 with reference to the then-existing economic situation and the resources of the state budget. In their view, the judgment of the majority overlooked the salary situation in relation to the representatives of the legislative and executive branch, and compared judges' salaries basically solely with the salaries of state officials – the administration. They argued that it was not correct that the judgment abandoned the direct connection with the salary level of the representatives of individual branches of the state power, which occurs through the annulment of the "2.75 multiple" only "as regards judges" of the general courts. They further contended that it is misleading that the judgment interpreted the contested provision (the 2.75 multiple) as a salary restriction, when in fact the nominal and real income of judges since 2012 has been consistently and significantly growing even with the application of that 2.75 multiple. They considered that the difference of 0.25 in the multiple (i.e. between the current 2.75 multiple and the desired 3 times

multiple), which makes a difference of slightly under CZK 5,800 in the base salary for the year 2013, does not reach constitutional dimensions in terms of violating judicial independence.

The Judges argued that, if judges are to be a social “elite,” they consider it unworthy of the dignity of their position and indicative of a lack of solidarity with the “rest” of society, for judges, given their monthly incomes, which far exceed the incomes of most citizens (measured by average salary), and which must rightly seem vertiginous to “ordinary mortals,” to file lawsuits seeking the payment of additional amounts, despite the fact that their incomes have been growing – unlike the incomes of other state representatives – at a significantly higher rate since 2011. In their opinion, the call by the majority of the Court, in this situation, for the judges to receive even more, so that they can join the ranks of an “upper middle class” seems inappropriate.

Languages:

Czech.



Estonia Supreme Court

Important decisions

Identification: EST-2003-2-003

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 17.03.2003 / **e)** 3-1-3-10-02 / **f)** A charge of Sergei Brusilov under Section 139.3.1 of the Criminal Code / **g)** *Riigi Teataja III* (Official Gazette), 2003, 10, Article 95 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 1.3.1. Constitutional Justice – Jurisdiction – **Scope of review.**
- 1.3.4.1. Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**
- 1.4.9.1. Constitutional Justice – Procedure – Parties – **Locus standi.**
- 5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
- 5.2. Fundamental Rights – **Equality.**
- 5.3.5. Fundamental Rights – Civil and political rights – **Individual liberty.**
- 5.3.13.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.38.1. Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

Keywords of the alphabetical index:

Sentence, criminal, mitigation of criminal law, subsequent / Criminal law, more lenient / Remedy, non-available / Court, remedy, exceptional.

Headnotes:

Where the fundamental rights of a person serving a sentence are violated and no other effective means of judicial protection are available to that person, he or she may petition the Supreme Court.

Article 23.2 of the Constitution (providing that where subsequent to the commission of an offence, the law provides for a less severe punishment, the less severe punishment applies) is applicable not only up to the time that a conviction becomes final, but also during the time that a convicted person is serving a sentence.

The aim pursued of the effective functioning of the court system cannot justify the restriction of fundamental rights.

Summary:

In 1997 Mr Brusilov's conviction for theft became final, and he was punished under Section 139.3.1 of the Criminal Code with six years' imprisonment. On 30 September 2002 Mr Brusilov petitioned the Supreme Court. He claimed that according to Section 199.2 of the Penal Code, which replaced the Criminal Code as of 1 September 2002, the maximum punishment for theft was five years' imprisonment. Mr Brusilov had served five years as of 22 September 2002 and argued that he should not have to serve the remaining sentence.

The Criminal Chamber of the Supreme Court referred the case to the Supreme Court *en banc*. The Criminal Chamber found that the question of the constitutionality of Sections 1.1 to 1.3 of the Penal Code Implementation Act had to be resolved in order to adjudicate the case.

The Supreme Court *en banc* first considered the question of whether Mr Brusilov's petition was admissible. The Criminal Chamber of the Supreme Court had treated Mr Brusilov's petition as one seeking the correction of an error made by the court (under Section 777.1 of the Code of Criminal Court Appeal and Cassation Procedure), even though his petition did not include any grounds for the correction of a court error and the time-limit for the correction of court errors had lapsed. The Criminal Chamber found that the fundamental rights set out in Articles 14 and 15 of the Constitution justified hearing the matter. The Supreme Court *en banc* noted that Mr Brusilov did not challenge the correctness of the judgements against him. He sought to be released from serving the remaining sentence, for the reason that he had been imprisoned for a period of time longer than that prescribed by the Penal Code as the maximum sentence for a similar crime. The Supreme Court *en banc* concluded that Mr Brusilov's petition could not be considered a petition for the correction of a court error.

The Supreme Court *en banc*, however, noted that according to Article 15 of the Constitution, anyone whose rights and freedoms had been violated had the right to have recourse to the courts. Mr Brusilov's petition concerned his constitutional rights – he raised an issue as to the scope of application of Article 23.2 of the Constitution, providing that, *inter alia*, where subsequent to the commission of an offence, the law provides for a less severe punishment, the less severe punishment is to apply. The Supreme Court concluded that in the light of Article 15 of the Constitution, the Supreme Court could not reject Mr Brusilov's petition as inadmissible, as no other effective means of judicial protection were at his disposal.

As for the substance, the Supreme Court held that Article 23.2 of the Constitution should be interpreted as applying not just to the period prior to the delivery of the final judgement, but also to the period during which the sentence was served. The Supreme Court held that the broader interpretation of fundamental rights was to be preferred. Section 5.2 of the Penal Code does not limit the retroactive effect of a law relating to the mitigation of sentences. The Penal Code Implementation Act explicitly provides for the release from punishment of some groups of persons: those persons whose acts are no longer punishable, those who at the time they committed a criminal offence were less than 14 years of age, and those having committed a criminal offence whose constituent elements correspond to those of a misdemeanour under the new Act. The legislature thus extended the effect of the less severe punishment to persons who had already been convicted and were already serving their sentences. The Supreme Court also examined other fundamental rights, *inter alia*, the right to liberty. The right to liberty is an important constitutional value for the interpretation of Article 23.2 of the Constitution. The Supreme Court noted that that interpretation was consistent with the criminal law provisions of several European countries.

The Supreme Court found that Mr Brusilov's constitutional right to mitigation of sentence was restricted by the Penal Code Implementation Act, because that Act did not provide for persons serving a sentence to be released if the term of imprisonment imposed under Criminal Code exceeded the term of imprisonment set out in the corresponding Section of Penal Code. The Supreme Court noted that under the new Act, the provisions for a less severe punishment applied to some persons serving sentences, but not to other persons (including Mr Brusilov) serving sentences longer than those set out by the Penal Code for the same act. Consequently, the right to equal treatment (Article 12.1 of the Constitution) had also been infringed.

The Supreme Court considered the values that could justify restriction of the fundamental rights at stake. The restriction could not be justified by the aim pursued of the effective functioning of the court system. The number of persons involved was not excessively large. According to current understanding, the aim of Mr Brusilov's punishment had been realised. As the legislature had decreased the minimum and maximum imprisonment for theft, it had to be concluded that imprisonment exceeding five years for theft was no longer fair.

Moreover, the right to equality, taken separately, might have also been violated. The Penal Code Implementation Act might treat differently persons having committed identical offences before enactment of the Penal Code. The case might arise where a person is convicted; the conviction becomes final before enactment of the Penal Code; the result is that that person is punished under the Criminal Code. Whereas another person, committing an identical offence at the same time, absconds; that person thereby avoids criminal proceedings and is convicted only after enactment of the Penal Code; the result is that that person is punished under the Penal Code. The Supreme Court found such a differentiation to amount to a violation of Article 12.1 of the Constitution.

The Supreme Court declared that the Penal Code Implementation Act was in conflict with the second sentence of Article 23.2 of the Constitution in conjunction with the first sentence of Article 12.1 of the Constitution to the extent that the Act did not provide for a possibility for a sentence imposed under the Criminal Code to be mitigated up to the maximum term of imprisonment laid down by a corresponding provision of the Penal Code. The Court also ordered that Mr Brusilov be released from serving the remaining sentence.

Supplementary information:

Seven justices out of seventeen delivered three dissenting opinions. According to the dissenting opinions, the retroactive effect under Article 23.2 of the Constitution of a law relating to the mitigation of sentences applied only until the offender's conviction became final and did not apply during the time that a convicted person was serving a sentence. Three justices were of the opinion that the Supreme Court should have declared Mr Brusilov's petition inadmissible, as the law of criminal procedure did not provide for the kind of petition he had filed.

Cross-references:

Decisions of the Supreme Court:

- no. 3-4-1-6-98, 30.09.1998, *Bulletin* 1998/3 [EST-1998-3-006];
- no. 3-3-1-38-00, 22.12.2000;
- no. 3-4-1-1-02, 06.03.2002, *Bulletin* 2002/1 [EST-2002-1-001];
- no. 3-4-1-2-02, 03.04.2002, *Bulletin* 2002/1 [EST-2002-1-002];
- no. 3-1-1-77-02, 14.11.2002.

Languages:

Estonian, English (translation by the Court).



Identification: EST-2004-1-006

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 21.01.2004 / **e)** 3-4-1-7-03 / **f)** Review of constitutionality of Article 22.1.4 of Social Welfare Act / **g)** *Riigi Teataja III* (Official Gazette), 2004, 5, 45 / **h)** <http://www.nc.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.5. General Principles – **Social State.**
 3.19. General Principles – **Margin of appreciation.**
 4.5.2. Institutions – Legislative bodies – **Powers.**
 5.2.1.3. Fundamental Rights – Equality – Scope of application – **Social security.**
 5.4.14. Fundamental Rights – Economic, social and cultural rights – **Right to social security.**
 5.4.18. Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Social assistance, individual character / Housing, benefit.

Headnotes:

The right to social assistance in case of need as provided for in Article 28.2 of the Constitution is a social fundamental right, arising from the principles of

a state based on social justice and human dignity referred to in Article 10 of the Constitution.

It is up to the legislator to decide to what extent the state shall grant assistance to needy persons. Nevertheless, the Court has a duty to intervene where assistance falls below the minimum level.

A state, having created social security systems and provided for social assistance, must also ensure the observance of the fundamental right to equality, expressed in Article 12.1 of the Constitution.

Unequal treatment cannot be justified by difficulties of a mere administrative and technical nature.

Summary:

A. Maisurjan, a student of Faculty of Medicine of Tartu University, made an application to the Social Welfare Department of Tartu City Government for subsistence benefit. To the application, he annexed a lease for a room in a hostel as a document proving the right to use the dwelling and a document from the Faculty of Medicine certifying that he did not get a scholarship and that he was not on academic leave. In resolutions passed on 17 April and 16 May of 2003, the Social Welfare Department of Tartu City Government refused his application for subsistence benefit. According to the resolutions, the document submitted by A. Maisurjan to prove the legal basis for the permanent use of the dwelling did not comply with the legal bases referred to in Article 22.1.4 of Social Welfare Act (hereinafter "SWA").

A. Maisurjan challenged the resolutions of the Social Welfare Department in the Tartu Administrative Court. He requested that the resolutions be annulled and subsistence benefit for April and May be paid to him. On 27 June 2003, Tartu Administrative Court allowed his action and declared Article 22.1.4 SWA unconstitutional and did not apply it. Before the proceedings in A. Maisurjan's case commenced, the Legal Chancellor invited the Riigikogu to bring Article 22.1.4 SWA into conformity with the Constitution. As the proceedings exceeded all the time-limits, the Legal Chancellor brought the case before the Constitutional Review Chamber of the Supreme Court.

The petitions of the Legal Chancellor and Tartu Administrative Court pertain to the right to state assistance in case of need, provided for in Article 28.2 of the Constitution. That right is a social fundamental right, arising from the principles of a state based on social justice and human dignity, referred to in Article 10 of the Constitution.

The Constitution determines neither the amount nor the conditions for the receipt of social assistance. The second sentence of the second subSection of Article 28 of the Constitution leaves it up to the legislator to decide to what extent the state shall grant assistance to needy persons. Nevertheless, the legislator may not freely decide to what extent and to whom the social rights established by Article 28 of the Constitution shall be guaranteed. Courts have a duty to intervene where the assistance falls below the minimum level.

A state, having created social security systems and having provided for social assistance, must also ensure the observance of the fundamental right to equality, expressed in Article 12.1 of the Constitution. When deciding on state social assistance and the extent thereof, the provisions of Article 27 of the Constitution must also be taken into account.

Article 28.2 of the Constitution refers to need as one of the grounds entitling a person to state assistance and requiring the state to provide assistance. The Constitution does not specify the circle of persons who may be considered needy. For that reason, in the interpretation of the Constitution, it is necessary to examine international agreements to which the Republic of Estonia has acceded.

The Constitutional Review Chamber referred to Article 11 of the Covenant on Economic, Social and Cultural Rights, Articles 13.1 and 12.1 of the European Social Charter (revised) and the Charter of Fundamental Rights of the European Union.

The Social Welfare Act regulates the conditions and procedure for the receipt of assistance in case of need. The Act is based on the principle that the state has an obligation to provide assistance where the potential for a person or family to cope is insufficient (Article 3.1.3). A needy person is entitled to subsistence benefit.

The judgment of the administrative court and the petition of the Legal Chancellor pertained to the wording of Article 22.1.4 SWA that was in force from 1 January 2002 to 5 September 2003. The judgment of the court and the petition of the Legal Chancellor both agreed that the Act excluded persons whose dwellings did not fulfil the requirements of Article 22.1.4 SWA from receiving subsistence benefits. The complainants were of the opinion that the exclusion of those persons from the group of persons entitled to social benefits was not in conformity with the right to state assistance in case of need established in Article 28.2 of the Constitution, in conjunction with the principle of equal treatment established in Article 12.1 of the Constitution.

The Supreme Court was of the opinion that Article 22.1.4 SWA meant that in granting subsistence benefits to needy persons and families whose dwellings did not fulfil the requirements of Article 29 of the Dwelling Act, the expenses connected with those dwellings could not be taken into account and housing benefits could not be paid to them. When granting subsistence benefits in the broader sense to needy persons whose dwellings fulfilled the requirements of Article 29 of the Dwelling Act, the expenses connected with the dwellings within the limits established by local government had to be taken into account and housing benefits had to be paid to them. Thus, the Act treated needy persons and families differently, depending on where they lived.

Although not discussed by the legislator, the possible justifications for the unequal treatment might be the elimination of unjustified applications for subsistence benefits (e.g. applications to compensate for the expenses connected with a hotel room), avoidance of technical problems in administering subsistence benefit applications, and maintenance of the budgetary balance of the state.

The Chamber pointed out that it would be possible to avoid unjustified applications for subsistence benefits by the legislator's empowering local government councils to establish the limits of expenses connected with dwellings. Unequal treatment could not be justified by difficulties of a mere administrative and technical nature. An excessive burden on the State Budget is an argument that could be considered when deciding on the scope of social assistance, but the argument could not be used to justify unequal treatment of needy persons and families.

On the basis of the foregoing, the Chamber concluded that there was no reasonable ground for unequal treatment of needy persons and families. The violation of the right to equality and the disregard of the right to state assistance in case of need were manifestly inappropriate. Article 22.1.4 of the Social Welfare Act in the wording in force from 1 January 2002 to 5 September 2003 was in conflict with the right of every person to state assistance in case of need, established in Article 28.2 of the Constitution, in conjunction with the general right to equality, established in Article 12.1 of the Constitution, to the extent that in the granting of subsistence benefits to some persons and families, it did not permit the taking into account of the expenses connected with dwellings, and some persons and families had not been paid housing benefits.

Cross-references:

- no. 3-3-1-65-03, 10.11.2003;
- no. 3-1-3-10-02, 17.03.2003, *Bulletin* 2003/2 [EST-2003-2-003].

Languages:

Estonian, English.



Identification: EST-2008-2-006

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 16.05.2008 / **e)** 3-1-1-86-07 / **f)** Misdemeanour matter concerning punishment of I. Eiche under Article 54⁷.1 of the Public Transport Act / **g)** *Riigi Teataja III* (Official Gazette), 2008, 24, 259, www.riigikohus.ee / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 3.3. General Principles – **Democracy.**
- 3.9. General Principles – **Rule of law.**
- 4.14. Institutions – **Activities and duties assigned to the State by the Constitution.**
- 4.15. Institutions – **Exercise of public functions by private bodies.**

Keywords of the alphabetical index:

Transport, public / Separation of powers / Misdemeanour proceedings.

Headnotes:

As there would be potential for severe infringements on fundamental rights if criminal proceedings and the state's penal power over them were delegated to the private sector, any such delegation would not be constitutional. They are core functions of the state. However, the prohibition on the delegation of penal power to a legal person in private law explicitly and directly relates solely to criminal proceedings; it does not extend, for example, to administrative actions of a supervisory nature preceding criminal proceedings.

Summary:

I. In March 2007, a city transport employee of the ticket inspection group of the AS Ühisteenusused imposed a sanction on I. Eiche on the basis of Article 54⁷.1 of the Public Transport Act ("PTA") by a fine of 8 fine units (480 kroons). Eiche had, on 22 February 2007, travelled by public transport vehicle without a document certifying the right to use public transport. The AS Ühisteenusused is a legal person in private law on whom the duties of a body conducting extra-judicial proceedings have been conferred, by means of a contract under public law entered into with the city of Tallinn. The possibility to delegate the conduct of extra-judicial proceedings concerning certain misdemeanours explicitly provided for in the PTA to a legal person in private law is established in Article 54¹¹.3 of the PTA. According to the first subSection of the same Section all the provisions of the misdemeanour procedure shall apply to such bodies in private law conducting extra-judicial proceedings.

I. Eiche filed an appeal against the decision of the body conducting extra-judicial proceedings, applying for it to be overturned, and for the misdemeanour proceedings to be stopped. He also sought a declaration as to the unlawfulness of stopping public transport vehicles in between stops by the AS Ühisteenusused.

The Harju County Court handed down a judgment in June 2007, overturning the decision of the body conducting extra-judicial proceedings as to the punishment imposed on I. Eiche, and replacing it with a fine of 4 fine units (240 kroons). The remaining part of the appeal was dismissed.

I. I Eiche's counsel submitted an appeal in cassation against the judgment of the Harju County Court, seeking the reversal of the county court judgment and termination of the misdemeanour proceedings. The Criminal Chamber of the Supreme Court referred the misdemeanour matter to the General Assembly of the Supreme Court for hearing, on the basis that adjudication of this matter requires the commencement of constitutional review proceedings in order to determine whether Article 54¹¹.3 of the PTA was in conformity with the provisions of the preamble and Sections 3, 10, 13 and 14 of the Constitution in their conjunction.

II. The General Assembly of the Supreme Court took the view that the delegation of proceedings of offences and the related penal power of the state to a legal person in private law is in conflict with the provisions of Sections 3, 10, 13 and 14 of the Constitution in their conjunction, and declared

Article 54¹¹.3 of the PTA and Articles 9.3 and 10.5 of the Code of Misdemeanour Procedure ("CMP") unconstitutional and invalid. Consequently, as the circumstances of subject of proof in misdemeanour procedure can be established solely by a body conducting extra-judicial proceedings, the officials of the AS Ühisteenusused did not have jurisdiction to establish the necessary elements of a misdemeanour in the conduct of I. Eiche. The General Assembly accordingly repealed the judgment of the Harju County Court and terminated misdemeanour proceedings against I. Eiche on the basis of Article 29.1.1 of the CMP, which provide that proceedings are to be terminated if the act in question does not contain the elements of a misdemeanour.

The Supreme Court found, that both criminal procedure and misdemeanour procedure constitute the exercise of one of the sub-categories of state power – penal power. According to the first sentence of Section 3.1 of the Constitution state power, including penal power, must be exercised solely pursuant to the Constitution and laws; this is also one of the expressions of the principle of a state based on the rule of law. So Section 3.1 of the Constitution must be read in conjunction with the principle of a democratic state based on the rule of law expressed in Section 10 of the Constitution.

The requirement that restrictions of fundamental rights be established by law does not necessitate an outright ban on delegation of certain state powers. The Constitution does not permit the delegation of all powers of state; the method of delegation must be in conformity with the Constitution. The title of the contract itself will indicate that it is permissible to delegate by a contract under public law solely and without exception the administrative functions within the sphere of executive power. Penal power – including the entire conduct of criminal proceedings and the attendant judicial procedure – cannot be considered as (ordinary) exercise of administrative functions. That is why, to the extent that the provisions of Articles 9.3 and 10.5 of the CMP and Article 54¹¹.3 of the PTA, allow, on the basis of a contract under public law, for the delegation of state penal power to a legal person in private law, they cannot be deemed to be in full conformity with the requirement that restrictions of fundamental rights be established by law.

The delegation of the competence of a body conducting extra-judicial proceedings to the AS Ühisteenusused and the delegation of penal power in the broader sense is not only unconstitutional because of the non-observance of the requirement that restrictions of fundamental rights be established by law. The delegation of penal power to a legal person in private law is also in conflict with the

requirement, within the first sentence of Section 3.1 and Section 10 of the Constitution, that powers of state must be exercised solely pursuant to the Constitution. This requirement includes the requirement that exercise of powers of state must not be in conflict with the Constitution. Also those functions which, under the Constitution, must be exercised by the state power, and which therefore make up the core functions of the state, cannot be delegated by the state to a legal person in private law.

Penal power, including the conduct of criminal proceedings, must be perceived as one of the core functions of the state, as the conduct of criminal proceedings is a sphere of state activity where extensive infringements of fundamental rights are possible. At the same time the Code of Misdemeanour Procedure does not distinguish the extent of competence of bodies conducting extra-judicial proceedings on the basis of whether the body conducting the proceedings is a public authority or a legal person in private law.

The more extensive the legal possibilities of restricting fundamental rights in certain spheres, the greater the responsibility upon the state to act to protect the individual and to create a situation which precludes unjustified infringements of fundamental rights. A person's ability to defend his interests and to have confidence in the conduct of penal proceedings is dependent upon the public authority establishing rules for the conduct of these proceedings, supervising the training and activities of those who conduct them. Care must also be exercised during each misdemeanour case that fundamental rights are not excessively infringed. In cases where the state does not have direct responsibility over misdemeanour proceedings and does not exercise supervision over the body conducting the proceeding, the fundamental right to procedure and organisation (Sections 13 and 14 of the Constitution) is in jeopardy. Furthermore, the exercise of penal power under the Constitution requires that a penal authority be objective and independent and act solely in the public interest.

Supplementary information:

This judgment attracted considerable public attention, and brought about swift alterations to the *modus operandi* of the ticket inspection group in the public transport system of the city of Tallinn (and other cities), as local government officials with the power to levy fines were recruited, instead of private companies.

Cross-references:

General Assembly of the Supreme Court:

- no. 3-4-1-10-00, 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009], *Riigi Teataja* III (Official Gazette), 2001, 1, 1;
- no. 3-4-1-5-02, 28.10.2002, *Bulletin* 2002/3 [EST-2002-3-007], *Riigi Teataja* III (Official Gazette), 2002, 28, 308.

Constitutional Review Chamber of the Supreme Court:

- no. 3-4-1-2-01, 05.03.2001, *Bulletin* 2001/1 [EST-2001-1-003], *Riigi Teataja* III (Official Gazette), 2001, 7, 75;
- no. 3-4-1-14-07, 01.10.2007, *Bulletin* 2007/3 [EST-2007-3-005], *Riigi Teataja* III (Official Gazette), 2007, 34, 274;
- no. 3-4-1-15-07, 08.10.2007, *Riigi Teataja* III, (Official Gazette), 2007, 33, 263;

Criminal Chamber of the Supreme Court:

- no. 3-1-1-7-06, 10.04.2006, *Riigi Teataja* III (Official Gazette), 2006, 13, 125.

Languages:

Estonian, English.



Identification: EST-2012-3-005

a) Estonia / **b)** Supreme Court / **c)** *en banc* / **d)** 12.07.2012 / **d)** 12.07.2012 / **e)** 3-4-1-6-12 / **f)** / **g)** www.riigiteataja.ee/akt/130032012023 / **h)** www.riigi.kohus.ee/?id=11&tekst=RK/3-4-1-6-12; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 3.1. General Principles – **Sovereignty.**
- 3.3.1. General Principles – Democracy – **Representative democracy.**
- 3.9. General Principles – **Rule of law.**
- 4.5.2.1. Institutions – Legislative bodies – Powers – **Competences with respect to international agreements.**

Keywords of the alphabetical index:

European Stability Mechanism, treaty.

Headnotes:

Article 4.4 of the European Stability Mechanism Treaty interferes with the financial competence of Parliament and is related to the principle of a democratic state subject to the rule of law. It also interferes with the financial sovereignty of the state of Estonia, in that the people's right of discretion is indirectly restricted. Article 4.4 of the Treaty provides for a proportional measure for the achievement of the objective.

Summary:

I. By the Government order "Approval of the Draft Treaty establishing the European Stability Mechanism and grant of authorisation" the Draft European Stability Mechanism Treaty (hereinafter, the "Treaty") was approved and the permanent representative of Estonia to the EU was authorised to sign it. The representative signed the amended Treaty which the Member States were required to ratify. The Chancellor of Justice made a request to the Supreme Court, relying on Article 6.1.4 of the Constitutional Review Court Procedure Act (hereinafter, the "CRCPA"), to declare Article 4.4 of the signed Treaty in conflict with the principle of parliamentary democracy and with Articles 65.10 and 115 of the Constitution.

II. An assessment was first made of the admissibility of the Chancellor of Justice's request. The Court noted that the Treaty is an international agreement and not part of the primary or the secondary law of the European Union. Paragraph 123 of the Constitution prohibits entering into international treaties which are in conflict with the Constitution. Article 6.1.4 of the CRCPA grants the Chancellor of Justice the right to file with the Supreme Court a request to declare a signed international agreement or one of its provisions in conflict with the Constitution. The Court found that the Chancellor of Justice is entitled to make such requests even if the Treaty has yet to be ratified; it has not been ratified yet. A preliminary review prevents a situation in which an unconstitutional international agreement might later be withdrawn or censured.

Another significant question had arisen over the constitutionality of Article 4.4 of the Treaty. The Court noted that the Treaty determines the upper limit of the obligations of the Member States and sets out when and how the capital has to be paid in.

Article 4.4 of the Treaty interferes with the financial competence of the Parliament provided for in Article 65.6 of the Constitution in conjunction with Article 115.1 of the Constitution and in Article 65.10 of the Constitution in conjunction with Article 121.4 of the Constitution, and is related to the principle of a democratic state subject to the rule of law. The Parliament's possibility of making political choices is restricted, because the choices already made have decreased national financial resources. It also interferes with the national financial sovereignty arising from the preamble to and Article 1 of the Constitution, because the people's right of discretion is indirectly restricted. Article 4.4 interferes with the financial competence of the Parliament, as well as the state's financial sovereignty related thereto and the principle of a democratic state subject to the rule of law due to the possibility that, at the request of the European Stability Mechanism Treaty (hereinafter, the "ESM") the callable capital must be paid in the future.

The Court was of the opinion that the purpose of Article 4.4 of the Treaty is to guarantee for the ESM in an emergency the efficiency of the decision-making mechanism to eliminate threats to the economic and financial sustainability of the euro area. This objective is legitimate for interfering with the principles addressed above.

The objective of Article 4.4 of the Treaty is related to the purpose of the Treaty to safeguard the financial stability of the euro area. Financial instability and the closely related economic instability of the euro area also endanger the financial and economic stability of the state of Estonia, because Estonia is part of the euro area. Economic and financial stability is necessary in order for Estonia to be able to fulfil its obligations arising from the Constitution. Consequently, the interference arising from Article 4.4 of the Treaty is justified by substantial constitutional values – the need arising from the preamble to and Article 14 of the Constitution to guarantee the protection of fundamental rights and freedoms.

The Court found that Article 4.4 of the Treaty provides for an appropriate, necessary and reasonable measure for the achievement of the objective. In weighing up reasonableness the Court deemed it necessary to distinguish the interference occurring on the ratification of the Treaty and the interference which may occur later in implementing the Treaty when, at the request of the ESM, the callable capital must be paid. The interference occurring on ratification is not in itself very serious; however, the interference is based on weighty constitutional values – the need to guarantee the protection of fundamental rights and freedoms. Therefore, Article 4.4 of the

Treaty does interfere with the financial competence of the Parliament as well as the principles of the financial sovereignty of the state and of a democratic state subject to the rule of law, but the objectives justifying the interference are sufficiently significant. Article 4.4 of the Treaty is not therefore in conflict with the Constitution; the Court dismissed the request of the Chancellor of Justice.

The Court made the following statement, *obiter dicta*.

When the Constitution of the Republic of Estonia Amendment Act (hereinafter, the “CREAA”) was passed in a referendum, the people gave their consent in form and in substance for Estonia to accede to the European Union and to enjoy the rights and obligations arising from membership. The Court held that the CREAA should be considered as authorisation to ratify the Accession Treaty as well as authorisation allowing Estonia to be part of the changing European Union, provided any amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. The CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to more extensive delegation of the competence of Estonia to the European Union and more extensive interference with the Constitution, it will be necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably to amend the Constitution again. These requirements are also to be considered if the Treaty leads to amendments to the TFEU and TEU.

Supplementary information:

There are 5 separate opinions from 9 judges.

Cross-references:

Supreme Court *en banc*:

- no. 3-4-1-17-08, 19.03.2009, *Bulletin* 2009/1 [EST-2009-1-003];

Constitutional Review Chamber:

- no. 3-4-1-1-03, 17.02.2003, *Bulletin* 2003/2 [EST-2003-2-002];
- no. III-4/A-1/94, 12.01.1994.

European Court of Human Rights:

Golder v. United Kingdom, no. 4451/70, 21.02.1975, Series A, no. 18; *Special Bulletin Leading Cases ECHR* [ECH-1975-S-001].

Languages:

Estonian, English (translation by the Court).



Identification: EST-2014-2-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 16.12.2013 / **e)** 3-4-1-27-13 / **f)** / **g)** 18.12.2013, 12; www.riigiteataja.ee/akt/118122013012 / **h)** www.riigikohus.ee/?id=11&tekst=RK/3-4-1-27-13; www.riigikohus.ee/?id=1495 (in English); CODICES (Estonian, English).

Keywords of the systematic thesaurus:

3.3. General Principles – **Democracy**.
 3.9. General Principles – **Rule of law**.
 3.10. General Principles – **Certainty of the law**.
 5.3.38. Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
 5.4.6. Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Environment, protection / Expectation, legitimate / Enterprise, freedom / Democratic, legitimacy / *Vacatio legis*, principle / Regulation, retroactive effect.

Headnotes:

Freedom of entrepreneurial activity does not grant a person the right to require the use of national treasures or state assets in the interest of their entrepreneurial activity. Nevertheless, this freedom is infringed when a public authority creates conditions that make engaging in an entrepreneurial activity less favourable than under the legal framework that was in force earlier.

In light of the principle of legitimate expectation, it is important that people can rely on the fact that a law will not be made more unfavourable in respect of them. The principle does not only concern rights and freedoms, but also obligations.

The principle of legitimate expectation also extends to an adopted and published law, which is not yet applicable.

It is generally inadmissible to increase obligations through a legal instrument that is applicable retroactively. That is, there may be no legal consequences to actions that have already been performed in the past. Retroactive application is non-genuine if it establishes prospective legal consequences on an activity that has started in the past. Non-genuine retroactive application is admissible if the public interest in the amendment of the law overrides the legitimate expectation of people.

The principle of legitimate expectation is restricted by the principle of democracy. Political bodies based either directly or indirectly on the mandate of people are, in principle, entitled to update their previous choices, unless this causes excessive harm to those who have relied on the law in force.

Summary:

I. The Environmental Charges Act provides the minimum and maximum rates of the mineral resource extraction and water abstraction charges. The establishment of specific rates for the charges has been delegated to the Government. The Government adopted regulations that entered into force on 1 January 2010. The regulations provided, for the years from 2010 to 2015, different rates of the water abstraction charge and the extraction charge in terms of years.

II. The disputed regulations were amended by Government Regulation of 4 October 2012 (Amendment Regulation), which entered into force on 12 October 2012. The regulation amended rates of the charges as from 1 April 2013, 1 January 2014 and 1 January 2015.

Prior to the amendments, according to the Regulations, as from 2013 the rates of the charge for the extraction of all the mineral resources and water abstraction had to increase at most by about 5%, compared to the previous year. Following the amendment, as from 1 April 2013 the rates of the charge would increase by approximately 20 % a year, so on average by about 20%, 40% and 60% over the years compared to the charge rates established earlier for the same period.

The Chancellor of Justice filed a request with the Supreme Court.

III. The Court found that the increase in the contested charge rates infringed the freedom of entrepreneurial activity and the principle of legitimate expectation.

The Chamber agreed with the present case-law. Furthermore, it found that the establishment of a provision with a regulation does not preclude the creation of legitimate expectation. The creation of legitimate expectation was also not precluded due to the fact that the case concerned an obligation. In the context of the principle of legitimate expectation, obligations mean that a person will have a legitimate expectation that their obligations will not increase. People who fulfilled all the prerequisites for their activities reasonably expect that they have a right in the future to the application of legislation that is favourable to them. Disappointment caused by an amended law that is unfavourable to them does not necessarily constitute an infringement of their legitimate expectation.

The Chamber did not agree with the arguments that, following various non-binding documents and surveys, the undertakings had to understand that the charge rates established by regulations indicate only an increase in the charge rates and if necessary, the rates will be reassessed.

The principle of legitimate expectation also extends to an adopted and published law, which is not yet applicable. The principle of legitimate expectation does not mean only a restriction for the state authority. Rather, it allows for binding itself so that people are given a promise and certainty in respect of provisions that will enter into force in the future and they are thus directed to plan their activities in the long term, i.e. they are encouraged to invest.

The law allows an extraction permit to be issued for most mineral resources for up to thirty years. There were undertakings for which water abstraction permits and extraction permits, which extended to the effective period of the disputed provisions, had been issued.

The Chamber held that, in this case, the legitimate purpose was to make undertakings use natural resources economically and to increase the state budget revenue.

Fixed-term and termless legislation should still be understood differently when assessing the reasonableness of the infringement of legitimate expectation. In the event of rights granted and obligations restricted for a fixed term, the legitimate

expectation of persons is more protected than in the event of termless legislation.

Despite the significant differences in percentage, the share of extraction charges in operating charges is low and thus the impact on sales revenue is not big.

The extraction of mineral resources is an investment-intensive field. During the long-term period of validity of permits, the final expenses of undertakings depend on many variables. Therefore, a possible extensive change in circumstances in the distant future is an inevitable risk. The near future can be forecast better. If any fixed-term legislation has been established for the first years, then the persistence thereof is an important criterion for undertakings when planning their activities.

The Court held that the only justifiable argument for increasing the charge rates was the fact that, compared to 2009, in 2012 the Government decided to give different weight to different aspects of environmental protection. Hence, as regards the field of regulation, the charge rates had been established for a short period and complied with the law. In the meantime no circumstances have changed unexpectedly or extensively. The purpose of making undertakings use natural resources economically and increasing state budget revenue does not override the infringement of the freedom of entrepreneurial activity in conjunction with the principle of legitimate expectation.

The charge rates were declared unconstitutional and repealed to the extent that they exceeded the current charge rates.

Supplementary information:

Legal norms referred to:

- Articles 5, 10, 11, 31 and 53 of the Constitution.

Cross-references:

- no. 3-4-1-2-13, 09.12.2013;
- no. III-4/A-5/94, 30.09.1994;
- no. 3-4-1-2-99, 17.09.1999;
- no. 3-4-1-6-98, 30.09.1998;
- no. 3-4-1-9-00, 06.10.2000;
- no. 3-4-1-20-04, 02.12.2004, *Bulletin* 2006/2 [EST-2006-2-005];
- no. 3-4-1-13-09, 19.01.2010;
- no. 3-4-1-24-11, 31.01.2012;
- no. 3-4-1-1-02, 06.03.2002;
- no. 3-3-2-1-07, 10.03.2008, *Bulletin* 2008/1 [EST-2008-1-004].

Languages:

Estonian, English (translation by the Court).



Identification: EST-2014-3-004

a) Estonia / **b)** Supreme Court / **c)** *en banc* / **d)** 26.06.2014 / **e)** 3-2-1-153-13 / **f)** / **g)** 03.07.2014, 39; www.riigiteataja.ee/akt/103072014039; www.riigikohus.ee/?id=11&tekst=RK/3-2-1-153-13 / **h)** www.riigikohus.ee/?id=1515 (in English); CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 3.9. General Principles – **Rule of law.**
- 3.12. General Principles – **Clarity and precision of legal provisions.**
- 3.13. General Principles – **Legality.**
- 4.6.3.2. Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**
- 4.7.4.2. Institutions – Judicial bodies – Organisation – **Officers of the court.**
- 5.3.13.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.39. Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Court, civil, jurisdiction, judge, authority / Ownership right, restriction / Minister, law-making-power / Minister, exceeding of power.

Headnotes:

In county court civil proceedings, the determination of procedural expenses constitutes an administration of justice within the meaning of the first sentence of Article 146 of the Constitution. Such administration of justice can only be carried out by a judge for the purposes of Articles 147, 150 and 153 of the Constitution.

To ensure legal clarity, provisions that are closely connected to the contested provision and that, provided they remain in force, may cause confusion about the legal situation must be considered relevant. If the wording of the regulations overlap such that

they substantively constitute the same provision, the other regulation can be considered as relevant.

Setting a compensation limit on the expenses of a contractual representative interferes with the fundamental right to property of a party to proceedings (Article 32 of the Constitution) and the right of recourse to the court (Article 15.1 of the Constitution). It may also interfere with the right of appeal (Article 24.5 of the Constitution). Depending on the circumstances, the interference may be serious. Therefore, establishing compensation limits to the expenses of a contractual representative may be considered an important matter for the purpose of the parliamentary reservation expressed in the first sentence of Article 3.1 of the Constitution.

Summary:

I. The applicant filed with the court a request to determine whether the procedural expenses he had incurred in the amount of over 8 000 euros constitute legal assistance expenses and if so, the claimant be ordered to pay the expenses. The claimant objected to the request. An assistant court judge partially granted the applicant's request regarding the procedural expenses and ordered the claimant to pay the applicant the contractual representative expenses in the amount of 319 euros. According to the assistant judge, the applicant's reasonable and necessary expenses for the contractual representatives in the case amounted to approximately 5 400 euros. The assistant judge, however, only awarded the applicant 319 euros. The assistant judge relied on a government regulation, according to which the expenses of a contractual representative could be recovered from other parties in proceedings up to 319 euros in this kind of civil case.

The applicant appealed the county court order. The circuit court upheld the order and dismissed the appeal. The applicant appealed to the Supreme Court. The Civil Chamber C of the Supreme Court placed the case before the Supreme Court *en banc*.

Under Article 174.8 of the Code of Civil Procedure (hereinafter, the "CCP"), an order on determining procedural expenses may also be made by an assistant judge.

Article 173 CCP provides that the government can set limits on the expenses recovered for a contractual representative and advisor from other parties. As such, the government established the regulation "Limits of Recovery of Expenses of Contractual Representative from Other Parties to Proceedings".

II. The Court reviewed the two main issues in the case and decided as follows.

a. The right of an assistant judge to determine procedural expenses that had arisen from Article 174.8 of the CCP.

According to the first sentence of Article 146 of the Constitution, justice is administered exclusively by the courts. Determining procedural expenses in civil proceedings in a county court constitutes an administration of justice for the purposes of the first sentence of Article 146 of the Constitution. Determining the procedural expenses cannot be deemed as an activity of preparing or arranging the administration of justice or as a technical or calculation step. In essence, this is the adjudication of a claim for damage compensation. A substantive decision that qualifies as an enforcement title is made on the matter of dispute, thereby creating, altering or terminating the rights and obligations of the parties to the proceedings.

In court, justice can be administered for the purposes of the first sentence of Article 146 of the Constitution only by a judge for the purposes of Articles 147, 150 and 153 of the Constitution. Only judges have been provided with constitutional guarantees, such as the appointment to office for life, removal from office only by a judgment, the requirement that the grounds and procedure for release of judges from office as well as the legal status of judges and guarantees for their independence, including special procedure for appointment to office and bringing criminal charges against judges. The Constitution does not set out such guarantees or restrictions for any other officials working in the court system. The Court found Article 174.8 of the CCP, which authorises an assistant judge to determine procedural expenses in civil proceedings, is in conflict with the first sentence of Article 146 of the Constitution. The Court declared it unconstitutional and repealed it.

b. The limits set on recovering the expenses of contractual representative from other parties to proceedings were established by two different government regulations at different times. Also, there were two different delegating norms in the CCP at different times. The Court found that the concrete norm control must be extended to the regulations at different times as the wordings of those regulations overlapped to such a great extent that they substantively constitute the same provision. The Court also took into consideration the principle of legal clarity.

Under the first sentence of Article 3.1 of the Constitution, governmental authority is exercised solely on the basis of the Constitution and laws that are in conformity therewith. This provision of the Constitution expresses the parliamentary reservation, i.e. the principle of importance, according to which the Legislature must decide all matters of importance from the point of view of fundamental rights itself and must not delegate their regulation to the Executive. The Executive is allowed to impose less intensive restrictions of fundamental rights by a regulation based on a provision delegating authority, which is accurate, clear and in conformity with the intensity of the restriction.

Setting a limit on the compensation of the expenses of a contractual representative thus interferes with multiple fundamental rights and depending on the circumstances, the interference may be serious. Therefore, the establishment of compensation limits on the expenses of a contractual representative may be considered an important matter for the purpose of the parliamentary reservation.

Additionally, it must be taken into account that since the matter concerns compensation of expenses incurred in judicial proceedings, the issue falls within the scope of application of an act governing court procedure that must be regulated by an act passed by the majority of the members of the Parliament (Article 104.2.14 of the Constitution).

The regulations and delegating norms of the CCP were declared unconstitutional.

III. There were two separate opinions from three judges.

Cross-references:

Legal norms referred to:

- Articles 3, 11, 15, 24, 32, 87, 146, 147, 150 and 153 of the Constitution.

Supreme Court:

- no. 3-4-1-29-13, 04.02.2014;
- no. 3-4-1-18-07, 26.11.2007;
- no. 3-4-1-10-02, 24.12.2002, *Bulletin* 2002/3 [EST-2002-3-010];
- no. 3-4-1-8-09, 16.03.2010, *Bulletin* 2010/1 [EST-2010-1-006];
- no. 3-4-1-1-08, 05.02.2008, *Bulletin* 2008/1 [EST-2008-1-003];
- no. 3-4-1-20-07, 09.04.2008, *Bulletin* 2008/1 [EST-2008-1-005];

- no. 3-4-1-16-06, 13.02.2007;
- no. 3-2-1-62-10, 12.04.2011; no. 3-4-1-20-13, 10.12.2013.

Languages:

Estonian, English (translation by the Court).



Identification: EST-2016-1-001

a) Estonia / **b)** Supreme Court / **c)** *en banc* / **d)** 12.04.2011 / **e)** 3-2-1-62-10 / **f)** / **g)** www.riigiteataja.ee/akt/121042011016 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

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:

Access to courts, limitations / Court fees, excessive cost.

Headnotes:

The objective that in an action, at least in case of monetary disputes, the state costs for the administration of justice shall be borne by court fees paid by the participants in the proceeding can be deemed permissible under the Constitution; as well as for reasons of procedural efficiency in order to avoid unfounded, vexatious and other similar appeals. However, the possible objective of using court fees to earn extra income for the state and to finance from it other expenses of the state, if the fee is higher than is necessary for ensuring the bearing of the legal costs by the participants and procedural economy, cannot be considered legitimate.

The need to ensure the right to appeal outweighs procedural efficiency and the participation of the litigants in bearing the legal costs. The latter objective should be achieved in a way that a person lacking effective means can protect his or her fundamental rights in court.

Summary:

I. The applicant had requested a court order directing the defendant to pay the sum of 31,500,000 kroons (15,6 kroons = 1 euro) as a principal debt. The county court dismissed the action.

The applicant subsequently filed an appeal, for which he did not pay a state fee. The applicant requested to hear the appeal without payment of the fee, by arguing for procedural assistance under the existing regulatory framework for procedural assistance, but without application of the additional conditions pertaining to legal persons (which are entitled to very limited financial assistance under the law). The circuit court did not exempt the applicant from the obligation to pay the fee and did not grant him procedural assistance and required him to pay a state fee of 945,000 kroons for the appeal.

In the appeal against the court ruling filed with the Supreme Court, the applicant requested the annulment of the circuit court judgment and a new ruling accepting the appeal without requiring any further state fee or granting him procedural assistance to that extent.

Upon the filing of a statement of claim, a state fee, according to Article 56.1 and to Annex 1 to the State Fees Act, if the value of a civil matter exceeds 10,000,000 kroons, the full rate of the state fee is 3% of the value of the civil matter, but not more than 1,500,000 kroons. Based on the referred provisions, a state fee of 945,000 kroons had to be paid for the action in the county court. Pursuant to Article 56.19 of the State Fee Act, a state fee of 945,000 kroons has to be paid on the appeal as well.

The civil chamber of the Supreme Court referred the matter to be reviewed by the Supreme Court *en banc* to decide also the constitutionality of the provisions in question.

II. To assess the constitutionality of the regulatory framework for exemption from payment of a state fee on an appeal by means of procedural assistance, there is inevitably the question whether the state fee, payment of which the procedural assistance is sought, is constitutional. The obligation to pay a state fee on an appeal is in itself in conformity with right to appeal to a higher court (Article 24.5 of the Constitution).

The primary objective of a state fee is compensation in full or in part by a party of the act for expenses of a public-law act performed by the state.

The objective that in an action, at least in case of monetary disputes, the state costs on administration of justice shall be borne on the account of the fees paid by the participants in the proceeding (participation of the participants in bearing the legal costs principle) can be deemed permissible under the Constitution, i.e. other taxpayers need not finance that proceeding, at least in general. However, this principle cannot be extended in a way that the participants as a whole should similarly finance also the court proceedings where public interests are at stake, e.g. disputes regarding children and family, disputes with the state or, for example, criminal offence proceedings.

The legitimate objective of state fees is also procedural efficiency in order to avoid unfounded, vexatious and other similar appeals since it may result in the court system's inability to offer effective legal protection within a reasonable time.

The possible objective of court fees to earn extra income for the state, and to finance from it other expenses of the state if the fee is higher than is necessary for ensuring the bearing of the legal costs by the participants and procedural economy, cannot be considered legitimate. It would be contrary to the essence of the fee arising from Article 113 of the Constitution.

The obligation to pay in a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on an appeal is not a moderate measure for complying with the participation of the participants in bearing the legal costs principle as well as for achieving procedural efficiency. The need to ensure the right to appeal outweighs procedural efficiency and the participation of the litigants in bearing the legal costs. The latter objective should be achieved in a way that a person lacking effective means can protect his or her fundamental rights in court.

Having recourse to the courts cannot be ensured only in matters with a prospect of definite success.

In a situation where the state has prescribed the obligation to pay in cases of a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on an appeal, such an obligation may mean that a person lacks the actual possibility to protect his or her significant fundamental rights in court, i.e. the essence of the right to appeal has been damaged. The non-moderation of an infringement of the right to appeal is substantially increased by the fact that in order to file an appeal, the fee already paid upon filing of the action has to be paid again in the same amount, i.e. that for referring

the matter to the appeal court in case of dismissal of the action the plaintiff actually has to pay a state fee total of 6% of the value of the matter on the action.

III. There is one separate opinion from two judges.

Supplementary information:

The Supreme Court declared later many different amounts of state fees unconstitutional, too.

Cross-references:

Legal norms referred to:

- Article 24.5 of the Constitution.

Supreme Court:

- no. 3-4-1-10-00, 22.12.2000;
- no. 3-4-1-25-09, 15.12.2009.

European Court of Human Rights:

- *Paykar Yev HaghTanak Ltd v. Armenia*, no. 21638/03, 20.12.2007;
- *Kreuz v. Poland*, no. 28249/95, 19.06.2001;
- *Teltronic-CATV v. Poland*, no. 48140/99, 10.01.2006.

European Court of Justice:

- *C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22.12.2010.

Languages:

Estonian, English (translation by the Court).



France

Constitutional Council

Important decisions

Identification: FRA-1962-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 06.11.1962 / **e)** 62-20 DC / **f)** Law on the election of the President of the Republic by direct universal suffrage, adopted by the referendum of 28 October 1962 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.11.1962, 10778 / **h)**.

Keywords of the systematic thesaurus:

1.3.1. Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.5. Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

1.3.5. Constitutional Justice – Jurisdiction – **The subject of review.**

Keywords of the alphabetical index:

Referendum, law, constitutionality / Constitutional Court, special jurisdiction.

Headnotes:

The jurisdiction of the Constitutional Council “is strictly defined by the Constitution and by the provisions of the organic Law of 7 November 1958”; “it cannot therefore be called upon to determine cases other than those exhaustively set out in those texts”. The Constitutional Council therefore declares that it has no jurisdiction to examine the compatibility with the Constitution of a law adopted by referendum.

Summary:

Following the attempt on his life at Petit-Clamart, General de Gaulle decided that the arrangements for appointing the President of the Republic should be changed. He chose to make use of the procedure provided for in Article 11 of the Constitution. Since it was necessary to amend certain articles of the Constitution, the opposition claimed that the procedure was unconstitutional and argued that the Constitution could be amended only pursuant to Article 89 of the

Constitution. By order of 2 October 1962, the President of the Republic decided to submit a bill (on the election of the Head of State by universal suffrage) to a referendum, on 28 October 1962.

The reform was approved by 62% of the votes cast. The President of the Senate then referred the matter to the Constitutional Council, on the basis of Article 61.2 of the Constitution. Following the declaration by the Constitutional Council in the present decision that it lacked jurisdiction, the constitutional law was promulgated and Articles 6 and 7 of the Constitution were amended.

Supplementary information:

Controversial at the time, the decision of the Constitutional Council has since been confirmed (Decision no. 92-313 of 23 September 1992, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 94).

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

Constitutional Court:

- no. 92-313, 23.09.1992, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 94.

Languages:

French.



Identification: FRA-1971-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 16.07.1971 / **e)** 71-44 DC / **f)** Law supplementing the provisions of Articles 5 and 7 of the Law of 1 July 1901 on association agreements / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.07.1971, 7114 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.1. Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

2.1.1.1.2. Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments.**

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

Keywords of the alphabetical index:

Principle, constitutional value / Constitution, preamble, legal value / Constitution, sources / Association, registration.

Headnotes:

The principle of freedom of association, which forms the basis of the general provisions of the Law of 1 July 1901 on association agreements, must be included among the fundamental principles recognised by the laws of the Republic and solemnly reaffirmed in the Preamble to the Constitution. According to that principle, associations are formed freely and may be made public, subject only to the requirement that a preliminary declaration be lodged. Thus, with the exception of measures which could be taken vis-à-vis special categories of associations, even where an association appears to be void or to have an illegal object, the validity of its formation cannot be made subject to the prior intervention of the administrative authorities or even the judicial authorities.

Summary:

The Commissioner of Police for Paris, acting on the instructions of the Minister of the Interior, had refused to issue to the founders of the Association of “Friends of the Cause of the People” an acknowledgement of the declaration of their association which they had made. The founders of the association brought the matter before the administrative court, which found in their favour. The law referred to the Constitutional Council by the President of the Senate, which was passed by the National Assembly alone, in order to overcome the annulment by the Paris Administrative Court of the refusal by the Commissioner of Police to issue an acknowledgement of the declaration of the association, restrictively amended freedom of association as established by the Law of 1 July 1901.

The Constitutional Council declared that Article 3 of the bill and the provisions of Article 1 of the law referring to that article were incompatible with the Constitution. Article 3 provided for a mechanism of

prior control of associations, contrary to the purely penal mechanism of the 1901 law, which was elevated to the rank of a measure of constitutional value.

This decision had and continues to have considerable political and legal repercussions: the decision of 16 July 1971 definitively establishes the legal value of the Preamble; it extends the *bloc de constitutionnalité*; it applies “the fundamental principles recognised by the laws of the Republic”, forcefully confirms the independence of the Constitutional Council vis-à-vis the political power, makes freedom of association a constitutionally protected freedom and, in particular, transforms the nature of the Constitutional Council: previously the regulator of institutions, it is now also the guardian of freedoms.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1992-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 02.09.1992 / **e)** 92-312 DC / **f)** Treaty on European Union (Maastricht II) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.09.1992, 13337 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.5.1. Constitutional Justice – Jurisdiction – The subject of review – **International treaties.**
3.1. General Principles – **Sovereignty.**
4.1.2. Institutions – Constituent assembly or equivalent body – **Limitations on powers.**

Keywords of the alphabetical index:

European Union, Treaty.

Headnotes:

The compatibility of a Treaty with the Constitution, where the latter has been amended following an initial decision of the Constitutional Council, cannot be examined unless it appears that the Constitution, as amended, remains contrary to one or more provisions of the Treaty, or if a new provision has been inserted into the Constitution which renders one or more provisions of the Treaty incompatible with it.

“The constituent power is sovereign and can repeal, amend or supplement provisions of the Constitution in the form which it deems appropriate (..).”

Summary:

The Constitutional Council was again requested by 70 senators to examine the compatibility of the Treaty of Maastricht with the amended Constitution.

This was the first occasion on which the new procedure, introduced by the constitutional amendment of 25 June 1992 which allowed 60 deputies or 60 senators to request the Constitutional Council to examine the compatibility with the Constitution of an international commitment.

In the present case, the Constitutional Council rejected all the complaints raised by the senators, on the ground that “the Treaty on European Union contains no clause contrary to the Constitution” and that, consequently, “authorisation to ratify it may be given on the basis of a law”.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-2011-1-009

a) France / **b)** Constitutional Council / **c)** / **d)** 03.12.2009 / **e)** 2009-595 DC / **f)** Institutional Act concerning the application of Article 61-1 of the Constitution / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.12.2009, 21381 / **h)** CODICES (French, English, German, Spanish).

Keywords of the systematic thesaurus:

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

1.3.4.1. Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

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

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

Keywords of the alphabetical index:

Constitutionality, priority question of, effectiveness, procedure / Constitutional justice, individual access.

Headnotes:

A priority question of constitutionality (hereinafter, “PQC”) is confined to the sphere of constitutionally secured rights and freedoms, excluding questions about the procedure for enacting law, and must be raised before a court answerable to the *Conseil d’État* or to the Court of Cassation. It may be raised initially at first instance, at appeal or before the Court of Cassation. Apart from these features of relative limitation, the sole condition for the admissibility of a PQC before trial and appeal courts is to be presented in a separate, reasoned written submission. This condition is intended to facilitate the handling of PQCs, especially to avoid prolonging the proceedings. Moreover, in accordance with Article 61-1 of the Constitution, it is accepted that a court may not raise a PQC of its own motion.

Summary:

Following the constitutional revision of 23 July 2008 to modernise the institutions of the Vth Republic, the Constitutional Council ruled on the Institutional Act on the application of Article 61-1 of the Constitution instituting the PQC. All provisions of the Act referred to the Council were declared consistent with the Constitution. However, reservations intended to guarantee the procedural rights of persons before the courts were made.

The Institutional Act referred to the Constitutional Council was enacted on the basis of the new Article 61-1 of the Constitution. It specifies the arrangements for the application of the procedure to review the constitutionality of the law by way of objection. Persons before the courts now have a new right enabling them to assert the rights and freedoms derived from the Constitution. This strengthens the authority of the letter of the Constitution in the domestic legal system. The Institutional Act settles the rules applicable before trial and appeal courts, the *Conseil d’État* and the Court of Cassation which have jurisdiction to decide whether or not to transmit the PQC, and before the Constitutional Council.

A PQC is confined to the sphere of constitutionally guaranteed rights and freedoms, excluding questions about the procedure for enacting law, and must be raised before a court answerable to the *Conseil d’État* or the Court of Cassation. It may be raised initially at first instance, at appeal or before the Court of Cassation. Apart from these features of relative limitation, the sole condition for the admissibility of a PQC before trial and appeal courts is to be presented in a separate, reasoned written submission. This condition is intended to facilitate the handling of PQCs, especially to avoid prolonging the proceedings. Moreover, in accordance with Article 61-1 of the Constitution, it is accepted that the Court may not raise a PQC of its own motion. The Council therefore validated all these provisions.

The impossibility of putting a PQC to the assize court was also deemed to be in accordance with the Constitution, as this provision was justified by the expediency of good administration of justice to the extent that it did not deprive persons on trial of the right to raise a PQC either before the assize court proceedings, at any stage of the investigation, or afterwards at appeal.

As to the conditions and time limits for examining a PQC, several aspects of the Constitutional Council’s decision are worth emphasising. Firstly, transmission of the PQC by a court to the *Conseil d’État* or to the Court of Cassation is only effective in so far as three

cumulative conditions are complied with: the impugned provision is applicable to the litigation or proceedings, has not already been declared constitutional by the Constitutional Council in the grounds and the operative part of its decisions, unless the circumstances have changed, and finally the question is not devoid of cogency. All these conditions were deemed consistent with Article 61-1 of the Constitution. In particular, the second requirement confirmed Article 62 of the Constitution, providing that “the decisions of the Constitutional Council are not subject to any appeal. They are binding on the public authorities and on all administrative and judicial authorities”.

Thus, in the light of these cumulative criteria, the *Conseil d'État* and the Court of Cassation had jurisdiction to decide whether a PQC should be referred to the Constitutional Council. Moreover, in the Council's opinion, the absence from the Institutional Act of specific procedural provisions on the consideration of a PQC by the *Conseil d'État* or the Court of Cassation, if not at variance with the legislator's authority, was to be construed as enjoining compliance with a fair, equitable procedure for examining the referral of a PQC to the Constitutional Council. To fulfil this reservation made by the Council, if supplementary procedural rules were established by decree they must meet this requirement.

Furthermore, the Institutional Act required complaints over constitutionality to be examined with priority, i.e. before points of international or European law. The Constitutional Council held that these provisions confirmed the place of the Constitution at the apex of the French domestic legal system. However, this priority did not override the international undertakings of France, which pre-supposed ensuring the supremacy over the laws not only of legally ratified or approved treaties or agreements (Article 55 of the Constitution), but also of the European Union standards (Article 88-1 of the Constitution).

In every case, the transmission of a PQC to a higher court prompted the first court receiving the PQC to suspend judgment, whether all judicial or administrative courts or the Court of Cassation or the *Conseil d'État* (which would have referred the question to the Constitutional Council). There were nevertheless two notable exceptions to this rule. Firstly, the court could not stay the proceedings if the law or regulations required it to deliver judgment within a specified time or urgently, or if the suspension was liable to have irreparable or manifestly excessive consequences for the rights of the parties. In these specific cases, the court deciding to refer the question could rule on the points of

urgency. Next, the need for suspension disappeared where a person was in custody on account of the proceedings or where their object was to end a custodial measure.

The case might therefore be finally determined even while the Constitutional Council had yet to deliver the decision on the constitutionality of a legislative provision. Accordingly, the Council made a significant reservation: this eventuality must not deny litigants the possibility of bringing fresh proceedings in order to benefit from the final decision of the Constitutional Council.

With the reservations made earlier, the Constitutional Council therefore considered this entire mechanism of referral and suspension of proceedings consistent with the Constitution. The resultant centralisation of review of constitutionality, with abrogative effect (*erga omnes*), presented itself as a guarantee of certainty and coherence in the protection of fundamental rights. However, any abrogation could only occur as the upshot of adversarial proceedings, involving a public hearing and ending with a reasoned decision published in the Official Gazette.

Cross-references:

Constitutional Council:

- no. 74-54 DC, 15.01.1975, Act on voluntary termination of pregnancy;
- no. 2004-505 DC, 19.11.2004, Treaty establishing a Constitution for Europe;
- no. 2010-605 DC, 12.05.2010, Law on opening-up of competition and regulation of the on-line gambling sector;
- no. 2010-1 PQC, 28.05.2010, Mr and Mrs L. (Freezing of pensions).

Languages:

French.



Georgia

Constitutional Court

Important decisions

Identification: GEO-2016-1-004

a) Georgia / **b)** Constitutional Court / **c)** Second Board / **d)** 08.08.2014 / **e)** 2/4/532, 533 / **f)** Irakli Kemoklidze and Davit Kharadze v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality.**

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

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

5.2.2.8. Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**

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

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

5.3.34. Fundamental Rights – Civil and political rights – **Right to marriage.**

5.3.43. Fundamental Rights – Civil and political rights – **Right to self fulfilment.**

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

Keywords of the alphabetical index:

Physical disorder, mental / Capacity, legal proceedings / Consent, legal representative / Interference, rights / Personal development / Capacity, restoration.

Headnotes:

Restrictions on the rights of persons with mental retardations should conform to constitutional standards of human rights and fundamental freedoms, and should not rest upon the person's mental illness. Disability caused by psychological diseases does not always imply that a person is incapable of making conscious decisions in all areas of social life and carry out actions that may entail

legal consequences, particularly small household transactions aimed at satisfying personal, reasonable needs that do not infringe on the legitimate rights and interest of other persons.

Summary:

I. The applicants (persons recognised as incapable) appealed a list of norms of the Civil Code, Civil Procedure Code and the “Law on Psychiatric Care”. They opined that these norms contradicted Articles 14, 16, 17, 18, 24, 36, 41 and 42 of the Constitution.

They disputed norms of the Civil Code:

- a. Restricted persons recognised as incapable due to their “imbecility” or mental illness, in their freedoms to willingly and actively acquire civil rights and responsibilities;
- b. Abolished acts of persons who were recognised as incapable;
- c. Banned persons who were recognised as incapable from the right to marry;
- d. Declared legal representatives as the persons’ lawful representatives empowered to represent the subject of their guardianship with third parties without specific appointment (e.g., courts) and were entitled to sign every necessary deal on behalf of persons recognised as incapable.

They also disputed norms of the Civil Procedure Code:

1. That appointed guardians to legally represent the interests and defend persons recognised as incapable in the courts;
2. When the person recognised as incapable had recovered from their disease, only the legal guardians, family members or psychiatric institutions had the right to apply to the courts to annul legal guardianship and to restore the persons in question to their capacities.

Additionally, they disputed norms of the “Law on Psychiatric Care” that:

- a. Foresaw, instead of a person recognised as incapable, the information about his or her disease and psychiatric care was to be given to his or her legal representative;
- b. Stripped off the person recognised as incapable from the right to participate in private legal matters;

- c. In order to administer treatment, it requested an informed consent of the legal representative of the person recognised as incapable, but sidestepped the will of the person him or herself;
- d. Allowed the legal representative of the person recognised as incapable to choose psychiatric care facility, and to stop medical examinations/treatment;
- e. Gave the right to doctors, for the purposes of security, to restrict enacted rights of the persons recognised as incapable;
- f. Declared treatment voluntary, if the legal representative, not the patient, had asked for it and had signed informed consent.

II. Substantiation of the Judgment:

With regards to Article 16 of the Constitution (the right to take necessary actions for the purposes of autonomy and for personal development), the Court first evaluated the group of norms of the Civil Code. They constituted a unified regime and restricted persons recognised as incapable, due to their “imbecility” or “mental disability”, from their liberties to willingly acquire and act upon rights and responsibilities, to represent selves with third parties, sign deals and turned them entirely dependent on their legal representatives, and for an indeterminate amount of time. Therefore, an entire class of persons, much like claimants in the present case, were declared as lacking civil free-will, regardless of the complexity of specific relations or risks. Considering this, taking away capacities in an absolute and blanket manner for an indeterminate amount of time amounted to losing autonomy in practically every aspect of life. This was seen as a highly intense interference in such right.

The legitimate aim of a restriction, according to the respondent, was to defend the rights and interests of persons with mental disabilities. The Court determined that Article 58, which annulled every single deal negotiated by a mentally disabled person (including deals that benefited these persons), vividly trespassed the aim to defend the persons with mental disorders, and were disproportionate restrictions. Therefore, this norm violated Article 16 of the Constitution.

Norms that enacted the status of being recognised as incapable and replaced the individual’s will with that of his or her legal representative were not justifiable means aimed at taking care of the person recognised as incapable. The existing normative approach to disorder was completely ignoring the reality that the limitation of mental disorders is characterised by the wide-ranging gradations and fragmentation of limiting the ability of persons with mental disorders to comprehend the results of their actions to a varying

degree. The disputed norms, however, were applied to all persons recognised as mentally incapable, and took away from them the possibility to realise those capacities, which they did still have in their possession. The Court pointed out that an optimal mechanism to recognise a person as incapable should allow a court to consider the damage on the decision-making capacity of a person with mental disorders and must ensure as much as possible that the rights and freedoms of this person are protected. Furthermore, the purpose of guardianship lies in supporting the person in the decision-making process and not in substituting their will in every field of life. Therefore, it was determined that the disputed norms disproportionately restricted the right to free development of personality of the persons recognised as incapable, and were declared unconstitutional with regards to Article 16 of the Constitution.

The Court also reviewed the norms of the “Georgian Law on Psychiatric Care” that restricted incapable persons’ freedom to choose the psychiatric care facility, a doctor and decide on commencing treatment. The Court pointed out that the right to self-development includes the right of an individual to submit him or herself to this or that kind of treatment, choose a doctor and a care facility. When a person is incapable to give informed and free consent to the treatment plan, interference in the right is permissible, if this will benefit the welfare of the person in question. However, when the person is capable of consenting independently and in an informed manner, any interference on his or her health shall require consent.

Since recognition of incapacity does not involve measurement of the level of mental disorder, a person recognised as incapable may possess this kind of capacity. He or she is unconditionally excluded from the process of medical decision-making that will impact his or her health, which results in ignoring his or her enacted rights. Therefore, these norms also disproportionately interfered in the right protected by Article 16 of the Constitution and thus, were declared unconstitutional.

The Court did not believe that the norms that took away the right from incapable persons to independently apply to a court when they recovered from their mental disorder, with the request for restoration of capacities, and to join the process launched at the initiative of other persons. Furthermore, the part of the norm that afforded a guardian, a doctor and a psychiatric care facility to go to the law and ask for restoration of the capacity of the person, was not determined to violate the right to self-development, since the aim of the norm was to restore a person in his or her rights.

The Court pointed out that these disputed norms instituted a restriction on the right enshrined in Article 42 of the Constitution (right to apply to a court). Therefore, the Court determined that a person recognised as incapable must not depend on the goodwill of his or her legal representatives, family members or psychiatric care facilities to be able to enjoy the right to appeal to a court, a right that will protect these persons from abuse of discretion. Based on these reasons, the above-described norms were declared unconstitutional with regards to Article 42.1 of the Constitution.

Additionally, the Court evaluated these norms against Article 14 of the Constitution. The Court determined that the disputed norms established specific norms for the persons recognised as incapable, and capable persons were not given any preferential treatment with regards to the norm in question. There was no differential treatment between adult, regardless of their status of recognised capacities. Therefore, these norms were declared constitutional with regards to Article 14 of the Constitution.

The respective article of the Civil Code that prohibited marriage, if one of the future spouses was recognised as incapable, was evaluated with regards to Article 36 of the Constitution. The disputed norms took away the possibility for them to turn cohabitation with a partner into a legal recognition of their voluntary union into an act of creating a family. The legitimate aim of the disputed norms was to protect persons recognised as incapable from forced marriage and protect their right to property from interference.

The Court found that there was a least restrictive mechanism to achieve this legitimate aim – by allowing marriage through the consent of legal representative or respective body, which allowed for individual interference into the right to marriage. If a person has social skills to understand non-material results that accompany a marriage, which is not established at any moment when the recognition of incapacity takes place, then taking away the right to marry represents a disproportionate interference in the right. Therefore, without taking into the account the individual mental capacities, restricting the right of the persons recognised incapable was declared unconstitutional with regards to Article 36.1 of the Constitution.

The following norms (recognition of a person incapable, limitation of the right to marry and regulations related to psychiatric care) were assessed in relation to Article 14 of the Constitution because the applicants alleged that persons recognised as incapable were subjected to differential treatment when compared to persons with equal skills but not

recognised as incapable. The Court found that the general characteristic of the social group in question is the recognition as incapable, which is based on their mental disorder. Membership of the group or transferring to other group is not dependent on the will of the persons recognised as incapable. The Court concluded that classical discrimination was taking place, regulated by Article 14 of the Constitution and hence, it applied “strict scrutiny” test to find out if it was justified.

Within the test, the Court determined that since it was possible to identify the individual capacities of the persons and tailor the status of incapable, the existing norms dictating the process of recognition, annulment of the acts of persons recognised as incapable, and complete substitution of their free-will with that of their legal representative, also the prohibition of the right to marry, were not interferences absolutely necessary and therefore, violated Article 14 of the Constitution.

Furthermore, the applicant disputed the norm of the “Law on Psychiatric Care” that disallowed a person recognised as incapable to receive information about their own disease and psychiatric care with regards to Article 16 of the Constitution (the right to free development of his or her personality), Article 24 of the Constitution (right to freedom of expression), and Article 41 of the Constitution (right to shall have the right to become acquainted, in accordance with a norm prescribed by law, with the information about him or her stored in state institutions as well as official documents existing there). The Court highlighted that the disputed norm regulated relations that arise in the process of psychiatric care, which is not part of the right to freedom of expression, which includes the right to disseminate information (with regards to Article 24 of the Constitution). At the same time, since psychiatric care facility, even it is a state institution, is not a body tasked with carrying out public functions, and for the purposes of Article 41, cannot be counted as “state institution”. Therefore, the disputed norm was declared constitutional with regards to both constitutional rights.

As for Article 16 of the Constitution, the Court indicated that it defends the right of a person to independently make decisions regarding their own health and treatment, and access to their own health records is crucial for making such decisions. Therefore, the disputed norm restricted the applicants’ right protected by Article 16 of the Constitution (access information about own health) and constituted interference in this right. The Court declared the norm as disproportional restriction. The Court found that it failed to recognise the varying degrees of individual mental capacities of persons recognised as incapable. With the blanket ban, the

norm stripped them off of their rights to receive information about their own health conditions. Therefore, the norm was declared unconstitutional with regards to Article 16 of the Constitution.

Article 15.3 of the “Law on Psychiatric Care” allowed the doctors a right, in exceptional cases with the purpose of security, “to limit the rights of patients placed under stationary care, including the right to be protected from inhuman and undignified treatment”. The norm was challenged with regards to Article 17.1 of the Constitution, which stipulates that “honour and dignity of an individual is inviolable”. Article 17.2 of the Constitution prohibits various forms of inviolability in physical and mental integrity, among others, inhuman treatment and infringement upon honour and dignity. The Court pointed out that this is an absolute right and the state is mandated not only to restrain from such treatment but also to ensure that third parties do not interfere in this right. Word-by-word analysis of the norm illustrated that it allowed, in certain conditions, to treat patients placed under stationary care, in a manner that was inhumane and infringed upon honour and dignity. Therefore, the disputed norm was declared unconstitutional with regards to Article 17.1 and 17.2 of the Constitution.

Also disputed was the norm of the “Law on Psychiatric Care” that declared that with the consent of the patient’s legal representative, the placement of a patient in the stationary care facility was voluntary treatment. The norm was disputed with regards to Article 18.1 and 18.2 of the Constitution (inviolability of an individual’s liberty – right to movement and restriction of the right to free movement, including, for the purposes of forced treatment) and allows interference in the right only with a Court decision.

The Court determined that for the purposes of Article 18 of the Constitution, the placement of a person in psychiatric stationary facility, based only on the consent of his or her legal representative, cannot be interpreted as the will of the person, even if the patient is devoid of his or her ability to express his or her will that will meet the standard for such expression. Due to peculiar characteristics of mental disorder, placement in the stationary facility may last for long periods of time, for several months or even years (beyond the 48 hours) that the Constitution allows. Therefore, interference in Article 18 of the Constitution with such form, nature and intensity requires specific procedural safeguards, namely verification by the courts, if restriction of personal liberty takes place for more than 48 hours. Since the disputed norm allowed for extra-judicial interference in the individual’s right to liberty, it was declared unconstitutional with regards to Article 18.1 and 18.2 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2014-1-001

a) Georgia / **b)** Constitutional Court / **c)** Plenary / **d)** 28.06.2010 / **e)** 1/466 / **f)** Public Defender v. Parliament / **g)** *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.1.1.3. Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
5.2.2.4. Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
5.3.13.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Discrimination, foreign persons, stateless persons, legal entity.

Headnotes:

The right of access to court is enshrined within the Constitution and is applicable to all, irrespective of citizenship. The wording of the Constitution does not imply that only those residing within the territory of Georgia are protected by this right.

Summary:

I. The applicant in these proceedings contended that under the Constitution, the State must guarantee the right of access to court for all individuals who fall under its jurisdiction. Citizens of foreign countries and persons without citizenship may fall under its jurisdiction too, irrespective of whether they reside there, along with legal entities regardless of their place of registration. Discrimination based on citizenship, which prevents certain people from enjoying rights which are recognised as universally applicable, is inadmissible. The right to access to court falls into that category of rights.

The representative of the Respondent put forward the view that the norm under challenge, from the Law on the Constitutional Court, did not restrict the circle of subjects who could apply to the Constitutional Court. It actually widened it, giving other individuals residing in Georgia (not just citizens) the right to lodge claims, by contrast to Article 89.1 of the Constitution, which only named citizens as subjects of this right.

The respondent also observed that the Constitutional Court undertakes norm-making activities through its decisions. The type of legislation and the specific norms which should apply within the country and the regulation of various affairs can all be the subject of deliberation at the Constitutional Court, but only through the participation of citizens of Georgia. It is up to them to define the rights they should have and the format for this.

II. The Constitutional Court noted the duty incumbent on the State under Article 7 of the Constitution to recognise and protect human rights. Recognition by the State implies an obligation to recognise the rights as every individual's concomitant good. Protection implies a duty to provide all necessary safeguards to allow the enjoyment of these rights, including the possibility of protecting them before a court.

The Court stated that the Constitution is not confined to recognising the rights of citizens of its country. Everyone is an object of protection by the Constitution, though a citizen of any country residing in any country or a stateless person may not be protected by the Constitution if they have no legal ties with Georgia.

The aim of the Constitution to protect human rights would be completely ineffective if restrictions were imposed confining protection to persons residing in Georgia.

The Court observed that the most important safeguard for the enjoyment of any right is the ability to protect it through the court system. If there is no opportunity to avoid a right being breached or to restore a right that has been violated, doubt will be cast over the enjoyment of the right. A prohibition or disproportionate restriction on the right to apply to court for protection of rights and freedoms not only breaches the right to fair trial but also strikes at the heart of the right the person was seeking to protect by applying to court. Restrictions on the right of access to court are possible but these must not be based on a person's citizenship.

The Court stated that the Constitutional Court is not there to establish a new legal order in the country. It

is there to uphold the supremacy and efficiency of the Constitution, promoting its fulfilment by the state and the people.

Individuals apply to the Constitutional Court for redress after a right has been violated, restoration of that right or the avoidance of its violation. Their dispute will take place within the scope of specific constitutional review; they will not be getting involved in or seeking to influence the process of norm-making in the country.

Individuals who apply to the Constitutional Court do not have the possibility to change the content of their rights through their participation. Neither are they entitled to establish a content that is different from that of specific right; they cannot apply to the Constitutional Court to this end. The sole purpose of their claims is the protection of their constitutional rights.

The Court held that its decisions cannot be altered depending on whether the person who has applied to it is a citizen or a foreigner. Neither can the Court take the applicants' status as citizen or foreigner into account in its deliberations. It cannot therefore be contended that foreigners and stateless persons become engaged in deciding upon the sovereign matters of the country.

The ability to protect a right at common court is very important. All three instances must be fully accessible to foreigners and stateless persons. In certain instances though, the only way to prevent the violation of a right is by recourse to the Constitutional Court.

The Constitutional Court accordingly resolved that regulations determining that individuals who were not citizens of Georgia and legal entities that were not registered there were not entitled to lodge a constitutional claim were unconstitutional.

Languages:

Georgian, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-1994-2-021

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 12.07.1994 / **e)** 2 BvE 3/92, 2 BvE 5/93, 2 BvE 7/93, 2 BvE 8/93 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 1994, 90, 286 / **h)** *Europäische Grundrechte Zeitschrift*, 1994, 281; *Neue Juristische Wochenschrift*, 1994, 2207; CODICES (German).

Keywords of the systematic thesaurus:

1.3.4.2. Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

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

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

2.3.6. Sources – Techniques of review – **Historical interpretation.**

3.1. General Principles – **Sovereignty.**

3.3. General Principles – **Democracy.**

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

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

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

4.16.1. Institutions – International relations – **Transfer of powers to international institutions.**

Keywords of the alphabetical index:

Armed forces, use, abroad / Armed forces, use, within UN / Armed forces, use, within NATO / Parliamentarian group, interest / Parliament and foreign politics.

Summary:

In a dispute between the Government and the Federal Parliament (*Bundestag*), the Constitutional Court had to decide on the constitutional implications of the participation of German armed forces in international peace-keeping and enforcement operations.

As a preliminary issue, the Court decided that a parliamentary group has *locus standi* to have the constitutionality of governmental measures examined by the Constitutional Court although it had not objected to their adoption in the political arena. The possibility to attack certain measures politically does not deprive a parliamentary group of its standing before the Constitutional Court.

The Court nonetheless rejected the applications brought by another parliamentary group which invoked its right as a “blocking minority” (*Sperrminorität*) of one third of the members of the *Bundestag* which is entitled to block the adoption of constitutional amendments. The measures complained of did not constitute an amendment of the constitution. Finally, the Court reaffirmed that single deputies may only bring an application to protect the rights of Parliament in cases expressly provided for by law.

Article 24.2 of the Basic Law entitles the Federal Republic to enter a system of mutual collective security and to undertake the obligations resulting from such a system. This provision also allows German armed forces to be made available for operations of international organisations of which Germany is a member. The United Nations as well as NATO have to be qualified as systems of mutual collective security in the sense of Article 24.2 of the Basic Law, although the latter is also an alliance of collective self-defence.

The integration of the Federal Republic of Germany into a system of mutual collective security requires the consent of Parliament. This consent also covers the conclusion of agreements between Germany and the United Nations on the use of German armed forces.

Parliament participates in foreign politics by adopting the statutes authorising the ratification of treaties which regulate the political relations of the State. All other acts concerning foreign politics fall in principle within the competence of government. If the government undertakes new international obligations without Parliament’s approval, it can violate the prerogatives of the legislative body. The government is, however, entitled to give a treaty – in co-operation with the other members thereto – a new interpretation without changing the content of this treaty and without asking for Parliament’s approval. This does not exclude the creation of new rights and obligations within the framework of existing treaties, either by “authentic interpretation” or by starting a new practice which may influence the content of treaty obligations. The government is, however, prevented from internally executing those obligations which require the

adoption of a statute, especially those which affect the exercise of fundamental rights or have budgetary implications.

As a consequence of these considerations, the Court decided that the use of armed forces in the framework of NATO and WEU operations in the former Yugoslavia which had been authorised by the UN Security Council did not violate the treaty-making prerogatives of the Federal Parliament.

According to the Court, the government is, however, under an obligation to seek previous parliamentary approval for any use of German armed forces. This prerogative of Parliament derives from a long-standing constitutional tradition which dates back to the Weimar Constitution of 1918. The precise scope and modalities of parliamentary participation in this field will have to be determined by law.

Languages:

German.



Identification: GER-1996-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 14.05.1996 / **e)** 2 BvR 1938/93, 2 BvR 2315/93 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 94, 49-114 / **h)** *Europäische Grundrechtezeitschrift*, 1996, 237; CODICES (German).

Keywords of the systematic thesaurus:

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

2.1.1.4.3. Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949.**

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

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

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

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

Keywords of the alphabetical index:

Country, third, secure.

Headnotes:

The legislator is free to amend the Constitution within the limits of Article 79.3 of the Basic Law, which declares that certain fundamental principles such as the protection of human dignity as laid down in Article 1.1 of the Basic Law are unalterable; this establishes the criteria to be applied by the Federal Constitutional Court. The right of asylum does not fall under the special guarantee of Article 79.3 of the Basic Law.

Article 16a.2 of the Basic Law, providing that a person who enters the country from a Member State of the European Communities or another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is assured, limits the right to asylum with respect to the described group of persons.

The Member States of the European Communities are by operation of the Constitution secure third States in the sense mentioned above.

The qualification of a State as a secure third country requires such a State to be party to the Geneva Convention relating to the Status of Refugees and to the European Convention on Human Rights, and it is a requirement also that it does not deport foreigners to countries where they, as they allege, are persecuted without examining whether they really are threatened by persecution, torture or inhuman treatment.

The legislator has a margin of appreciation when qualifying a country as a secure third State where the application of the above-mentioned Conventions is assured.

A foreigner subject to deportation to a secure third State where the applications of the above-mentioned Conventions is assured is precluded from alleging that this State is not secure.

The Federal Republic of Germany has to grant protection if obstacles to the deportation arise which cannot be taken into consideration in the legislative or constitutional procedure for determining the existence of a secure third State in the above-mentioned sense.

An examination of whether such obstacles exist can be required by a foreigner only if certain circumstances make it probable that he is concerned by special conditions not considered by the legislative norm which characterises the country in question as a secure third State.

Summary:

I. In 1993 the Federal Republic of Germany amended the constitutional provision on the right of asylum. It introduced a provision according to which a person cannot invoke the right of asylum in circumstances where such person entered the country from a Member State of the European Communities or another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is assured (Article 16a.2 of the Basic Law).

Two persons entering Germany – an Iraqi woman coming from Greece and an Iranian coming from Austria – had their applications for asylum rejected because according to the courts these persons came from secure third States where the application of the above-mentioned Conventions was assured. The two persons brought individual constitutional complaints before the Federal Constitutional Court.

II. The Federal Constitutional Court rejected the complaints on the following grounds: The constitutional legislator decided that a person who enters the Federal Republic of Germany from a secure third State cannot invoke the right of asylum. According to Article 23.1 of the Basic Law the Federal Republic of Germany's membership in the European Union requires a minimum level of constitutional homogeneity amongst the Member States. The Member States of the European Communities future Member States included are determined as secure third States by the Basic Law itself. According to Article 16a.2 of the Basic Law, other States may be so characterised by the legislator if they too are parties to the Geneva Convention on Refugees and to the European Convention on Human Rights and if they apply these treaties. However, the qualification as a secure third State does not presuppose that this State provides for a procedure concerning the right of asylum which is similar to that of Germany; this qualification requires only that asylum seekers must have the possibility of invoking their asylum rights before competent authorities. The legislator has a margin of appreciation in determining secure third States; its decision must be reasonable.

An authority or a court is not obliged to prove through which country the asylum seeker came. As all neighbour States of the Federal Republic of Germany are considered to be secure third States, a foreigner entering Germany by land cannot invoke the right of asylum. He or she is also precluded from alleging that the third State qualified as secure does not respect the Geneva Convention on Refugees or the European Convention on Human Rights. The Federal Republic of Germany, however, must grant protection if there exist circumstances which exclude a deportation and if these circumstances were not considered by the actual legislation on asylum as for example the threat of the imposition of the death penalty in the third State.

Furthermore, the amendment of the constitutional provision on the right of asylum in Article 16a of the Basic Law at issue does not breach the limits set out in the eternity clause in Article 79.3 of the Basic Law. In amending the Constitution, the legislator is subject to the limits reflected in Article 79.3 of the Basic Law according to which the principles enshrined in Articles 1 and 20 of the Basic Law are inviolable. The fact that the right of asylum in Article 16a of the Basic Law is guided by a conviction that is based on respect for the inviolability of human dignity as set out in Article 1.1 of the Basic Law that no state has the right to endanger or violate the life, limb or personal freedom merely on political or religious grounds does not mean that the right of asylum provided by Article 16a of the Basic Law as such also belongs to the guaranteed content of Article 1.1 of the Basic Law.

Given that Article 16a.2-16a.3 of the Basic Law did not raise concerns in that respect, the Court did not have grounds to decide whether the principles of Article 20 of the Basic Law also declare that the rule of law principle of individual legal protection that is specified in Article 19.4 of the Basic Law is inviolable.

Supplementary information:

On the same day, the Federal Constitutional Court issued two other decisions concerning the constitutional amendments of the right of asylum, namely: 2 BvR 1507/93; 2 BvR 1508/93, *Bulletin* 1996/2 [GER-1996-2-015] and 2 BvR 1516/93, *Bulletin* 1996/2 [GER-1996-2-016].

Cross-references:

Federal Constitutional Court:

- 1 BvR 1170, 1174, 1175/90, 22.01.1991, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 84, 90 <120 and 121>;

- 2 BvR 502, 100, 961/86, 10.07.1989, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 80, 315 <333>;
- 2 BvF 1/69, 2 BvR 629/68, 308/69, 15.12.1970, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 30, 1 <33 et seq.>.

Languages:

German, English (abridged translation by Donna Elliott, © Konrad-Adenauer-Stiftung in *60 years German Basic Law*, Jürgen Brohmer, Clauspeter Hill & Marc Spitzkat (Eds).



Identification: GER-2004-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 03.03.2004 / **e)** 1 BvR 2378/98, 1 BvR 1084/99 / **f)** Acoustic Monitoring / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 109, 279-391; *Bundesgesetzblatt* (Official Gazette), 2004, 470 / **h)** *Neue Juristische Wochenschrift*, 2004, 999-1022; CODICES (German).

Keywords of the systematic thesaurus:

- 1.3.5.3. Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**
- 3.16. General Principles – **Proportionality.**
- 5.1. Fundamental Rights – **General questions.**
- 5.3.13.1.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
- 5.3.13.6. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**
- 5.3.24. Fundamental Rights – Civil and political rights – **Right to information.**
- 5.3.32.1. Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**
- 5.3.35. Fundamental Rights – Civil and political rights – **Inviolability of the home.**

Keywords of the alphabetical index:

Residence, acoustic monitoring / Evidence, exclusion / Communication, eavesdropping, electronic / Data, destruction / Data, collection.

Headnotes:

1. Article 13.3 of the Basic Law in the version of the Act to Amend the Basic Law (Article 13) of 26 March 1998 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 of the Basic Law 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 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:

I. As a result of an amendment to the Basic Law in 1998, also Article 13 of the Basic Law the fundamental right to the inviolability of the home was amended. Pursuant to Article 13.3 of the Basic Law acoustic monitoring of residential premises for the purposes of criminal prosecution is now permitted. It

requires that particular facts justify the suspicion that someone has committed an especially serious crime defined by a law, that that person is probably at the private premises and alternative methods of investigation would be disproportionately difficult or unproductive. Article 13.3 of the Basic Law was fleshed out statutorily by several provisions set out in the Act to Improve the Suppression of Organised Crime.

The complainants mainly argued that their fundamental rights under the Basic Law, namely 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) have been violated.

II. 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 as it only allows measures that respect the limits set out therein. Article 79.3 of the Basic Law only forbids constitutional amendments which affect the principles laid down in Articles 1 and 20 of the Basic Law which is not the case here. Regarding Article 1 of the Basic Law, these include the requirement that human dignity be respected and protected, and respect for the inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. Article 20 of the Basic Law reflects the requirement to respect fundamental elements of the constitutional principles of the rule of law and the social state, which Article 13.3 of the Basic Law does not violate. The Court ruled that Article 13.3 of the Basic Law is compatible with the guarantee of human dignity set out in Article 1.1 of the Basic Law. In its specific design, Article 13.3 of the Basic Law ensures that persons are not treated as mere objects of state power; it also properly balances the individual's interests and the interests in law enforcement and ensures that monitoring measures are construed as *ultima ratio*. The requirements that statutory provisions fleshing out Article 13.3 of the Basic Law satisfy the principle of clarity of the law. Furthermore, the Court ruled that application of the proportionality principle does not question the absolute nature of the inviolability of human dignity; rather it ensures that any risk that monitoring of residential premises violates human dignity is ruled out.

However, the statutory authorisation to carry out the acoustic monitoring of residential premises based on Article 13.3 of the Basic Law (§ 100.c.1.3, § 100.2 and 100.3 of the Code of Criminal Procedure) and other related provisions are unconstitutional in significant respects. The legislature, for instance, 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. In addition, a prohibition on the use of information improperly obtained and a requirement that such information be immediately destroyed and a guarantee that information from the inviolable private sphere is not used in main proceedings or as a basis for further investigations are missing. Furthermore, some of the crimes listed in § 100.c.1.3 of the Code of Criminal Procedure do not fulfil the requirement of Article 13.3 of the Basic Law that monitoring be allowed only with regard to particularly serious offences.

Considering that the fundamental right to the inviolability of the home requires procedural protection, in particular through the involvement of a judge (§ 100.d.2, 100.d.4.1 and 100.d.4.2 of the Code of Criminal Procedure), the Panel also defined more closely the prerequisites for a court order's content and written substantiation.

The provisions on the duty to notify the persons affected (§ 101 of the Code of Criminal Procedure) as well as the reasons listed in § 101.1.1 of the Code of Criminal Procedure for allowing the notification of the parties to be deferred in exceptional circumstances are only in part compatible with the Basic Law. Identified deficiencies concern notification of the monitored subjects of fundamental rights, but also the owner and occupants of a home in which monitoring measures have been taken as well as, under certain specified circumstances, third parties.

The provisions regarding the use of personal information in other proceedings (§ 100.d.5.2 and § 100.f.1 of the Code of Criminal Procedure) are largely in conformity with the Basic Law. However, information may only be used to solve other similarly important "catalogue crimes" and to specific eliminate threats 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 unconstitutional.

Due to a sufficient balancing of interests, the provisions concerning the destruction of data (§ 100.d.4.3, § 100.b.6 of the Code of Criminal Procedure) are incompatible with the guarantee of effective legal protection under Article 19.4 of the Basic Law.

III. Two members of the Panel have attached a dissenting opinion to the decision. In their opinion Article 13.3 of the Basic Law is not in conformity with the Basic Law and therefore void. They advocate a strict and narrow interpretation of Article 79.3 of the Basic Law, arguing that it is not simply necessary to stop the beginning of a dismantling of fundamental rights positions guaranteed by the constitution but rather to prevent a situation in which the concept of the individual is no longer reconcilable with the values in a free democratic state governed by the rule of law.

Cross-references:

Federal Constitutional Court (selection):

- 1 BvR 1170, 1174, 1175/90, 22.01.1991, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 84, 90 <120 and 121>;
- 2 BvR 1983/93, 2 BvR 2315/93, 14.05.1996, *Bulletin* 1996/2 [GER-1996-2-014] and *Special Bulletin Constitutional Principles*;
- 1 BvR 253/56, 22.02.1956, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 6, 32 <36>;
- 2 BvF 1/69, 2 BvR 629/68, 308/69, 15.12.1970, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 30, 1 <25 et seq. and 39 et seq.>.

Languages:

German, English (abridged translation by Donna Elliott, © Konrad-Adenauer-Stiftung in *60 years German Basic Law*, Jürgen Brohmer, Clauspeter Hill & Marc Spitzkat (Eds).



Identification: GER-2004-3-010

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 26.10.2004 / **e)** 2 BvR 955/00 2 BvR 1038/01 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2005, 560-567; *Europäische Grundrechte-Zeitschrift* 2004, 728-741; CODICES (German).

Keywords of the systematic thesaurus:

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

3.1. General Principles – **Sovereignty.**

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

5.1.1.2. Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**

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

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

Keywords of the alphabetical index:

International law, general principles, effects in national law / Expropriation, restitution, exclusion / Expropriation, occupying power.

Headnotes:

The state governed by the Basic Law in principle has a duty to guarantee on its territory the integrity of the elementary principles of public international law, and, in the case of violations of public international law, to create a situation that is closer to the requirements of public international law in accordance with its responsibility and within the scope of its possibilities of action. However, this does not create a duty to return the property that was seized without compensation outside the state's sphere of responsibility in the period between 1945 and 1949.

Summary:

I. At the instigation of the Soviet Military Administration in Germany, expropriations without compensation, *inter alia* of all private landholdings of over 100 hectares, were carried out in all states and provinces in September 1945. There were no judicial means of legal protection against the measures. In the course of the negotiations concerning the accession of the German Democratic Republic to the Federal Republic of Germany, the governments of the two German states issued on 15 June 1990 a Joint Declaration on the Settlement of Open Property Issues. With regard to the retransfer of property rights in land and buildings, the Declaration stated that the expropriations under occupation law or on the basis of sovereign acts by occupying powers (1945-1949) were “no longer reversible” (exclusion of restitution). For the expropriations in the German Democratic Republic from 1949 to 1990, the principle “return before compensation” was laid down. The Joint

Declaration, by Article 41.1, became part of the Unification Treaty, which in turn, was laid down in Article 143.3 of the Basic Law.

Both complainants are heirs of landowners who had been expropriated in the course of the land reform. They had unsuccessfully sought legal protection before the administrative courts. In their constitutional complaints, they challenged the violation of their fundamental rights, and rights equivalent to fundamental rights, under Article 1.1 of the Basic Law (human dignity), Article 2.1 of the Basic Law (right to free development of one's personality) in conjunction with Article 25 of the Basic Law (precedence of public international law), Article 3 of the Basic Law (equality before the law), Article 14 of the Basic Law (right to property) and Article 79 of the Basic Law (amendment). In their opinion, the exclusion of restitution violates public international law.

II. The Second Panel rejected the constitutional complaints as unfounded and essentially gave the following reasons in the grounds of its decision:

The constitutional complaints cannot be based on the fundamental right to property (Article 14.1 of the Basic Law). If a legal system such as the Soviet occupation regime, which comes into existence lawfully under public international law, breaks the connection between the owner and the property owned, then, independently of the question of the legality of the expropriation, the formal legal position of the owner ends when the expropriation occurs. If the expropriation took place outside the temporal or territorial area of application of the Basic Law, the previous owner cannot rely on Article 14 of the Basic Law.

The general principles of international law, under Article 25 of the Basic Law, are part of German law, with a priority higher than that of federal or constitutional law. The German state bodies, under Article 20.3 of the Basic Law, are bound by public international law. However, a duty to enforce public international law is not to be assumed indiscriminately for any and every provision of public international law, but only to the extent that it corresponds to the conception of the Basic Law. The Basic Law seeks to increase respect for international organisations that preserve peace and freedom, and for public international law, without giving up the final responsibility for respect for human dignity and for the observance of fundamental rights by German state authority. There may be a tense relationship between this duty and the international cooperation between the states and other subjects of public international law, which is also intended by the Constitution, in particular if a violation of law may be terminated only

by cooperation. Then this manifestation of the duty of respect can be put into concrete form only in interaction with and balanced against Germany's other international obligations.

Article 1.2 of the Basic Law and sentence 1 of Article 25 of the Basic Law adopt the recognition of the existence of mandatory provisions of public international law, which may not be excluded by the states either unilaterally or by agreement.

A violation of the constitutional duty to respect public international law cannot be established because the expropriations on the territory of the Soviet occupation zone of Germany in the years 1945 to 1949 were the responsibility of the Soviet occupying power and cannot be attributed to the state power of the Federal Republic of Germany.

After its foundation, the German Democratic Republic, as the new sovereign in the meaning of public international law, could on the basis of its territorial sovereignty reverse measures of the occupying power, but it waived the right to do so. On German unification, the Federal Republic of Germany attained the sovereign competence to decide on the continuation of the expropriations carried out on the basis of sovereign acts by occupying powers. The Hague Land Warfare Convention, which was binding even at the time of the occupation, may give rise to claims between the occupying power and the returning sovereign. A party to a conflict that does not observe the provisions of Hague law is obliged to pay damages. However, this right to damages of the states involved is subject to their disposition. In the Two-Plus-Four Talks, the Federal Republic of Germany impliedly waived the right to any claims it had under the Hague Land Warfare Convention. There are no rules of mandatory public international law preventing the waiver. At the date of the expropriations, there was no general legal conviction that the protection of property of the state's own citizens was part of universally applicable public international law in the sense of *ius cogens*. The Panel further held that it could also not be established that at a later date a rule of mandatory public international law arose that excludes *ex nunc* the possibility of treating the existing situation as lawful.

Universal public international law does not contain a guarantee of the property of a state's own citizens as a protective standard for human rights. Nor do the provisions of the Vienna Convention on the Law of Treaties and the International Law Commission's articles on state responsibility give rise to the legal consequence that the expropriations on the basis of sovereign acts by occupying powers – assuming they violated mandatory international law – are to be

treated as void by the Federal Republic of Germany. Instead, the legal consequence of voidness is laid down only to the extent that duties under treaties are directed precisely to performance that is prohibited by a mandatory norm. Apart from this, however, the states have merely a duty to cooperate with regard to the consequences.

The Federal Republic of Germany satisfied this duty to cooperate with regard to the consequences by bringing about reunification by way of peaceful negotiations. In this connection, the Federal Government was permitted to come to the conclusion that managing reunification cooperatively would be incompatible with treating the expropriations as void. No breach of the public-international-law duty of the state not to enrich itself from another state's breach of international law has occurred. Such a duty is not mandatorily directed to the regained assets being returned specifically to the former owners. Instead, it is required that the total amount of distribution is adequate. The Federal Government has adequately distributed the enrichment resulting from Articles 21-22 of the Unification Treaty by passing the Compensation and Equalisation Payments Act. The equalisation arrangements made are just as compatible with the constitutional requirements of a state under the rule of law and the social welfare state and with Article 3.1 of the Basic Law as they are in harmony with any goals required by public international law.

In this connection it should also be taken into account that German unification is a process in which the Federal Republic of Germany may classify the treatment of individual topics – such as dealing with the land reform – as parts of an overall conception of the balancing of interests. In this connection, the second Panel held as follows:

“The consequences of the Second World War, a period of rule under occupation and a post-war dictatorship must be borne by the Germans as a community of fate and also, within particular limits, as the individual experience of injustice, without it being possible in every case to obtain adequate compensation, to say nothing of restitution in kind.”

The decision does not conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. By the established case-law of the European Court of Human Rights, Article 1 Protocol 1 ECHR protects not only property positions already existing under national law, but also acquired claims on the realisation of which the claimant was rightfully entitled to rely. This definition

of property excludes reliance on the continuation in existence of earlier property rights that over a long period of time could not be effectively exercised. The European Court of Human Rights has several times expressed the opinion that in the immediate post-war period, property rights removed as a consequence of the Second World War in principle created no “legitimate expectations” protected by Article 1 Protocol 1 ECHR for the former holders of rights.

III. Judge Lübke-Wolff added a dissenting opinion to the decision in which she states the following: The Panel replies to questions that are not raised in the case with constitutional principles that are not contained in the Basic Law: The question as to whether the contested expropriations are to be reversed is answered by the Basic Law itself (Article 143.3 of the Basic Law). The complainants' fundamental rights may therefore be injured by the challenged decisions only subject to the condition that Article 143.3 of the Basic Law is unconstitutional constitutional law (Article 79.3 of the Basic Law). It was only necessary to examine whether Article 143.3 of the Basic Law, and consequently also the challenged decisions, violated the core of human dignity of fundamental rights of the complainants, which may not be violated even by a statute amending the Constitution. If the Panel had asked the original question in this way, it would have directly become obvious that it is to be answered *ipso iure* in the negative. This question has already been answered in the negative by decisions of the First Panel. If only because of their status, public-international-law aspects are not capable of casting doubt on the correctness of these decisions. The general principles of international law, as the Panel itself recently emphasised, take precedence over federal statutes, but not over the Constitution. They can therefore not be in a position to enrich the complainants' fundamental rights with core contents that also stand up to the Constitution-amending legislature. Consequently, the case gave no occasion to undertake more detailed discussion of the position under public international law.

Languages:

German.



Identification: GER-2009-2-019

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 30.06.2009 / **e)** 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 / **f)** Lisbon Decision / **g)** / **h)** *Neue Juristische Wochenschrift* 2009, 2267-2295; *Europäische Grundrechte-Zeitschrift* 2009, 339-388; *Deutsches Verwaltungsblatt* 2009, 1032-1040; *ZFSH/SGB Sozialrecht in Deutschland und Europa* 2009, 469-501; *Recht der Internationalen Wirtschaft*, supplement 2009, 537-565; *Europäisches Wirtschafts- und Steuerrecht* 2009, 319-322; CODICES (German, English, French).

*Keywords of the systematic thesaurus:*3.1. General Principles – **Sovereignty.**

4.16.1. Institutions – International relations – **Transfer of powers to international institutions.**

4.17. Institutions – **European Union.**

4.17.2. Institutions – European Union – **Distribution of powers between the EU and member states.**

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

Keywords of the alphabetical index:

European Union, Treaty of Lisbon / Treaty of Lisbon, act approving / European lawmaking procedures and treaty amendment procedures, participation of the Parliament / European Union, legal instrument transgressing the boundaries of its sovereign powers / European Union, Member States, room for the political formation of living conditions.

Headnotes:

1. Article 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimation.

2.a. Insofar as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure, whilst preserving the application of the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany has to comply internally with the requirements under

Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court.

2.b. A law within the meaning of Article 23.1 second sentence of the Basic Law is not required, in so far as special bridging clauses are limited to subject areas which are already sufficiently defined by the Treaty of Lisbon. However, in such cases it is incumbent on the *Bundestag* and, in so far as legislative competences of the *Länder* are affected, the *Bundesrat*, to assert its responsibility for integration in another appropriate manner.

3. European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics.

4. The Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (see *BVerfGE* 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>; see the latter two concerning legal instruments transgressing the limits), whilst adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 second sentence and 5.3 of the Treaty on European Union in the version of the Treaty of Lisbon (hereinafter, "Lisbon TEU"). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see *BVerfGE* 113, 273 <296>). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere co-operation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.

Summary:

I. The Federal Constitutional Court had to decide on constitutional complaints and applications in *Organstreit* proceedings (proceedings on a dispute between supreme constitutional bodies) challenging the German Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) of 13 December 2007, the Act Amending the Basic Law (Articles 23, 45 and 93) and the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*).

The Treaty of Lisbon, among other things, extends the European Union's competences, expands the possibilities of qualified majority voting in the Council, strengthens the European Parliament's participation in the lawmaking procedures and dissolves the European Union's pillar structure. At the same time, it confers legal personality on the European Union. Furthermore the Treaty incorporates provisions of the failed Treaty establishing a Constitution for Europe. Moreover, it provides for a number of reforms of the European Union's institutions and procedures.

In October 2008, the Act Approving the Treaty of Lisbon and the accompanying laws successfully passed through the German legislative process.

II. The Second Panel of the Federal Constitutional Court has decided that the Act Approving the Treaty of Lisbon is compatible with the Basic Law. In contrast, the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as the *Bundestag* and the *Bundesrat* have not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures. The Federal Republic of Germany's instrument of ratification of the Treaty of Lisbon may not be deposited before the rights of participation set out in law as constitutionally required have entered into force. The decision was reached unanimously as regards the result and by seven votes to one as regards the reasoning.

The judgment focuses on the connection between the democratic system prescribed by the Basic Law at Federation level and the level of independent rule which has been reached at European level. The structural problem of the European Union is at the centre of the review of constitutionality: The extent of the Union's freedom of action has steadily and considerably increased, not least by the Treaty of

Lisbon, so that in some policy areas, the European Union has a shape that corresponds to that of a federal state, i.e. is analogous to that of a state. In contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation i.e. are analogous to international law. As before, the structure of the European Union essentially follows the principle of the equality of states.

As long as no uniform European people, as the subject of legitimation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority. In Germany, accession to a European federal state would require the creation of a new Constitution, which would go along with the declared waiver of the sovereign statehood safeguarded by the Basic Law. There is no such act here. The European Union continues to constitute a union of rule (*Herrschaftsverband*) founded on international law, a union which is permanently supported by the intention of the sovereign Member States. The primary responsibility for integration is in the hands of the national constitutional bodies which act on behalf of the peoples. With increasing competences and further independence of the institutions of the Union, safeguards are required to keep pace with this development, in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States. With progressing integration, fields of action which are essential for the development of the Member States' democratic opinion-formation must be retained. In particular, a guarantee is vital that the responsibility for integration can be exercised by the state bodies of representation of the peoples.

The further development of the competences of the European Parliament can reduce, but not completely fill, the gap between the extent of the decision-making power of the Union's institutions and the citizens' democratic power of action in the Member States. Neither as regards its composition nor its position in the European competence structure is the European Parliament sufficiently prepared to take representative and assignable majority decisions as uniform decisions on political direction. Measured against requirements placed on democracy in states, its election does not take due account of equality, and it is not competent to take authoritative decisions on political direction in the context of the supranational balancing of interests between the states. It therefore cannot support a parliamentary government and organise itself with regard to party politics in the

system of government and opposition in such a way that a decision on political direction taken by the European electorate could have a politically decisive effect. Due to this structural democratic deficit, which cannot be resolved in an association of sovereign states (*Staatenverbund*), further steps of integration that go beyond the *status quo* may not undermine the States' political power of action or the principle of conferral.

The peoples of the Member States are the holders of the constituent power. The Basic Law does not permit the special bodies of the legislative, executive and judicial power to dispose of the essential elements of the Constitution, i.e. of the constitutional identity (sentence 3 of Article 23.1 and Article 79.3 of the Basic Law). The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the Federal Constitutional Court to ensure, within the boundaries of its competences, that the Community or Union authority does not violate the constitutional identity by its acts or evidently transgress the competences conferred on it. The transfer of competences, which has been increased again by the Treaty of Lisbon, and the independence of decision-making procedures therefore require an effective *ultra vires* review and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany.

Languages:

German, English, French.



Identification: GER-2016-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 15.12.2015 / **e)** 2 BvR 2735/14 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest (*Entscheidungen des Bundesverfassungsgerichts*) / **h)** *Europäische Grundrechte-Zeitschrift* 2016, 33-50; *Neue Juristische Wochenschrift* 2016, 1149-1162; *Juristenzeitung* 2016, 410-422; CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.2.2. Constitutional Justice – Jurisdiction – The subject of review – Law of the European Union/EU Law – **Secondary legislation.**

2.2.1.6.3. Sources – Hierarchy – Hierarchy as between national and non-national sources – Law of the European Union/EU Law and domestic law – **EU secondary law and constitutions.**

2.2.1.6.5. Sources – Hierarchy – Hierarchy as between national and non-national sources – Law of the European Union/EU Law and domestic law – **Direct effect, primacy and the uniform application of EU Law.**

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

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

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

Keywords of the alphabetical index:

Community law, national law, interpretation favourable to Community law, limits / Constitution, clause, immutable / Constitution, identity / Constitution, immutability, principle / Constitutional identity / European Arrest Warrant, surrender procedures between Member States / European Arrest Warrant, non-execution, limitation / European Union, law, effectiveness / European Union, member states, mutual trust / Identity, constitutional, review / Guilt, individual, principle / Mutual legal assistance in criminal matters / Review, standard / Trial *in absentia*, condemnation / Trial *in absentia*, right to new trial.

Headnotes:

By means of the identity review, the Federal Constitutional Court guarantees, without reservations and in every individual case, the protection of fundamental rights which is indispensable according to the third sentence of Article 23.1 in conjunction with Article 79.3 and Article 1.1 of the Basic Law.

The strict requirements for activating the identity review are paralleled by stricter admissibility requirements for constitutional complaints that raise such an issue.

The principle of individual guilt forms part of the constitutional identity. Therefore, one must also ensure that it is complied with in extraditions for the purpose of executing sentences that were rendered in the absence of the requested person during the trial.

German public authority must not assist other states in violating human dignity. The extent and the scope of the investigations, which the courts are under an obligation to conduct in order to ensure the respect of the principle of individual guilt, depend on the nature and the significance of the points submitted by the requested person that indicate that the proceedings in the requesting state fall below the minimum standards mandated by Article 1.1 of the Basic Law.

Summary:

I. The applicant is a citizen of the United States of America. In 1992, by final judgment of the Florence *Corte di Appello*, he was sentenced in absence to a custodial sentence of thirty years. In 2014, he was arrested in Germany on the basis of a European Arrest Warrant. In the context of the extradition procedure, he mainly submitted that he did not have any knowledge of his conviction and that, under Italian law, he would not be able to have a new evidentiary hearing in the appeals proceedings. Nevertheless, by the challenged order of 7 November 2014, the Higher Regional Court declared the extradition of the applicant to be permissible. In his constitutional complaint, the applicant mainly asserted that his fundamental rights under Article 1 of the Basic Law (human dignity), Article 2.1 of the Basic Law (right to personal self-determination), the second sentence of Article 2.2 of the Basic Law (personal liberty), Article 3 of the Basic Law (equality) and Article 103.1 of the Basic Law (right to be heard by the court dealing with the case) were violated. In addition, he asserted a violation of his fundamental right to a fair trial (Article 2.1 in conjunction with Article 20.3 of the Basic Law, Article 6.3 ECHR), a violation of the binding minimum requirements under public international law enshrined in the Constitution, and of Article 6.3 ECHR.

II. The Federal Constitutional Court held that the Higher Regional Court, in granting the extradition, had violated the applicant's human dignity (Article 1.1 in conjunction with the third sentence of Article 23.1 and Article 79.3 of the Basic Law). The applicant had asserted in a substantiated manner that Italian procedural law did not provide him with the opportunity to have a new evidentiary hearing at the appeals stage. However, the Higher Regional Court had not followed up on these objections by way of investigations, despite its obligation to do so. The Federal Constitutional Court therefore reversed the challenged decision and remanded it to the Higher Regional Court. It also held that in this regard both the Framework Decision on the European Arrest Warrant (hereinafter, the "Framework Decision") and the German law transposing it were compatible with human dignity.

The Federal Constitutional Court's decision is based on the following considerations:

In general, sovereign acts of the EU and acts of German public authority – to the extent that they are determined by Union law – are accorded precedence over German law. However, if the German constitutional identity, as protected under the third sentence of Article 23.1 in conjunction with Article 79.3 of the Basic Law, is at stake, the Federal Constitutional Court has the exclusive power, upon application, to conduct an identity review, ultimately declaring such an act to be inapplicable. Such a review is compatible with EU law, as it is a concept inherent in the first sentence of Article 4.2 of the Treaty on European Union (TEU) and does not entail a substantial risk for the uniform application of Union law due to the restraint with which it is exercised and due to the German Constitution's openness to European integration which is taken into account.

In the present case, the Higher Regional Court's extradition decision was determined by Union law – the Framework Decision on the European Arrest Warrant. The Federal Constitutional Court reviewed the case according to standards under German constitutional law because the strict procedural requirements for an identity review were met, and the German constitutional identity was possibly at stake, as the applicant asserted a violation of the right of an effective defence in criminal cases. This right is contained within the scope of the principle of individual guilt, the latter being enshrined in human dignity, which forms part of the constitutional identity. It is also a constitutive element of the rule of law.

There was no need to limit the precedence of the Framework Decision via Article 23.1 in conjunction with Article 79.3 of the Basic Law: Both the German Constitution and the Framework Decision allow and require a national authority that decides on an extradition to review whether the requirements under the rule of law have been complied with, even if the European Arrest Warrant formally meets the requirements of the Framework Decision. Minimum guarantees of the right of defence necessary according to the principle of individual guilt have to be taken into account in extradition decisions and might require further investigations by the relevant court. The right mandates that a requested person who has been sentenced in his or her absence and who has not been informed about the trial and its conclusion be at least provided with the real opportunity to defend him or herself effectively after having learned of the trial, in particular by presenting circumstances to the court that may exonerate him or her and by having them reviewed. Despite relevant indications warranting further investigations, the Higher Regional

Court had not duly investigated whether the applicant would be accorded the right to a full retrial of the case, with regard to both the facts and the merits, if he were extradited. Thereby it had failed to meet its obligation corresponding to the applicant's right.

In general, to the extent required, the Federal Constitutional Court will base its review of the European act in question on the interpretation provided by the European Court of Justice in a preliminary ruling under Article 267.3 of the Treaty on the Functioning of the European Union (TFEU). In this case, according to the Court, there was no need for a preliminary ruling under Article 267 TFEU, because the *acte clair* doctrine applied. There was no conflict between Union law and the protection of human dignity under the Basic Law.

Cross-references:

European Court of Human Rights (selection):

- *Colozza v. Italy*, no. 9024/80, 12.02.1985, paragraphs 27-31, *Special Bulletin Leading Cases – ECHR* [ECH-1985-S-001];
- *Soering v. United Kingdom*, no. 14038/88, 07.07.1989, paragraph 91, *Special Bulletin Leading Cases – ECHR* [ECH-1989-S-003];
- *Poitrimol v. France*, no. 14032/88, 23.11.1993, paragraph 35;
- *Van de Hurk v. the Netherlands*, no. 16034/90, 19.04.1994, paragraph 59;
- *Mantovanelli v. France*, no. 21497/93, 18.03.1997, paragraph 33;
- *Lietzow v. Germany*, no. 24479/94, 13.02.2001, paragraph 44;
- *Medenica v. Switzerland*, no. 20491/92, 14.06.2001, paragraphs 55, 57;
- *Jones v. United Kingdom*, no. 30900/02, 09.09.2003;
- *Somogyi v. Italy*, no. 67972/01, 18.05.2004, paragraph 72;
- *Sejdovic v. Italy*, no. 56581/00, 10.11.2004, paragraph 40;
- *Stoichkov v. Bulgaria*, no. 9808/02, 24.03.2005, paragraph 56;
- *Sejdovic v. Italy*, no. 56581/00, 01.03.2006, paragraphs 85-88, 103 *et seqq.*

Court of Justice of the European Union (selection):

- C-6/64, *Costa v. ENEL*, 15.07.1964, [1964] *European Court Reports* 1251 <1269-1270>, *Special Bulletin Leading Cases – ECJ* [ECJ-1964-S-001];
- C-29/69, *Stauder*, 12.11.1969, [1969] *European Court Reports* 419, paragraph 7, *Special Bulletin Leading Cases – ECJ* [ECJ-1969-S-001];

- C-283/81, *C.I.L.F.I.T.*, 06.10.1982, [1982] *European Court Reports* 3415, paragraph 16 *et seqq.*;
- C-218/82, *Commission v. Council*, 13.12.1983, [1983] *European Court Reports* 4063, paragraph 15;
- C-222/84, *Johnston*, 15.05.1986, [1986] *European Court Reports* 1651, paragraph 19, *Special Bulletin Leading Cases – ECJ* [ECJ-1986-S-002];
- C-5/88, *Wachauf*, 13.07.1989, [1989] *European Court Reports* 2609, paragraph 19;
- C-473/93, *Commission v. Luxemburg*, 02.07.1996, [1996] *European Court Reports* I-3207, paragraph 35;
- C-221/97 P, *Schröder and Thamann v. Commission*, 10.12.1998, [1998] *European Court Reports* I-8255, paragraph 24;
- C-397/01 to C-403/01, *Pfeiffer*, [2004] 05.10.2004, *European Court Reports* I-8835, paragraphs 115 and 116;
- C-36/02, *Omega*, 14.10.2004, [2004] *European Court Reports* I-9609, paragraph 31 *et seqq.*;
- C-105/03, *Pupino*, 16.06.2005, [2005] *European Court Reports* I-5285, paragraphs 58 *et seqq.*, *Bulletin* 2008/2 [ECJ-2008-2-016];
- C-303/05, *Advocaten voor de Wereld*, 03.05.2007, [2007] *European Court Reports* I-3633, paragraph 45, *Bulletin* 2009/2 [ECJ-2009-2-007];
- C-388/08 PPU, *Leymann and Pustovarov*, 01.12.2008, [2008] *European Court Reports* I-8993, paragraph 51;
- C-491/10 PPU, *Aguirre Zarraga*, 22.12.2010, [2010] *European Court Reports* I-14247, paragraphs 70-71;
- C-42/11, *Lopes Da Silva Jorge*, 05.09.2012, EU:C:2012:517, paragraph 56, [ECJ-2012-E-009];
- C-399/11, *Melloni*, 26.02.2013, EU:C:2013:107, paragraphs 46, 48 *et seqq.*, 59, [ECJ-2013-E-003];
- C-168/13 PPU, *Jeremy F.*, 30.05.2013, EU:C:2013:358, paragraph 36, with further references, and 49, [ECJ-2013-E-009];
- C-156/13, *Digibet and Albers*, 12.06.2014, EU:C:2014:1756, paragraph 34;
- C-362/14, *Schrems*, 06.10.2015, EU:C:2015:650, paragraphs 91 *et seqq.*

The Court also referred to several opinions rendered by different Advocates General.

Languages:

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



Identification: GER-2016-2-014

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

Keywords of the systematic thesaurus:

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

3.1. General Principles – **Sovereignty.**

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

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

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

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

Keywords of the alphabetical index:

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

Headnotes:

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

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

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

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

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

Summary:

I. With their application for *Organstreit* proceedings (i.e., proceedings relating to disputes between constitutional organs), the complainants and the applicant challenge, first, the participation of the German Central Bank in the implementation of the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (hereinafter, “OMT Decision”), and secondly, that the German Federal Government and the German Parliament (*Bundestag*) failed to act regarding this Decision. The OMT Decision envisages that the ESCB can purchase government bonds of selected Member States up to an unlimited amount if, and as long as, these Member States, at the same time, participate in a reform programme as agreed upon with the European Financial Stability Facility or the

European Stability Mechanism. The stated aim of the Outright Monetary Transactions is to safeguard an appropriate monetary policy transmission and the consistency or “singleness” of the monetary policy. The OMT Decision has not yet been put into effect.

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

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

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

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

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

that characterise the principles of democracy, of the rule of law, of the social state, and of the federal state within the meaning of Article 20 of the Basic Law.

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

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

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

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

The Federal Constitutional Court bases its review on the interpretation of the OMT decision formulated by the Court of Justice in its judgment of 16 June 2015. The Court of Justice’s finding that the policy decision on the OMT programme is within the bounds of the respective competences and does not violate the

prohibition of monetary financing of the budget still remains within the mandate of the Court of Justice (second sentence of Article 19.1 TEU).

Nevertheless, the manner of judicial specification of the Treaty on the Functioning of the European Union evidenced in the judgment of 16 June 2015 meets with serious objections on the part of the Panel. These objections concern the way the facts of the case were established, the way the principle of conferral was discussed, and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted. Despite these concerns, if interpreted in accordance with the Court of Justice's judgment, the policy decision on the OMT programme does not – within the meaning of the competence retained by the Federal Constitutional Court to review *ultra vires* acts – “manifestly” exceed the competences attributed to the European Central Bank.

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

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

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

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

Cross-references:

Federal Constitutional Court:

- 2 BvR 1390, 1421, 1438, 1439, 1440, 1824/12, 2 BvE 6/12, 18.03.2014, *Bulletin* 2014/1 [GER-2014-1-012];
- 2 BvR 2728, 2729, 2730, 2731/13, 2 BvE 13/13, 14.10.2014, *Bulletin* 2014/1 [GER-2014-1-005];
- 2 BvR 2134, 2159/92, 12.10.1993, *Bulletin* 1993/3 [GER-1993-3-004];

- 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 2 BvR 182/09, 30.06.2009, *Bulletin* 2009/2 [GER-2009-2-019];
- 2 BvR 987, 1485, 1099/10, 07.09.2011, *Bulletin* 2011/3 [GER-2011-3-017];
- 1 BvR 1916/09, 19.07.2011, *Bulletin* 2011/3 [GER-2011-3-015].

Languages:

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



Greece

Council of State

Important decisions

Identification: GRE-2012-3-002

a) Greece / **b)** Council of State / **c)** Plenary Session / **d)** 20.02.2012 / **e)** 668/2012 / **f)** On the constitutionality of the “Memorandum” / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

2.1.1.4. Sources – Categories – Written rules – **International instruments.**

3.1. General Principles – **Sovereignty.**

3.16. General Principles – **Proportionality.**

3.18. General Principles – **General interest.**

3.19. General Principles – **Margin of appreciation.**

4.10. Institutions – **Public finances.**

4.17.2. Institutions – European Union – **Distribution of powers between the EU and member states.**

5.2.1.1. Fundamental Rights – Equality – Scope of application – **Public burdens.**

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

Keywords of the alphabetical index:

Administrative Court, jurisdiction / Annulment, application / Binding effect, constitutional doctrine / Constitutional complaint, admissibility, limits of review / Fundamental rights / International agreement, constitutional requirement, parliamentary approval / Judicial review over other state powers / Legislation, delegated / Monetary policy, powers / Pension system / Property right / Tax, unequal treatment / Treaty, international, ratification.

Headnotes:

The “Memorandum” agreement, which was signed between the Greek Government and the Euro area Member States and the International Monetary Fund, sets the goals and time-limits of granting financial support to Greece during the economic crisis and does not constitute an international treaty, since it is not legally binding for the signatory parties. State measures adopted to fulfil the aims set by the “Memorandum” do not violate basic individual rights,

because they are intended to serve, for a limited period of time, the public interest of avoiding default and restructuring a viable economy.

Summary:

I. The Athens Bar Association joined forces with the highest syndicate of civil servants and other professional organisations and individual citizens to challenge, by way of application for judicial review, various regulatory and individual administrative acts, which set measures of economic austerity in implementation of the Laws responding to the economic crisis and the need to establish financial support to Greece by the International Monetary Fund (IMF) and by Euro area Member States (Statutes 3833/2010 and 3845/2010).

II. First of all, the Court deemed the application admissible only insofar as it concerned administrative acts, whether regulatory or individual, issued under statutory authorisation of the said laws in order to set the conditions of the application of these laws to particular cases or individual situations. The constitutionality review of these laws was only incidental to the review of the directly challenged administrative acts. The application was rejected as inadmissible insofar as it was directed against particular provisions of the above-mentioned laws, as it was held that these legislative provisions were of a non-reviewable, general and abstract nature and did not contain a complete and exhaustive regulation of a certain individual case that would render ineffective the issue of a reviewable administrative act. Had the latter been the case, then the legislative provisions in question would be considered reviewable by the Court on the grounds of unconstitutionality, more specifically, for being contrary to the citizens’ right to judicial protection (Article 20.1 of the Constitution, Article 6.1 ECHR), because they would then implement the choice of the Administration to initiate a legislative act, which escapes direct judicial review, instead of administrative acts establishing measures of severe economic austerity, which are subject to judicial review.

Then the Court proceeded to examine the question whether the Memorandum (analysed in the Memorandum of Understanding on Specific Economic Policy Conditionality and the Memorandum of Economic and Financial Policies) signed by the Democracy of Greece, on one part, and the Euro area Member States and the IMF, on the other, and ratified by Statute 3845/2010, to which it was attached, constituted an international agreement that conveyed national competences to organs of international organisations and was adopted contrary to the application requirements of Article 28.2 of the

Constitution, which suggest that such an agreement is voted by a majority of three fifths of the total number of Members of Parliament. The majority of the Court in plenary session decided that Statute 3845/2010 was not enacted in breach of Article 28.2 of the Constitution, because the attachment of the said Memorandum to it served nothing more than to publicise its content and the time-schedule set for the enforcement of the aims and means of the programme of the Greek government to deal with the financial crisis and avoid default. Being a mere governmental programme in nature, the Memorandum (dated 9 February 2010) neither conveys competences to organs of international organisations nor does it establish rules with immediate effect, but requires, instead, the further issue of legislative acts (statutes or regulatory acts authorised by statute) for the realisation of the pronounced policies. The Memorandum is no international treaty for the additional reason that it is not legally binding for the signatory parties since no mutual commitments are undertaken by them and no forcing mechanisms or other forms of legal sanctions are provided for as means to secure the realisation of the aims of the Treaty. The only legal obligations that the Greek State undertook as against the other Member States of the Euro area arise from the adoption of Council Decision 2010/320/EU in accordance with Articles 126.9 and 136 of the Treaty on the Functioning of the European Union and from the EU Loan Facility Agreement of 8 May 2010. These European-law instruments, issued L in any case after the enactment of Statute 3845/2010 which authorised the directly challenged administrative acts, are the only internationally binding rules for the Greek State, as they set out the measures that it has to adopt in order to fulfil the obligations it assumed, as Member State of the Euro area, in its programme to limit its enormous deficit.

Given the fact that neither the Memorandum nor Statute 3845/2010 grant competences relevant to the exercise of economic and financial policy to other Member States of the Euro area, to organs of the European Union or to the International Monetary Fund and the fact that they do not transfer any other kind of powers to organs of international organisations that limit the exercise of national sovereignty, the Court found that the Greek government maintains its powers under Article 82.1 of the Constitution to make national policy and that Statute 3845/2010 is not opposed to Article 28.3 of the Constitution which states that:

“Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated

by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.”

The Court then proceeded to examine the constitutionality of the content of the Memorandum provisions that formed part of Statutes 3833/2010 and 3845/2010. In general terms, the Court held that all measures taken by the Greek government, which involved cuts in salaries and pensions paid by the state and by state social security organisations, as a small part of a broader programme of financial adjustment and structural reform of the Greek economy within the European framework, aimed at the immediate lowering of public-sector expenditure, the rationalisation of public finances, the viable reduction of the financial deficit and the service of the country's international debt. In adopting the necessary measures to the above-mentioned goals, the legislator enjoys a wide margin of appreciation which is subject to judicial review only in its outer limits. The cuts in salaries and pensions lead to a reduction in the income of citizens, but not to the deprivation thereof they are thus neither contrary to Article 1 Protocol 1 ECHR nor to the constitutional principle of proportionality (Article 25.1.4 of the Constitution). They are also not opposed to the constitutional protection of property (Article 17 of the Constitution), because the Constitution does not guarantee the right to a salary or pension at a certain level, but allows for the differentiation of the amounts paid by the state according to national circumstances, without requiring the provision of compensation. The fact that these measures are obligatory and do not leave to the Administration the exercise of a margin of appreciation at each particular case, is not in opposition to any other constitutional or legislative provision. The right to human dignity (Article 2 of the Constitution) is also not hurt because the applicants have failed to prove that a minimum standard of decent living is jeopardised by the aforementioned cuts. Finally, the principle of equality in the sharing of public burdens is not violated by measures that provide for cuts in the citizens' income, while, at the same time, allowing tax-payers to put in order their obligations by paying less taxes to the state than the amounts really owed. According to the majority of the Court, these measures are only temporary and aim at creating an immediate revenue influx for the Greek state, only until another set of measures, designed to fight tax-avoidance and tax-fraud, start to operate. Seen in this light, the examined measures of economic austerity are not contrary to the principle of equal contribution to the public burdens by the Greek citizens.

Languages:

Greek.

*Identification:* GRE-2012-3-003

a) Greece / **b)** Council of State / Special Highest Court / **c)** / **d)** 28.06.2012 / **e)** 25/2012 / **f)** Special Supreme Court Decision 25/2012 on the constitutionality of Article 21 of the Code of Laws on the Trials of the State / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

- 1.4. Constitutional Justice – **Procedure.**
- 2.3.6. Sources – Techniques of review – **Historical interpretation.**
- 2.3.9. Sources – Techniques of review – **Teleological interpretation.**
- 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.**
- 4.7.7. Institutions – Judicial bodies – **Supreme court.**
- 4.7.10. Institutions – Judicial bodies – **Financial courts.**
- 4.10. Institutions – **Public finances.**
- 4.10.2. Institutions – Public finances – **Budget.**
- 5.1.5. Fundamental Rights – General questions – **Emergency situations.**
- 5.2.1.1. Fundamental Rights – Equality – Scope of application – **Public burdens.**
- 5.3.39. Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Appeal, jurisdiction / Constitution, interpretation, jurisdiction / Public power, review / Supreme Court, jurisdiction.

Headnotes:

The differentiation between the amount of interest paid by the State and that paid by private parties on overdue payments does not contravene the right to judicial protection (Article 20.1 of the Constitution). The establishment of a privileged interest rate for the Greek State is justified by the severe economic crises that Greece underwent throughout its history and for

very long periods of time which also affected the periods when more favourable conditions for the country's development existed. Article 21 of the Code of Laws on the Trials of the State introduces an acceptable preferential treatment in favour of the Greek State, which aims at the proper exercise of public power through the safeguard of financial stability and of the assets of the State and ultimately, at the fulfilment of state obligations against its citizens. The same provision also aims to limit public debt created by paying default interest on overdue payments and guarantees the public estate to which all citizens contribute through the payment of taxes and the state's ability to calculate in advance the amount of state debts and their consequences. Article 21 of the Code of Laws on the Trials of the State does not violate Article 17 of the Constitution on the protection of property.

Summary:

I. The case was remitted to the Special Highest Court with authority to settle constitutional controversies between the courts of highest jurisdiction (established by Article 100.1.e of the Constitution), following Decision 2812/2011 of the Court of Auditors (*in plenum*) and contrary decisions (*in plenum*) of the same Court and of the Highest Civil and Criminal Court (*Areios Pagos*), on the constitutionality of Article 21 of the Code of Laws on Trials of the State (codifying decree of 26 June/10 July 1944). This Law stipulates that the Greek State should pay its debts to a minimum of 6% default interest rate and the question raised before the Special Highest Court concerned the conformity of this provision with Article 4.1 of the Constitution (principle of equality), Article 20.1 of the Constitution (judicial protection) and Article 25.1 of the Constitution (principle of proportionality) and also the application of Article 293 of the Civil Code and Article 15.5 of Statute 876/1979 which provide in contrary that the higher interest rate paid by private parties on overdue payments is decided each time by a governmental decision.

II. The Special Highest Court decided first that Article 21 of the Code of Laws on Trials of the State, which sets the percentage of default interest rate paid by the Greek State, constitutes a substantive and not a procedural legal provision, which does not accord preferential treatment to the State within the judicial process. Therefore, the differentiation between the amount of interest paid by the State and that paid by private parties does not contravene the right to judicial protection (Article 20.1 of the Constitution).

Then the Court proceeded to examine the conformity of Article 21 of the Code of Laws on Trials of the State with the equality principle enshrined in

Article 4.1 of the Constitution, according to which, there is no equality between the State and private parties when the former acts in the exercise of public power or when a privilege established in favour of the State with a certain substantive-law provision aims at the proper execution of the public power and at the fulfilment of the obligations of the State against its citizens. In doing so, the Special Highest Court stressed the fact that ever since the year 1877, the Greek State always paid less default interest in its capacity as debtor compared to what private individuals paid for their debts. The Court documented this thesis by supplying a historical report on all the financial crises suffered by the Greek State, starting in 1893, when Greece declared a moratorium, and continuing in 1898, when it was placed under international economic control after the war against Turkey, in 1908 and after the military coup in Goudi in August 1909, after the Balkan wars, the so-called Catastrophe in Minor Asia in 1922, the international economic crisis of 1929 and the moratorium declared by Greece in 1932. The Court also made reference to the times after the dictatorship in the period 1967-1974 and in the year 1985, when strict economic measures affecting the income of the Greek citizens had to be made and to the years 2004 and 2009, when the Council of the European Union issued Decisions on the existence of an excessive deficit in Greece. Finally the Court mentioned the recent obligations that Greece has undertaken against the member states of the Euro-area and the International Monetary Fund, which mean that extensive cuts in salaries and pensions and a great reduction in the total income have to be suffered by the Greeks as well as raises in taxes and all kinds of social contributions. All these measures, which have been absolutely necessary in order to secure the financial stability of Greece, signify the danger to the Greek economy as a whole in the case that the State is judicially ordered to pay a higher than 6% default interest rate on its deferred payments, considering the facts that in the year 2011 the public deficit reached 9,1%, the public debt 165,3% of the gross domestic product and that in 2012, the overdue payments of the State amounted to 6.333 million euros.

On the basis of all the above-mentioned evidence, the majority of the Special Highest Court ruled, finally, that the establishment of a privileged interest rate for the Greek State is justified by the severe economic crises that Greece underwent throughout its history and for very long periods of time which affected also the periods when more favourable conditions for the country's development existed. Therefore, Article 21 of the Code of Laws on the Trials of the State was deemed to introduce an acceptable preferential treatment in favour of the Greek State, which aims at

the proper exercise of public power through the safeguard of financial stability and of the assets of the State and ultimately, at the fulfilment of state obligations against its citizens. The same provision aims also at the limitation of public debt created from paying default interest on overdue payments and guarantees the public estate to which all citizens contribute through the payment of taxes and the state's ability to calculate in advance the amount of state debts and their consequences. By taking into account all the aforementioned facts and the aims served, Article 21 of the Code of Laws on the Trials of the State is contrary neither to the equality principle and the principle of equality in the sharing of public burdens nor to the principle of proportionality.

Finally, the majority of the Court ruled that Article 21 of the Code of Laws on the Trials of the State does not violate Article 17 of the Constitution on the protection of property, for the additional reason that the provision alone of a higher interest rate for the debts of the citizens in comparison to the interest rate for the debts of the State does not create a property right for the lenders of the State since the same higher interest is not payable for the debts of the State.

Languages:

Greek.



Hungary

Constitutional Court

Important decisions

Identification: HUN-1990-S-003

a) Hungary / b) Constitutional Court / c) / d) 31.10.1990 / e) 23/1990 / f) / g) *Magyar Közlöny* (Official Gazette), 107/1990 / h).

Keywords of the systematic thesaurus:

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

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

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

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

5.1.4. 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.**

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

Keywords of the alphabetical index:

Death penalty, abolition, tendency / Death penalty, criminological and statistical finding / Basic right, essence.

Headnotes:

Capital punishment is unconstitutional when assessed against a comparative reading of Articles 8.2 and 54.1 of the Constitution. The relevant provisions of the Criminal Code and other related legal rules which permitted capital punishment as a criminal sanction conflicted with the prohibition against any limitation on the essential content of the right to life and to human dignity. From an examination of the Constitution, human life and human dignity form an inseparable unit, having a greater value than other rights; and thus being an

indivisible, absolute fundamental right limiting the punitive powers of the State. It is the inherent, inviolable and inalienable fundamental right of every person in Hungary irrespective of citizenship, which the State had a primary responsibility to respect and protect.

Article 8.2 of the Constitution does not permit any limitation upon the essential content of fundamental rights even by way of legislative enactment. Since the right to life and human dignity are itself the “essential content”, the State cannot derogate from it. Consequently any deprivation of it is conceptually arbitrary. The State would come into conflict with the whole concept of fundamental constitutional rights if it were to authorise deprivation of the right by permitting and regulating capital punishment. Therefore Article 54.1 of the Constitution cannot be construed as allowing capital punishment even if imposed on the basis of legal proceedings, i.e. non-arbitrarily, since the possibility of any kind of limitation on any basis of the right to life and human dignity is theoretically excluded. Since capital punishment results not merely in a limitation upon that right but in fact the complete and irreversible elimination of life and dignity together with the guarantee thereof, all relevant provisions providing for capital punishment were therefore declared null and void.

Moreover, it follows from the fact that as the sanctions provided for in the Criminal Code constituted a coherent system, the abolition of capital punishment – which previously formed a component of that system – would necessarily result in a complete revision of the entire system. Such a revision, however, is beyond the jurisdiction of the Court.

Summary:

The petitioner submitted that the above mentioned provisions were unconstitutional on the grounds, *inter alia*, that they violated Article 54 of the Constitution which guarantees that no-one should be arbitrarily deprived of the right to life, and that such punishment:

- a. could not be justified ethically;
- b. was generally incompatible with fundamental rights as specified in Article 8 of the Constitution; and
- c. amounted to an irreparable and irreversible means of punishment unsuitable for preventing or deterring the commission of serious crimes.

When petitioning the Constitutional Court to establish the unconstitutionality of legal rules providing for capital punishment, the petitioner pointed out that these rules violate the provisions of Article 54 of the

Constitution, according to which: “In the Republic of Hungary, every human being has the inherent right to life and to human dignity of which no one shall be arbitrarily deprived” [paragraph 1]; and “no one shall be subjected to torture, to cruel, inhuman or degrading treatment or punishment” [paragraph 2].

The Chapter on “Penalties and Measures” in Article 38.1 of the Criminal Code, mentions capital punishment as the first item on the list of primary penalties. In Article 39, the legislature stipulated the subjective criteria for the imposition of capital punishment, the applicable secondary punishments and certain legal consequences.

The Chapter on “Imposition of Punishments” in Article 84 states that “capital punishment may only be imposed in exceptional cases and – with respect to the extreme danger presented by the perpetrator and the crime as well as to the especially high degree of culpability – the protection of society can only be secured with the application of this punishment.”

The Constitutional Court based its decision to declare the rules on capital punishment unconstitutional and therefore null and void on the following considerations:

Chapter I of the Constitution, entitled “General Provisions”, states that “The Republic of Hungary recognises inviolable and inalienable fundamental human rights. Ensuring the respect and protection of these shall be a primary obligation of the State” [Article 8.1]. The Constitution states in the first place in Chapter XII, “Fundamental Rights and Duties”, that “In the Republic of Hungary, every human being has the inherent right to life and to human dignity, of which no one shall be arbitrarily deprived” [Article 54.1]. According to Article 8.4 of the Constitution, the right to life and human dignity are considered fundamental rights, whose exercise may not be suspended or limited even in a state of emergency, exigency or peril.

It can be concluded from the comparison of the quoted provisions of the Constitution that, irrespective of citizenship, the right to life and human dignity is an inherent, inviolable and inalienable fundamental right of every human being in Hungary. It is a primary responsibility of the Hungarian State to respect and protect these rights. Article 54.1 of the Constitution stipulates that “no one shall be arbitrarily deprived of” life and human dignity. The wording of this prohibition, however, does not exclude the possibility that someone shall be deprived of life and human dignity in a non-arbitrary way.

Nevertheless, when judging the constitutionality of the legal permissibility of capital punishment, the relevant provision is Article 8.2 of the Constitution under which in the Republic of Hungary, rules pertaining to fundamental rights and obligations shall be determined by law which, however, shall not impose any limitations on the essential content of fundamental rights.

The Constitutional Court found that the provisions in the Criminal Code and the quoted related regulations concerning capital punishment breached the prohibition against the limitation of the essential content of the right to life and human dignity. The provisions relating to the deprivation of life and human dignity by capital punishment not only impose a limitation upon the essential content of the fundamental right to life and human dignity, but also allow for the entire and irreparable elimination of life and human dignity or of the right ensuring these. Therefore, the Constitutional Court established the unconstitutionality of these provisions and declared them null and void.

After the reasons for the Constitutional Court's decision to declare the quoted provisions of the Criminal Code and other regulations unconstitutional and therefore null and void, the Constitutional Court considered it necessary to refer to the following:

1. Article 8.2 of the Constitution conflicts with the text of Article 54.1 of the Constitution. It is the responsibility of Parliament to harmonise the two.
2. Human life and human dignity form an inseparable unity and have a greater value than anything else. Accordingly the rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the precondition for several other fundamental rights. A state under the rule of law shall regulate fundamental rights stemming from the unity of human life and dignity with respect to the relevant international treaties and fundamental legal principles, and in the service of public and private interests defined by the Constitution. The right to human life and dignity as an absolute value leads to a limitation upon the power of the State in the criminal field.
3. The Constitutional Court found that consideration should be given to criminological and statistical findings, based on the experience of several countries: the application or abolition of capital punishment has not been confirmed to influence either the total number of crimes or the incidence of the commission of crimes that were formerly penalised by capital punishment.

4. Article 6.1 of the International Covenant on Civil and Political Rights – which was signed by Hungary and promulgated by Law Decree 8/1976 – declares that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his or her life.” Paragraph 6 of the same article states that “[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”

The Covenant, therefore, recognises a development towards the abolition of capital punishment. While Article 2.1 ECHR, signed in Rome on 4 November 1950, recognised the legitimacy of capital punishment, Article 1 Protocol 6 ECHR adopted on 28 April 1983 provides that “[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed.” Also, Article 22 of the Declaration “On Fundamental Rights and Fundamental Freedoms”, adopted by the European Parliament on 12 April 1989, declares the abolition of capital punishment. Hungarian constitutional development moves in the same direction since, after the formulation of Article 54.1 of the Constitution which did not clearly exclude capital punishment, a subsequent modification of Article 8.2 of the Constitution proscribed limitations by law upon the essential content of fundamental rights.

5. Since the punishments included in the Criminal Code form a coherent system, the abolition of capital punishment which is a part of this system requires the revision of the entire penal system; this does not, however, fall within the competence of the Constitutional Court.

Supplementary information:

The reasoning of the Court was in the form of a summary and the Justices enlarged upon their own theories in concurring opinions.

Languages:

Hungarian.



Identification: HUN-1992-S-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.03.1992 / **e)** 11/1992 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 23/1992 / **h)**.

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.10. General Principles – **Certainty of the law.**
 3.14. General Principles – ***Nullum crimen, nulla poena sine lege.***
 3.22. General Principles – **Prohibition of arbitrariness.**
 5.3.38.1. Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

Keywords of the alphabetical index:

Transition, justice / Sanction, criminal, re-imposition / Statute of limitations, extension / Pardon, restriction / Punishment, mitigation, restriction.

Headnotes:

Concerning the question of the constitutionality of the specific provisions of Act IV of 1991 on the Prosecution of Serious Criminal Offences not previously prosecuted for Political Reasons, the Constitutional Court's opinion is the following:

- Re-imposition of criminal punishability for offences whose statutes of limitation had expired is unconstitutional.
- Extension of the statute of limitation defined by law for criminal offences whose statute of limitation has not yet expired is unconstitutional.
- Enactment of a law to interrupt the running of the statutes of limitation for criminal offences whose statute of limitation has not yet expired is unconstitutional.
- The determination of causes for the suspension and interruption of the statute of limitation by a retroactive law is unconstitutional.
- With respect to the running of the statute of limitation, there is no constitutional basis for differentiating between the State's failure to prosecute for political or for other reasons.
- The vagueness of the statutory definition stating that the “State's failure to prosecute for criminal offences was based on political reasons” is repugnant to the principle of legal certainty, and as a result, the suspension of the statute of limitation on such a basis is unconstitutional.

- It is unconstitutional for the Act to incorporate the crime of treason within its scope without consideration of the fact that the legally-protected subject matter has undergone numerous changes under different political systems.
- Restrictions upon the right of pardon for a partial or total mitigation of punishments, imposed on the basis of the Act, are unconstitutional.

Summary:

The President of the Republic, having declined to promulgate Act IV of 1991 on the Prosecution of Serious Criminal Offences not previously prosecuted for Political Reasons (henceforth, the "Act"), petitioned for a preliminary review of its constitutionality.

He sought to know whether Article 1 of the Act violated the principle of the rule of law under Article 2.1 of the Constitution and, further, Article 57.4 of the Constitution. In particular, he petitioned, *inter alia*, as to whether:

- i. the recommencement of the statute of limitation conflicted with the principle of the rule of law, an essential component of which was legal certainty;
- ii. Article 1 of the Act amounted to an unconstitutional retroactive criminal law which violated the doctrine of *nullum crimen sine lege* especially since the statute of limitation for acts criminalised by the Section might have already expired according to the Criminal Code in force at the time the acts were committed;
- iii. the recommencement of the statute of limitation, which had already expired, violated the rule of law, especially the principle of legal certainty;
- iv. moreover, overly general provisions and vague concepts violated the principle of legal certainty, e.g. "the State's failure to prosecute its claim was based on political reasons"; and
- v. it was a violation of the prohibition of arbitrariness under Article 54.1 and equal protection of citizens under Article 70/A of the Constitution that a distinction was drawn by the law as regards different instances of the same offence being committed, with the state giving different reasons for prosecuting or excusing such offences.

The ambiguity and vagueness of the Act offended the principle of legal certainty and was accordingly unconstitutional. Since the change of system had proceeded on the principle of legality as imposed by the rule of law, the old law had thereby retained its validity and thus, irrespective of the date of enactment, every law had to comply with the present

Constitution. It was possible, however, to give special treatment to the previous law where legal relationships created by the old (now unconstitutional) law could be harmonised with the new Constitution; or where, in judging the constitutionality of new laws intended to remedy unconstitutional measures of the previous systems, whether the unique historical circumstances of the transition should be taken into consideration. Such matters were to be resolved in conformity with the fundamental principle of the rule of law, of which legal certainty formed a part, that required, *inter alia*, the protection of vested rights, the non-interference with legal relations already executed or concluded, and the limitation of the possibility of modifying existing long-term legal relations. As a consequence of legal certainty, already concluded legal relations – as a rule – could not be altered constitutionally either by enactment or by invalidation of existing law. Retroactive modification of the law and legal relations were permitted within very narrow limits. Exceptions to legal certainty were permissible only if the constitutional principle competing against it rendered this outcome unavoidable, provided that in fulfilling its objectives it did not cause disproportionate harm. Accordingly, reference to historical situations and the rule of law's requirement of justice could not be used to set aside legal certainty as a basic guarantee of the rule of law.

As a result, the Act regarding the recommencement of the statute of limitation overstepped the limits of the State's criminal power. These were guaranteed rights, the restriction of which Article 8.4 of the Constitution did not permit, even if other fundamental rights could constitutionally be suspended or restricted. The constitutional guarantees of criminal law could be neither relativised nor balanced against some other constitutional right or duty since they already contained the result of a balancing act, i.e. the risk of unsuccessful prosecution was borne by the State. The presumption of innocence could not therefore be restricted or denied full effect because of another constitutional right: as a result of the State's inaction, once the time limit for prosecution expired the non-indictability thereby acquired was complete. Considerations of historical circumstances and justice could not therefore be used to gain exemption from the guarantees of criminal law since any such exemption would completely disregard those guarantees, a result precluded by the rule of law.

The Act was also contrary to the principle of the legality of criminal law. Article 8.1 and 8.2 of the Constitution required offences, their punishment and the declaration of the criminality of an act to be regulated only by statute, and stated that the imposition of punishment had to be necessary, proportional and used only as a last resort. It followed

from Article 57.2 of the Constitution, on the presumption of innocence, that only a court of law establishing the defendant's guilt could convict him and from Article 57.4 of the Constitution, that such conviction and punishment could only proceed according to the law in force at the time of commission of the crime. The court was therefore required to judge the offence and punishment in accordance with the law in force when the crime was committed unless a new law was passed subsequent to the offence which prescribed a more lenient punishment or decriminalised the act. This was the necessary result of the prohibition on retroactivity embodied in the principle of legal certainty (foreseeability and predictability) which, in turn, stemmed from the rule of law.

The re-imposition of the possibility of criminal sanctions for a crime the statute of limitation for the prosecution of which had already expired was contrary to Articles 2.1 and 57.4 of the Constitution. With the expiry, the criminal responsibility of the offender was irrevocably extinguished and he acquired the right not to be punished since the State was unable to punish him during the period prescribed for the exercise of its punitive powers. It did not matter which method was used to reimpose the possibility of punishment (whether the statute of limitation recommenced or *ex post facto* legislation was imposed to suspend the statute) since their constitutionality had to be viewed in the same light as a law retroactively imposing punishment on conduct which, at the time of its commission, did not constitute a criminal offence.

The statutory extension of a statute of limitation which had not yet expired was also unconstitutional. According to law, the prosecuting authorities could suspend and recommence its running with regard to the offender without informing him with the result that the duration of the suspension extended the statute of limitation: this extended statute of limitation would then represent the minimum rather than the actual time required for termination of the offender's responsibility. Although the statute of limitation did not guarantee that punishability would be extinguished within the initially prescribed time frame, it did ensure the methods of calculating the time expired did not change in a manner detrimental to the offender: the State's punitive powers therefore had to be the same at the time of punishment as at the time of the offence. Consequently the extension of the as yet unexpired statute of limitation was unconstitutional since it would always impose a more onerous burden on the offender. Moreover, determination of whether or not the period had expired could not be decided retroactively by the legislature: no law could therefore retroactively declare that the period was suspended

for reasons which the law in force at the time of the offence and during the running of the statute of limitation did not acknowledge as applicable to that criminal offence. The legal facts determining the commencement and duration of the statute of limitation had to exist throughout the duration of the period and what did not constitute a legal fact warranting the suspension of the period could not be declared so retroactively.

The incorporation of the condition that the statute of limitation recommenced "if the State's failure to prosecute was based on political reasons" into the Act was unconstitutional. Legal certainty required the predictability of the behaviour of other legal subjects as well as of the authorities themselves and the condition failed to satisfy this requirement since it did not allow for an interpretation which could be determined with sufficient certainty. Further the differentiation contained in the law allowed the re-enactment of the statute of limitation only for three of many non-prosecuted crimes and then only for non-prosecution of those three crimes based on political reasons: such differences could only be justified if Parliament sought to apply positive discrimination in favour of those offenders whose actions, while not covered, by it could have fallen within the scope of the Act. As the Act revealed no reason which could satisfy the constitutional requirement for positive discrimination, it was accordingly contrary to Article 70/A.1 of the Constitution.

Languages:

Hungarian.



Identification: HUN-2007-M-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.11.2003 / **e)** 50/2003 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2003/126 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.9. Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules.**

1.3.5.15. Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

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

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

4.5.2.2. Institutions – Legislative bodies – Powers – **Powers of enquiry.**

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

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

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.**

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

Keywords of the alphabetical index:

Parliament, enquiry, procedure / Parliament, enquiry, guarantees / Legal gap.

Headnotes:

The legal regulations governing investigation and control activities by standing and temporary parliamentary committees are, largely, incomplete. There are no statutory conditions ensuring the efficiency of examinations by the committee, or which confirm the *sui generis* nature of the committee's inquiry. Neither are there any legal guarantees safeguarding the fundamental rights of citizens against parliamentary committees carrying out investigations as organs applying the law based on public authority.

This omission has resulted in an unconstitutional situation. On the one hand, the gap in regulation has failed to ensure the efficient performance of investigations by the parliamentary committees. Potentially, this could give rise to an encroachment upon the Parliament's control function, which stems from the doctrine of separation of powers. There is also a danger of a breach of freedom of public debate, enshrined within Article 61.1 of the Constitution. On the other hand, the legislative gap may jeopardise personal rights and the freedom of private life originating from Article 54.1 and 59.1 of the Constitution. It could also prevent the exercise of the right to legal remedy, enshrined in Article 57.5 of the Constitution, and threaten the security of fundamental procedural guarantees in a State under the rule of law, in the course of investigations by the committees.

Summary:

I. The Constitutional Court received several petitions regarding the carrying out of inquiries by committees. One petitioner called for a finding of an unconstitutional omission of legislative duty, as the activities and rights of parliamentary ad hoc committees and committees of inquiry are only defined in parliamentary resolutions and decisions by parliamentary committees, not in Acts of Parliament. He argued that this violated the constitutional provisions on the restriction of fundamental rights, the right to court, the right to legal remedy, and the right to the protection of personal data.

II.1. According to Article 49.1 of Act XXXII of 1989 on the Constitutional Court (referred to here as "the Act"), an unconstitutional omission of legislative duty may be established if the legislature has failed to fulfil its legislative duty when mandated by a legal norm, and this has given rise to an unconstitutional situation. The Constitutional Court shall establish an unconstitutional omission if the guarantees necessary for the enforcement of a fundamental right are lacking, or if the omission of regulation jeopardises the enjoyment of a fundamental right.

In the case in point, in order to determine whether there had been an unconstitutional omission of legislative duty, the Constitutional Court had to examine whether the regulations governing parliamentary committees are deficient in a sense that qualifies as an omission. Where an omission can be established, it has to be decided whether or not it has caused an unconstitutional situation.

Another closely related question is whether the legislative gap needs addressing by means of an Act of Parliament, or whether it is sufficient to adopt a normative parliamentary resolution. In order to answer these constitutional questions, the Constitutional Court examined, in a broader constitutional context, the parliamentary committees' functions of inquiry and control and the legal regulation thereof.

2. The Constitutional Court examined the constitutional requirements with which the legislature must comply, in regulating parliamentary committees' activities of inquiry and control.

Parliamentary committees' functions of inquiry and control, which result directly from Article 21 of the Constitution, are based on two constitutional rules.

One of them is the requirement of the rule of law under Article 2.1 of the Constitution, which includes a basic criterion of constitutionality in terms of content: the principle of the separation of powers. The right of

Parliament to carry out investigations through its committees and its obligation of having ministers report serve the purpose of controlling the work of the Government, i.e. the executive branch. The rights of investigation and the obligations of reporting secure information for the Parliament. This is indispensable for exercising control.

Parliamentary committees' inquiry functions stem from Article 61.1 of the Constitution. This acknowledges as a fundamental right the right of access to data of public interest (freedom of information) and the freedom of expressing one's opinion. Being informed and knowing the facts are pivotal to freedom of expression. Parliament plays a prominent and indispensable role not only in setting norms but also in debating public matters. Parliamentary committees carrying out inquiries in public matters and hearing officials under public law are important channels for the debating of matters of public interest.

3. In the claim for unconstitutional omission of legislative duty, the petitioner suggested that breaches had occurred of several constitutional provisions. This was because the activity of parliamentary ad hoc committees and committees of inquiry is regulated by parliamentary resolutions rather than by Acts of Parliament, which are universally binding.

Articles 54.1 and 59.1 of the Constitution protect the privacy of people as well as their private secrets, good standing, reputation, and personal data. A question closely related to the protection of privacy is how the constitutional guarantees required in other procedures, and in particular in criminal proceedings, are enforced during proceedings conducted by parliamentary committees carrying out investigations. Under the Hungarian rules, the legal status of persons under investigation and obliged to testify or invited to a hearing is not clear. Under Article 21.3 of the Constitution, everyone is obliged to testify before parliamentary committees. At the same time, it is evident on a constitutional basis that the prohibition on self-incrimination and the presumption of innocence provided for in Article 57.2 of the Constitution are to be enforced unconditionally in proceedings other than criminal ones.

Article 57.1 of the Constitution guarantees the right to a court trial. Article 57.5 acknowledges the right to legal remedies against decisions by judicial and administrative organs and other authorities. The activity of parliamentary committees carrying out investigations qualifies as an activity of applying the law on the basis of public authority. The requirement of the availability of legal remedies against decisions

passed in the course of the above activity when they affect the rights, obligations and lawful interests of citizens and other persons derives from Article 57.5 of the Constitution.

Under the rules in force in Hungary at present, parliamentary committees carrying out investigations are not bound to adopt formal resolutions on their decisions and measures affecting the rights and obligations of citizens. There are no normative requirements regarding legal remedies against the committees' decisions. Legal remedies are not available against decisions made by parliamentary committees as they cannot sue or be sued. Neither can they be regarded as public administration bodies. No procedural Act applies to parliamentary committees performing inquiries.

4. Based on the above facts, the Constitutional Court held that the Parliament made an unconstitutional omission of legislative duty in failing to regulate, by Act of Parliament, inquiries performed by the standing and the temporary committees of the Parliament. It had also failed to create the statutory preconditions for the effectiveness of inquiries by the parliamentary committees.

Languages:

Hungarian.



Identification: HUN-2010-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 31.03.2010 / **e)** 33/2010 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/47 / **h)**.

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 4.5.2. Institutions – Legislative bodies – **Powers.**
 4.5.6. Institutions – Legislative bodies – **Law-making procedure.**
 4.6.3.1. Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**
 4.10. Institutions – **Public finances.**

Keywords of the alphabetical index:

Decree, legislative, review, constitutional.

Headnotes:

Granting legislative powers to the President of the Hungarian Financial Supervisory Authority would have required constitutional amendment.

Summary:

At its session of 23 November 2009, Parliament passed an Act on the Amendment of several acts concerning the legislative power of the President of the Hungarian Financial Supervisory Authority (or HFSA).

The President of the Republic did not sign the Amendment because he had concerns over its constitutionality. Exercising the power vested in him by Article 26.4 of the Constitution, he initiated a constitutional review of the Amendment.

The President observed that only the Constitution can grant legislative power. Without amending the Constitution, the President of the HFSA had no right to issue decrees.

The amendment under dispute changed the Acts on capital market, insurance, reinsurance and investment business, granting the President of the HFSA authority to issue decrees pertaining to these sectors.

The Constitutional Court noted that under the Constitution only the Parliament has legislative power (Article 19.3). The Government (Article 35.2), members of the Government (Article 37.2), the President of the Hungarian National Bank (Article 32/D.4) and local representative bodies (Article 44/A.2) are allowed to issue decrees. During a national crisis, the National Defence Council may issue decrees, as may the President of the Republic during a state of emergency (Article 19/B, 19/C).

The Constitution grants the above institutions exclusive power to enact statutes and to issue decrees. Therefore any statute granting legislative power to state institutions other than those listed in the Constitution is unconstitutional.

Consequently, the Constitutional Court declared the HFSA head's legislative rights unconstitutional.

Justice Péter Kovács attached a concurring opinion to the decision, in which he emphasised that EU law also forms part of the Hungarian legal system under Article 2/A of the Constitution.

Languages:

Hungarian.

*Identification:* HUN-2012-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.12.2012 / **e)** 45/2012 / **f)** On the annulment of certain provisions of the Transitional Provisions to the Fundamental Law / **g)** *Magyar Közlöny* (Official Gazette), 2012/184 / **h)** CODICES (Hungarian).

Keywords of the systematic thesaurus:

1.3.5.4. Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation**.
3.9. General Principles – **Rule of law**.
4.5.6. Institutions – Legislative bodies – **Law-making procedure**.

Keywords of the alphabetical index:

Constitution, amendment / Constitution, amendment, validity / Constitution, change / Constitution, transition, provisional.

Headnotes:

Transitional Provisions adopted under the Fundamental Law are not valid where they do not comply with the requirements for the adoption of such provisions under the Fundamental Law. Parliament, acting as a constitution-amending power, must comply with the constitutional requirements of law-making. The Fundamental Law may only be amended directly, through the appropriate constitutional procedure. Indirect amendment of the Fundamental Law, through the addition of general normative rules contained within transitional provisions, which purport to become an integral part of the constitutional text, is not permitted.

Summary:

I. In March 2012 the Commissioner of Fundamental Rights submitted a petition in which he requested the Court to examine whether the Transitional Provisions to the Fundamental Law (hereinafter, the “TPFL”) comply with the requirements of the rule of law laid down in Article B of the Fundamental Law. According to the Commissioner the TPFL, adopted by Parliament in December 2011 in a separate document, gravely violates the principle of the rule of law, and may cause problems of interpretation and endanger the unity and operation of the legal system.

First, the Commissioner found it problematic from the point of view of the rule of law that the status of the TPFL as a legal source and its place in the legal system is not clearly defined. The Fundamental Law provides for the adoption of transitional provisions, but the TPFL exceeds this authorisation and defines itself as part of the Fundamental Law, attempting thereby to prevent examination of the content of its provisions as to their compliance with the rules on guarantees laid down in the Fundamental Law. The Commissioner emphasised that it would entail grave dangers if Acts adopted on the basis of the TPFL were contrary to the Fundamental Law itself and its fundamental rights provisions.

Second, according to the Commissioner there are numerous articles of the TPFL that do not comply with the requirement of transitionality appearing also in the title of the legal norm: the main criterion of the transitional provisions to a rule of law is that their adoption is made necessary by the transition from the old regulation into the new one, therefore they always include concrete and temporary provisions, i.e. transitional provisions related to the transition itself. Beyond the formal objections, the Commissioner indicated in his petition that other constitutional concerns may also be raised regarding the content of the contested provisions.

Thirdly, subsequent to the Commissioner's petition, Parliament amended the Fundamental Law. According to Article 1 of the First Amendment of the Fundamental Law, the Closing Provisions of the Fundamental Law shall be supplemented with the following point 5: "5. The Transitional Provisions to the Fundamental Law (31 December 2011) adopted according to point 3 above form a part of the Fundamental Law." The Constitutional Court enquired the Commissioner if he upheld his petition in the new constitutional background.

The Commissioner upheld the petition challenging the TPFL, since the First Amendment to the Fundamental Law did not answer all the questions according to which the Commissioner contested the TPFL. In the Commissioner's opinion, the TPFL could not overrule the Fundamental Law; neither could they make exceptions from the application of its regulations.

II. The starting point of the Court's constitutional review was that the Fundamental Law is a unified system. Under Article R of the Fundamental Law, the basis of the legal order is the Fundamental Law. The Fundamental Law, like any other constitution, requires absolute priority and implementation in the whole legal order. It is the standard against which all pieces of legislation shall be evaluated. Every amendment of the Fundamental Law shall be an

integral part of the constitutional text, ensuring the coherence of the Fundamental Law from the point of view of its content and structure. That means that a constitutional amendment must appear in the official version of the text of the Fundamental Law. If the TPFL could set down exceptions to the Fundamental Law, the standard itself would be infringed. Such a situation would call the constitutional status of the Fundamental Law itself into question.

Point 3 of the Closing Provisions of the Fundamental Law requires Parliament to adopt transitional provisions for the purpose of securing the transition from the former Constitution to the new one. However, alongside the real transitory regulations, the TPFL contained permanent normative provisions. The Court did not review the constitutionality of these provisions one by one. Instead, the Court examined whether Parliament, acting as a constitution-amending power, had complied with the constitutional requirements of law-making. The Court declared that many of the provisions of the TPFL were certainly not temporary measures, so the Court annulled them.

Among these nullified provisions were: the preamble on the criminal responsibility of communist leaders and the reduction of their pensions; Article 11.3 and 11.4, which allowed the president of the National Judicial Office and the Prosecutor General to transfer cases to courts of their choosing; Articles 12 and 13, which dealt with the early retirement of judges and prosecutors; and Article 18, which stated that the president of the Budgetary Council was to be appointed by the President of Hungary.

In addition, the Court annulled Article 21 of the TPFL, which allowed Parliament to decide on the status of churches; and Article 22, which defined the constitutional complaint proceeding of the Constitutional Court. The Court also nullified Article 23.1, 23.4 and 23.5 concerning electoral registration, Article 27 on the extension of the restriction of the competence of the Constitutional Court, Article 28.3 which allowed the government to pass regulations for local governments if they neglect to regulate a matter prescribed by law, and Article 29, under which new taxes could be assessed in cases where the Court of Justice of the European Union imposes a fine on Hungary because of government actions that contravenes European Union law.

Last but not least, the Court annulled Article 31.2 of the TPFL, according to which the transitional provisions were accepted on the basis of the old and new constitutions; and Article 32, which declared 25 April as a memorial day of the Fundamental Law.

III. András Holló and István Stumpf attached a concurring opinion, István Balsai, Egon Dienes-Oehm, Barnabás Lenkovics, Péter Szalay and Mária Szívós attached dissenting opinions to the decision.

Cross-references:

Constitutional Court:

- no. 31/2012, 29.06.2012, *Bulletin* 2012/2 [HUN-2012-2-002].

Languages:

Hungarian.



Identification: HUN-2013-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24.05.2013 / **e)** 12/2013 / **f)** On the constitutionality of the Fourth Amendment to the Fundamental Law / **g)** *Magyar Közlöny* (Official Gazette), 2013/80 / **h)**.

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
4.5.6. Institutions – Legislative bodies – **Law-making procedure.**

Keywords of the alphabetical index:

Constitutional amendment, review / Constitutional Court, competence.

Headnotes:

In terms of the Fourth Amendment to the Fundamental Law, the Court, as the principal organ for the protection of the Fundamental Law, will continue to interpret and apply the Fundamental Law as a coherent system and will consider and measure all provisions of relevance to the decision in a given matter.

Summary:

I. The Commissioner for Fundamental Rights filed a petition with the Court for a declaration of the unconstitutionality of certain provisions of the Fourth

Amendment to the Fundamental Law, noting that it is unconventional for the Commissioner to turn to the Court with problems that might result in formal, procedural, and public law invalidity pertinent to the adoption of a constitutional amendment. It is primarily the duty of the President of the Republic to be the guardian of the democratic operation of the state organisation. However, the Head of State – due to his interpretation of this role – had decided not to initiate proceedings before the Court. The Commissioner, in the interests of safeguarding the rule of law, and “as an auxiliary duty”, decided to submit the petition.

The applicant explained that detailed debate on the Bill on the Fourth Amendment (“the Bill”) was held on 25 February 2013. Following the conclusion of the detailed debate and the closing remarks of the proponents of the Bill, the Committee for Constitutional Matters submitted a total of four committee amendment proposals. Two of them were intended to affect the wording of the Bill in a substantive manner, in terms of content. The proposals recommended including the wording “the provisions of a cardinal Act concerning the recognition of churches may be the subject of a constitutional complaint”, “and suitability for cooperation to promote community goals” (Article 4.1 and 4.2 establishing the wording of Article VII.4 of the Fundamental Law) and the incorporation of the wording “and social catching-up” into Article 21.1.e of the Fundamental Law.

Parliament placed the Bill back on the agenda. In the absence of any further proposals for amendment of the Bill, no closing debate was held, and Parliament adopted the Fourth Amendment at its next sitting.

The applicant argued that it was incompatible with the constitutional principles of the democratic exercise of power (such as free debate of public affairs in Parliament, thorough and all-encompassing examination of matters in debate, MPs’ right of speech) that the Parliament did not (or could not) debate in plenary session the proposals submitted by the Committee for Constitutional Matters.

The applicant also pointed out that Article 24.5 of the Fundamental Law does not allow for a review of the conformity of the Fundamental Law in terms of content. However, in his opinion, in addition to the narrow interpretation of invalidity under public law, in a broader sense it amounts to invalidity under public law if internal controversy is created within the Fundamental Law as a result of any amendment to it. Amendments which generate internal controversy or dissolve the unity of the Fundamental Law will not be deemed to have been incorporated within it.

In his opinion, the unity of the Fundamental Law was clearly broken where the Fourth Amendment was contrary to previous Court decisions. This was the situation in this case, in terms of Articles 3, 4, 5.1, 6 and 8 of the Fourth Amendment. The applicant requested the annulment of these provisions.

II. Under Article 24.5 of the Fundamental Law, the Court may only review the Fundamental Law and amendments to it for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and enactment (in the case of procedural error). This wording obviously encompasses the proponents of the Bill, the legislative process, the two-thirds adoption, provisions with regard to the designation of the act and the rules of signature and enactment, i.e. observance of the provisions of Article S of the Fundamental Law.

The applicant had contended that those provisions of the Fourth Amendment which were adopted based on the proposals submitted by the Committee for Constitutional Matters following the conclusion of the closing debate were not debated by the Parliament in plenary session. The Court, found that MPs had in fact had the opportunity to express their opinions. They were not prevented from initiating the reopening of the detailed debate and could have submitted amendment proposals prior to the closing debate. There was no closing debate due to the absence of petitions to that effect, since the MPs did not find it necessary to have one. The adoption of the provisions of Articles 4.1, 4.2 and 21.1.e did not, in the Court's view, infringe the formal requirements laid down in the Fundamental Law for the adoption and enactment of the Fundamental Law.

Regarding the second part of the petition, the Court noted the limitations on its powers in terms of the structure of division of powers; it would not extend its powers to review the Constitution and new norms amending it without express and explicit authorisation to that effect. It resolved therefore only to allow limited judicial review of the Fundamental Law and amendments to it. The changes brought about by the Fourth Amendment to Article 24.5 of the Fundamental Law only actually allow the Court to review the Fundamental Law and any amendments to it for conformity with the procedural requirements laid down in the Fundamental Law in terms of its adoption and enactment.

The Commissioner had placed emphasis on the formal approach of invalidity under public law. In fact, the petition was aimed at having the Court compare the amendments – with regard to their content – to other provisions of the Fundamental Law and to

reasoning and requirements defined in prior Court decisions. The Court has no power to do this and it rejected the petition.

It did, however, make the following points. The Court will decide on the constitutionality of statutory regulations to be adopted based on the constitutional authorisation mentioned above. In the exercise of its powers, the Court, as the principal organ for the protection of the Fundamental Law, shall continue to interpret and apply the Fundamental Law as a coherent system and will consider and measure against one another, every provision of the Fundamental Law relevant to the decision of the given matter. The Court will also take into consideration the obligations Hungary has undertaken in its international treaties or those that follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them. These rules constitute a unified system of values which are not to be disregarded in the course of framing the Constitution or legislation or in the course of constitutional review.

Supplementary information:

The plenary debate on a bill begins with the general debate which is conducted on the concept of the whole bill. The second part of the parliamentary debate is the so called detailed debate. In this debate, MPs can profound their views on the proposed amendments and the parts of the bill affected by the amendments. The last stage of the plenary debate is the closing or final debate. An amending motion can be launched on any kind of previously accepted enactment in case it is considered to be inconsistent with the Constitution or with other laws. The Committee of Constitutional Affairs forms an opinion on it and Parliament holds a final debate which is based on the opinion of the Committee. Then comes the final vote on the whole bill.

Languages:

Hungarian.



Identification: HUN-2015-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24.09.2015 / **e)** 28/2015 / **f)** On the referendum initiative on early retirement of men / **g)** *Magyar Közlöny* (Official Gazette), 2015/137 / **h)**.

Keywords of the systematic thesaurus:

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

1.5.6.3. Constitutional Justice – Decisions – Delivery and publication – **Publication**.

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

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

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

Keywords of the alphabetical index:

Retirement, age, gender, equality / Referendum, pension / Referendum, limitation.

Headnotes:

Women have the right to preferential treatment, especially in the field of the right to a pension, and this right follows from the Fundamental Law.

Summary:

I. A union leader proposed a referendum on the subject of allowing men who have worked for forty years to retire with full benefits. The question is whether men and women should be entitled to the same rights to early retirement, i.e. after forty years of employment. The National Election Committee had refused the authentication of the question in the signature-collecting sheets concerning the referendum on early retirement rights. Later Hungary's Supreme Court (the Curia) overrode the decision of the National Election Committee. Following the Curia's ruling, trade unions began collecting the 200,000 signatures required by law for calling a referendum, but several women and lobby groups representing women submitted complaints to the Constitutional Court.

II. The Constitutional Court declared that the Curia's ruling was unconstitutional and annulled it. The Court made an early announcement due to the on-going collection of signatures and published the reasoning of the decision at a later point. The Court's decision meant that a referendum could not be held on the issue.

The Constitutional Court first examined whether the question to be put to a referendum was to be held fell into the category that was not allowed to be included in a referendum by the Fundamental Law. According to Article 8.3.b of the Fundamental Law, no referenda may be held on the central budget, the implementation of the central budget, central taxes, duties, contributions, customs duties, or the content of Acts determining the central conditions for local taxes. The Court argued that any such changes to the pension system have an effect of the state budget, since lowering the age for obtaining an old-age pension of men would increase the amount the state budget should cover.

The Court also examined whether the question was to be held against the principle of equality. Article XV.2 of the Fundamental Law stipulates that "Hungary shall guarantee the fundamental rights to everyone without any discrimination, in particular on grounds of sex". Women entitled to special protection in accordance with Articles XV.5 and XIX.4 of the Fundamental Law. Under provision Article XV.5 of the Fundamental Law, Hungary shall take special measures to protect, among others, women. Article XIX.4 of the Fundamental Law reads that "Hungary shall contribute to ensuring a livelihood for the elderly by maintaining a unified state pension system based on social solidarity and by allowing for the operation of voluntarily established social institutions. The conditions of entitlement to state pension may be specified by an Act also in view of the requirement for increased protection for women". As a result, women have the right to preferential treatment, especially in the field of the right to a pension, and this right follows from the Fundamental Law. This constitutional right would have been violated in the case of a successful referendum.

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-1964-S-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 03.07.1964 / **e)** SC (1962 no. 913 P / **f)** Ryan v. The Attorney General / **g)** [1965] 1 IR 294 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Constitution, citizens, rights and guarantees / Common Law, constitutionality, fundamental principle, interpretation, judicial review, new, sources, wording, unwritten / Constitutional provision, constitutional review, fundamental rights, personal rights, integrity, unenumerated rights, implied, rights, unspecified rights.

Headnotes:

The guarantee of “personal rights” enshrined in Article 40.3.1 of the Constitution extends to rights other than the “life, person, good name, and property rights” specified therein.

Summary:

The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution) and in certain instances direct from the High Court. The decision of the Supreme Court summarised here is an appeal brought by the applicants against the decision of the High Court.

The plaintiff sought a declaration that provisions of the Health (Fluoridation of Water Supplies) Act 1960 were unconstitutional on the ground that the addition of fluoride to the public water supply was dangerous to health, and the obligation of the plaintiff and her family to use such fluoridated water infringed on their personal rights under Article 40.3 of the Constitution.

Article 40.3 of the Constitution, headed 'Personal Rights', provides:

- “1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

The plaintiff contended that Article 40.3 of the Constitution implicitly included a “right of bodily integrity”. This was the first occasion on which a plaintiff claimed the existence of an unspecified right under Article 40.3 of the Constitution.

In the High Court, Kenny J found against the plaintiff on the question of the properties of fluoride, but agreed that the personal rights which may be invoked to invalidate legislation are not confined to the rights specified in Article 40 of the Constitution, but include all rights which result from “the Christian and democratic nature of the State”. The High Court held at 313:

“If the general guarantee of Article 40.3 of the Constitution extends to personal rights other than those specified in Article 40 of the Constitution, the High Court and the Supreme Court have the difficult and responsible duty of ascertaining and declaring what are the personal rights of the citizens which are guaranteed by the Constitution. In modern times this would seem to be a function of the legislative rather than of the judicial power; but it was done by the courts in the formative period of the common law and there is no reason why they should not do it now.”

The Supreme Court dismissed the appeal of the plaintiff on the facts, but agreed that:

“[t]he “personal rights” mentioned in Section 3.1 are not exhausted by the enumeration of “life, person, good name, and property rights” in Section 3.2 as is shown by the use of the words “in particular”; not by the more detached treatment of specific rights in the subsequent Sections of the Article. To attempt to make a list of all the rights which may properly fall within the category of “personal rights” would be difficult and, fortunately, unnecessary in this present case.”

The Supreme Court found that an unenumerated right to bodily integrity exists under Article 40.3 of the Constitution.

Supplementary information:

The case led to the subsequent judicial recognition of numerous unenumerated personal rights under the Constitution.

Cross-references:

Supreme Court:

- *Ryan v. The Attorney General*, [1965] 1 IR 294.

Languages:

English.

*Identification:* IRL-1995-S-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 17.11.1995 / **e)** 361/366/1995 / **f)** *McKenna v. An Taoiseach and Others* / **g)** [1995] 2 IR 10 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 General Principles - **Separation of powers**.
 4.6.2 Institutions - Executive bodies - **Powers**.
 4.6.6. Institutions – Executive bodies – **Relations with judicial bodies**.
 4.7.1. Institutions – Judicial bodies – **Jurisdiction**.
 4.10.1 Institutions - Public finances - **Principles**.
 5.3.19. Fundamental Rights – Civil and political rights – **Freedom of opinion**.

Keywords of the alphabetical index:

Referendum, publicity campaign, public funds / Constitution, amendment, requirements.

Headnotes:

In expending public monies to campaign for a specific outcome to a referendum to amend the terms of the Constitution, the government is not acting within its powers under the Constitution and the law, and the Court has jurisdiction to act in relation to the government's breach of the Constitution.

Summary:

I. The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland) and in certain instances direct from the High Court. The decision of the Supreme Court summarised here is an appeal brought by the applicants against the decision of the High Court.

The plaintiff brought an appeal to the Supreme Court with regard to:

- a. whether the government was entitled to expend State monies on funding a publicity campaign directed to persuade the public to vote in favour of a proposed amendment to the Constitution; and
- b. Whether the court had any jurisdiction to interfere with such allocation and use by the government of such funds, this being an exercise of the executive power of the State.

The amendment proposed to abolish the provision within the Constitution, which sets down that no law shall be enacted providing for a dissolution of marriage. The appellant claimed that her constitutional rights were being infringed by the activity of the government in requesting or advising voters to vote in favour of the proposed divorce referendum.

II. The Supreme Court had to consider the nature of the courts' jurisdiction in the circumstances of this case and in light of the principle of the separation of powers. It was held that if the government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene. The government cannot act free from the restraints of the Constitution. Neither the powers of the *Oireachtas* (the legislature) nor of the government are absolute even within their own domain.

The majority of the Court based its reasoning on the role the People had in amending the Constitution. They stated that it was the sole prerogative of the People to amend any provision of the Constitution. The People, by virtue of the democratic nature of the State enshrined in the Constitution, were entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State. The use by the government of public funds to fund a campaign designed to influence voters was an interference with the democratic process and the constitutional process for the amendment of the Constitution, and infringed the concept of equality and the right to a democratic process. For the government to fund one side of a campaign was to treat unequally those citizens who held the opposite view.

Cross-references:

Supreme Court:

- *McKenna v. An Taoiseach and Others*, [1995] 2 IR 10.

Languages:

English.

Identification: IRL-1996-2-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 31.07.1996 / **e)** 272/1995 / **f)** Hanafin v. Minister of Environment and Others / **g)** to be published in the *Irish Reports* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

1.3.4.5. Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

1.6.8. Constitutional Justice – Effects – **Influence on everyday life.**

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

4.9.2. Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

4.9.8. Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material.**

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

Keywords of the alphabetical index:

Advertising, campaign, governmental / Referendum, validity.

Headnotes:

Any unconstitutional advertising campaign conducted by the executive constitutes an interference with the conduct of a referendum but, since the Court of First Instance had decided on issues of fact, supported by credible evidence, that the result of the referendum has not been materially affected, the appeal of the petitioner failed.

Summary:

The petitioner brought an appeal to the Supreme Court with regard to whether the result of a referendum as a whole was materially affected by unconstitutional governmental interference with and/or obstruction of the conduct of the referendum.

The Government had expended State monies on funding a publicity campaign directed to persuading the public to vote in favour of a proposed amendment to abolish the provision within the Constitution which sets down that no law shall be enacted providing for a dissolution of marriage.

The Supreme Court examined the standard of proof which lay on the petitioner to establish his case and

found that as the case was a civil one, the onus was on the balance of probabilities.

The Court had to decide two fundamental issues. Firstly, they had to examine the meaning of the words “conduct of the referendum” within the relevant statute and, secondly, whether the Court of First Instance was correct in determining that the result as a whole was not materially affected by the government’s campaign.

The Supreme Court were satisfied that the campaign did amount to an interference with the conduct of the referendum, as any unlawful activity which would interfere with the vote expressing the free will of the people.

However, as the Court of First Instance had concluded that it had not been established by the petitioner on the facts that the result of the referendum had been materially affected, this was clearly binding on the Supreme Court.

Languages:

English.

*Identification:* IRL-1996-2-004

a) Ireland / **b)** Supreme Court / **c)** / **d)** 23.07.1996 / **e)** SC (no. 247 of 1994) / **f)** Heaney v. Ireland / **g)** [1996] 1 IR 580 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality.**

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:

Constitution, fundamental rights, right to silence, privilege against self-incrimination / Proportionality, constitutional review, test.

Headnotes:

The constitutional right to silence at pre-trial stage is a corollary of the right to freedom of expression under Article 40 of the Constitution. However this

right is not absolute and the State is entitled to encroach on it in the interests of maintaining public peace and order, provided that encroachment was proportionate to the purpose of the legislation.

Summary:

The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland) and in certain instances direct from the High Court. The decision of the Supreme Court summarised here is:

Article 38.1 of the Constitution of Ireland provides:

“No person shall be tried on any criminal charge save in due course of law.”

Article 40.6.1 of the Constitution provides that the State guarantees liberty for the exercise of the right of the citizens to express freely their convictions and opinions, subject to public order and morality.

The plaintiff challenged the constitutionality of Section 52 of the Offences Against the State Act 1939, which required individuals arrested to provide a full account of their movements, and provided that failure to do so amounted to an offence. The plaintiffs were arrested under the Act of 1939 and, while in custody, failed to answer questions pursuant to Section 52, and were convicted of an offence. The plaintiffs argued that Section 52 infringed, *inter alia*, their constitutional right to silence.

In assessing whether the impugned provision constituted a legitimate restriction on the constitutional right against self-incrimination, the High Court applied the doctrine of proportionality, relying on jurisprudence of the European Court of Human Rights and the decision of the Supreme Court of Canada in *R v. Chaulk* (1990) 3 SCR 1303. Costello J held at 607:

“The objective of the impugned provisions must be of sufficient importance to warrant over riding a constitutionally protected right or freedom. It must relate to concerns which are pressing and substantial in a free and democratic society. The means chosen must pass a personality test. They must:

- a. be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- b. impair the right as little as possible; and
- c. be such that their effects on rights are proportional to the objective.”

The High Court held that, in light of the objective of Section 52 of the Offences Against the State Act 1939, which was the investigation and punishment of serious subversive crime, and the existence of legal protections, which minimise the risk in the operation of the section, the Section was proportionate to the objective it was designed to achieve.

On appeal, the Supreme Court upheld the decision of the High Court. The Court held that the right to silence was a corollary to the qualified right to freedom of expression under Article 40.6.1 of the Constitution. The Supreme Court considered the issue before it as being “whether the power given the [police] in the circumstances by Section 52 is proportionate to the objects to be achieved by the legislation”. The Court held that:

“There is a proper proportionality in Section 52 between any infringement of the citizen's rights with the entitlement of the State to protect itself.”

Cross-references:

Supreme Court:

- *Heaney v. Ireland*, [1996] 1 IR 580.

Languages:

English.



Identification: IRL-1998-2-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 15.05.1997 / **e)** 118/1997 / **f)** In the Matter of Article 26 of the Constitution of Ireland and In the Matter of the Employment Equality Bill, 1996 / **g)** / **h)**.

Keywords of the systematic thesaurus:

- 1.3.2.1. Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**
- 3.5. General Principles – **Social State.**
- 3.16. General Principles – **Proportionality.**
- 3.17. General Principles – **Weighting of interests.**
- 5.1.1.4.1. Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**
- 5.1.1.4.2. Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated.**

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

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

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.**

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

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

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

Keywords of the alphabetical index:

Disabled person, employment / Vicarious liability of employers / Policy, social.

Headnotes:

Provisions of the Employment Equality Bill, 1996, which made employers vicariously liable for the acts of employees, Sections requiring employers to adapt the conditions of employment for people with disabilities and a Section of the Bill which provided that a certificate could be sufficient evidence to ground a particular conviction, among other provisions, were held to be contrary to the Constitution.

Summary:

Article 26 of the Constitution empowers the President of Ireland to refer a bill to the Supreme Court before the bill is signed into law, in order for the Court to determine whether the bill, or particular provisions thereof, is or are repugnant to the Constitution. The Employment Equality Bill, 1996 was referred to the Supreme Court in this manner.

The Bill was designed to prevent discrimination and harassment in employment. However there were a number of exceptions to the general prohibition in the Bill, the constitutional validity of which was questioned. In particular, provisions relating to people aged below 18 years and people above 65 years of age excluded those age groups from the scope of the Bill. In addition, the defence forces were excluded from its remit, as were the operations of certain institutions under the direction of religious bodies.

The Court held that the Government had the responsibility of balancing the competing constitutional rights, a responsibility which was exclusively

within its province. The constitutional rights to equality, the right to earn a livelihood and other property rights had to be balanced in this instance. The Court stated that these constitutional rights were not absolute and the Government could restrict their exercise, provided the means by which it did so were not contrary to reason or fairness and were necessitated by the common good. On this basis, the relevant Sections of the Employment Equality Bill were held not to be unjustifiable and these exceptions were therefore not unconstitutional.

The Court considered provisions of the Bill dealing with people with disabilities. It was submitted to the Court that the provisions in this regard infringed the employer's constitutional right to earn a livelihood, as employers were required to bear the financial burden of adapting the place of employment to the needs of disabled employees, with no possibility of compensation. The Court considered the requirements of social justice and the competing constitutional right to earn a livelihood of employers. The Court concluded that these provisions of the Bill did represent an unjust attack on the rights of the employer and were contrary to the Constitution.

It was submitted that the provisions of the Bill which imposed vicarious liability on employers for the criminal acts of employees, were repugnant to the Constitution. The Court noted that an employer with no guilty intent could be found guilty of offences and sentenced to a term in prison. The Court held that such a change to the criminal law could not be justified on the grounds of social policy, as it was disproportionate to the aim intended. The imposition of a criminal sanction on employers in these circumstances was unjust, irrational and inappropriate. These provisions of the Bill were therefore contrary to the Constitution.

The Bill provided that an employer would not be obliged to employ a person with a propensity for unlawful sexual behaviour. This was challenged as a violation of the constitutional right to equality. The Court was of the view that this provision was justifiable on the grounds of prudence and safety.

The Bill contained a Section which enabled the Director of Equality Investigation to issue a certificate which would then be accepted as *prima facie* evidence of the fact that the implementation of the Bill had been obstructed or that there had been a failure to comply with its terms, and that this conduct should be subject to a criminal sanction. It was submitted to the Court that this provision violated the constitutional right to a trial in due course of law, as it had the effect that a person could be prosecuted on the basis of a certificate alone. The Court stated that this Section concerned the

essence of a constitutional criminal trial. The certificate was to be issued by a person who would have no personal knowledge or involvement in the events in issue and in circumstances where there was likely to be conflicts of evidence. The provision clearly was an interference with the right to a trial in due course of law. The Court then considered whether this interference was constitutional. In this regard the Court stated that there was a legitimate social policy underlying the section. However, the certification procedure which was proposed was neither rational nor necessary. The Court concluded that there was no proportionality between the process of trial by certification and the objective of the Bill and the right to trial in due course of law. This provision was accordingly a failure to protect the constitutional rights of the citizen and was repugnant to the Constitution.

Further provisions of the Bill were challenged as being repugnant to the Constitution. A provision which enabled entry onto premises for the purposes of investigations, was claimed to contravene the constitutional right to inviolability of the dwelling. The Supreme Court held that the powers of entry conferred were reasonably necessary and were not repugnant to the Constitution. It was also claimed that a provision which imposed a duty to answer questions or sign declarations, was contrary to Article 40.3 of the Constitution, as it failed to protect the privilege against self-incrimination. The Court held that the Section at issue was reasonably necessary to the discharge of the functions under the Bill and did not infringe the constitutional rights of the citizen.

Languages:

English.



Identification: IRL-2010-1-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 21.01.2010 / **e)** SC 419/2003 / **f)** Meadows v. Minister for Justice, Equality and Law Reform / **g)** [2010] IESC 3 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.5. Sources – Categories – Written rules – International instruments – **Geneva Convention on the Status of Refugees of 1951.**
3.4. General Principles – **Separation of powers.**

3.16. General Principles – **Proportionality.**

3.19. General Principles – **Margin of appreciation.**

3.20. General Principles – **Reasonableness.**

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

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

Keywords of the alphabetical index:

Judicial review, standards / Proportionality, burden of proof / Refugee, expulsion.

Headnotes:

A proportionality test should be applied in reviewing whether administrative decisions which affect fundamental rights are reasonable.

Summary:

1.1. The Supreme Court is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters, including civil and constitutional matters. The decision of the Supreme Court summarised here arose from a point of law of exceptional public importance referred by the High Court to the Supreme Court. The question was whether, in determining the reasonableness of an administrative decision, which affects the constitutional or fundamental rights of an individual, it was correct to apply the existing standards of review under established case-law.

2. The appellant was a Nigerian national who had applied for refugee status upon her arrival in Ireland in 1999, at the age of 17. Her application was primarily based on the grounds that a former business partner of her father's would harm her as revenge for the death of his son in a tribal war between the Hausa and Yoruba tribes, and also that, if returned to Nigeria, she would be forced into a marriage arranged by her father and subjected to female genital mutilation (FGM). She was informed in September 2001 that her application for refugee status had been refused and that the Minister for Justice proposed to make a deportation order against her. She was also informed that, before the making of a deportation order, she was entitled to make representations to the Minister setting out any reasons why she should be allowed to remain temporarily in Ireland.

In October 2001, the appellant made written submissions to the Minister requesting leave to remain in Ireland on humanitarian grounds, namely, that she

would be subjected to female genital mutilation (FGM) if returned to Nigeria. It was argued that this would constitute a violation of her fundamental right to “life, liberty and security of the person” under both national and international law and thus breach the prohibition of *refoulement* in Section 5 of the Refugee Act 1996, which gives effect to the prohibition of *refoulement* in Article 33 of the Geneva Convention of 1951 relating to the Status of Refugees.

In July 2002, the appellant was informed by letter that the Minister for Justice had decided to issue a deportation order against her. The reasons for the Minister's decision were provided as follows:

“In reaching this decision the Minister has satisfied himself that the provisions of Section 5 (Prohibition of Refoulement) of the Refugee Act 1996 are complied with in your case.

The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having had regard to the [factors in Section 3.6 of the Immigration Act, 1999 upon which the Minister could consider granting the appellant leave to remain in Ireland on humanitarian grounds], including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State.”

3. The issue before the Supreme Court was the ambit of the criteria which the courts should apply when reviewing the validity of administrative decisions. It is established in the case-law of the Supreme Court that judicial review of administrative acts is not an appeal and that the court in reviewing a decision is not to substitute its own views for those of the decision-maker. The existing test for review, according to established case-law, is that of 'reasonableness': a court cannot interfere with an administrative decision unless it is 'unreasonable' i.e. where it “plainly and unambiguously flies in the face of fundamental reason and common sense”.

Counsel for the appellant had submitted that the Supreme Court should apply a stricter test for review of administrative decisions in the appellant's case i.e. the “anxious scrutiny” test used by the English courts in cases concerning administrative decisions affecting important fundamental rights, particularly in asylum and immigration cases. That test allows for a “sliding scale” of review, with the intensity of review depending on the subject matter under consideration, the importance of the human right affected and the extent of the encroachment upon that right.

II. In considering the question of the appropriate standard of review, the Supreme Court referred to previous case-law, which stated that where rights are recognised under the Constitution, a remedy to enforce these rights must also be available, and that it is the task of the courts to ensure that where rights are wrongfully violated that an effective remedy is available.

However, the Supreme Court eschewed adoption of the “anxious scrutiny” test, preferring to resolve the matter on the basis of existing Irish case-law, by reference to the principle of proportionality.

The Court noted that it had, in previous cases concerning the compatibility of a legislative provision with the Constitution, subjected the legislation to a proportionality test. Denham J. set out the proportionality test in Irish law, which is that formulated by the Supreme Court of Canada and adopted by the Irish courts in a previous decision: the measure which restricts a fundamental right must:

- a. “be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- b. impair the right as little as possible; and
- c. be such that their effects on rights are proportional to the objective.”

The Supreme Court clarified that, in examining whether a decision is 'reasonable', i.e. “whether the decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense”, the Court could legitimately apply a proportionality test in determining that question. In other words, application of the proportionality test is a means of examining whether a decision meets the test of 'reasonableness'.

The Chief Justice stated that it is inherent in the principle of proportionality that where an administrative decision entails grave or serious limitations on an individual's fundamental rights, the countervailing reasons justifying the decision must be correspondingly more substantial.

The Chief Justice held that where material has been presented to the Minister for Justice to suggest that a deportation order would cause the life or freedom of the deportee to be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, contrary to the prohibition of *refoulement* in Section 5 of the Refugee Act 1996, the Minister must specifically address that issue and form an opinion. Under the 1996 Act, a threat to a person's freedom includes the risk of a “serious assault” and the appellant had asserted that she would be subjected to female

genital mutilation (FGM) if returned to Nigeria, which the Supreme Court held could be considered a “serious assault” within the meaning of the Act.

In the instant case, the Minister for Justice had not provided any reasons to explain his decision to issue a deportation order. The letter sent to the appellant informing her of the Minister's decision to deport her simply stated:

“In reaching this decision the Minister has satisfied himself that the provisions of Section 5 (Prohibition of *Refoulement*) of the Refugee Act 1996 are complied with in your case.”

The Supreme Court held that an administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. The Chief Justice stated that the rationale provided should be patent from the terms of the decision or capable of being inferred from its terms and context. Without such a requirement, the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.

The Chief Justice held that the Minister's decision in the instant case was expressed in terms so vague and opaque that its underlying rationale could not be properly or reasonably deduced. There was therefore a fundamental defect in the Minister's decision and the Supreme Court allowed the appellant to institute proceedings before the High Court to have the Minister's decision judicially reviewed on this point.

It may be noted that, in applying the proportionality test, the Chief Justice held that a “margin of appreciation” should be accorded to the decision-maker in his choice of an effective means of fulfilling any legitimate policy objectives. Fennelly J. expressly stated that his judgment was not intended to express or imply any view as to how the Minister should make his decision; the decision remained within the Minister's discretion, in striking a balance between the rights of the individual and other policy considerations.

The Supreme Court also held that, where the principle of proportionality is relevant, the onus rests on an applicant to establish that an administrative decision is disproportionate.

III. This case was heard by a panel of five judges. The Supreme Court judgment summarised above was by a majority of three judges. Two Judges dissented from the majority judgment. Hardiman J., with whom Kearns P. fully agreed, objected to the approach of the majority on the basis that it violated

the constitutional principle of the separation of powers by failing to accord due deference to the Minister as a member of the executive branch of government. In Hardiman J.'s view, the majority approach, in looking for explanation and justification from the Minister for his decision, required the courts to examine the merits and demerits of the Minister's decision and shifted the onus of proof to the Minister, contrary to the general principle of judicial review that the onus remains on the appellant at all times to establish that the decision made was unreasonable. To shift the onus, he said:

“...would, in my view, be very significantly to interfere with the separation of powers and to hamper or obstruct the Minister in taking a decision which is clearly within his scope. The courts would naturally and properly balk at any suggestion of a ministerial interference in matter properly within their jurisdiction: the corollary of this is that the courts must respect the Minister's jurisdiction and interfere only upon proper proof by the applicant that the Minister's decision is flawed.”

He viewed the majority's approach as a “revolution in the law of judicial review”, comparable to the adoption of the “anxious scrutiny” standard of review in English law.

Languages:

English.



Identification: IRL-2015-1-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 15.04.2015 / **e)** SC 398/2012 / **f)** The People at the Suit of the Director of Public Prosecutions v. JC / **g)** [2015] IESC 31 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal law, evidence admissibility, exclusionary rule.

Headnotes:

The consideration by a trial judge of whether evidence obtained in breach of the constitutional rights of an individual should be admitted or excluded should involve the application of a test which represents an appropriate balance of the constitutional rights and values at issue.

Summary:

I. The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland) and in certain instances direct from the High Court. The decision of the Supreme Court summarised here is an appeal brought by the Director of Public Prosecutions under Section 23 of the Criminal Procedure Act 2010 seeking a review of the decision of the trial judge in the Circuit Criminal Court to exclude evidence on the basis of the application of the exclusionary rule as set out by the Supreme Court in *Director of Public Prosecutions v. Kenny* [1990] 2 IR 110. By way of background, in the case of *The People (Attorney General) v. O'Brien* [1965] IR 142, the Supreme Court stated that where there has been a deliberate and conscious violation of constitutional rights, evidence obtained by such violation should in general be excluded, save in extraordinary and excusing circumstances. Subsequently, in *The People (DPP) v. Kenny*, the Supreme Court held that an act could amount to a “deliberate and conscious” violation of rights even though the person is unaware of the unlawfulness of the act.

In *DPP v. JC*, the accused/respondent was on trial before the Circuit Criminal Court for alleged offences involving robberies. Applying the rule governing the exclusion of evidence set out by the Supreme Court in *DPP v. Kenny*, the trial judge excluded evidence. As a result, the case against the accused/respondent collapsed.

The two key issues for the Supreme Court to consider were:

- i. the scope of appeals which can be brought to the Supreme Court by the DPP under Section 23 of the Criminal Procedure Act 2010; and
- ii. the rule governing the admission or exclusion of evidence obtained in breach of the constitutional rights of a person.

The Supreme Court considered the key question of whether *DPP v. Kenny* was correctly decided. If not, a question arose as to what is the appropriate test to be applied when considering whether evidence obtained

in circumstances involving a breach of constitutional rights should be admitted or excluded.

A preliminary question for consideration was whether an appeal lay under Section 23 of the Criminal Procedure Act 2010. Section 23 provides that the Director of Public Prosecutions may appeal an acquittal on a question of law, where a ruling was made during the course of a trial which “erroneously excludes compelling evidence”.

Section 23.14 provides that such evidence must be:

1. reliable;
2. of significant probative value; and
3. be such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person’s guilt in respect of the offence concerned.

Historically, no appeal lay from an acquittal in criminal proceedings. Before the enactment of Section 23 of the Criminal Procedure Act 2010, the only appeal which lay to the Supreme Court from an acquittal was a consultative appeal by the Attorney General or Director of Prosecutions without prejudice to the verdict or decision in favour of an accused person pursuant to Section 34 of the Criminal Procedure Act 1967, as substituted by Section 21 of the Criminal Justice Act 2006. Section 23 of the 2010 Act provides for an appeal which, if directed by the Court, can be with prejudice to an accused person, as it can lead to a retrial which could result in the conviction of an accused. An issue for consideration was whether the statutory criteria under Section 23 of the Criminal Procedure Act 2010, which requires “compelling evidence”, were satisfied.

II. Written judgments were delivered by Murray J, Hardiman J, O’Donnell J, McKechnie J, Clarke J and MacMenamin J. On the issue of whether an appeal lay under Section 23 of the Criminal Procedure Act 2010, a majority of the Supreme Court (Denham CJ, O’Donnell J, Clarke J and MacMenamin J) was of the view that the exclusionary rule could properly be raised under the section. A minority of the Court (Murray J and Hardiman J) dissented on this point. Murray J was of the view that an appeal did not lie under Section 23 of the Criminal Procedure Act 2010 as the decision of the trial judge to exclude the evidence was one which she was bound to make and was not erroneous within the meaning of Section 23 of the 2010 Act. Hardiman J was of the view that, where a trial judge follows a binding authority of which a higher court subsequently disapproves, the judge does not commit an error. The law which the trial judge applied in this case appeared to be clear since the decision of *DPP v. Kenny*. Therefore, it was for the Supreme Court to decide whether a

trial judge could be found to have erroneously excluded evidence if the judge properly applied the established case-law of a higher court even if the higher Court concludes that the established case-law ought to be reviewed. A majority of the Court (Denham CJ, O'Donnell J, Clarke J and MacMenamin J) considered that the incorrect exclusion of the evidence in question was an error. This was the case even if the trial judge was bound to follow the decision of *DPP v. Kenny*, unless *Kenny* was redefined by the Supreme Court.

On the substantive legal issue concerning the exclusionary rule, the Court considered the proper balance to be struck in vindicating the constitutional rights and principles engaged. O'Donnell J reviewed the sequence of Irish case-law concerning the question of admissibility of evidence and international authorities from the United States, the United Kingdom, Canada, New Zealand and South Africa. A majority of the Supreme Court took the view that the exclusionary rules as stated in *The People (AG) v. O'Brien* and *DPP v. Kenny* failed to adequately balance the competing constitutional rights involved, including the rights of the accused, the entitlement of society to the proper and legitimate conviction of those guilty of crime and the rights of victims to ensure that those who commit crimes are brought to justice when there is sufficient probative evidence to establish the guilty of the accused to the criminal standard. The Supreme Court held that there should be a clear test to be applied, which should appropriately balance competing factors at issue. Clarke J (with whom Denham CJ, O'Donnell J and MacMenamin J agreed) set out the following test to be applied:

- i. "The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.
- ii. Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:
 - a. that the evidence was not gathered in circumstances of unconstitutionality; or
 - b. that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis.

iii. Any facts relied on by the prosecution to establish any of the matters referred to at ii. must be established beyond reasonable doubt.

iv. Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.

v. Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.

vi. Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority."

On the application of the above test to the facts of the case, a majority of the Supreme Court held that although the trial judge was bound to follow the decision of the Court in *DPP v. Kenny*, her decision to exclude the evidence was erroneous within the meaning of Section 23 of the Criminal Procedure Act 2010. The Court must yet determine a final issue of whether the acquittal of the respondent should be quashed and a retrial ordered or whether his acquittal should be affirmed as it would not be in the interests of justice to order a retrial. The final decision on whether the appeal should be allowed was, therefore, adjourned.

In summary, a majority of the Supreme Court held that an appeal lay under Section 23 of the Criminal Procedure Act 2010. If the decision of the trial judge to exclude evidence was incorrect, such a decision was an error even if the trial judge was bound by the

decision of the Supreme Court in *DPP v. Kenny*. The Supreme Court set out a new test to be applied when considering the exclusion of evidence obtained in breach of the constitutional rights of a person which involves a balancing of competing factors.

Languages:

English, Irish.



Identification: IRL-2015-1-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 24.04.2015 / **e)** SC 432/2013 / **f)** Re: Referendum Act & re: Jordan and Jordan v. Minister for Children and Youth Affairs & others / **g)** [2014] IESC 26 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

3.3. General Principles – **Democracy.**

4.9.2. Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

Keywords of the alphabetical index:

Referendum, amendment to Constitution / Referendum, outcome, query, violation of human rights and freedoms / Referendum, campaign, public fund, confirmation, validity, procedure, test.

Headnotes:

For the purpose of the legislative procedure which provides for petitioning a provisional referendum certificate, evidence of a “material effect on the out-come of a referendum” involves establishing that it is reasonably possible that the irregularity or interference identified affected the result. The object of this test is to identify the point at which it can be said that a reasonable person could be in doubt about, and no longer trust, the provisional outcome of the election or referendum.

Summary:

I. The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland)

and in certain instances directly from the High Court. The decision of the Supreme Court summarised here relates to two appeals from the High Court. One appeal was from a judgment of the High Court delivered on 18 October 2013 [2013] IEHC 458 in proceedings relating to a provisional referendum certificate, which is a document issued following a referendum containing the results. Part V of the Referendum Act 1994 provides for a statutory procedure for challenging a provisional referendum certificate. In light of the necessity for any interference with a decision of the People of Ireland in a referendum to be strictly compliant with the law and the Constitution, it involves a two stage process. The first stage is an application to the High Court for leave, which requires an applicant to prove that there is *prima facie* evidence of the matter required by the statute and the said matter is such as could affect materially the result of the referendum as a whole. The second stage is a hearing at trial. The second appeal was from a judgment of the High Court delivered on 20 June 2014 [2014] IEHC 327 from plenary proceedings challenging the constitutionality of provisions of the Referendum Act 1994.

By way of background, a referendum took place on 10 November 2012. The referendum asked the eligible electorate to vote on whether Article 42.5 of the Constitution of Ireland should be replaced with a new Article 42A, with the heading ‘Children’. The proposed amendment was provided for in the Thirty First Amendment of the Constitution (Children) Bill 2012. 33.49% of persons eligible voted in the referendum. 58% of voters voted in favour of the proposed amendment and 42% voted against it. A provisional referendum certificate was published in *Iris Oifigiúil* (Official Gazette of the Government of Ireland) on 13 November 2012.

On the 8 November 2012, two days before the referendum in question, the Supreme Court ruled in *McCrystal v. The Minister for Children and Youth Affairs and ors* [2012] 2 IR 726 that a booklet and website entitled “Children’s Referendum” and advertisements published and distributed by the Department of Children and Youth Affairs using moneys voted by the *Oireachtas* (Irish Parliament) breached the principles set out by the Supreme Court in *McKenna v. An Taoiseach* (no. 2) [1995] 2 IR 10. In *McKenna*, the Supreme Court held that in light of Article 40.1 of the Constitution relating to equality, Article 47.1 of the Constitution, which concerns referenda, requires equal treatment of the ‘Yes’ and ‘No’ sides of a referendum. Consequently, spending of public money by the Government to promote one side of a referendum campaign represented a breach of equality, freedom of expression and the constitutional right to a democratic process in referenda. In *McCrystal*, the Court did not grant an injunction postponing the referendum, but declared that the respondent acted unlawfully in the manner in which it had allocated funds.

On 19 November 2012, the appellant, via a plenary summons, sought a declaration that the provisions of the Referendum Act 1994 are unconstitutional; a declaration under Section 5 of the European Convention on Human Rights Act 2003 that Sections of the Referendum Act 1994 are incompatible with the European Convention on Human Rights; the respondent Minister had acted in breach of the constitutional rights of the applicant under certain provisions of the Constitution; and that the State had acted in violation of certain rights of the appellant under the European Convention on Human Rights. The applicant argued that Sections 42.3 and 43 of the Referendum Act 1994 made it practically impossible for an applicant to prove that an unlawful interference had a “material effect on the outcome of a referendum.” She submitted that once it was established that an irregularity or interference had been committed the burden of proof should shift to the State to prove that it had not materially affected the outcome of the vote. The High Court held that Sections 42 and 43 of the Referendum Act 1994 employ a rational and proportional onus and standard of proof which may on occasion be difficult, but is not impossible to discharge. The trial judge found that an absolute rule requiring the referendum to be set aside does not follow from a breach of the McKenna principles. Such an approach, it held, would be incompatible with the sovereignty of the People. The appellant had not rebutted the presumption of constitutionality from which the impugned provisions benefited. The High Court held that a declaration that the respondent breached the McKenna principles was a sufficient remedy.

On 21 November 2012, the applicant sought the leave of the High Court to present a petition pursuant to Section 42 of the Referendum Act 1994 in respect of the aforementioned referendum. The High Court granted the appellant leave to present the petition, but was not satisfied on the balance of probabilities that the appellant had adduced cogent and reliable evidence to show that the result of the referendum as a whole was materially affected by the unconstitutional wrongdoing.

II. The Supreme Court unanimously dismissed the appeals brought by Ms Jordan. The argument in the Supreme Court focused mainly on the question of which party bore the burden of proof in applications pursuant to Section 42 of the Referendum Act 1994. In addition, the Court considered the contention of the appellant that the question of the material affect of any established wrongdoing was only relevant at the *ex parte* leave stage and not at the second full hearing stage. The Supreme Court held that the burden of proof is on the applicant and the issue of materiality remains before the Court at the full hearing.

The Supreme Court set out the following test to be applied when the outcome of a referendum is challenged, in order to appropriately balance making too easy the overturning of a decision made by the People, and making a genuine challenge so difficult so as to be practically impossible.

The Supreme Court set out the following test:

“material affect on the outcome of a referendum’ involves establishing that it is reasonably possible that the irregularity or interference identified affected the result. Because of the inherent flexibility of the test, it may be useful to add that the object of this test is to identify the point at which it can be said that a reasonable person could be in doubt about, and no longer trust, the provisional outcome of the election or referendum.”

The Court stated that in applying the test in cases, the individual factors of each case will have to be considered. The factors to be considered will depend on the circumstances of each case.

The Court was of the view that the relevant factors in the present case included:

- the matter raised, i.e. the decision of the Supreme Court in *McCrystal*;
- the actions of the Minister; and
- the statistics of the referendum (the Court found that the margin between those who voted in favour of the referendum and those who voted against was a significant factor); and
- a remedy had been already ordered in *McCrystal*.

Applying the test to the factors in the case, the Court found that it had not been established that it was reasonably possible that the actions of the Minister materially affected the outcome of the referendum as a whole. The Court was satisfied that a reasonable person could not have a doubt about, and would trust, the provisional outcome of the referendum. The Supreme Court dismissed both appeals and confirmed the provisional referendum certificate which, on return to the referendum returning officer, would become final and be conclusive evidence of the result of the referendum.

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)** HCJ 5016/96 / **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.**
- 5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
- 5.3.6. Fundamental Rights – Civil and political rights – **Freedom of movement.**
- 5.3.20. 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)** HCJ 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, HCJ 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.**
- 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.**
- 5.1.4. 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-2001-1-007

a) Israel / **b)** Supreme Court / **c)** Five Justice Panel / **d)** 08.03.2000 / **e)** HCJ 6698/95 / **f)** Ka'adan v. Israel Land Authority / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 54(1), 258 / **h)**

Keywords of the systematic thesaurus:

3.13. General Principles – **Legality.**

5.1.1.2. Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**

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

5.2.2.6. Fundamental Rights – Equality – Criteria of distinction – **Religion.**

Keywords of the alphabetical index:

Land, allocation, principles / Discrimination, third party / Settlement, communal, establishment.

Headnotes:

The principle of equality prohibits the state from allocating land directly to its citizens on the basis of religion or nationality. The state may not indirectly discriminate against its citizens by allocating land to a third party who will in turn distribute it on the basis of religion or nationality.

Summary:

The petitioners were an Arab couple who live in an Arab settlement. They sought to build a home in Katzir, a communal settlement in the Eron River region. This settlement was established in 1982 by the Jewish Agency in collaboration with the Katzir Cooperative Society, on state land that was allocated to the Jewish Agency (via the Israel Land Authority) for such a purpose. The Katzir Cooperative Society only accepts Jewish members. It refused to accept the petitioners and permit them to build their home in the communal settlement of Katzir. The petitioners claimed that the policy constituted discrimination on the basis of religion or nationality and that such discrimination is prohibited by law with regard to state land.

The Court examined the question of whether the refusal to allow the petitioners to build their home in Katzir constituted impermissible discrimination. The Court's examination proceeded in two stages. First, the Court examined whether the state may allocate land directly to its citizens on the basis of religion or nationality. The answer is no. As a general rule, the principle of equality prohibits the state from distinguishing between its citizens on the basis of religion or nationality. The principle also applies to the allocation of state land. This conclusion is derived both from the values of Israel as a democratic state and from the values of Israel as a Jewish state. The Jewish character of the state does not permit Israel to discriminate between its citizens. In Israel, Jews and non-Jews are citizens with equal rights and responsibilities. The state engages in impermissible discrimination even if it is also willing to allocate state land for the purpose of establishing an exclusively Arab settlement, as long as it permits a group of Jews, without distinguishing characteristics, to establish an exclusively Jewish settlement on state land (“separate is inherently unequal”).

Next, the Court examined whether the state may allocate land to the Jewish Agency knowing that the Agency will only permit Jews to use the land. The answer is no. Where one may not discriminate directly, one may not discriminate indirectly. If the state, through its own actions, may not discriminate on the basis of religion or nationality, it may not facilitate such discrimination by a third party. It does not change matters that the third party is the Jewish Agency. Even if the Jewish Agency may distinguish between Jews and non-Jews, it may not do so in the allocation of state land.

The Court limited its decision to the particular facts of this case. The general issue of use of state land for the purposes of settlement raises wide-ranging questions. This case is not directed at past allocations of state land.

The Court stated that there are different types of settlements, for example, *kibbutzim* and *moshavim*. Different types of settlements give rise to different problems. The Court did not take a position with regard to these types of settlements. Special circumstances, beyond the type of settlement, may also be relevant. The decision of the Court is the first step in a sensitive and difficult journey. It is wise to proceed slowly and cautiously at every stage, according to the circumstances of each case.

With regard to the relief requested by the petitioners, the Court noted various social and legal difficulties and ordered that the state was not permitted, by law, to allocate state land to the Jewish Agency for the purpose of establishing the communal settlement of Katzir on the basis of discrimination between Jews and non-Jews. It was further ordered that the state must consider the petitioners' request to acquire land for themselves in the settlement of Katzir for the purpose of building their home. This consideration must be based on the principle of equality, and considering various relevant factors – including those factors affecting the Jewish Agency and the current residents of Katzir. The state must also consider the numerous legal issues. Based on these considerations, the state must determine with deliberate speed whether to allow the petitioners to make a home within the communal settlement of Katzir.

President A. Barak filed an opinion in which Justices T. Or and I. Zamir joined. Justice M. Cheshin concurred in the judgment and filed an opinion. Justice Y. Kedmi dissented in the judgment and filed an opinion.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2003-2-008

a) Israel / **b)** Supreme Court / **c)** / **d)** 15.05.2003 / **e)** E.Au. 11280/02; E.Au. 50/03; E.Ap. 55/03; E.Ap. 83/03; E.Ap. 131/03 / **f)** The Central Election Committee v. Parliament Member Tibi / **g)** 57(4) Isr.S.C. 1 (Official Digest) / **h)**

Keywords of the systematic thesaurus:

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

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

3.24. General Principles – **Loyalty to the State.**

4.5.10.4. Institutions – Legislative bodies – Political parties – **Prohibition.**

4.9.5. Institutions – Elections and instruments of direct democracy – **Eligibility.**

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

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

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

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

Keywords of the alphabetical index:

Democracy, defensive / Party, disqualification, burden of proof / State, Jewish / Democratic state, core elements.

Headnotes:

A thriving democracy must not participate in its own destruction. Thus the “democratic paradox” arises from conflicting desires to foster an open marketplace of ideas (in which minority voices are protected against majority political forces), and to enable democracy to protect itself from those who seek to destroy it. In an attempt to resolve this paradox, the State of Israel has enacted numerous laws relating to the registration of political parties, the conduct of general elections, and the criminalisation of certain activities that threaten democracy.

There are many democratic states, but there is only one Jewish State. The Jewish character of Israel is its central feature – it is axiomatic. Israel's Basic Law therefore bars the participation of a candidate or list of candidates who advocate nullification of the core elements of the State's Jewish character as a central part of their aspirations and actions. The same prohibition applies to those seeking to abolish the basic democratic features of the State. Democracy is based on dialogue, not on force. Those who wish to change the structure of society may participate in the democratic dialogue, as long as they use legal means to achieve their aims, and as long as their activities comply with the core democratic characteristics of the state.

Summary:

Section 7A of the Basic Law on the Knesset empowers the Central Election Committee, (“the Committee”) to prohibit a list of candidates or a particular candidate from participating in the elections to the Parliament if they (in their aims or actions, either explicitly or implicitly):

1. deny the existence of the State of Israel as a Jewish and democratic state;
2. incite racism;
2. support the armed struggle, by an enemy state or of a terrorist organisation, against the State of Israel.

The Committee's decision to disqualify a particular candidate must be reviewed by the Supreme Court, and there is a right to appeal a decision disqualifying a list of candidates.

On the basis of Section 7A of the Basic Law on the Knesset, the Committee considered the disqualification of several candidates for the January 2003 general elections. The first candidate, Azmi Bishara, is an Israeli Arab member of Knesset. The Committee cited two reasons for its decision to prevent Bishara from participating in the elections:

1. Bishara denied the Jewish character of the State, through his campaign to transform Israel into a “state of all of its citizens” as opposed to a Jewish state; and
2. Bishara supported the armed struggle of both Palestinian and Lebanese (Hezbollah) terrorist organisations against Israel. In addition, the Committee also decided to disqualify the list of candidates proposed by Bishara's political party, the National Democratic Assembly (N.D.A.: Brit Leumit Democratit (B.L.D. in Hebrew)).

The second candidate, Ahmed Tibi, is also an Israeli Arab Member of Knesset. Tibi was disqualified from participating in the elections due to his support of Palestinian terrorist groups' armed struggle against Israel. The Committee also considered the disqualification of Baruch Merzel, an Israeli Jewish candidate in a far right-wing party, Herut. Merzel is the former leader of the outlawed Kach movement, a racist anti-Palestinian and anti-Arab group. Numerous complaints of incitement to racial hatred were made against Merzel, but Merzel argued that he had changed his views, and the Committee approved his participation. All of those decisions were reviewed by the Supreme Court.

The Supreme Court, sitting as an extended bench of eleven Justices, held that Section 7A of the Basic Law on the Knesset assumes that a democracy can

defend itself from undemocratic forces using democratic means to undermine democracy. That dilemma represents a kind of democratic paradox; Israeli constitutional law balances the democratic freedoms of expression and pluralism with the preservation of Israel as a Jewish and democratic state. Thus, that dilemma reflects Israel's character as a defensive democracy.

Disqualifying a candidate or a list of candidates is an extreme measure that infringes upon the electorate's right to vote and the candidates' right to participate in an election. To justify such a disqualification, the Committee must satisfy a heavy evidentiary burden. The candidates' participation in activities prohibited by the Basic Law must be a dominant and central feature of their public lives, and they must undertake measures in order to accomplish the prohibited aims. The Court proceeded to discuss in obiter dicta the possibility of interpreting the Basic Law to require proof of probable success in achieving the prohibited aims (the probability element).

Due to the grave implications of the disqualification procedure, Israel's characteristics as a “Jewish state” and “democratic state” should not be applied too broadly in this context. The core elements of a Jewish state include the right of every Jew to immigrate to Israel, in which there is a Jewish majority; the establishment of Hebrew as the official language; and the centrality of Jewish heritage in Israel's state culture, as reflected in its national holidays and symbols. However, Israel's Jewish character must not contradict the fact that all of its citizens, Jews and non-Jews alike, have a right to equality. The core elements of a democratic state include free and equal elections, basic human rights, separation of powers and the rule of law. Drawing upon these interpretive principles, Israel may prohibit incitement to racial hatred and may prohibit political candidates from supporting an armed struggle against Israel.

A majority of the Supreme Court overturned the Committee's decision to disqualify Bishara and the N.D.A. list of candidates. It held that although the aims of Bishara and the N.D.A. were clearly not Zionist, they did not necessarily contradict the core elements of Israel as a Jewish state. While there was some evidence of support by Bishara and the N.D.A. for the general struggle by Palestinians and Lebanese against Israel, the Court doubted whether that included support for an armed struggle as required by the Basic Law, and found that such doubt should be resolved in favour of the candidates. The minority opinion would have upheld the disqualifications, based on its conclusion that the evidence established Bishara and the N.D.A. aimed to abolish Israel as a Jewish state, had undertaken actual

measures to accomplish that aim, and had in fact supported the armed struggle of terrorist groups against Israel.

The Court unanimously overturned Tibi's disqualification, citing the lack of evidence in support of the Committee's decision.

Finally, a majority of the Court ruled that the Committee had acted reasonably in accepting Merzel's assertion that he no longer espoused the racist views of the Kach movement. In contrast, a minority of the Justices found that the Committee had abused its discretion in permitting his candidacy, pointing to evidence suggesting Merzel's recent involvement in racist activities.

The Court decided the case on 9 January 2003. The elections took place on 28 January 2003, with the participation of Bishara, the N.D.A. list of candidates, Tibi, and Merzel. The Court's reasons were published on 15 May 2003.

Cross-references:

- E.Ap. 1/65 *Yardor v. The Chairperson of the Central Election Committee* 19(3) Isr.S.C. 365;
- E.Ap. 2/84 *Neiman v. The Chairperson of the Central Election Committee* 39(2) Isr.S.C. 225 (also available in English at the Court site www.court.gov.il);
- E.Ap. 1/88 *Neiman v. The Chairperson of the Central Election Committee* 42(4) Isr. S.C. 177;
- E.Ap. 2/88 *Ben Shalom v. The Central Election Committee* 43(4) 221 Isr. S.C. 221.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2012-1-002

a) Israel / **b)** Supreme Court / High Court of Justice (Supreme Court) / **c)** Extended Panel / **d)** 11.01.2012 / **e)** HCJ 466/07 / **f)** Gal-on v. Attorney General / **g)** to be published in the Official Digest / **h)**.

Keywords of the systematic thesaurus:

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

3.16. General Principles – **Proportionality.**

3.21. General Principles – **Equality.**

4.5.8. Institutions – Legislative bodies – **Relations with judicial bodies.**

5.1.1.1. Fundamental Rights – General questions – Entitlement to rights – **Nationals.**

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

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

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

5.3.45. Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Equality, inequality, human rights of others, impact / Security, consideration / Terrorism, combat.

Headnotes:

The Citizenship and Entry into Israel Law (Temporary Order) of 2003 restricts the Interior Secretary's authority and denies citizenship or other official status in Israel for residents of the Palestinian territories or other enemy states who are married to Israeli citizens, unless certain exceptions apply. In essence, the Law restricts the realisation in the state of Israel of unions between spouses of Israeli, and the above-mentioned nationalities.

Summary:

I. In this petition, the Supreme Court, sitting as the High Court of Justice, was asked to nullify the law, according to which spouses of Israeli Arab citizens were denied citizenship or other legal status in Israel. The petitioners were a number of human rights organisations and individuals whose spouses were denied access to Israel. The basis for enacting the Law was a security analysis which found that a number of Israeli citizens' spouses were involved in terrorist activities.

II. The Supreme Court, in a six to five decision, denied a petition requesting the court to nullify the Law. The Justices, from both the majority and the minority, differed on several key questions and especially on whether the constitutional right to family life includes an opportunity to exercise it in the State of Israel and not elsewhere, and on whether the infringement upon the right to equality occasioned by the Law meets the requirements of the limitation clause set forth in the Basic Law: human dignity and liberty. This was not the first time the Court was

required to consider the question of the Law's constitutionality. Six years prior to the current decision, the Supreme Court denied another petition (HCJ 7052/03) requesting the Court to declare the Law as unconstitutional. In that prior case, as in the current one, the Supreme Court, in an extended panel of 11 Justices, denied the petition in a 6 to 5 decision. Since that previous decision was given by the Supreme Court the *Knesset* (national parliament) revised the Law in a number of respects in order to deal with the Court's reservations regarding the Law as it was formulated at the time the prior case was considered.

The majority opinion in the current petition consisted of Deputy President E. Rivlin, Justice A. Grunis, Justice M. Naor, Justice E. Rubinstein, Justice H. Melcer and Justice N. Hendel, all of whom believed the petition should be denied. Justice A. Grunis followed his opinion in the previous decision, namely, that the social benefit arising from the Law exceeds the harm, if such even exists, sustained to constitutional rights. Justice A. Grunis quoted President A. Barak who in turn quoted, in another decision, Justice R. Jackson of the Supreme Court of the United States in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) by saying that we should not convert human rights into a national suicide pact. Deputy President E. Rivlin based his opinion on the doctrine by which the Supreme Court should treat the other branches of government with deference while dealing with issues falling within their expertise. He also noted that an issue like the one before the Court should be decided by a branch of government accountable to the public for its decision, unlike the Supreme Court. With these doctrines in mind, and in order to safeguard the resources of the judicial branch, especially public trust, and to allow the courts to protect human rights when needed, he was of the view that the Supreme Court must refrain from deciding on controversies, the nature of which request a non-judicial decision. Justice M. Noar, following her previous decision, thought that even though it is commendable for a country to allow its citizens and residents, while circumstances permit, to bring their families to their homeland, one should not infer from that a constitutional right to family life in Israel. Justice M. Noar stressed that such a constitutional right was not acknowledged elsewhere in democratic nations around the world. Justice E. Rubinstein thought that the Temporary Order does not infringe upon a constitutional right to family life or a constitutional right to equality, considering that the law deals with Israeli citizens or residents who chose a spouse who is part of a national entity hostile to the state of Israel. Justice H. Melcer based his opinion on "The Precautionary Principle". He found the Law to be the least of evils and thought that, given the continued

threat to Israel's existence, one should take a "better safe than sorry" course of action. Justice N. Hendel found the Law to fall within the margins of reasonableness and therefore was of the view that the Court should not intervene.

III. The minority opinion, consisting of five dissenting opinions, stated that the petition should be granted and that the Law should be declared unconstitutional. President D. Beinisch considered, as she did in the previous case, that the Law infringes upon constitutional rights in an unproportional manner. In the President's view the amendments to the Law only worsened its inherent problems. No effort was made to integrate an individual examination of the security risk arising from the person requesting citizenship or his surroundings, and no other means were utilised to soften the harm inflicted upon those people. The President also criticised the ongoing usage of the form of "Temporary Order" in the legislative process, keeping in mind that at first the Law was to be enacted for no longer than a year but was subsequently extended several times to an aggregate of almost ten years in total. Justice E. E. Levy found that the Law does not meet any of the requirements of the limitation clause. First and foremost it does not suit the values of the State of Israel as a Jewish and Democratic state. Justice E. Arbel held that there was no place to use a Temporary Order act of parliament in a way that so deeply infringes upon constitutional rights. Justice E. Arbel also noted that the potential enhancement of the country's security entailed in the Law is not measurable against the definitive harm inflicted upon the right to equality and the right to family life. Justice S. Jubran found the Law to restrict Israel's Arab citizens. He thought that the complete denial of the opportunity to receive official status in Israel for spouses of Arab Israeli citizens entails discriminatory treatment, ethnic profiling, and a grievous assault on human dignity, and should be annulled. Justice E. Hayut found no fault in a presumption of dangerousness for Palestinians, but held that such a presumption should be rebuttable and that a Palestinian individual should have an opportunity, based on an individual examination, to prove that no danger will come from him or her.

Languages:

Hebrew.



Identification: ISR-2012-1-006

a) Israel / **b)** Supreme Court / High Court of Justice (Supreme Court) / **c)** Panel / **d)** 28.02.2012 / **e)** HCJ 10662/04 / **f)** Hassan v. The National Insurance Institute of Israel / **g)** to be published in the Official Digest / **h)**.

Keywords of the systematic thesaurus:

3.5. General Principles – **Social State**.
 3.16. General Principles – **Proportionality**.
 5.4.18. Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

Keywords of the alphabetical index:

Income, minimum, welfare benefits.

Headnotes:

The irrebuttable presumption, according to which the amount of income produced from a vehicle equals or exceeds the stipend provided by the Assurance of Income Law to impoverished individuals, deprives the right to minimum standards of living in dignity from those whose income in fact does not suffice to ensure this right, but who do own or use vehicles, since their entitlement to the stipend is revoked based on the presumption.

Summary:

I. The question in this case regarded the constitutionality of an arrangement established in Article 9a.b of the Assurance of Income Law (hereinafter, the “Law”), by which a person owning a vehicle or using a vehicle owned by another is to be regarded as earning an income in the amount of the stipend provided by the Law, thus making such a person unqualified to receive the stipend. The question before the Supreme Court was whether such an arrangement infringes upon the constitutional right to minimum standards of living in dignity.

II. In an extended panel of seven Justices, the Supreme Court unanimously held that Article 9a.b of the Law is unconstitutional since it infringes in an disproportionate manner on the right to minimum standards of living in dignity. The Supreme Court held that the right to a minimum standard of living in dignity is not a derivative of the right to human dignity, but, rather, is in itself a right deeply entrenched in the core of the constitutional right to human dignity. The Court stipulated that of all the different meanings one can attribute to the concept “human dignity”,

especially considering the “human” part of it, the most fundamental of them is the meaning which focuses on the unique and special dignity of human beings and on the most necessary conditions needed for survival. The Court noted that living in starvation, without shelter, and in a continuous search for a way out of poverty is not a dignified living. Minimum standards of living are essential not only for protecting human dignity, but also for the fulfilment of all other human rights. Without minimal material conditions, a person does not have the capacity to create, to aspire, to make his or her choices and to realise his or her liberties. A person’s image, the Court held, is harmed first and foremost if he or she falls to a humiliating level of deepest poverty.

The Supreme Court discussed at length the alleged difference between social-economic rights and political-civil rights and found that such a distinction is unwarranted, unless in regard to a historical sense of dividing them into two generations of rights. Based on this premise the Court held that the same type of judicial review should be applied when dealing with the infringement of “social” rights as with “political” rights. As for Article 9a.b of the Law, the Court held that it creates a fiction which infringes the right to a minimum standard of living. The fiction is rooted in the irrebuttable presumption by which the amount of income produced from a vehicle is considered equal to, or more than, the stipend provided by the Law. This general absolute rule infringes the right to minimum standards of living since it deprives from each and every person who owns or uses a vehicle the entitlement to an assurance of income stipend, without regard to the specific question of whether or not that person has an income in the amount that would guarantee the fulfilment of his or her right to a minimal dignified human existence. For example, one of the petitioners was denied the allowance granted by the Law after it was established that she uses a family vehicle three times a month although she does not contribute any sum to the car’s payments; another petitioner was forced to resign since a car, made available to her by an acquaintance, was her only available means of transportation to reach her place of employment. These petitioners and others alike did not have the means to guarantee a minimal dignified human existence.

The Supreme Court ruled that the income assurance stipend plays an integral part in the assurance of minimum standards of living. Although the Court did not deal with what are minimum standards, it did hold that its decision is based on the state’s obligation to set conditions for such a minimal existence and to derive the state’s welfare system therefrom accordingly. Although the Supreme Court did not contest that a vehicle can be used as an estimate for a

person's income, it was held that it cannot be used as the sole component of establishing such an estimate; especially given the fact that according to the Law all persons requesting the income assurance stipend undergo an individual examination regarding all their assets and incomes.

Based on the above reasoning the Supreme Court held that the harm inflicted upon the right to minimum standards of living in dignity breaches the requirements of the limitation clause of the Basic Law: human dignity and liberty, and especially the proportionality requirement. The Supreme Court indicated that the Article's appropriate purpose of making sure the state's support is given only to those who need it, could have been achieved with a less intrusive or harmful means. Accordingly, the Supreme Court declared Article 9a.b of the law unconstitutional and thus void, effective within six months of the day the Court's verdict was pronounced.

Languages:

Hebrew.



Identification: ISR-2012-2-008

a) Israel / **b)** Supreme Court / High Court of Justice (Supreme Cou / **c)** Panel / **d)** 17.05.2012 / **e)** HCJ 1758/11 / **f)** Orit Gorren v. Home Centre / **g)** / **h)** CODICES (Hebrew).

Keywords of the systematic thesaurus:

3.21. General Principles – **Equality.**

5.2.1.2.1. Fundamental Rights – Equality – Scope of application – Employment – **In private law.**

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

Keywords of the alphabetical index:

Employee, labour, condition, economic and social.

Headnotes:

When a female employee receiving lower wages than a male employee who carries out the same work for the same employer manages to prove her cause of action under the Equal Pay to Male and Female

Workers Act (hereinafter, "Equal Pay Act"), a presumption arises that the employer has discriminated against her because of her gender, and she may therefore also have a cause of action pursuant to the Equal Opportunities in the Workplace Act (hereinafter, "Equal Opportunities Act"). In such circumstances, the burden of proof will fall upon employers who have been paying female employees a lower salary than their male counterparts, to show that gender was not a consideration in determining the female workers' wages. The mere fact that the female employee requested lower wages than the male employee during the employment negotiations cannot serve a defence under the Equal Pay Act. Women may at times have less leverage than men in negotiating payment; claims that the parties negotiated wages freely will not be enough to justify a significant gap in wages of female and male workers.

Summary:

I. The applicant was employed as an advisor in the tools department of a homeware chain store. Having discovered that a male employee holding the same job was earning wages 35 % higher than hers, she approached the branch manager and requested that her wages be made equal to those of the male employee. When her request was not answered, she resigned from her job and filed suit for compensation, claiming violations of both the Equal Pay Act and the Equal Opportunities Act. The National Labour Tribunal determined that her suit pursuant to the Equal Pay Act should be accepted, as the respondent could not prove substantial justification for the wage disparity between the applicant and the other employee. However, her suit pursuant to the Equal Opportunities Act was denied. The National Tribunal, in a majority decision, ruled that proving a course of action pursuant to the Equal Pay Act does not automatically also give rise to a course of action under the Equal Opportunities Act (which enables the court to rule compensation without proof of damage in favour of the discriminated employee). In this context it was ruled that the Equal Opportunities Act sets a higher evidentiary bar in comparison to the Equal Pay Act, and requires the employee to prove the existence of a causal link between one of the considerations that the employer is prohibited from considering (such as the gender of the employee) and the decision that was made regarding that employee (in this case, the applicant's wage level). Consequently, the employee filed a petition with the Supreme Court, requesting the Court to intervene in the ruling of the National Labour Tribunal and to determine her entitlement to compensation pursuant to the Equal Opportunities Act.

II. A decision was rendered by President D. Beinisch (Judges N. Hendel and Y. Amit concurring), in which President Beinisch stressed the differences between the Equal Pay Act and the Equal Opportunities Act. Firstly, while the Equal Pay Act addresses gender discrimination against women in the workplace, the Equal Opportunities Act deals with other forms of discrimination against different minority groups (such as sexual orientation, age, race and religion). Secondly, both acts define the prohibited discrimination differently. Thirdly, each act requires different standards of proof. The Equal Pay Act requires a relatively lenient burden of proof, examining the discrimination according to an "outcome" test; i.e., it is sufficient to prove a disparity in the wages of a man and a woman who hold the same job for the same employer for the action to succeed. The Equal Opportunities Act, however, requires proof of a causal connection between the employer's intention and the decision made regarding the employee; i.e., the discrimination prohibited by this act is discrimination "because of" a certain characteristic of the employee, which the employer is prohibited from considering. The President stressed that the Equal Pay Act does not require proof of the employer's intention to discriminate against the employee as a condition of the crystallisation of a cause of action. Fourthly, the differences between the acts affect the remedies they afford. The Equal Pay Act does not determine a criminal sanction for its violation, and the longest period for which the discriminated employee can claim wage disparities is 24 months. In contrast, in cases of violation of the Equal Opportunities Act, the Labour Tribunal may grant the employee compensation without proof of damage, in an amount it sees fit considering the circumstances of the case. This compensation naturally has a deterrent and educational aspect, which does not exist under the Equal Pay Act. The violation of the Equal Opportunities Act is also considered a criminal offence.

In the decision, President Beinisch determined that the employer's freedom of contract during negotiations cannot stand as an independent consideration which might justify wage discrimination between men and women. If the employer's freedom of contract were to be recognised as a defence under the Equal Pay Act, this might, in the Court's opinion, allow it to be used as a cover for gender discrimination and its perpetuation, undermining the fundamental purpose of the Equal Pay Act. This consideration also ignores the actual disparities in the labour market between men and women with respect to their demands regarding wages, and the manner in which negotiations regarding wages are conducted. Therefore, President Beinisch ruled that when there is no substantive consideration regarding the

employees themselves, the employer is prohibited from granting different wages to male and female employees performing the same job.

Due to the differences between these acts, President Beinisch ruled that proving a cause of action pursuant to the Equal Pay Act does not "automatically" give rise to a cause of action under the Equal Opportunities Act. However, if the female employee manages to prove her cause of action pursuant to the Equal Pay Act, this would *prima facie* be regarded as gender discrimination, and the burden of proof, under the Equal Opportunities Act, shifts to the employer. The employer would then have to prove that the employee's gender was not a consideration in determining her wage. If the employer cannot do so, the female employee is entitled to cause pursuant to both Acts. An employer who proves that the wages of his employees were determined by negotiation, in which the same policy was applied towards male and female applicants in terms of wages, may raise the burden of the Equal Opportunities Act, provided the employer can then show that the policy adopted was not affected by the applicants' gender or other prohibited considerations. However, as the wage disparity between male and female employees is more significant, the burden upon the employer to show that the female employee's gender was not a consideration in determining her wages, and that they were set at a lower rate simply because she entered the negotiations with a lower asking price, grows heavier.

President Beinisch ruled that due to the significant disparity (almost 35 %) between the wages of the applicant and the male employee, the respondent could not benefit from the claim that the two employees simply asked for different wages during negotiation. Therefore, the applicant's claim under the Equal Opportunities Act was also accepted.

Languages:

Hebrew.



Italy

Constitutional Court

Important decisions

Identification: ITA-2015-2-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 14.05.2015 / **e)** 96/2015 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 23, 10.06.2015 / **h)**.

Keywords of the systematic thesaurus:

3.17. General Principles – **Weighing of interests.**
 3.20. General Principles – **Reasonableness.**
 5.3.4. Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**
 5.4.19. Fundamental Rights – Economic, social and cultural rights – **Right to health.**

Keywords of the alphabetical index:

Abortion / Medically assisted procreation / Medical treatment.

Headnotes:

Rules confining “the use of medically assisted protection (...) solely to cases where there are no other methods of treatment capable of overcoming the causes of sterility or infertility” and restricting it to medically certified inexplicable cases of sterility or infertility and cases of sterility or infertility [stemming] from a medically verified and certified cause, violate Articles 3 and 32 of the Constitution, which protect the right to equality and the right to health respectively.

Summary:

I. The Rome Court held that Articles 1.1, 1.2 and 4.1 of Law no. 40 of 19 February 2004 (rules on medically assisted procreation; hereinafter “MAP”), insofar as they prohibit fertile couples with transmissible genetic diseases from having recourse to MAP, violate Articles 2, 3 and 32 of the Constitution and also Article 117.1 of the Constitution, the latter on the grounds of violation of Articles 8 and 14 ECHR.

The question of constitutionality was raised by a court with which an application for interim measures had been lodged by two couples who had previously had recourse to abortions so as not to transmit to their children hereditary genetic diseases of which they had been found to be healthy carriers and who were seeking urgent authorisation to have recourse to MAP. As the law makes no provision for this option for fertile couples, the Court referred it to the Constitutional Court, holding it to be in contradiction with:

- Article 2 of the Constitution, on the grounds of breaches of the inviolable rights of individuals, such as “the right of a couple to a healthy’ child” and the right to freedom of choice in reproduction;
- Article 3 of the Constitution, as an expression of the principle of reasonableness, as the prohibition of MAP obliges couples carrying genetic diseases to try for pregnancy by natural means and possibly have recourse to abortion, which the law permits if prenatal diagnosis shows the foetus to be affected by the disease;
- Article 3 of the Constitution, as an expression of the principle of equality, as the prohibition of MAP for fertile couples carrying genetic diseases entails discrimination in relation to couples where the man has a sexually transmitted viral disease, who are granted the right to have recourse to MAP under a Ministry of Health decree;
- Article 32 of the Constitution, concerning undermining of the woman’s right to health, given that in choosing to start a natural pregnancy she may subsequently, under the terms of the abortion law, have an abortion if it transpires that the foetus has contracted the genetic disease, thereby putting both her physical and mental health at risk;
- Article 117.1 of the Constitution, in connection with the provisions of Article 8 ECHR (on the right to respect for family life) and Article 14 ECHR (on the prohibition of discrimination). In the former case, the prohibition of MAP in the case of couples carrying hereditary diseases encourages abortion and therefore amounts to interference in these couples’ family lives. In the case of Article 14, the arguments are the same as those put forward alleging violation of Article 3 of the Constitution (principle of equality).

II. The question was declared admissible insofar as the referring court had not ruled on the application for interim measures and had preserved its “*potestas judicandi*”. Moreover, the Court could not itself apply the standards of the European Convention on Human

Rights rather than domestic provisions if it held them to conflict with the former, and thereby grant the application, given that this option is admissible solely in the case of conflict with the provisions of European Community law. It is for the Constitutional Court to rule in cases of conflict between domestic law and provisions of international treaty law, as in the case of law stemming from the European Convention on Human Rights.

The question was relevant (*"rilevante"*): the referring court could not rule on the application lodged with it until the Constitutional Court had first ruled on the legitimacy of the provisions preventing the granting of the application.

The Court ruled that Articles 1.1, 1.2 and 4.1 of Law no. 40 of 19 February 2004 violate Articles 3 and 32 of the Constitution.

It is contrary to the principle of reasonableness, which is set out in Article 3 of the Constitution, to deny MAP and hence preimplantation genetic diagnosis to fertile couples affected (even as healthy carriers) by a hereditary genetic disease who may accordingly transmit serious malformations to the foetus. This is all the truer since the Italian legal order (Law no. 194 of 22 May 1978 on the voluntary termination of pregnancy) allows such couples who have started a natural pregnancy to have recourse to abortion if a prenatal diagnosis detects serious anomalies or malformations in the foetus, which may harm the woman's physical or mental health. This contradiction was already underlined by the European Court of Human Rights in *Costa and Pavan v. Italy*.

The system in force, which prevents the woman from obtaining information about the embryo's state of health, thereby leaving her the sole option of having an abortion if the foetus is malformed, which involves much greater risks for her health, is therefore contrary to Article 32 of the Constitution.

The impugned provisions are therefore the result of an unreasonable balancing of the various interests involved and are contrary to the principle of the consistency of the legal system. They violate the right to health of fertile women carrying (or whose male partner carries) a serious transmittable genetic disease insofar as they make no provision for couples affected by such diseases duly diagnosed by a qualified public body to have recourse to MAP. The latter is for the sole purpose of identifying embryos affected by the parent's disease and which could develop into fetuses with malformations or serious anomalies which could be terminated under the terms of Law no. 194 of 1978.

The Constitutional Court therefore declared the impugned provisions unconstitutional. However, it made it clear that it was not within its power, but a matter for parliament, to adopt, under its discretionary powers, measures to determine on a periodic basis and taking account of scientific advances, the diseases which may justify fertile couples being granted access to MAP and the procedures for verifying such diseases with a view to preimplantation diagnosis. Parliament may also introduce authorisation measures and effective controls over the bodies required to implement such procedures, taking account of the solutions adopted in the countries which allow medical practices of this kind.

The ruling is in line with the decision taken by the European Court of Human Rights in *Costa and Pavan v. Italy*.

Cross-references:

European Court of Human Rights:

- *Costa and Pavan v. Italy*, no. 54270/10, 28.08.2012.

Languages:

Italian.



Identification: ITA-2015-3-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 07.10.2015 / **e)** 230/2015 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 46, 18.11.2015 / **h)**.

Keywords of the systematic thesaurus:

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

3.20. General Principles – **Reasonableness.**

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

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

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

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

Keywords of the alphabetical index:

Disability pension / Communication allowance / Deaf / Foreign national.

Headnotes:

A provision making the granting to non-EU nationals of a disability pension for deaf people and a communication allowance (*indennità di comunicazione*) conditional on their being holders of a residence permit, and therefore having legally resided in Italy for at least five years, amounts to discrimination contrary to Article 3 of the Constitution and must therefore be declared unconstitutional.

Summary:

I. The Milan District Court raised the question of the constitutional legitimacy of the part of Section 80.19 of law no. 388 of 23 December 2000 “which makes the granting of a disability pension for deaf people and a communication allowance (*indennità di comunicazione*) to foreign nationals legally resident in Italy conditional on them being holders of a residence permit”. The District Court considered the provision contrary to the constitutional rules which protect the right to health and the principle of non-discrimination against foreign nationals legally residing in Italy.

II. The Constitutional Court found the provision in issue contrary to the Constitution. On numerous occasions, with reference to many welfare measures, it has had to examine the limits placed by the legal provisions in issue on the entitlement of non-EU nationals legally resident in Italy. The law limits welfare benefits, which are personal rights for the purposes of the legislation on personal services in the welfare field, to foreign nationals who have a residence permit (now a permanent residence permit). Permanent residence permits are issued to individuals who have had a valid residence permit for at least five years.

In its Judgments no. 306 of 2008 (on welfare support for persons unfit to work) and no. 11 of 2009 (on pensions for people unable to work) the Court found the provision concerned unconstitutional for being unreasonable, insofar as it denied the aforementioned benefits to non-EU nationals who did not earn enough money to qualify for the residence permit on which the benefits were conditional.

Following Judgment no. 187 of 2010 the provision at the origin of the question examined today has been criticised several times for discrimination against non-EU nationals in respect of the different types of

welfare measures concerned in each case. In that same judgment the provision was declared unconstitutional insofar as it made eligibility for the disability allowance (*assegno mensile di invalidità*) conditional on possession of a residence permit, and therefore on the requirements for obtaining such a permit.

Then came Judgment no. 329 of 2011, still concerning the same provision, which was once again declared contrary to the Constitution, this time with reference to the allowance paid to minors with disabilities to attend vocational training classes (*indennità di frequenza*), from which non-EU nationals were excluded. The Court emphasised the interests at issue here, all of which are protected by the Constitution: protecting children and health, protecting people with disabilities and the welfare of their families, the need to ensure the prompt integration of minors into the workforce and their full participation in social life. There had therefore been a violation of Article 14 ECHR and, as a consequence, a violation of Article 117.1 of the Constitution, a violation of the principle of equality and the right to education, health and work, which were all the more serious in that they affected minors with disabilities.

In Judgment no. 40 of 2013, in respect of welfare support and the pension for unfit for work, the same provision was declared contrary to the principle of solidarity enshrined in Article 2 of the Constitution, in so far as it excluded from these benefits non-EU nationals who were unfit to work, even if they were legally resident in Italy.

Lastly, in Judgment no. 22 of 2015 the Court declared that making the disability pension for the blind or partially blind (*ciechi parziali*) conditional on their possession of a residence permit, and therefore on their having been in Italy for at least five years, was to disregard the real needs of these people, in violation of Articles 2, 3 and 117.1 of the Constitution, together with Article 14 ECHR.

In the case before it concerning the disability pension for deaf people and the communication allowance (*indennità di comunicazione*), the Court considered that the same solution is called for: these benefits must also be afforded to non-EU nationals lawfully resident in Italy, even if they do not yet have an EU long-stay permit. These are special benefits designed to protect the right to health (Article 32 of the Constitution) and the right to social protection (Article 38 of the Constitution) of people suffering from serious disabilities which considerably limit their ability to work.

Supplementary information:

The judgment applies the principles which the Constitutional Court has repeatedly defended in respect of other support measures in favour of people with serious disabilities, for which non-EU nationals were not eligible.

Cross-references:

Constitutional Court:

- no. 306/2008, 29.07.2008, *Bulletin* 2008/2 [ITA-2008-2-002];
- no. 187/2010, 26.05.2010, *Bulletin* 2010/2 [ITA-2010-2-001];
- no. 329/2011, 16.12.2011, *Bulletin* 2011/3 [ITA-2011-3-001];
- no. 40/2013, 11.03.2013, *Bulletin* 2013/1 [ITA-2013-1-001].

Languages:

Italian.

*Identification:* ITA-2016-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 12.01.2016 / **e)** 20/2016 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 7, 17.01.2016 / **h)**.

Keywords of the systematic thesaurus:

- 3.10. General Principles – **Certainty of the law.**
 3.22. General Principles – **Prohibition of arbitrariness.**
 4.6.4.3. Institutions – Executive bodies – Composition – **End of office of members.**
 4.8.2. Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

Keywords of the alphabetical index:

Civil servant, discharge from post / Political decision, implementation.

Headnotes:

Automatic, or in any case discretionary, discharge from a managerial post, instigated for reasons which are not connected with the contract of employment and which do not relate to the results achieved in performing the relevant duties, is incompatible with the Constitution, which provides that public services must be organised in such a way that they guarantee the smooth functioning and impartiality of the administration, insofar as it applies to holders of managerial posts, albeit not governed by the administration's rules, whose remit is limited to implementing decisions taken at a political level.

Summary:

The Court of Cassation called into question the legitimacy of two legal provisions of the Abruzzo region:

- Article 1.2 of the Law of 12 August 2005, no. 27, providing that appointments to the most senior bodies of public organisations in the Abruzzo Region, which are made by persons who have regional political authority, shall be for the same duration as appointments to the regional council, a provision which had been applied to the manager of “*Abruzzo-lavoro*”, a public organisation of the Abruzzo Region, which was subsequently abolished;
- Article 2.1 of the same law, which made provision, as soon as it entered into force, for the revocation of the managers of the region's public organisations, as designated in Article 1.2, who had been appointed by political executive bodies under the previous regional council.

The manager of “*Abruzzo-lavoro*” was vested with representation powers and exercised organisational and managerial authority. He had been appointed following a public process, after the examination of candidates' CVs. The candidates had to satisfy the criteria for managerial posts within the regional authority, be under 65 years of age, have an in-depth knowledge of the fields in which “*Abruzzo-lavoro*” worked and have lengthy experience of managing complex organisations. The aim of “*Abruzzo-lavoro*” was to provide technical assistance to the region and the provinces and to monitor the labour market. Its manager, who performed administrative and technical duties, was responsible for its performance in his capacity as manager and could be revoked only in the circumstances referred to in Article 21 of Law no. 29 of 1993, as amended by Article 14 of Legislative Decree no. 80 of 1998, including failure to fulfil the balanced budget obligation; failure to abide by the time-limit set for the completion of staff recruitment procedures; and conviction of offences

committed in the course of his managerial duties. The manager was responsible for pursuing the objectives laid down by the region's (political) executive bodies without being in a relationship of trust with the latter.

II. Above all, the Constitutional Court declared inadmissible the question raised with regard to Article 1.2 of the Abruzzo Law: the manager of "Abruzzo-lavoro" had been discharged from his post pursuant to Article 2.1 of the Law and, consequently, it was this provision alone that the Court must examine.

In line with its previous case-law (see *Supplementary information*), the Constitutional Court declared unconstitutional the part of the impugned provision applicable to the manager of "Abruzzo-lavoro". The Court held that automatic discharge, irrespective of any fault, if enforced against managers who do not work directly together with holders of political office and whose duties are limited to implementing their decisions, as in the case of the manager of "Abruzzo-lavoro", was contrary to Article 97.2 of the Constitution.

Supplementary information:

The regional provision to which this judgment relates had given rise to a "primary" appeal, submitted to the Constitutional Court by the State as soon as it had been approved. On that occasion, the Court had only been able to examine the matter from an "abstract" point of view, because the provision had not yet been enforced, and, in its Judgment no. 233 of 2006, it declared the question to be unfounded on the basis of the general provisions contained in the law. Subsequently, the Court recognised the non-conformity with the Constitution of provisions of regional laws implementing the "automatic discharge" rule for managers who did not contribute to the process of shaping a region's political objectives but confined themselves to achieving, from a technical viewpoint, the targets that had been set for them (Judgments nos. 27, 2014; 152, 2013; 228, 2011 and 104, 2007).

Languages:

Italian.



Identification: ITA-2017-1-001

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

Keywords of the systematic thesaurus:

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

2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Law of the European Union/EU Law and domestic law.**

2.2.1.6.1 Sources – Hierarchy – Hierarchy as between national and non-national Sources – Law of the European Union/EU Law and domestic law – **EU primary law and constitutions.**

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

3.13 General Principles – **Legality.**

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

Keywords of the alphabetical index:

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

Headnotes:

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

2. "there is not a sufficiently precise legal basis for setting aside such legislation";
3. "...[that] limitation is part of the substantive criminal law in the Member State's legal system and is subject to the principle of legality"; and
4. "... the setting aside [of] such legislation would contrast with the supreme principles of the constitutional order of the member state or with inalienable human rights recognised under the Constitution of the member State".

Summary:

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

According to the Constitutional Court, firstly, the recognition of the primacy of EU law is an established fact within its case-law. However, according to such settled case-law, compliance with the supreme principles of the Italian Constitutional order and inalienable human rights is a prerequisite for the applicability of EU law in Italy. In this regard, there is no doubt that the principle of legality in criminal matters is an expression of a supreme principle of the legal order, laid down by Article 25.2 of the Constitution, which requires that criminal rules must be precise and must not have retroactive effect. Although it is well known that certain Member States of the European Union embrace a procedural concept of limitation, to which the judgment given in the

Taricco case is closer, under the Italian legal system, the legal regime governing limitation periods is subject to the principle of legality in criminal matters laid down by Article 25.2 of the Constitution. It is therefore necessary to describe it in detail, as is done for the offence and the punishment, by means of a rule in force at the time the offence was committed. From this perspective, the Court is convinced that an individual could not have reasonably considered, prior to the judgment given in the *Taricco* case, that Article 325 TFEU required the courts to disregard the last paragraph of Article 160 and Article 161.2 of the Criminal Code. Were the application of Article 325 TFEU to entail the incorporation into the legal order of a rule incompatible with the principle of legality in criminal matters, as put forward by the referring courts, the Constitutional Court would be under a duty to prevent it.

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

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

Finally, even in the event that it were concluded that limitation is procedural in nature, or that it may in any case also be regulated by legislation enacted after the offence was committed, this would not affect the principle that the activity of the courts must be governed by sufficiently precise legal provisions. In this regard, while Article 325 TFEU sets out an obligation as to a clear and unconditional result, according to the ruling of the Court of Justice, it fails to indicate in sufficient detail the path which the

criminal courts must follow in order to achieve that purpose. This could potentially end up allowing the judiciary to exceed the limits applicable to the exercise of judicial powers in a State governed by the rule of law, and does not appear to comply with the principle of legality laid down in Article 49 of the Charter.

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

Cross-references:

European Court of Human Rights:

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

Court of Justice of the European Union:

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

Languages:

Italian.



Japan Supreme Court

Important decisions

Identification: JPN-2006-1-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 14.09.2005 / **e)** (Gyo-Tsu) 82, 2001, (Gyo-Hi) 76, (Gyo-Tsu) 83/2001; (Gyo-Hi) 77/2001 / **f)** Judgment on the right to vote of Japanese citizens residing abroad / **g)** *Minshu* (Official Collection of the decisions of the Supreme Court of Japan on civil cases), 59-7-2087 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.1. General Principles – Democracy – **Representative democracy.**
 4.9.3. Institutions – Elections and instruments of direct democracy – **Electoral system.**
 4.9.7.1. Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**
 5.2.1.4. Fundamental Rights – Equality – Scope of application – **Elections.**
 5.3.41.1. Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

Keywords of the alphabetical index:

Election, vote, citizen residing abroad.

Headnotes:

Precluding Japanese citizens residing abroad from voting at all in national elections is in breach of the constitutional right to vote under Articles 15.1, 15.3, 43.1 and 44 of the Constitution.

Summary:

1. The appellants, Japanese citizens residing abroad, contend that the Public Offices Election Law, which completely or partly precludes Japanese citizens residing abroad from voting in national elections, is in violation of Articles 14.1, 15.1, 15.3, 43 and 44 of the Constitution.

The second and first instance courts dismissed all suits concerning the right to vote of Japanese citizens residing abroad, on the grounds that none of them could be considered as a legal controversy under Article 3.1 of the Law on Courts and that this was not an exceptional case where the failure by *Diet* members to establish an overseas voting system should be deemed illegal. However, the Supreme Court overturned the judgment in part. The majority ruling by the Court was as follows:

2. Articles 15.1, 15.3, 43.1 and 44 of the Constitution guarantee the right to take part in national administration by voting in national elections as an inalienable right, and, to achieve this goal, it guarantees equal opportunity to vote. Therefore, it is impermissible in principle to restrict the right to vote or the exercise of the right to vote. Any such restrictions can only be imposed if they are unavoidable. Such unavoidable grounds would only exist where it would be almost impossible or extremely difficult to allow the exercise of the right to vote whilst maintaining fairness in elections.

Firstly, under the Public Offices Election Law before the partial amendment in 1998 (the “Amendment”), Japanese citizens residing abroad were not listed on the electoral roll and thus could not vote. In the past, there may have been difficulties in setting up an infrastructure to enable Japanese citizens residing abroad to vote, such as providing Japanese diplomatic establishments abroad with adequate human and material resources. However, the Cabinet had already put forward the Amendment Bill in 1984, with a view to establishing an overseas voting system applicable to all national elections, on the assumption that it should be possible to overcome such obstacles. It cannot therefore be argued that there were unavoidable grounds preventing the *Diet* from establishing an overseas voting system for more than ten years since the amendment bill was quashed.

Secondly, the Amendment of the Public Offices Election Law established an overseas voting system, which allows Japanese citizens residing abroad to exercise the right to vote in national elections. However, it was also stipulated that, for the time being, Japanese citizens residing abroad were allowed to vote only in national elections under the proportional representation system and not those held under the constituency system. The rationale behind this partial restriction was that it was difficult to provide Japanese citizens residing abroad with correct information on individual candidates, and the proportional representation system was simpler to administer. It was viewed as the first step towards establishing an overseas voting system. However, in view of the repeated use of the overseas voting

system and remarkable progress in global communication technology since the Amendment, there is no longer any difficulty in providing Japanese citizens residing abroad with correct information on individual candidates. Therefore, it cannot be said that there will be unavoidable grounds precluding Japanese citizens residing abroad from voting in national elections under the constituency system, at least at the time of the first national election to be held after this judgment is handed down.

Consequently, the Public Offices Election Law before the Amendment was in violation of Articles 15.1, 15.3, 43.1 and 44 of the Constitution and the same law after the Amendment will be in violation of the same articles of the Constitution at the time of the first national election after this judgment, because it completely or partly precludes Japanese citizens residing abroad from voting.

Languages:

Japanese, English (translated by the Court).



Identification: JPN-2008-3-002

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 04.06.2008 / **e)** (Gyo-Tsu) 135/2006 / **f)** / **g)** *Minshu* (Official Collection of the decisions of the Supreme Court of Japan on civil cases), 62-6 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 3.21. General Principles – **Equality.**
 5.2.2.12. Fundamental Rights – Equality – Criteria of distinction – **Civil status.**
 5.3.8. Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**
 5.3.44. Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Nationality, acquisition by descent / Nationality, refusal.

Headnotes:

Article 3.1 of the Nationality Act provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality only if the parents later enter into matrimony; in 2003 at the latest, this provision was in violation of the Constitution's guarantee of equality before the law under Article 14.1.

The unconstitutionality of the above provision does not result in nullity of the provision of Article 3.1 as a whole. Article 3.1 should be read without the part that imposes an excessive requirement, and therefore a child will acquire Japanese nationality if he or she satisfies the requirements for acquisition of Japanese nationality except for the requirement of the marriage of the parents.

Summary:

I. Article 2.1 of the Nationality Act provides that a child shall be a Japanese citizen if the father or mother is a Japanese citizen at the time of birth, applying the principle of *jus sanguinis*.

Article 3.1 of the Nationality Act in effect provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality, if the child has acquired the status of a child born in wedlock as a result of the marriage of the parents.

The applicant, who was born to a father who is a Japanese citizen and a mother who has nationality of the Republic of the Philippines, a couple having no legal marital relationship, submitted a notification for acquisition of Japanese nationality to the Ministry of Justice on the grounds that he or she was acknowledged by the father after birth. However, the minister determined that the applicant had not acquired Japanese nationality due to failure to meet the requirement of the marriage of the parents. The applicant sued the State, seeking a declaration that the applicant has Japanese nationality. It was alleged *inter alia* that Article 3.1 of the Nationality Act was in violation of Article 14.1 of the Constitution which provided for equality before the law.

The Court of First Instance decided in favour of the applicant.

The judgment of second instance dismissed the applicant's claim without considering the constitutionality of Article 3.1 of the Nationality Act. It ruled that even supposing that the provision of said Article

should be in violation of Article 14.1 of the Constitution and therefore void, this does not lead to creating a new system for granting Japanese nationality to a child born out of wedlock who only satisfied the requirement of acknowledgment by a Japanese father after birth (but does not satisfy the requirement of the marriage of the parents).

The Supreme Court quashed the judgment of the second instance for the following reason. (There are both concurring and dissenting opinions.)

II. The legislative purpose of the provision of Article 3.1 of the Nationality Act, granting Japanese nationality only to persons who have a close tie with Japan, has a reasonable basis, and at the time when this provision was established, a certain reasonable relevance could be found between this provision and the legislative purpose. However, due to changes in social and other circumstances both in Japan and abroad, it is now difficult to find any reasonable relevance between the policy of maintaining legitimisation as a requirement to be satisfied when acquiring Japanese nationality, and the above mentioned legislative purpose.

Under these provisions, a child born in wedlock to a Japanese father or mother can acquire Japanese nationality by birth, as can a child born out of wedlock but acknowledged by a Japanese father before birth, and a child born out of wedlock to a Japanese mother. However, a child born out of wedlock who is acknowledged by a Japanese father after birth but has not been legitimised is unable to acquire Japanese nationality. Considering that acquisition of Japanese nationality is highly significant in terms of enjoying the guarantee of fundamental human rights and other benefits in Japan, the disadvantages that children would suffer from such discriminatory treatment cannot be overlooked, and there is no reasonable relevance between such discriminatory treatment and the above-mentioned legislative purpose.

In view of these circumstances, although the legislative purpose itself has a reasonable basis, reasonable relevance between the provision of Article 3.1 of the Nationality Act and the legislative purpose no longer exists. Consequently, by 2003 at the latest, this provision was in violation of Article 14.1 of the Constitution.

However, if the whole part of said provision is made void and the chance to acquire Japanese nationality is denied even for a child who is legitimised, this would ignore the purpose of said Act, and can hardly be perceived as the lawmakers' reasonable intention. Therefore such a legal construction is unacceptable.

In light of the demand for equal treatment under Article 14.1 of the Constitution and the principle of *jus sanguinis*, it should be construed that a child born out of wedlock to a Japanese father and a non-Japanese mother is allowed to acquire Japanese nationality by making a notification if he or she satisfies the requirements prescribed in Article 3.1 of the Nationality Act save for the requirement of the marriage of the parents. Such construction is also appropriate from the perspective of opening a path to direct relief for people subject to unreasonable discriminatory treatment.

The Court took the view that this interpretation was permissible, because it equated to cases where the Court creates a new requirement for acquisition of Japanese nationality not stipulated within the law, and carries out a legislative act that should originally be performed by the Diet.

In conclusion, a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth shall be allowed to acquire Japanese nationality under Article 3.1 of the Nationality Act if the child satisfies the requirements prescribed in this paragraph, save for the requirement of the marriage of the parents.

Languages:

Japanese, English (translation by the Court).



Identification: JPN-2014-2-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 04.09.2013 / **e)** (Ku) 984/2012, (Ku) 985/2012 / **f)** / **g)** *Minshu*, 67-6 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.1.1. Fundamental Rights – General questions – **Entitlement to rights.**

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

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

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

Keywords of the alphabetical index:

Inheritance, child born out of wedlock, equal treatment with legitimate child, right to inherit, statutory rules / Discrimination, children, marital status.

Headnotes:

A Civil Code provision that stipulates different statutory share in the inheritance between a child born out of wedlock and a child born in wedlock violated the Japanese Constitution, which guarantees equality under the law as of July 2001 at the latest.

The judgment has no effect on any legal relationships that have already been fixed by rulings. Also, it does not impact other judicial decisions on the division of estate, agreements on division of estate or other agreements made on the assumption of the said provision with regard to other cases of inheritance that commenced between July 2001 and this judgment.

Summary:

I. This case concerns the estate of the decedent, who died in July 2001. The appellees (decedent's children born in wedlock) filed a petition for a ruling on the division of the decedent's estate against the appellants (decedent's children born out of wedlock). The appellants argued that a part of Article 900.4 of the Civil Code, which provides that a child born out of wedlock shall only be entitled to half of the share in inheritance that a child born in wedlock is entitled to receive (hereinafter, the "Provision"), violates Article 14.1 of the Constitution, which provides for equality under the law, and therefore void.

II. The Supreme Court noted that the legislature has reasonable discretion to define the inheritance system. Despite its discretionary power, it is appropriate to construe that the distinction violates Article 14.1 of the Constitution if there is no reasonable ground for the said distinction. The circumstances taken into consideration in order to define the inheritance system change with the times. Therefore, the reasonableness of the Provision should be regularly examined and scrutinised in light of the Constitution, which provides for individual dignity and equality under the law.

The Supreme Court also noted that in Japan, the forms of marriage and family have greatly diversified and people now have diverse perceptions of marriage and family since the introduction of the Provision in 1947. Since the late 1960s, most countries have abolished discriminatory legal distinctions to make the

inheritance share between children born in and out of wedlock equal. Countries that have retained the distinction are rare at present. United Nations committees have repeatedly expressed concerns, recommending that Japan redress the discriminatory provisions relating to nationality, family register, and inheritance, including this Provision.

In Japan, an ordinance regarding the entry of a child's relationship with the head of his or her household in his or her residence certificate was revised in 1994, and an ordinance regarding the entry of the relationship of a child born out of wedlock with his or her mother or father in the family register was revised in 2004. As a result, a child born out of wedlock must be indicated in the same manner as a child born in wedlock in the residence certificate and the family register. Furthermore, in the judgment of the Grand Bench of the Supreme Court of 2008, the Court declared that Article 3.1 of the Nationality Act, which provided rules to acquire Japanese nationality for children born out of wedlock, had violated Article 14.1 of the Constitution as of 2003 at the latest. In response to this Supreme Court judgment, the Nationality Act was revised.

In addition, the Supreme Court pointed out repeatedly the issue of the Provision since the 1995 Grand Bench Decision was rendered.

Considering the abovementioned changes from the time of the 1947 Civil Code revision introducing the Provision until now, it can be said that respect for individuals in a family, which is a collective unit, has been recognised more clearly. It is now impermissible, as a result of such change in the recognition, to treat children differently because their mother and father were not in a legal marriage when the children were born, which the children themselves had no choice or chance to correct. Rather, all children must be respected as individuals and their rights must be protected.

Putting all the above mentioned points together even in light of the discretionary power vested in the legislative body, the distinction in terms of the statutory share in inheritance between children born in wedlock and children born out of wedlock had lost reasonable grounds by the time the inheritance of the present case commenced as of July 2001 at the latest. Consequently, the Provision had contravened Article 14.1 of the Constitution.

If the judgment of unconstitutionality made by the decision of the present case is deemed to have a *de facto* binding force as a precedent and affect the division of estate, for instance, and ultimately impact already solved cases, this would amount to

considerable harm to legal stability. Therefore, it is inappropriate to overturn at present such legal relationships that have already been fixed among the parties concerned by means of judicial decisions, agreement, etc.

Consequently, it is appropriate to construe that the judgment of unconstitutionality set by the decision of the present case has no effect on any legal relationships that have already been fixed by rulings. Also, it shall not impact other judicial decisions on division of estate, agreements on division of estate or other agreements, etc. made on the assumption of the Provision with regard to other cases of inheritance that have commenced during the period after July 2001 until the decision of the present case is rendered.

The decision has been rendered by the unanimous consent of fourteen Justices. Three Justices expressed concurring opinions respectively.

Supplementary information:

As a consequence of this decision, the provision was repealed in December 2013.

Languages:

Japanese, English (translation by the Court).



Kazakhstan

Constitutional Council

Important decisions

Identification: KAZ-2003-2-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 23.04.2003 / **e)** 4 / **f)** On the Official Interpretation of Articles 2.2 and 6.3 of the Constitution of the Republic of Kazakhstan. Resolution of the Constitutional Council of the Republic of Kazakhstan no. 4 of 12 May 2003 / **g)** *Kazakhstanskaya pravda* (Official Gazette) / **h)** CODICES (English, Russian).

Keywords of the systematic thesaurus:

3.1. General Principles – **Sovereignty**.
3.8.1. General Principles – Territorial principles – **Indivisibility of the territory**.
4.10.8. Institutions – Public finances – **Public assets**.
4.16. Institutions – **International relations**.

Keywords of the alphabetical index:

Land, allocation, principles / Diplomatic representation, land use.

Headnotes:

Article 2.2 of the Constitution stating that the state ensures the integrity, inviolability and inalienability of its territory is to be understood as a prohibition of the dismemberment of its territory, of the use of natural resources without the consent of the government, of the arbitrary change of the status of Kazakhstan regions and of territorial concessions to the prejudice of national interests as well as the safeguarding of the inviolability of the frontiers and the sovereignty of the state.

Land shall be made available by way of lease to foreign countries for allocation to their diplomatic representatives accredited in Kazakhstan. The existence of the jurisdiction of foreign countries on the territory allocated to their diplomatic representatives does not violate the principles of sovereignty, integrity, inviolability and inalienability of the territory recognised by international law and set out in Article 2.2 of the Constitution.

Land made available to foreign countries for allocation to their diplomatic representatives shall remain the property of the state.

In conformity with Article 6.2 of the Constitution, the right to regulate real property relations in the country belongs to the state, which establishes the legal regulation of ownership and alienation of land. The legislator shall set out the grounds, conditions and limits of land ownership and the subjects and objects of the legislation.

Making land available to foreign countries for their diplomatic representatives accredited in Kazakhstan shall be carried out according to the international agreements ratified by the state.

Summary:

The Chairman of the Parliament (Mazhilis) of Kazakhstan applied to the Constitutional Council for an interpretation of Articles 2.2 and 6.3 of the Constitution. According to Article 2.2, “the state ensures the integrity, inviolability and inalienability of its territory”. Article 6.3 provides:

“The land and underground resources, waters, flora and fauna, other natural resources shall be owned by the state. The land may also be privately owned on terms, conditions and within the limits established by legislation”.

The application questioned whether the said provisions of the Constitution implied that the assignment of land exceptionally designated for allocation to the diplomatic representatives accredited in Kazakhstan must be provided for by way of legislation.

The Constitutional Council recalled that the notion of the territory of Kazakhstan in the Constitution is closely connected with the notion of its sovereignty. Article 2.2 sets out that “the sovereignty of the Republic extends to its entire territory”. The territory of the state is the spatial border within which the state exists and functions as a sovereign organisation of power. It is the supreme power on this territory, indivisible and independent. The land and underground resources, waters, flora and fauna, other natural resources found within the territory of the Republic are the public and legal property of Kazakhstan.

Land made available to foreign countries for allocation to their accredited diplomatic representatives may only be made available by way of a legal form that does not result in the land being excluded from the public and legal property of Kazakhstan. That legal form is a lease.

The Republic, when it makes land available to foreign countries for allocation to their accredited diplomatic representatives, must ensure the integrity, inviolability and inalienability of its territory. The conditions under which land is made available are to be laid down on the basis of the nature of the particular relationship of Kazakhstan with a foreign country.

Languages:

English, Russian.



Identification: KAZ-2004-1-001

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 of the Constitutional Council of the Republic of Kazakhstan no. 4 of 21 April 2004 / g) *Kazakhstanskaya pravda* (Official Gazette) / h) CODICES (Kazakh, Russian).

Keywords of the systematic thesaurus:

3.13. General Principles – **Legality.**

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

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

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

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

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

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

Keywords of the alphabetical index:

Media, access / Media, media law.

Headnotes:

The restriction of the right to demand that a newspaper publish a correction or retraction to Kazakh citizens only is unconstitutional.

Freedom of expression may be limited only by law and not by sub-statutory acts.

The revocation of mass media registration certificates without the possibility of appealing to a court is unconstitutional.

Summary:

1. Article 20.2 of the Constitution of the Republic of Kazakhstan states: “everyone shall have the right to freely receive and disseminate information by any means not prohibited by law”. The decision of the Constitutional Council of the Republic no. 12 of 1 December 2003 states: “the Constitution of the Republic of Kazakhstan differentiates the legal status of a person by using the terms “a citizen of the Republic of Kazakhstan”, “everyone”, “all”, “foreigners” and “persons without citizenship”. At the same time it is necessary to understand that where the text of the Constitution speaks of “everyone” and “all”, it means both citizens and non-citizens of Kazakhstan.

The Preamble of the law sets out: “the law.. aims at the realisation of the right on the 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 considers that “citizen”, the term used in the law, narrows the application of the law and leads to a 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 on demanding the publication of a correction or retraction only to citizens of the Republic do not correspond to the above-mentioned provisions 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”).

2. Article 5.1 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 amount to two of the main principles of mass media activity. The above-mentioned provisions of the law assume that freedom of speech and the right to freely receive and disseminate information may be restricted not only by law, but also by normative legal acts. That conflicts 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”), which provide guarantees from unlawful rule-making.

3. The restrictions of the freedom of speech laid down by the law, together with Article 8.4 of the law, enable the authorised body in the field of mass media to take a decision to revoke a television radio broadcasting licence and to revoke or annul a mass media registration certificate issued in proper legal form (Articles 24.4 and 12.11). The restrictive nature of those measures is such that they should only be imposed by the courts. That follows from Article 76.2 of the Constitution: “judicial power shall be extended to all cases and disputes arising on the basis of the Constitution, laws...”. That statement also reflects the legal positions in the normative decision of the Constitutional Council no. 7/2 of 29 March 1999: “the right is given to the court on the basis of the law to pronounce judgment.. allowing restrictions of some constitutional rights of individual and citizen”.

Consequently, Article 8.4 of the law allowing the authorised body to revoke mass media registration certificates conflicts with the general provisions, principles and rules of the Constitution safeguarding the constitutional rights on the freedom of speech (Articles 1.1, 12.1, 13.2, 20.1, 75.1 and 76.2 of the Constitution).

Accordingly, the Constitutional Council of the Republic held that the mass media law of the Republic of Kazakhstan adopted by the Parliament of the Republic on 18 March 2004 and submitted for signature to the President of the Republic of Kazakhstan on 25 March 2004 was not in accordance with the Constitution.

The Constitutional Council also noted that there were some difficulties with the law in relation to questions of legal techniques.

Languages:

Kazakh, Russian.



Identification: KAZ-2010-1-004

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 11.02.2009 / **e)** 1 / **f)** Review of the constitutionality of the Law of the Republic of Kazakhstan “On the insertion of amendments in certain legislative acts of the Republic of Kazakhstan on questions of freedom of conscience and religious communities” / **g)** *Kazakhstanskaya pravda* (Official Gazette), 2009, 68-69; *Juridical Newspaper*, 2009, 80;1 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

4.4.3.1. Institutions – Head of State – Powers – **Relations with legislative bodies.**

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

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

Keywords of the alphabetical index:

Religion, church and State, peaceful co-existence / Community, religious / Religion, religious worship, protection.

Headnotes:

The secular nature of the State, established by Article 1.1 of the Constitution, assumes the separation of Church and State, and also the equality of all religious communities before the law. According to the law of the Republic of Kazakhstan, freedom to meet for the purpose of satisfying religious needs and freedom to disseminate religious convictions are not absolute and may be limited by the law in accordance with the Constitution. Such a concept is in keeping with international human rights standards and in particular with Article 18 of the International Covenant on Civil and Political Rights, which has been ratified by the Republic of Kazakhstan and which provides that “freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals”.

Summary:

On 26 November 2008, the Parliament of the Republic of Kazakhstan adopted the Law “on the insertion of changes and amendments into certain legislative acts of the Republic of Kazakhstan on questions of freedom of conscience of religious communities” and had submitted it to the President for his signature.

The President had then requested the Constitutional Council to review the constitutionality of that Law. After examining the application, the Constitutional Council adopted the following decision: the Law “on

the insertion of changes and amendments into certain legislative acts of the Republic of Kazakhstan on questions of freedom of conscience of religious communities” sought to strengthen the rules on freedom of conscience and the activities of religious communities and groups. The Constitutional Council noted that, in that Law, the legislator unlawfully restricted the circle of persons enjoying privileges and also the circle of persons whose legitimate interests must be protected by the competent organ, insofar as it excluded from the number of such persons aliens and individuals without citizenship who were lawfully on the territory of Kazakhstan. That contradicted the constitutional principle that all persons are equal before the law. Section 1.3.4 of the Law under review, with respect to the possibility of a restriction of “freedom of conscience”, was not consistent with Article 39.3 of the Constitution. In the course of its review of Section 1.2.1 of the Law, the Constitutional Council had noted a semantic error in the text of the Russian and Kazakh versions, which distorted the content of the legal rule and made a single interpretation impossible. Thus, on the basis of Article 7.2 of the Constitution, it was impossible to apply that rule in practice. The Constitutional Council noted that the wording of certain of the provisions of the contested Law failed to comply with the rules on legal technique, which rendered their application impossible.

The legal and technical flaws in the contested Law were apt to give rise to different understandings of its provisions, which might in practice lead to a free interpretation, an inadequate application of the measure in question and ultimately an arbitrary restriction of human and civil rights and freedoms.

For the reasons set out above, the contested Law was deemed unconstitutional and, in consequence, was not signed by the President.

Languages:

Kazakh, Russian.



Identification: KAZ-2010-1-005

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 05.11.2009 / **e)** 6 / **f)** Official interpretation of the norms of Article 4 of the Constitution in accordance with the order of enforcement of decisions of international organisations and their organs / **g)** *Kazakhstanskaya pravda* (Official Gazette), 2009, 283; *Juridical Newspaper*, 2009, 197 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

3.1. General Principles – **Sovereignty.**

3.2. General Principles – **Republic/Monarchy.**

3.6.1. General Principles – Structure of the State – **Unitary State.**

4.16.1. Institutions – International relations – **Transfer of powers to international institutions.**

Keywords of the alphabetical index:

International agreement, direct applicability.

Headnotes:

The Republic of Kazakhstan is an independent State and a primary subject of international relations. It pursues a policy of co-operation and good neighbourly relations with other States on the basis of the Constitution and in accordance with international treaties and the law. According to Article 4 of the Basic Law, the Constitution, organic laws, laws, international treaties and other international obligations, decisions of the Constitutional Council and of the Supreme Court constitute the law in force in the Republic. Article 4.3 of the Constitution provides that international treaties, duly ratified by the Republic, have higher authority than that of laws and apply directly, except where that application requires the adoption of a law.

Summary:

On 7 October 2009, the Prime Minister made an application to the Constitutional Council concerning the interpretation to be given to Article 4 of the Constitution, on the priority of international treaties over laws and the direct application of those treaties. The question was whether that priority extended to decisions of international organisations and their organs, established on the basis of duly ratified international treaties. It was the Government's intention, in that regard, that Article 7 of the Treaty of

6 October 2007 establishing the Commission of the Customs Union between Russia, Belarus and Kazakhstan, which provides that the Commission's decisions are binding on the Parties, should be observed. That Commission is an organ to which, on the basis of the principles of the voluntary gradual transfer of part of the powers of the State, the power to ensure the functioning and development of the Customs Union is to be transferred.

After examining the above application, the Constitutional Council adopted the following decision. The Constitution does not establish a special rule providing for the possibility of transferring certain powers of the State organs to international organisations and their organs. Furthermore, the Republic of Kazakhstan's status as a sovereign State enables it to take such decisions while observing the principles and rules established by the Constitution. Article 4.3 of the Constitution provides that "international treaties, duly ratified by the Republic, have higher authority than that of laws and apply directly, except where that application requires the adoption of a law". Where those provisions are applied to the acts of international organisations, established in accordance with the international treaties duly ratified by the Republic, that means that where the text of the Treaty indicates that such acts are binding, the States Parties and their organs must take all measures necessary to comply with that requirement, including bringing national legislation into line with those acts. Thus, if the act of the Commission, which, according to the Treaty, is binding, proves to be contrary to a law of the Republic, then, in accordance with the general principles, the legal norm adopted by the Commission is applied.

Furthermore, the Constitutional Council observed that it is not permissible to recognise as binding decisions of international organisations and their organs which are adopted in breach of the positions of Article 91.2 of the Constitution. That Article provides that the sovereignty of the Republic extends to its entire territory and that it is prohibited to impair its territorial integrity, the unitary regime of the State and the republican form of government. In addition, decisions of the Commission which harm constitutional human and civil rights and freedoms cannot take priority over the laws of Kazakhstan.

Thus, Article 4.3 of the Constitution, on the priority of international treaties over laws, also extends to decisions of international organisations and their organs established on the basis of a convention. But, in accordance with Article 4.2 of the Constitution, decisions of international organisations and their organs cannot run counter to the Constitution of the Republic.

Decisions of international organisations and their organs may have direct effect in the domestic legal order of Kazakhstan, where the treaties establishing them provide that those decisions are to be mandatory.

In the event of a conflict between such a decision and a provision laid down in the domestic law of the Republic, the decision is to be applied until the conflict is exhausted.

Decisions of international organisations and their organs which harm constitutional human and civil rights and freedoms cannot be directly applied or take priority over the laws of Kazakhstan.

Languages:

Kazakh, Russian.



Identification: KAZ-2011-1-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 31.01.2011 / **e)** 2 / **f)** On examining the constitutional compliance of the Law of the Republic of Kazakhstan on making amendments to the Constitution of the Republic of Kazakhstan / **g)** *Kazakhstanskaya pravda* (Official Gazette), 26.04.2008 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

4.4.5.2. Institutions – Head of State – Term of office – **Duration of office.**

4.9.5. Institutions – Elections and instruments of direct democracy – **Eligibility.**

Keywords of the alphabetical index:

Head of state, elections.

Headnotes:

The legislation which amended the Constitution so that limitations on the extension to the term of office of the Head of State did not apply to the First President of the Republic of Kazakhstan, was found to be insufficiently clear and precise. It did not

conform to the constitutional principles of judicial accuracy and predictability of consequences and was therefore unconstitutional.

Summary:

I. The Law on making amendments to the Constitution of the Republic of Kazakhstan was adopted by Parliament on 14 January 2011 and presented on that date to the Head of State for signature.

It amended the second part of Article 42.5 of the Constitution as follows:

“The present limitation does not apply to the First President of the Republic of Kazakhstan; the term of his presidential powers may be extended at the referendum of the Republic of Kazakhstan.”

In accordance with Article 72.1.2 of the Constitution, the President of the Republic of Kazakhstan sent the Law to the Constitutional Council, to verify its compliance with the Constitution.

II. The provisions in Articles 41.1, 41.2, 41.5 and 42.1, 42.2 and 42.3 of the Law regulate the beginning and end of the presidential mandate. They cover matters such as the election of the Head of State by citizens who are of age on the basis of general, equal and direct electoral rights during a secret ballot; requirements of candidates for Presidency of the republic; the term of presidential authority, the time frame for elections and the method of determining their results; the text of the oath and the order of assumption of office, and reasons and procedure for the termination of the President’s authority.

The specific purpose of Article 42.5 of the Constitution is to prevent the same person being elected as President more than twice. However, under the new version of Article 42.5, this limitation did not extend to the First President of the Republic of Kazakhstan – (*Elbasy*); his term of presidential authority could be extended at a referendum.

The Constitutional Council stated that point 1 of the Law did not convey sufficiently clearly the length of time for which the authority of the First President of the Republic of Kazakhstan might be extended. No indication was given as to whether this extension was of a one-off or of a repeated nature, or as to whether it presupposed that the elections of the Head of State could be dispensed with altogether.

The poor definition of this constitutional norm could pave the way for imbalance within the state and the social institutions.

The Constitutional Council stressed that the law must conform to the requirements of judicial accuracy and predictability of consequences. Its norms must be formulated accurately, eliminating the possibility for free interpretation and application of legal positions (normative decrees of the Constitutional Council no. 2 of 27 February 2008, no. 1 of 11 February 2009 and no. 5 of 20 August 2009).

The amendments made by the Law to the Constitution were not therefore in conformity with the Constitution.

Languages:

Kazakh, Russian.



Identification: KAZ-2012-3-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 13.04.2012 / **e)** 5 / **f)** On the Official Interpretation of the Norms of the Constitution on the Issues of the Calculation of Constitutional Terms / **g)** *Kazakhstanskaya pravda* (Official Gazette), 19.04.2012 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Arrest and detention, safeguard / Court control / Detention, duration / Detention, lawfulness / Judicial supervision / Protection, judicial, effective, right / Liberty, personal, right.

Headnotes:

The constitutional provision on the detention of a person for a period exceeding seventy-two hours without the sanction of a court means that no later than this specified time a judgement must be made as to whether an application for arrest and detention

is to be made concerning a detainee, and any other measures provided by the law taken. Otherwise the detainee is subject to release.

Summary:

I. On 1 March 2012, the Prime Minister filed an appeal requesting the Constitutional Council to provide an official interpretation of the provisions of the Constitution of the Republic of Kazakhstan concerning the calculation of terms of detention.

The Prime Minister contended that the Constitution does not establish in all cases the starting point for the calculation of and termination of the terms of detention to which explicit reference is made in its text and does not specify or define the date from which the beginning of the calculation and the termination of terms should proceed.

II. The Constitutional Council began its decision by noting that, according to Article 1.1 of the Constitution, the individual, his life, rights and freedoms are accorded the highest values in the state.

The right to personal freedom is one of the fundamental human rights (Article 16.1 of the Constitution). It belongs to everyone by virtue of birth, is recognised as absolute and inalienable, and Article 39 of the Constitution lists it as one of the rights and freedoms which may not be limited in any event save for the exceptional reasons enumerated in Article 39.1 of the Constitution.

Article 16 of the Constitution provides that arrest and detention shall be allowed only in cases stipulated by law and with the sanction of a court, and that an arrested person has a right of appeal. Article 16 further provides that without the sanction of a court, a person may be detained for a period not exceeding seventy-two hours; and that every person detained, arrested and accused of committing a crime shall have the right to the assistance of a defence lawyer (defender) from the moment of detention, arrest or accusation.

“Detention” in constitutional law is defined as a coercive measure, which entails the short-term, no more than seventy-two hours, restriction of the personal liberty of a person in order to suppress an offense or to ensure proceedings on criminal, civil and administrative cases, and also to ensure the application of other measures of compulsory character, which is carried out by authorised government bodies, officials and other persons on the basis, and within the framework, provided by the law.

The Constitutional Council interpreted the constitutional proscription of the detention of a person for a period exceeding seventy-two hours without the sanction of a court as meaning that no later than the specified time concerning the detainee a judgement must be made as to whether an application for arrest and detention is to be made, and also other measures provided by the law must be taken. Otherwise, the detainee is subject to release. The Constitutional Council also noted that the legislature has the power to set shorter terms, within seventy-two hours, for adoption of the relevant decisions.

The beginning of the term of detention is that hour to within a minute of the time when restriction of the freedom of the detained person, including the person's freedom of movement, has been realised (e.g. compulsory retention in a certain place, compulsory bringing in inquiry and investigation bodies, capture, closing indoors, coercive action or orders to remain in a certain place), and also any other actions significantly limiting the personal liberty of the person, irrespective of the according of any procedural status to the detainee or the performance of other formal procedures. The moment of the termination of this term is the expiration of seventy-two hours which is calculated as running continuously from the first point of the actual initial detention.

Languages:

Kazakh, Russian.



Korea

Constitutional Court

Important decisions

Identification: KOR-2015-2-002

a) Korea, Republic / **b)** Constitutional Court / **c)** / **d)** 28.01.2014 / **e)** 2012Hun-Ma431, 2012Hun-Ka19 (consolidated) / **f)** Prohibition of Using the Name of a Political Party Whose Registration Has Been Cancelled / **g)** 26-1(1), *Korean Constitutional Court Report* (Official Digest), 155 / **h)**.

Keywords of the systematic thesaurus:

4.5.10.1. Institutions – Legislative bodies – Political parties – **Creation.**

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

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

Keywords of the alphabetical index:

Freedom to form a political party / Political party, registration, cancellation / Political party, name.

Headnotes:

Article 8.1 of the Constitution lays down the fundamental right that every person, in principle, can form a political party without State interference. Although not stipulated in the Constitution, the freedom of political parties to continue their existence and to conduct their political activities is included in the meaning of the freedom to form a political party. Since the political party's name is a strong indicator of its political convictions and policies, the freedom to form a political party includes the freedom that individuals can use the name of their choice in establishing the political party and engaging political activities therein.

Summary:

I. Pursuant to Article 44.1 of the Political Parties Act, the election committee cancelled the registration of the applicants (political parties including the New Progressive Party, the Green Party and the Youth Party), as they failed to obtain more than 2% of total

number of effective votes. Also, the applicants were unable to use their names, such as the New Progressive Party, the Green Party and the Youth Party, due to Article 41.4 of the Political Parties Act, which prohibits the use of the name of a political party whose registration has been cancelled for a certain period of time.

The applicants filed this constitutional complaint for the review of the constitutionality of Article 41.4 of the Political Parties Act and filed a suit to revoke the cancellation of the political party registration. While the case was pending, the applicants filed a motion to request a constitutional review of Article 44.1.3 of the Political Parties Act.

II. The Constitutional Court reviewed Article 44.1.3 of the Political Parties Act, which allows the election commission to revoke the registration of a political party that fails to obtain a seat in the National Assembly after participating in an election of National Assembly members and fails to obtain more than 2% of total number of effective votes. It also reviewed the part related to Article 44.1.3 of Article 41.4 of the Political Parties Act, which prohibits the use of the name of a political party whose registration has been cancelled for a certain period of time. The Court ruled that these provisions violate the freedom to form a political party, running afoul of the Constitution.

1. Whether the Cancellation Provision infringes on the freedom to form a political party

No record or minutes reveal the legislative purposes of the Cancellation Provision when it had been first introduced by the Legislative Council for National Security in 1980 or the minutes of the subsequent sessions of the National Assembly in the process of amendment to the Political Parties Act. Considering the freedom to form a political party guaranteed by Article 8.1 of the Constitution and the legislative purpose of Article 8.4 of the Constitution, any legislation excluding a political party from the process of forming political opinion by the people simply because it is a small party that fails to achieve a certain level of political support should not be allowed under our Constitution.

Having said that, the legislative purpose of the Cancellation Provision can be considered legitimate to the extent that a political party that practically does not have any ability or will to participate in the process of people's forming political opinions can be excluded from such a process in order to foster the development of party democracy. Cancelling the registration of a political party that has no members of the National Assembly or fails to obtain certain number of votes is an effective means to achieve the legislative purposes.

Meanwhile, different from the dissolution of a political party by a ruling of the Constitutional Court, when a political party's registration is revoked pursuant to the Cancellation Provision, a substitute political party can be established upon the same or similar platform as the revoked political party. The name of the revoked political party can be used after a lapse of time as stipulated in the statutory provision. Even so, however, any provision that stipulates the revocation of political party's registration should be legislated based on a strict standard within the necessary minimum scope because it deprives a political party of its existence, making it impossible for the political party to conduct any kind of political activities at all.

Moreover, it is possible to come up with less restrictive measures to achieve the legislative purposes. For example, the cancellation of registration can depend on the election result after providing a political party with several chances to participate in elections for a certain period of time. Alternatively, the cancellation of registration may be limited to political parties that fail to fulfil the statutory requirements for registration or have not participated in elections of the National Assembly members and others for a long time. In this regard, the Cancellation Provision does not satisfy the least restrictive means requirement.

Further, the aforementioned provision is unreasonable in that the registration of a political party that fails to attain a certain level of support in the elections of the National Assembly members is supposed to be cancelled no matter how it had been successful in the Presidential Election or local government elections. It is also problematic that newly established or small parties, frustrated by the Cancellation Provision, would not even venture into elections from the beginning.

For the foregoing reasons, the Cancellation Provision infringes upon the applicants' freedom to form a political party, violating the rule against excessive restriction.

2. Whether the Prohibition Provision infringes on the freedom to form a political party

The Prohibition Provision prevents the name of a political party whose registration has been cancelled under the Cancellation Provision from being used as the title of a political party from the date of such cancellation of registration until the date of election of the National Assembly members first held due to the expiration of their terms. As the Prohibition Provision is premised on the Cancellation Provision, it also infringes upon the freedom to form a political party for the same reasons as reviewed above in the constitutionality of the Cancellation Provision.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2015-2-003

a) Korea, Republic / **b)** Constitutional Court / **c)** / **d)** 27.03.2014 / **e)** 2010Hun-Ka2, 2014Hun-Ga13(consolidated) / **f)** Case on the Prohibition of Night-time Demonstration / **g)** 26-1(1), *Korean Constitutional Court Report* (Official Digest), 324 / **h)**.

Keywords of the systematic thesaurus:

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

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

3.18. General Principles – **General interest.**

3.20. General Principles – **Reasonableness.**

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

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

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

5.5. Fundamental Rights – **Collective rights.**

Keywords of the alphabetical index:

Demonstration, night-time / Restriction, excessive, rule against.

Headnotes:

Night-time demonstration between sunset and midnight of the same day can disrupt public order or legal peace, depending on the general public's lifestyle, duration and forms of demonstrational activities, service hours of public transportation, and business hours of shops and stores. Therefore, the legislator should be granted a margin of discretion to decide whether to place limits on certain demonstrations. Their decision should include several factors, including the peaceful residence, private lives, circumstances and situation of protests unique to Korea, and legal sentiment or common values of the Korean people.

Summary:

I. Two applicants were charged with violating the Assembly and Demonstration Act by allegedly staging a demonstration between sunset and midnight. During the criminal trials, they filed motions to request for the constitutional review of Articles 10 and 23.3 of the Assembly and Demonstration Act (hereinafter, "ADA"). The trial courts granted the motions and requested constitutional reviews on the afore-mentioned provisions.

The subject matter of review is the constitutionality of the part on "demonstration" of the main text of Article 10 of the ADA" (hereinafter, the "instant provision") and the part on "demonstration" of the part of the "main sentence of Article 10" of Article 23.3 of the ADA.

II. The Constitutional Court held that Article 10 of the ADA that stipulates that "[n]o one may stage any demonstration either before sunrise or after sunset" and its penal provision Article 23.3 of the Act are unconstitutional. The Court reasoned that these provisions infringe on the freedom of demonstration under the principle against excessive restriction, as they apply the "demonstration from sunset to midnight of the same day".

1. Definition of "Demonstration" under the ADA

The term "demonstration" under the ADA means an act of persons associated under common objectives:

i. Parading along public places available for the free movement of the general public (e.g., roads, plazas and parks) with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them; or

ii. Displaying their will or vigorous determination with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them. It is not required to demonstrate at public places where people can freely pass or move places, such as parading. The provision of Article 10 of the ADA that grants an exception for outdoor assemblies before sunrise or after sunset does not apply to demonstrations.

2. Whether the Unconditional Ban on the Night-time Demonstration Infringes on the Freedom of Demonstration

Compared to an individual expressing an opinion, a demonstration may cause more conflicts with public safety and order, given that it is associated with the

collective actions of many persons. At night, citizens strongly seek serenity. Compared to the daytime, at night, participants of a demonstration may be more sensitive to emotions, clouded by reasonable judgment, or lose their self-control.

In contrast to daytime demonstrations, night-time demonstrations pose the challenges of maintaining public order and responding to unexpected violent situations. The prohibition on night-time demonstrations under the instant provision is an appropriate means to achieve a legitimate purpose in that it intends to protect the safety and order of our society and maintain peace of the residence and private life of citizens, considering the nature and unique character of night-time demonstrations.

Nonetheless, the instant provision would prevent daytime workers or students from staging or participating in demonstrations held on weekdays during the winter season when daytime is short. The limitation would substantially infringe on or degenerate the freedom of demonstration. In the modern urbanised and industrialised society, the broad and variable traditional meaning of night-time, which is "before sunrise or after sunset", does not present the aforementioned nature or distinctiveness of "night time" in a clear sense.

The distinctiveness of "night-time" corresponds to the unique danger of "late night". Considering that the instant provision prohibits demonstrations "either before sunrise or after sunset", which is a broad and variable time frame, it violates the principle of least restriction beyond the reasonable necessity to achieve the legislative purpose. It also violates the principle of balance of legal interests by excessively restricting the freedom of demonstration for the public interests protected by the instant provision. Therefore, the instant provision infringes on the freedom of demonstration by violating the principle against excessive restriction.

3. Necessity to Limit the Unconstitutional Part

The instant provision includes the constitutional part as well as the unconstitutional part. It should be vested in the Legislature to determine the appropriate means to achieve the legislative purpose while restricting the freedom of demonstration in the least manner, among variable alternatives. Accordingly, we have rendered the incompatibility decision to apply tentatively the ADA provision that prohibited a night-time outdoor assembly in the applicants' 2008Hun-Ka25 Decision. Nonetheless, the failure of legislative revision led to the nullification of the entire provision prohibiting a night-time outdoor assembly, resulting in night-time outdoor assembly being regulated the

same way as daytime outdoor assembly. Although the increase in number of illegal or violent assemblies has not been reported, we are unconvinced that night-time demonstrations do not require any stricter regulation. With the comprehensive considerations of the legal vacuum and practical issues after the aforementioned incompatibility decision, we do not agree that there is a need to tentatively apply the provision that is incompatible with the Constitution.

On the other hand, if the instant provision is deemed incompatible with the Constitution and suspended completely, practical problems would arise in that night-time outdoor assemblies and demonstrations would be regulated as daytime outdoor assemblies and demonstrations. The implications are manifold, including the challenge to address disruptions to the public order or legal peace in case of night-time outdoor assemblies or demonstrations, despite the need for stricter regulations.

Therefore, we declare the instant provision unconstitutional as long as it completely prohibits night-time demonstrations, under the ADA's current regulatory frame that employs time frame as a standard to distinguish between the constitutional part and unconstitutional part of the instant provision. The instant provision and its penal provision, Article 23.3 of the ADA, are unconstitutional when it is applied to a demonstration "from sunset to 24:00 of the same day", which belongs to the "daily living time frame".

Languages:

Korean, English (translation by the Court).



Identification: KOR-2015-2-005

a) Korea, Republic / **b)** Constitutional Court / **c)** / **d)** 27.11.2014 / **e)** 2014Hun-Ba224, 2014Hun-Ka11 (consolidated) / **f)** Case on the Act on the Aggravated Punishment, etc. of Specific Crimes / **g)** 26-2(1), *Korean Constitutional Court Report* (Official Digest), 703 / **h)**.

Keywords of the systematic thesaurus:

3.21. General Principles – **Equality.**

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

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

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

Keywords of the alphabetical index:

Punishment, aggravated / Human dignity / Penal system, legitimacy, balance.

Headnotes:

In principle, a special provision should include additional aggravated elements to the criminal elements stipulated by a general provision. Article 10 of the Act on Aggravated Punishment, etc. of Specific Crimes is a special provision and provides for an aggravated punishment; however, it stipulates the equivalent criminal elements as those in Article 207 of the Criminal Act. Hence, it violates the fundamental principles of the Constitution (e.g., human dignity and the principle of equality) and is against the legitimacy and balance of the penal system.

Summary:

I. The subject matter of review is whether parts of Article 207.1 and 207.4 of the Criminal Act and Article 10 of the Act on the Aggravated Punishment, etc. of Specific Crimes (hereinafter, "AAPSC") (revised by Act no. 10210 on 31 March 2010) (hereinafter, the "instant provision") violates the Constitution. The applicants, who were charged for crimes of counterfeit, during their legal proceedings, requested constitutional review of the AAPSC.

1. 2014Hun-Ba224

One of the applicants was charged with a crime for using fifteen counterfeit 50,000-won bills made with a colour printer and drawing paper at convenience stores and restaurants on 6 February 2014. While his trial was pending, he filed the motion to request a constitutional review of the AAPSC, which was eventually denied on 18 April 2014. Subsequently, the applicant filed this constitutional complaint on 23 May 2014.

2. 2014Hun-Ka11

The other applicant was sentenced to two years and six months in prison on 11 December 2013 for the crimes of counterfeiting six 50,000-won bills and thirty 10,000-won bills made with a laptop computer and multifunction printer to purchase tobacco and other items, together with Hwang OO, Choi OO and

Choi OO. The applicant filed the motion to request a constitutional review of the AAPSC while his appellate procedure was pending on 17 April 2014. The Busan High Court requested a constitutional review of this case, accepting the aforementioned motion, on 9 July 2014.

II. The Constitutional Court reviewed a provision of the AAPSC, which stipulates that crimes prescribed by Article 207 (Crimes of Counterfeiting Currency) of the Criminal Act shall be punished by capital punishment, imprisonment for life or imprisonment for more than five years. The Court held that the instant provision violates the fundamental principles of the Constitution, such as human dignity and the principle of equality, and is against the legitimacy and balance of the penal system.

The instant provision requires the same criminal elements as stipulated in Article 207.1 and 207.4 of the Criminal Act (hereinafter, the “criminal provision”). The only differences are the addition of capital punishment and the increase in the maximum period of imprisonment from two to five years. Even though the instant provision, which is a special provision, should be applied to a case, a prosecutor may indict for the violation of the Criminal Act provision, implying that the choice of applicable law may cause serious imbalances in the penal system.

In principle, a special provision should include criminal elements stipulated by a general provision in addition to other aggravated elements. The instant provision, also, should have included additional aggravated elements, in addition to the elements under the Criminal Act provision. Nonetheless, the instant provision does not stipulate such additional aggravated elements, suggesting that the choice of applicable law is solely within the discretion of a prosecutor, which may cause confusion within law enforcement. It could disadvantage the people and be abused during the investigation procedure. Accordingly, the instant provision clearly lacks the justification and balance of criminal punishment system as a special provision, thereby violating the fundamental principle of the Constitution that promotes human dignity and value and infringing the principle of equality.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2015-2-006

a) Korea, Republic / **b)** Constitutional Court / **c)** / **d)** 19.12.2014 / **e)** 2013Hun-Da1 / **f)** Dissolution of Unified Progressive Party Case / **g)** 26-1(2), *Korean Constitutional Court Report* (Official Digest), 1 / **h)**.

Keywords of the systematic thesaurus:

- 3.3.3. General Principles – Democracy – **Pluralist democracy.**
- 3.16. General Principles – **Proportionality.**
- 3.17. General Principles – **Weighing of interests.**
- 4.5.10.3. Institutions – Legislative bodies – Political parties – **Role.**
- 4.5.10.4. Institutions – Legislative bodies – Political parties – **Prohibition.**
- 4.5.11. Institutions – Legislative bodies – **Status of members of legislative bodies.**
- 5.3.27. Fundamental Rights – Civil and political rights – **Freedom of association.**
- 5.3.28. Fundamental Rights – Civil and political rights – **Freedom of assembly.**
- 5.3.29.1. Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**
- 5.3.30. Fundamental Rights – Civil and political rights – **Right of resistance.**

Keywords of the alphabetical index:

Political party, dissolution, jurisdiction / Basic democratic order / Democracy, progressive / Removal, seat, lawmaker / Political party, activity, objective / North Korean-style socialism, *Juche* ideology.

Headnotes:

Political activities that include meetings to discuss insurrection, as engaged by the Unified Progressive Party (hereinafter, “UPP”), a party motivated to establish the North Korean-style socialism, is against the democratic order. With no other alternative, this party should be dissolved to eliminate the concrete danger of substantial harm that it poses. Dissolving UPP does not violate the principle of proportionality. Disbanding a party for violating constitutional values shall be handled at the expense of the representative nature of lawmakers. Therefore, stripping UPP members of their seats in the National Assembly would be a legitimate and basic operative element of the political party dissolution system.

Summary:

I. The issues for the Constitutional Court in this case are whether a political party's objectives and activities, namely that of the UPP, violate the basic democratic order. If so, the Constitutional Court shall consider whether the UPP should be disbanded and whether the lawmakers affiliated with the Party should be stripped of their seats pending the Party's dissolution.

Headed by Chairperson Lee Jung-hee, the UPP was created on 13 December 2011 by a merger of the Democratic Labour Party (hereinafter, the "DLP"), the People's Participation Party (hereinafter, the "PPP"), and the "Alliance for the Creation of New Progressive Party," whose establishment was led by the members who defected from the New Progressive Party (hereinafter, the "NPP").

The UPP won 13 seats (seven local constituency seats, six proportional representative seats) at the 19th parliamentary election held on 11 April 2012. Immediately after, however, internal conflict occurred in a series of events, including the illegitimate proportional primary, violence at the UPP's central committee, and the controversy over the expulsion of lawmakers Lee Seok-ki and Kim Jae-yeon. Former members of the PPP and the NPP also defected from the UPP in September 2012. Meanwhile, lawmaker Lee Seok-ki of the UPP was indicted on charges including plotting treason on 25 September 2013.

The Government (hereinafter, the "applicant"), following the Cabinet's decision made after deliberation on 5 November 2013, filed a petition on the same day to request the dissolution of the UPP and removal of its lawmakers from office because the party's objectives and activities violate the basic democratic order.

II. This is the first case involving the dissolution of a political party in Korean constitutional history. The Court decided to disband the UPP and strip its lawmakers of parliamentary seats, on grounds that the Party's objectives and activities violate the basic democratic order.

1. The Constitutional Court's jurisdiction over political party dissolution:

The third constitutional amendment authorises the Constitutional Court to review the motion requesting dissolution of political parties, which is a product of modern history where a progressive opposition party was disbanded by the Government's unilateral administrative action. In South Korean history, this mechanism emerged as a procedure to protect

political parties. Even if a party appears to be aggressively undermining the basic democratic order, the Constitution guarantees its existence and activities in forming public political opinions. Thus, the party cannot be disbanded simply by a regular Executive action, but it can be excluded from party politics only when the Constitutional Court finds it unconstitutional and decides that it must be disbanded. This jurisdiction over political party dissolution is also needed as an institutional arrangement to prevent a political party from attacking, seriously damaging, or even abolishing our democratic system and thereby rendering it meaningless.

2. Requirements to dissolve a political party:

Article 8.4 of the Constitution provides that "if the objectives or activities of a political party are against the basic democratic order, the government may bring an action against it in the Constitutional Court." The issue here is precisely how to interpret the requirements of this provision to initiate the adjudication to dissolve the political parties.

A. Meaning of "objectives and activities of a political party"

"Objectives of a political party" generally refers to the political direction or purpose, or political plans to be practically implemented by a political party. Such objectives are mostly manifested in the official party platform or constitution. Other means can be helpful in understanding the party's objectives: official statements by a party's main figures (the chairperson or party executives); publications such as party journals or propaganda materials; and activities of party members who are influential in the party's decision-making process or those who are influenced by the party's ideology. If the real objectives are hidden, they can be unveiled through means other than the party platform.

Meanwhile, "activities of a political party" refer to acts or behaviour by an organ or key officials, members, etc. of a party, which are generally attributable to the party at large.

Considering the structure of the said provision, it is interpreted that the requirement to dissolve a party is met if either the objectives or the activities of a party violate the basic democratic order.

B. Meaning of "basic democratic order":

The idea of the "basic democratic order" stipulated in Article 8.4 of the Constitution is founded upon the pluralistic view based on the autonomy of reason and

presumes that all political opinions have relative truth and rationality. It indicates a political order composed of and operated by the democratic decision-making process accords freedom and equality to defy all sorts of violent, arbitrary control and respects the majority while caring for the minority. Specifically, the key elements of the basic democratic order specified in the current Constitution are popular sovereignty, respect for basic human rights, separation of powers, and pluralistic party system.

C. Meaning of “are against”:

The condition for disbanding a political party set forth in Article 8.4 of the Constitution is “if the objectives or activities of a political party are against the basic democratic order.” The “against” herein does not indicate a simple violation or infringement of the basic democratic order. Instead, it refers to a situation where the party's objectives or activities create the concrete danger of causing a substantial threat to our basic democratic order such that restricting the party's existence itself is necessary, notwithstanding that it is one of the indispensable elements of a democratic society.

D. Compliance with the proportionality principle:

Since a forced dissolution of a political party amounts to a fundamental restriction on the freedom of political party activities (a fundamental, constitutional right), the Constitutional Court, before handing down a decision, has to consider several factors. The Court analysed Article 37.2 of the Constitution, the limitations of a legal state in the intrusive exercise of state powers, and the fact that the dissolution of political parties should be a measure of last resort or subsidiary means. For this reason, even if there is an express provision on the dissolution requirement as provided by Article 8.4 of the Constitution, the Constitutional Court's decision to dissolve a political party can be justified only when there are no other alternatives to effectively remove the unconstitutionality inherent in the party at issue and where the social interests far outweigh its disadvantage. This effectively means limiting the freedom of political party activities and imposing a major restriction on the democratic society.

3. The need to consider inter-Korean confrontation as a particularity of the Korean society:

The Republic of Korea is proclaimed as a target of attack by its practical enemy North Korea and faces an environment where its northern neighbour constantly attempts to subvert its current system. Given the current divided state of the Korean peninsula, we are obliged to simultaneously

contemplate not only the universal principles of constitutionalism, but also a number of practical aspects facing our reality, the nation's particular historical circumstances, as well as the unique awareness and legal sentiment shared by the people.

4. Whether the UPP's objectives and activities contravene the basic democratic order:

A. The values or ideological ideal held by the UPP is “progressive democracy,” which has been interpreted differently depending on the circumstances of the times and the goals corresponding to the ideological disposition and the direction of the party's leading members. Therefore, appreciating the true meaning of progressive democracy advocated by the Party requires looking beyond the literal sense of its platform and examining the detailed process of its adoption. The perception about the platform and the direction taken by the current leaders should also be considered.

The UPP was created through a merger among the DLP, the PPP, and the “Alliance for the Creation of New Progressive Party,” which is composed of members who defected from the NPP, and the so-called “*Jaju* (translated as self-reliance) faction,” which represents the East Kyeonggi Alliance, the Busan Ulsan Alliance, and the Gwangju Jeonnam Alliance that used to be the regional chapters of the “National Alliance for Democracy and Unification of Korea,” advocated or supported the introduction of progressive democracy and even led the creation of the UPP. As the PPP and other countervailing forces defected from the UPP due to events such as the illegitimate proportional primary and the violence at the central committee, the key members of the East Kyeonggi Alliance, the Gwangju Jeonnam Alliance, and the Busan Ulsan Alliance, who uphold progressive democracy, as well as those who share the same ideological ideal with them (hereinafter the “leading members of the Respondent”) have led the party by making decisions according to their policy on major issues, including the selection of party executives. Given their formation process, attitude toward the North, activities, ideological uniformity, etc., the leading members of the UPP mostly practiced *Juche*, a state-imposed system of thought created and implemented by Kim Il Sung. The thought guided the ideology within the anti-government National Democratic Revolution Party (hereinafter, the “NDRP”), the enemy-benefitting Action and Solidarity for the South-North Joint Declaration (hereinafter, the “Action and Solidarity”), and the pro-North Korean Il-sim group, are followers of North Korea.

Inferring from how they perceive and understand the progressive democracy set forth in the UPP's platform, the leading members observe South Korea as a pariah capitalist or a colony under the control of foreign powers and argue that this contradiction is trampling sovereignty and impoverishing the lives of the people. They propose the "progressive democracy system" as a new alternative as well as an interim stage before transitioning to socialism. The leading members propose national self-reliance (*Jaju*, or self-reliance), democracy (*Minju*, or democracy), and national reconciliation (*Tongil*, or unification) as tasks to be undertaken under the platform. They view that people's democratic transformation in South Korea is a precondition to implementing the final platform task, achieving socialism through federalism-based unification and that self-reliance should be first achieved in order to accomplish unification and democracy. They advocate the seizure of power through election and the right of resistance as a way to advance progressive democracy, and claim that, if necessary, the existing free democratic system can be taken over by a new progressive democratic regime through use of force. All considered, the goal of the UPP's platform is to primarily achieve progressive democracy through violence and to finally realise socialism through unification.

B. Since Kim Jong Un came to power following the death of his father Kim Il Sung on 17 December 2011, North Korea has been increasing its threat of military provocation against South Korea since December 2012. Pyongyang launched a long-range rocket using its ballistic missile capabilities on 12 December 2012; conducted its third nuclear test on 12 February 2013; declared invalid the armistice agreement that ended the Korean War on 5 March 2013; stated that it will go on "No. 1" combat ready posture on 26 March 2013; recommended ambassadors in Pyongyang, foreigners residing in North Korea, etc. to leave North Korea by citing an imminent war on 5-9 April 2013; threatened to burn five islands in the West Sea to flames on 7 May 2013 and launched a short-range missile over the East Sea from 18-20 May 2013. Meanwhile, UPP's Lee Seok-ki and other key members of the East Kyeongi Alliance considered the then political landscape as a state of war. Under the lead of Lee Seok-ki, there have been gatherings to plot treason on 10 and 12 May 2013 with the purpose of sympathising with North Korea in the event of war and implementing the use of force, including the destruction of state infrastructure, weapons manufacture and seizure, and disturbance of communication. More than 130 people attended the above gatherings, including three out of five lawmakers affiliated with the UPP and their advisors, central committee members or delegates of the UPP. In light of the detailed circumstances behind the

meetings, the attendees' position and status within the UPP, and the UPP's supportive attitude toward this case, we can attribute the said gatherings to the activities of the Respondent.

In addition, the illegitimate proportional primary, the violence at the central committee, and the manipulation of opinion polls in Gwanak-B district show that members of the UPP sought to secure the election of candidates of their choice through violent means without any debate or voting process. This undermines democratic principles by distorting the democratic formation of opinions within the party, making the election system void.

C. As reviewed above, the UPP leaders aim to accomplish progressive democracy through violence and to ultimately achieve socialism through unification. They are followers of North Korea, and their idea of progressive democracy is overall the same or very similar to the North's revolutionary strategy against South Korea in almost all respects. At the same time, they defend the position of Pyongyang and deny the legitimacy of South Korea, while calling for revolution in line with the theory of People's Democracy Revolution, a tendency that is clearly shown in the insurrection case.

Given the aforementioned circumstances and the fact that the UPP leaders are taking control of the UPP, we can attribute their objectives and activities to those of the UPP. Considering all this, it can be concluded that UPP's true objectives and activities are aimed at initially implementing progressive democracy through use of force and eventually achieving North Korean-style socialism.

D. The North Korean-style socialist regime advocated by the UPP fundamentally contradicts the basic democratic order. It takes the political line proposed by the Chosun Workers Party as the absolute good and advocates a one-man dictatorship and leadership theory associated with the party line that focuses on a particular class. The UPP also contests that violence such as an *en masse* protest can be used to overthrow the existing free democratic system in order to achieve progressive democracy, which, again, is contrary to the basic democratic order. Meanwhile, the activities, such as the meetings aimed at insurrection, the illegitimate proportional primary, the violence at the central committee, and the manipulation of opinion polls in Gwanak-B district, deny the national existence, parliamentary system, and the rule of law in terms of substance. In terms of their means or nature, the activities, which actively resort to violence to serve UPP's purpose, violate the ideas of democracy.

The UPP's activities and gatherings where treason was plotted are grounded on the actual objectives of the UPP and are highly likely to be repeated in similar circumstances. Furthermore, the UPP admission of the possibility of taking over power through violence indicates that many of their activities reveal the concrete risk of inflicting substantial harm to the basic democratic order. In particular, the insurrection case, in which the leading members sympathised with North Korea and discussed specific ways to endanger the existence of South Korea, is a clear demonstration of their true objectives. This exceeds the limits of the freedom of expression and doubles the concrete risk of damage to the basic democratic order.

5. Whether disbanding the UPP is compatible with the proportionality principle:

The UPP's objectives and activities aimed at implementing the North Korean-style socialism contain seriously unconstitutional elements; South Korea is in a unique situation where it faces confrontation with North Korea, a country that strives to overthrow the government of its southern neighbour; there is no alternative other than dissolution in removing the risk of the UPP, since criminal punishment of the party's individual members will not be sufficient to eliminate the danger inherent in the entire party; the importance of social interest of safeguarding the basic democratic order and democratic pluralism far outweighs the disadvantage caused by party dissolution, namely the fundamental restraint on UPP's freedom to engage in party activities or partial restriction on pluralistic democracy. The decision to dissolve the UPP is an inevitable solution to effectively remove the risk posed to the basic democratic order, and is therefore not in violation of the principle of proportionality.

6. Whether members of a political party shall be removed from seats when the party is dissolved by the Constitutional Court:

It is not specified in law whether members of the National Assembly shall lose their seats when the Constitutional Court dissolves their party. Yet, the essence of entrusting the Constitutional Court with the power to disband parties lies in protecting the citizens by excluding the parties opposing the basic democratic order from forming political opinions. It becomes impossible to obtain substantial effectiveness of the decision to dissolve a party unless its members are stripped of their parliamentary membership. Hence, once the Constitutional Court decides to dissolve a political party, its affiliated lawmakers should be removed from their National Assembly seats regardless of how they were elected.

III. Justice Kim Yi-Su provided a dissenting opinion, claiming that UPP's objectives and activities did not give rise to a violation of the basic democratic order and the Constitutional Court's decision is inconsistent with the proportionality principle. Justices Ahn Chang-ho and Cho Yong-ho provided concurring opinions.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-1-002

a) Korea, Republic / **b)** Constitutional Court / **c)** / **d)** 26.06.2014 / **e)** 2012Hun-Ma782 / **f)** Case on the Restriction on Religious Assemblies of Pre-trial Detainees and Unassigned Inmates / **g)** 26-1(2), *Korean Constitutional Court Report (Official Digest)*, 670 / **h)**.

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality**.
 3.17. General Principles – **Weighing of interests**.
 3.18. General Principles – **General interest**.
 3.20. General Principles – **Reasonableness**.
 5.3.18. Fundamental Rights – Civil and political rights – **Freedom of conscience**.
 5.3.20. Fundamental Rights – Civil and political rights – **Freedom of worship**.
 5.3.28. Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Detainee, pre-trial / Inmate, unassigned / Detention centre / Religion, religious assembly / Activity, religious, attendance, restriction.

Headnotes:

Freedom of religion applies to everyone, including inmates and detainees. Limiting an individual's participation in weekly religious activities at a detention centre during pre-trial or during detention as an unassigned inmate (inmates whose additional trial is pending, whose remaining detention period is less than three months or who is subject to transfer) excessively restricted the freedom of religion, because pre-trial detainees as well as sentenced

inmates deserve the opportunity to attend religious activities. The opportunities to attend religious activities are *de facto* not provided for them considering that the detention period of pre-trial detainees and unassigned inmates is short.

Summary:

I. The applicant was being detained on a charge of violating the Punishment of Violence, etc. Act at the Busan Detention Centre from 16 April 2012 to after 26 July 2012, when his conviction was confirmed, because another trial was pending. The applicant filed this constitutional complaint on 19 September 2012, alleging the detention centre's restriction on the applicant's basic rights to participate in religious assemblies held at the facility every Tuesday from 16 April 2012 to 26 July 2012 infringed on his freedom of religion (except from 27 July to 19 September 2012 when the applicant was held as an unassigned inmate). During the time, he was held as a pre-trial detainee, was under investigation and punishment, and then as an unassigned inmate.

II. The Constitutional Court ruled that it was unconstitutional for the warden of the Busan Detention Centre to limit the applicant's participation in religious activities at the detention centre when he was detained from 16 April to 19 September 2012. The restriction infringed on his freedom of religion.

The correctional facility, including a detention centre and prison, requires strict discipline and regulation to maintain the security of the facility, staff, and detainees. Nonetheless, sentenced inmates as well as pre-trial detainees deserve the opportunity to attend religious activities, because religious activities contribute to the education and reformation of inmates, and the mental security of detainees. Moreover, the law provides that detainees can attend religious activities.

The original purpose of religious activities at the detention centre is education and reformation, suggesting that it is reasonable for the detention centre to provide religious activities in principle. Nevertheless, the detention centre provides three or four opportunities to attend religious activities per month for working inmates, which amounts to 1/8 of pre-trial detainees and unassigned inmates. In contrast, pre-trial detainees and unassigned inmates are provided one opportunity to attend religious activities per month in principle. In practice, pre-trial detainees and unassigned inmates are provided one opportunity to attend per year, because the religious assemblies are held at each building in turn, due to the lack of seating capacity and staff.

Considering that the detention period of pre-trial detainees and unassigned inmates is short, the opportunities to attend religious activities are *de facto* not provided for them. Therefore, the detention centre's action excessively restricted the freedom of religion of the applicant even under the consideration of inferior facilities of the Busan Detention Centre.

In addition, the detention centre did not consider the less restrictive means, which could be a way to distribute appropriate opportunities to attend religious activities for the freedom of religion to working inmates and other inmates under the given circumstances, a way to allow the attendance at religious activities by separating accessories or related persons, if any, or a way to allow the attendance of unassigned inmates at the religious activities for working inmates if there are no accessories or related persons. Therefore, the restriction on the attendance at religious activities did not satisfy the least restrictive principle.

The restriction on the attendance at religious activities may contribute to the security and order of the detention centre and the smooth running of religious activities. Nevertheless, such public interests did not exceed the significance of the infringement of freedom of religion, suggesting the principle of balance of interest was violated.

Therefore, the restriction on the attendance at religious activities infringed the freedom of religion of the applicant under the principle against excessive restriction.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-1-003

a) Korea, Republic / **b)** Constitutional Court / **c)** / **d)** 24.07.2014 / **e)** 2009Hun-Ma256, 2010Hun-Ma394 (Consolidated) / **f)** Case on restricting voting right of overseas electors / **g)** 26-2(1), *Korean Constitutional Court Report* (Official Digest), 173 / **h)**.

Keywords of the systematic thesaurus:

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

3.20. General Principles – **Reasonableness.**

4.9.2. Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

4.9.3. Institutions – Elections and instruments of direct democracy – **Electoral system.**

4.9.5. Institutions – Elections and instruments of direct democracy – **Eligibility.**

4.9.9.1. Institutions – Elections and instruments of direct democracy – Voting procedures – **Polling stations.**

4.9.9.6. Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

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

Keywords of the alphabetical index:

Election, by-election / Election, overseas elector, registration / Election, principle of universal suffrage / Domestic residence, report / Parliament, member, local constituency / Referendum, right to participate / Resident, registration.

Headnotes:

The provision of the National Referendum Act that grants voting rights just to registered residents in a given jurisdictional area and overseas Koreans who have reported their domestic residence to the authorities restricts the suffrage of overseas Koreans.

Summary:

I. The applicants are Korean nationals over nineteen-years-old living in Japan and the U.S.A., who neither report their domestic residence nor register as residents (hereinafter, “overseas electors”). They filed this constitutional complaint on 12 May 2009, arguing that Article 218-4.1 of the Public Official Election Act and Article 14.1 of the National Referendum Act infringe on their fundamental right to vote by depriving them of the right to cast votes for National Assembly elections and participate in national referendums.

II. Whereas the Constitutional Court held that the challenged provisions of the Public Official Election Act constitutional, it found unconstitutional Article 14.1 of the National Referendum Act. The Court provided the following analysis.

1. Whether the overseas electors’ right to vote or the principle of universal suffrage is violated by the proviso of Article 15.1 of the Public Official Election Act that does not recognise overseas electors’ right to vote in an election of the National Assembly members

of local constituencies due to the termination of the term of membership (hereinafter, the “Right to Vote Provision”) and by the part of “whenever an election of members of proportional representation for the National Assembly due to the termination of the term of membership are held, any elector who intends to vote overseas shall file an application for registration of an overseas elector” in Article 218-5.1 of the Public Official Election Act (hereinafter, the “Overseas Elector Registration Provision”).

A local constituency National Assembly member speaks for the interests of his or her constituency, and works as a representative of the people. Compared to the Presidential Election or election of proportional representation members for the National Assembly conducted nationwide for which Korean nationals are eligible to vote, local elections require prospective voters to have a “connection with the specific locations” where such elections are held. Requiring the registration as residents and the report of domestic residence to participate in local constituency National Assembly member elections is a reasonable means to certify the relevant people’s local connection. Therefore, the Right to Vote Provision and the Overseas Elector Registration Provision that do not acknowledge overseas elector’s right to vote for an election of members of proportional representation for the National Assembly due to the termination of the term of membership cannot be regarded as infringing on the overseas elector’s right to vote or violating the principle of universal suffrage.

2. Whether the Overseas Elector Registration Provision that does not recognise the right to vote in the by-election of the National Assembly members violates the overseas elector’s right to vote or the principle of universal suffrage

The legislator, while establishing the overseas election system, decided not to allow overseas electors to vote for the by-election of the National Assembly members, because the voting rate of by-elections held in foreign countries would be low. Moreover, it would require tremendous time and expense to conduct overseas by-elections, because whenever the grounds for by-elections are confirmed, diplomatic missions in foreign countries should prepare for such elections. Also, the election system established by the legislator cannot be considered distinctively unreasonable or unfair. Therefore, the Overseas Elector Registration Provision does not violate overseas electors’ right to vote or the principle of universal suffrage.

3. Whether the Overseas Elector Registration Provision that requires overseas electors to file an application for registration whenever elections are held violates overseas elector's right to vote

The method to make the electoral roll of overseas electors based on their application for registration is a reasonable way to prevent disorder in voting as it confirms overseas electors' right to vote in a relevant election and to register overseas electors who have the right to vote in the electoral roll. Therefore, the Overseas Elector Registration Provision does not violate overseas elector's right to vote.

4. Whether the part of Article 218-19.1 and 218-19.2 of the Public Official Election Act that requires overseas electors to visit in person – not by mail or Internet – overseas polling places to cast votes (hereinafter, the “Overseas Voting Procedure Provision”) violates overseas electors' right to vote

Ensuring fairness in election, the legislator considered the technical problems in election such as delivery of voting paper, effectiveness, etc. Requiring overseas electors to physically go to an overseas polling station in order to cast a vote, rather than by mail or internet, does not seem unacceptably unfair or unreasonable. Therefore, the Overseas Voting Procedure Provision does not violate overseas electors' right to vote.

5. Whether the part of “eligible voters registered as residents in their jurisdictional area and those, as Korean nationals residing abroad under Article 2 of the Act on the Immigration and Legal Status of Overseas Koreans, whose domestic residence reports have been made under Article 6 of the same Act” in Article 14.1 of the National Referendum Act (hereinafter, the “National Referendum Provision”) violates overseas elector's right to vote

A referendum on important national policy stipulated in Article 72 of the Constitution and a referendum on the amendment to the Constitution stipulated in Article 130 of the Constitution are the process in which citizens approve the decision of the National Assembly and the President. It is a logical conclusion that the subject of the right to elect representative organs also becomes the subject of the right to approve the decision of such representative organs. Since overseas electors, as people with the right to elect representative organs, also have the right to approve the decisions made by the representative organs, overseas electors should be considered as people with the right to participate in a national referendum. Also, because a national referendum is a process where the people directly participate in national politics, those who are considered Korean

nationals should be eligible to participate in a referendum. As such, the exclusion of the right to participate in a referendum, fundamentally derived from the status as Korean nationals, due to the abstract danger of or difficulties with election technicalities, amounts to a practical deprivation of the rights endowed by the Constitution. Therefore, the National Referendum Provision infringes on overseas electors' right to participate in a referendum.

6. Decision of nonconformity to the Constitution regarding the National Referendum Provision

The instant nullification of the National Referendum Provision on the ground of the Court's declaration of unconstitutionality will render impossible the preparation of the voter's list even when a referendum is scheduled to be held. Therefore, a transitional application of the National Referendum Provision is necessary until the legislator amends the provision. Also, there are many technical difficulties that must be resolved in the referendum process and fairness of the referendum. Therefore, the Court declares that the National Referendum Provision does not conform to the Constitution, but orders the transitional application of the provision until the legislator cures the defects.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-1-004

a) Korea, Republic / **b)** Constitutional Court / **c)** / **d)** 30.10.2014 / **e)** 2012Hun-Ma190-192-211-262-325, 2013Hun-Ma781, 2014Hun-Ma53 (Consolidated) / **f)** Case on Standard for Population Disparity allowed in Division of Electoral District / **g)** 26-2(1), *Korean Constitutional Court Report* (Official Digest), 668 / **h)**.

Keywords of the systematic thesaurus:

3.21. General Principles – **Equality**.
5.2.1.4. Fundamental Rights – Equality – Scope of application – **Elections**.
5.3.41.1. Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

Keywords of the alphabetical index:

Population disparity / Election, electoral district, arbitrary designation / Local representativeness.

Headnotes:

Table 1 of Article 25.2 of the Political Official Election Act, which designates electoral districts for the National Assembly elections based on the 50% population disparity between the most and the least populous districts, infringes on the right to vote and on equal voting rights (one person, one vote).

Summary:

I. The applicants (electors who registered as residents in the relevant districts) requested the Constitutional Court to review Table 1 of Article 25.2 of the Political Official Election Act (hereinafter, "Table"). They argue that the principle of equality in the election process and their right to vote are infringed upon by the redistricting system captured in the Table, which is based on the 50% population disparity between the most and the least populous districts. Additionally, they challenged that the redistricting system not only arbitrarily divides some administrative districts, but also combines them with other districts.

II. The Constitutional Court examined the disputed Table, which designates electoral districts for the National Assembly elections based on 50% population disparity between the most and the least populous districts. Although the designation of electoral districts is not regarded as arbitrary *per se*, the Court found that it violates the applicants' right to vote and principle of equality in the election process (namely, one person, one vote).

1. Whether the Relevant Parts of the Electoral District Table violate the equality in the worth of votes

The Constitutional Court had considered the standard of 50% population disparity between the most and the least populous districts regarding the local representativeness of the National Assembly members, population disparity between city and rural areas, developmental imbalance, etc. (2000Hun-Ma92, 25 October 2001). Given the following facts, the Court held that it is time to change the standard of population disparity allowed under the Constitution to the limit of 33% deviation in population and the maximum permissible population ratio between the most populous and least districts should be 2:1.

1. If the standard of 50% disparity in population is applied, the value of one person's vote, for example, could be three times more than that of another person's vote, which is an excessive inequality in the value of votes. Moreover, under the unicameral system, it can possibly be expected that, with the 50% disparity standard, the number of votes acquired by an assembly member elected in a less populous area are less than those acquired by an assembly member defeated in a more populous area. The result is never desirable from the perspective of representative democracy.

2. Even though the local representativeness of the National Assembly members is an important factor to be considered in the formation of the National Assembly, this cannot take priority over the equality in the weight of votes from which the principle of sovereignty originates. The current situation entrenches the need for the local autonomy system to sacrifice the constitutional principle of the equality in the weight of votes.

3. As the permissible limit of population disparity is relaxed, the area of imbalance in representativeness increases, which could reinforce the local political party system. In particular, such an imbalance can be seen even within rural areas in similar conditions, which could potentially hamper development in those areas and disturb the balance in the development of national land.

4. Considering that the next election will be held after one and a half years and the National Assembly, in delineating the constituencies for the National Assembly elections, can receive support from the Constituency Demarcation Committee for the National Assembly Elections composed of professionals [although not a standing committee (Article 24 of the Public Official Election Act)], practical difficulties in the adjustment of electoral districts cannot be used as the reason for relaxing the limit of population disparity.

5. Finally, since the research on foreign legislation and case-law shows that the permitted standard of population disparity has been stricter in many countries, we can no longer delay adopting a stricter standard for population disparity.

6. Therefore, the parts of "Gyeonggi Province, Yongin City, Electoral District A", "Gyeonggi Province, Yongin City Electoral District B", "South Chungcheong Province, Cheonan City, Electoral District A" and "Incheon Metropolitan City, Namdong-Gu, Electoral District A" in the Entire Electoral District Table at Issue, where the population disparity between the most and least populous districts is more than 33%,

violate the right to vote and the equality right of the applicants, who are living in the aforementioned election districts.

2. Whether the four electoral districts at issue amount to arbitrary division of electoral districts

The main reason the National Assembly, in delineating the boundaries of the four electoral districts at issue, divided some parts of administrative districts and combined them with other districts, is that it is hard to find any other alternatives to narrow the population disparity between the districts. Also, since the administrative district map shows that the divided districts are located geographically near the combined districts, there seems to be no big difference in living conditions, transportation or educational environment among the districts. We also cannot identify with any clear evidence that the new demarcation of electoral districts by the National Assembly shows its clear intention to discriminate electors who reside in specific areas, against other electors or such a demarcation evidently results in *de facto* discrimination against those electors.

Moreover, the Court considered the difference between the National Assembly's constituency demarcation and the proposal suggested by the Constituency Demarcation Committee for the National Assembly Elections. The Court also considered the consequential discordance between the Electoral District Table for the elections of the local constituency members of the National Assembly elections and that for the elections of the members of local government councils. However, the Court held that there are no reasons to conclude that the four electoral districts at issue deviate from the acceptable boundary of legislative discretion. Therefore, the Four Electoral Districts at Issue are not arbitrary demarcations of electoral districts, departing from the boundary of legislative discretion.

3. Inseparability of the Electoral District Table and the need to render a decision of nonconformity to the Constitution

Within the Electoral District Table, all districts are interconnected, such that a single change in one district may cause sequential changes in other districts. In this regard, electoral districts in the Electoral District Table as a whole are inseparable and should be considered as a single entity. Therefore, if one part of the Electoral District Table is considered unconstitutional, the Entire Electoral District Table at Issue should also be considered unconstitutional.

However, a decision of simple unconstitutionality of the entire electoral district Table at issue – if rendered in this situation where the National Assembly election has already been held based on the Table at issue – may bring about a legal vacuum where no electoral district Table for the elections of the local constituency members of the National Assembly exists on which the next re-election or vacancy election, if any, should be based on. Therefore, we render a decision of nonconformity to the Constitution, ordering temporary application of the Table at issue until the legislator revises it, by 31 December 2015.

Languages:

Korean, English (translation by the Court).



Kosovo

Constitutional Court

Important decisions

Identification: KOS-2014-3-006

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 08.12.2011 / **e)** KO 119/10 / **f)** Ombudsperson of the Republic of Kosovo – Constitutional Review of Articles 14.1.6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy, no. 03/L-111, 4 June 2010 / **g)** Official Gazette, 12.12.2011 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality.**

4.5.2. Institutions – Legislative bodies – **Powers.**

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

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

5.2.2. Fundamental Rights – Equality – **Criteria of distinction.**

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

Keywords of the alphabetical index:

Parliament, member, pension.

Headnotes:

Parliament has the discretion to enact a constitutionally appropriate pension plan for Deputies and their surviving family members in the event of death or injury. Pensions for Members of Parliament that are distinctly disproportional to average Kosovo pensions may constitute a gift without a clearly demonstrated public purpose. The Assembly has no constitutional authority to enact such pension legislation.

Summary:

The applicant filed a referral pursuant to Article 113.2.1 of the Constitution, asserting that Articles 14.1.6, 22, 24, 25 and 27 of the Law on Rights

and Responsibilities of the Deputy were incompatible with the Constitution on four grounds:

1. it provides deputies with pensions that are more favourable than those offered to other citizens, which is inconsistent with the constitutional principles of equality, the rule of law, non-discrimination and social justice;
2. the pensions are clearly disproportionate with average pensions in Kosovo, and are therefore disharmonious with the principles of democracy, equality, non-discrimination and social justice encompassed by Article 7 of the Constitution;
3. the arrangement allows for a retired Deputy's reinstatement to a public sector or publicly funded job held by the Deputy before service in the Assembly; and
4. there is no justification for treating Deputies' pensions so differently from those of other citizens.

In response, the Assembly asserted that the Law on Rights and Responsibilities of the Deputy was enacted legitimately.

II. The Court held that the referral was admissible because the Ombudsperson was authorised by Articles 113.2 and 135.4 of the Constitution to make the referral, and that the referral was submitted within the 6-month deadline set by Article 30 of the Law on the Constitutional Court, calculated from the date of the challenged law's enactment.

On the merits, the Constitutional Court considered the challenged provisions of the legislation, compared them to similar arrangements for legislators in 16 other countries and reviewed relevant decisions by the Constitutional Courts of Croatia, Montenegro and Macedonia. The Court reached five conclusions:

1. the pension arrangement unreasonably deviated from the pension provisions of UNMIK Regulation no. 2005/20 and Law no. 03/L-084;
2. the legislation provided an insufficient definition of the benefit, which does not resemble severance pay, a salary increase, life insurance or bonus, and it may constitute a gift without a clearly demonstrated public purpose, meaning that the Assembly had no constitutional authority to enact it;
3. the disputed pensions were distinctly disproportional to average Kosovo pensions and therefore no apparent legitimate public purpose for such discriminatory treatment;
4. the challenged pensions were 8-10 times higher than basic pensions set by the Kosovo Budget, and such disproportionate treatment raises

questions about the Assembly's consideration of Articles 3, 7 and 24 of the Constitution when enacting the legislation; and

5. the Assembly never provided a reasonable explanation of the legitimate aim of the disputed legislation, depriving it of the general presumption of constitutionality, and neither the Minister of Finance nor the Central Bank provided an explanation or justification concerning the fiscal or economic implications of the enactment, which occurred despite strenuous objections by some Deputies.

Finally, the Constitutional Court decided that the pension arrangement was incompatible with the Constitution, but added that the Assembly had the discretion to enact a constitutionally appropriate pension plan for Deputies and their surviving family members in the event of death or injury.

For the reasons stated, the Court issued a Judgment reflecting that the Referral was admissible, concluding that the relevant provisions of the Law on Rights and Responsibilities of the Deputy were not compatible with Articles 3.2, 7 and 74 of the Constitution, invalidating the relevant provisions, holding that the Court's interim order suspending the implementation of the relevant provisions had become permanent, and declaring that the Judgment was immediately effective.

Languages:

Albanian, English (translation by the Court).



Identification: KOS-2014-3-007

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 25.06.2012 / **e)** KO 45/12, KO 46/12 / **f)** Request of Liburn Aliu and 11 other Members of the Assembly of the Republic of Kosovo for constitutional assessment of the Law on the Village of Hoçë e Madhe v. Velika Hoca and the Law on the Historic Centre of Prizren / **g)** Official Gazette, 27.06.2012 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

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

3.18. General Principles – **General interest.**

Keywords of the alphabetical index:

Cultural heritage, preservation, municipal committee, composition / Municipality, committee, religious group, representation, discrimination / Municipality, general interest / Religion, secularism, principle.

Headnotes:

Chapter III of the Constitution provides for a special protection to communities that traditionally were present in the territory of the Republic of Kosovo. Chapter II, Article 45.3 of the Constitution provides that the State institutions support the possibility of every person to democratically influence decisions of public bodies. The Assembly has broad constitutional mandate to regulate for the consultative planning processes that are proposed in the Laws on the Village of Hoçë e Madhe and the Historic Centre of Prizren.

Summary:

I. The applicants filed referral based on Article 113.5 of the Constitution, alleging that Article 4.3.3 of the Law on the Village of Hoçë e Madhe, Article 14.1.2 of the Law on the Historic Centre of Prizren, are in contradiction with the Constitution.

The applicants stated that Article 4.3.3 of the Law on the Village of Hoçë e Madhe was in contradiction with the principle of secularism and neutrality in the religious matters and that creates privileges to a religious community, by marginalising and discriminating other religious communities and the citizens who do not have that religious orientation or belief. The Applicants filed the same arguments regarding Article 14.1.2 of the Law on the Historic Centre of Prizren. Article 4 of the Law on the Village of Hoçë e Madhe provides for a Committee to be established by the Municipality of Rahovec.

The abovementioned committee will be composed of five members, where one of them is selected by the Serbian Orthodox Church and must be a resident of the village of Hoçë e Madhe. The applicants stated that it is necessary that the composition of the Committee for the village of Hoçë e Madhe does not include any member, selected by the Serbian Orthodox Church, because it automatically creates a

privileged position for it and in that case among the other is violated Article 24 of the Constitution (Equality before the Law), openly creating inequality between the Serbian Orthodox Church towards the members and other religious communities and persons that do not belong to any religious orientation. Article 14.1.2 of the Law on Historic Centre of Prizren, foresees the establishment of the Cultural Heritage Committee by the Municipality of Prizren.

The above-mentioned Committee is composed of seven members, where the Islamic Community, the Serbian Orthodox Church and the Catholic Church select a member for representation in that Committee. Regarding the Article 24 of the Constitution, the applicants stated that the inclusion of three religious communities in the Law, clearly favours them compared to other religious communities and to citizens without religious affiliation and *inter alia* violates Article 24 of the Constitution. In order to substantiate their allegations, the applicants cited cases from the European Court of Human Rights case-law, as well as a case of the US Supreme Court.

II. The Constitutional Court concluded that the applicants are authorised parties and the referrals were submitted within legal time limit, they have met all criteria of requirements and, consequently, the referrals were admissible.

Regarding the merits of the referral, the Court reminded the applicants that the Chapter III of the Constitution provides for a special protection to communities that traditionally were present in the territory of the Republic of Kosovo, and that the Chapter II, Article 45.3 of the Constitution provides that the State institutions support the possibility of every person to democratically influence decisions of public bodies.

Furthermore, the Court noted that the Assembly has broad constitutional mandate to regulate the consultative planning processes that are proposed in the Laws on the Village of Hoçë e Madhe and the Historic Centre of Prizren. The Court further stated that although, in both instances, the Committees are given a large degree of consultative responsibility, they do not have executive powers and that the decisions on planning matters are ultimately taken, after appropriate consultation, by the relevant municipalities and not by the Committees established under the Laws. The Court also stated that Article 24.3 of the Constitution promotes the rights of individuals and groups, who are in unequal position, while the applicants read Article 24.1 and 24.2 of the Constitution, separately from Article 4.3 of the Constitution.

The Court further noted that the case-law cited by the applicants does not relate to the rights of religious communities to have a consultative voice in the decisions on planning that influence on the village Hoçë e Madhe and on Historic Center of Prizren, and that they do not support the argument that the articles of the challenged laws are not in compliance with the Constitution.

Due to the abovementioned reasons, the Court concluded that the referral is admissible from a procedural-formal aspect; that the Article 4.3.3 of the Law on village Hoçë e Madhe is in compliance with the Constitution of Kosovo; that Article 14.1.2 of the Law on Historic Center of Prizren is in compliance with the Constitution of Kosovo; ordered that the Judgment is served on the parties and pursuant to Article 20.4 of the Law, is published in the Official Gazette; and declared that the Judgment is effective immediately.

Languages:

Albanian, English (translation by the Court).



Identification: KOS-2015-1-002

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 13.11.2014 / **e)** KO 155/14 / **f)** Constitutional Review of Decree no. DKGJK-001-2014 of the President of the Republic of Kosovo, on Confirmation of the Continuation of Mandate of the International Judges of the Constitutional Court of the Republic of Kosovo, dated 31 August 2014 / **g)** *Gazeta Zyrtare* (Official Gazette), 17.11.2014 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.1.2.4. Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**
 1.3.5.6. Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State.**
 1.4.10.4. Constitutional Justice – Procedure – Interlocutory proceedings – **Discontinuance of proceedings.**
 2.2.1. Sources – Hierarchy – **Hierarchy as between national and non-national sources.**
 3.4. General Principles – **Separation of powers.**

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

4.4. Institutions – **Head of State.**

4.4.3.1. Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.4.3.3. Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.4.3.5. Institutions – Head of State – Powers – **International relations.**

4.4.5.1. Institutions – Head of State – Term of office – **Commencement of office.**

4.16. Institutions – **International relations.**

Keywords of the alphabetical index:

Constitutional Court, judge, international, appointment / International agreement, constitutional requirement, parliamentary approval / Treaty, ratification, effects / Treaty, incorporation / Treaty, non-self-executing.

Headnotes:

I. A presidential decree which incorporates an international agreement into the domestic legal system of the Republic of Kosovo, previously ratified by the Assembly, does not create new legal obligations, but it only complies with the obligations taken through an international agreement. In the present case, the Decree of the President of Kosovo served as an implementing act of those provisions of the International Agreement which are non-self-executing, while the consent of the State to be bound by the Agreement was formalised by the ratification of the Assembly.

Summary:

Pursuant to the provisions of Articles 113.2.1 and 135.4 of the Constitution, the Ombudsperson of the Republic of Kosovo (the applicant) requested a constitutional review of Decree no. DKGJK-001-2014 of the President of the Republic of Kosovo, which confirmed the Continuation of Mandate of the International Judges of the Constitutional Court of the Republic of Kosovo. The applicant claimed that the challenged Decree has not been adopted in accordance with the applicable constitutional provisions, which regulate the procedure for the election of the judges of the Constitutional Court. Namely, Article 114.2 provides that Judges of the Constitutional Court are appointed by the President upon the proposal of the Assembly, while Article 84.19, regulating the competences of the President, states that the President of the Republic of Kosovo appoints judges to the Constitutional Court upon proposal of the Assembly. According to the applicant, the President had exceeded her competences by circumventing the Assembly's role in

this process. Furthermore, the applicant argued that, despite the fact that the Assembly ratified the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, which among others, foresees continuation of the mandate of international judges; according to the applicant this cannot justify the circumvention of the Assembly in continuing the mandate of the three international judges.

In its decision KO 155/14 of 13 November 2014, the Constitutional Court, referred to Articles 11 and 13 of the Vienna Convention on the Law of Treaties which regulate the means of expressing consent to be bound by a treaty and the consent of States to be bound by a treaty, expressed by an exchange of instruments constituting a treaty. In this respect, the Constitutional Court noted that that the President of the Republic of Kosovo and the High Representative of the European Union exchanged letters in accordance with these above-mentioned provisions of the Vienna Convention on the Law of Treaties, which consequently had been ratified by the Assembly, by a law with two third majority vote, thus it became part of the legal system of Kosovo. Further to its Judgment of 9 September 2013 in case K095/13, (applicant: Visar Ymeri and 11 other deputies of the Assembly requesting constitutional review of Law no. 04/L-199, on Ratification of the First International Agreement of Principles governing the Normalisation of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this Agreement), the Constitutional Court further reiterated that it does not have jurisdiction *ratione materiae* to deal with the question of whether international agreements are compatible with the Constitution following ratification by the Assembly.

Even though the applicant alleged that he challenged the constitutionality of the decree, the Constitutional Court noted that the applicant's arguments are mainly related to the content of the International Agreement concluded between the Republic of Kosovo and the European Union through exchange of letters and ratified by the Assembly on 23 April 2014. The Constitutional Court concluded that the applicant did not substantiate his claim.

As to the applicant's request for interim measures, to exclude the international judges from deliberation and the decision making process in this Referral, the Constitutional Court, pursuant to its Rules of Procedure, concluded that since the applicant's referral is manifestly ill-founded and, therefore, inadmissible, the request for interim measure can no longer be subject of review, and, therefore must be rejected.

Languages:

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

*Identification:* KOS-2015-1-005

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 16.03.2015 / **e)** KO 13/15 / **f)** Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by fifty five Deputies of the Assembly and referred by the President of the Assembly by letter no. 05-259/DO-179 / **g)** *Gazeta Zyrtare* (Official Gazette), 18.03.2015 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.3.5.3. Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**
 2.1.1.1.1. Sources – Categories – Written rules – National rules – **Constitution.**
 3.10. General Principles – **Certainty of the law.**
 4.6.4.1. Institutions – Executive bodies – Composition – **Appointment of members.**
 5.2.2.1. Fundamental Rights – Equality – Criteria of distinction – **Gender.**
 5.2.2.13. Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis.***
 5.2.3. Fundamental Rights – Equality – **Affirmative action.**

Keywords of the alphabetical index:

Affirmative, action, temporal scope / Constitution, amendment, validity / Government, member, appointment, gender / Government, member, professional merit.

Headnotes:

Existing procedural safeguards in the Constitution with regards to gender equality are sufficient to guarantee the principle of equal representation of both genders in public institutions. Imposition of a gender-related quota for Ministerial and Deputy Ministerial positions narrows the applicability of the constitutional safeguards for gender equality. Thus, it diminishes the rights to gender-balanced participation in public bodies. Insufficient implementation of

legislation does not provide a justification for the introduction of new constitutional provisions.

Summary:

Pursuant to the provisions of Articles 113.9 and 144.3 of the Constitution, the President of the Assembly referred a Constitutional Amendment proposed by 55 Deputies for prior assessment by the Constitutional Court to confirm that the Amendment to the Constitution does not diminish any of the rights and freedoms guaranteed by Chapter II of the Constitution (Fundamental Rights and Freedoms).

The Amendment proposed to add a new paragraph 8 to Article 96 of the Constitution (Ministers and Representation of Communities), which states:

“8. None of the genders can be represented less than 40% in the positions of Ministers and Deputy Ministers of the Government of the Republic of Kosovo.”

The Deputies claim that so far, women in government were not represented more than 10-15% in ministerial positions, although the women/men ratio of the population is 50% to 50%. Based on that, they consider that there is a necessity to introduce a gender quota in the executive branch as an affirmative mechanism to change the situation. According to them, Article 24.3 of the Constitution (Equality before the Law) justifies the affirmative measures that should be taken towards “the less represented groups”.

In addition, the Deputies argued that the imposition of a gender quota in the Constitution establishes an obligation, which the Government cannot ignore, and which is similar to the guarantees that the Constitution provides to minorities. According to the Deputies, the negative experience of the non-implementation of Law no.2004/2 on Gender Equality of 19 February 2004, which includes all institutions and leading bodies, is another reason for this norm to be a constitutional norm and for the Constitution to be a guarantor thereof.

II. The Constitutional Court examined whether the proposed Amendment diminishes the rights and freedoms guaranteed by Chapter II of the Constitution (Fundamental Rights and Freedoms) as well as under Chapter III of the Constitution (Rights of Communities and Their Members) and its letter and spirit as established in the Court’s case-law.

In its Judgment KO 13/15 of 16 March 2015, the Constitutional Court, after analysing the existing constitutional safeguards for gender equality, found that the Constitution contains the internationally recognised safeguards for guaranteeing equal participations of both genders in public life. Further the Constitutional Court noted that a constitutional regulation of a gender quota for Ministerial and Deputy Ministerial positions may further, in practice, turn into a formal replacement of a person of the same gender that could diminish the rights of the other people being Deputies or qualified persons to become part of the government.

After analysing the Constitutions of a number of democratic countries and Court decisions of Constitutional courts, it found that that it is not a common practice to have constitutional provisions regulating the participation in public bodies through gender quotas. Rather, the principle of equal opportunities for both women and men should be applied. The constitutional practice does not establish a qualified form of positive discrimination whereby preference is automatically and unconditionally based on gender, notwithstanding the requirement of professional merit.

The Constitutional Court also explained that the nature of the positive discrimination or affirmative action, in general is temporary, until a certain goal has been achieved as per Article 24.3 of the Constitution. On the other hand, any constitutional norm is perceived to be of a permanent nature, in order to ensure a stable constitutional and legal order. This is in compliance with the principle of legal certainty.

Finally, the Court emphasised that the responsibility for implementing legislation lies with the Government, which is subject to the control of the Assembly, but it reiterates that it is the Assembly itself that votes and elects the Government.

Languages:

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



Identification: KOS-2015-2-008

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 04.08.2015 / **e)** KI 144/14, KI 156/14 / **f)** Vilijamin Hajdukovic and Stanka Tus Constitutional Review of the non-execution of two decisions of the Housing and Property Claims Commission, namely Decision nos. HPCC/REC/91/2007, 19.01.2007 and HPCC/REC/81/2006, 11.12.2006 / **g)** Official Gazette, 13.08.2015 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.2.2.1. Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**
 1.4.4. Constitutional Justice – Procedure – **Exhaustion of remedies.**
 1.4.9.1. Constitutional Justice – Procedure – Parties – **Locus standi.**
 1.6.6. Constitutional Justice – Effects – **Execution.**
 1.6.9.2. Constitutional Justice – Effects – Consequences for other cases – **Decided cases.**
 3.9. General Principles – **Rule of law.**
 4.7.13. Institutions – Judicial bodies – **Other courts.**
 5.3.13. Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
 5.3.13.2. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
 5.3.39. Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Constitutional complaint / Court, judgment, execution, right / Right, protection, judicial / Property, financial compensation, right / Decision, execution, right.

Headnotes:

The execution of a decision rendered by a court should be considered as an integral part of the right to a fair trial and competent authorities have an obligation to organise an efficient system for implementation of decisions which are effective in law and practice, and should ensure their implementation within reasonable time, without unnecessary delays.

It is not a duty of the Constitutional Court to determine what is the most appropriate method for the competent authority to find efficient mechanisms of execution, within its competences, in the sense of completely fulfilling the obligations it has under the Law and the Constitution.

Summary:

I. The case originated from two referrals submitted separately, but due to the fact that the referrals were related in subject matter, the Constitutional Court decided to treat them in a joint decision in compliance with the Rules of Procedure of the Court.

Namely, both applicants challenged the non-execution of decisions of the Kosovo Housing and Property Claims Commission (established by UNMIK Regulation no. 2000/60, 31 October 2000 on residential property claims). In both cases the applicants had received final decisions in their favour.

In both cases, the applicants were the legitimate occupants of apartments owned by Socially-Owned Enterprises. Such occupancy rights were based on employment within the respective enterprise. In both cases, the respective employment relationships changed at the end of the 1980s beginning of the 1990s. In one of the two cases, the applicant lost employment and occupancy rights, while in the other case the applicant gained such rights at that time.

Due to the operation of law post-1999, both applicants were entitled to make claims on the basis of their respective occupancy rights from the past. In one of the cases, the applicant was awarded the occupancy right to the apartment, but was not currently the factual occupant, and the factual occupant was awarded compensation. In the other case, the applicant was awarded compensation for the loss of his occupancy right, but could not be evicted pending the payment of compensation.

These decisions of the Kosovo property Claims Commission could not be executed because there were no funds available to pay the required compensation. The Kosovo Property Agency is the authority responsible for the administration and execution of the decisions of the Kosovo Property Claims Commission.

II. The applicants filed referrals to the Constitutional Court complaining that the non-execution of the decision by the competent authorities deprived them of the peaceful enjoyment of their property, resulting in a violation of Article 46 of the Constitution (Protection of Property). In addition, the lack of mechanisms within the legal system to achieve their rights violated their right to a free and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6 ECHR.

Upon examination of admissibility criteria, the Constitutional Court concluded that the applicants were direct victims of an alleged violation and that

there was no legal remedy in the domestic legal system to be exhausted, therefore the Constitutional Court decided to review the merits of the case.

The Constitutional Court found that the non-execution of final decisions by competent authorities and the failure of the competent authorities of the Republic of Kosovo to provide effective mechanisms, in terms of the execution of a final decision, is contrary to the principle of the rule of law and constitutes a violation of fundamental human rights guaranteed by the Constitution. Under these circumstances, the Court concluded that the non-execution of the final decisions, constitutes a violation of the right to a fair and impartial trial. Moreover, the Court held that, because of delays and non-execution of the above-mentioned decisions, the applicants were unjustly deprived of their right to their property. In this way, the rights of the applicants to the peaceful enjoyment of their property, guaranteed by Article 46 of the Constitution and Article 1 Protocol 1 ECHR, were violated.

Cross-references:

Constitutional Court:

- K1187/13, *N. Jovanovic*, Constitutional review regarding non-execution of Decision no. GSK-KPA-A-001/12 of the Appellate Panel of the Supreme Court, 08.05.2012 and of Decision no. HPCC/D/A/114/2011, 22.06.2011 of Kosovo Property Claims Commission.

European Court of Human Rights:

- *Romashov v. Ukraine*, no. 67534/01, 27.07.2004;
- *Hornsby v. Greece*, no. 18357/91, 19.03.1997, *Reports of Judgments and Decisions* 1997-II, Bulletin 1997/1 [ECH-1997-1-008];
- *Sovtransavto Holding v. Ukraine*, no. 48553/99, 25.07.2002, *Reports of Judgments and Decisions* 2002-VII;
- *Ryabykh v. Russia*, no. 52854/99, 24.07.2003, *Reports of Judgments and Decisions* 2003-IX, Bulletin 2003/2 [ECH-2003-2-007];
- *Pecevi v. "The former Yugoslav Republic of Macedonia"*, no. 21839/03, 06.11.2008;
- *Martinovska v. "The former Yugoslav Republic of Macedonia"*, no. 22731/02, 25.09.2006.

Languages:

Albanian, English (translation by the Court).



Identification: KOS-2015-3-009

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 21.12.2015 / **e)** KO 130/15 / **f)** The Referral of the President of the Republic of Kosovo, Her Excellency, Atifete Jahjaga, concerning the assessment of compatibility of the principles contained in the document entitled “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements” (hereinafter, the “Association”) with the spirit of the Constitution, Article 3.1 (Equality Before the Law), Chapter II (Fundamental Rights and Freedoms) and Chapter III (Rights of Communities and their Members) of the Constitution of the Republic of Kosovo / **g)** Official Gazette, 23.12.2015 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

2.1.1.4.14. Sources – Categories – Written rules – International instruments – **European Charter of Local Self-Government of 1985.**
 3.21. General Principles – **Equality.**
 4.8.3. Institutions – Federalism, regionalism and local self-government – **Municipalities.**

Keywords of the alphabetical index:

Legal entity, new / Local self-government / Municipalities, association / Community, diversity.

Headnotes:

“The Association” must be established as provided by the First Agreement on the Principles that Regulate the Normalisation of the Relations between the Republic of Kosovo and the Republic of Serbia signed on 19 April 2013 (hereinafter, the “First Agreement”). However, the Principles as elaborated under the document titled “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements” are not entirely in compliance with the spirit of the Constitution, equality of the law and Chapter II and III of the Constitution. The forthcoming legal act of the Government and the Statute implementing the Principles and thus establishing the Association must meet the constitutional standards as reasoned by the Court.

Summary:

I. The First Agreement was ratified by the Assembly and the law on ratification of such agreement was enacted by the President on 12 September 2013. The First Agreement established the creation of an Association/Community of Serb majority municipalities in Kosovo. On 25 August 2015, the Prime Minister agreed on a document entitled “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements”. This document was to serve as a basis for establishing the legal framework for the implementation of the Association.

The President filed a referral requesting the Court to decide whether these Principles are compatible with the spirit of the Constitution, its multi-ethnic nature, basic rights and freedoms and rights of communities and their members, as guaranteed by Article 3.1, Chapter II and III of the Constitution.

The applicant claimed it was necessary that the Court rule on the merits of this Referral considering that the implementation of the obligations arising from those principles will have a legal effect on the constitutional system, by creating a new legal entity, namely the Association. She further argued that these principles represent an intermediary legal act, which stems from the First Agreement and that they add additional elements in the process of creating the Association. Therefore, the applicant argued that there is a need for a constitutional assessment of these principles before proceeding further with its establishment.

II. The Court decided that the referral is admissible based on the authorisation of the President in the Constitution to raise constitutional questions before the Court. In addressing the merits of the referral, the Court decided to review the Principles chapter by chapter to ensure each chapter complies with the Constitution and specific provisions of each chapter are related to constitutional provisions. Furthermore, the Court reiterated that its reasoning and conclusions shall serve as a basis for the elaboration of the legal act and the Statute.

With respect to the Legal Framework, the Court considered that the principles laid down in this chapter do not entirely meet the constitutional standards. To meet such standards, the legal act, and the Statute that will establish this Association, must be in compliance with Articles 12, 21.4, 44 and 124.4 of the Constitution.

The Court expressed concern with the ambiguous language used in prescribing the Objectives of the Association. It observed that the meaning of certain terms was different in the English, Albanian and Serbian versions. As a result, the Court concluded that any ambiguities in the definition of the objectives of the Association must be clarified, once these principles are elaborated into a legal act and Statute. Consequently, the Court concluded that the objectives foreseen under this chapter did not entirely meet the constitutional standards. The objectives shall secure the responsibility of the participating municipalities to respect the Constitution and the laws, and shall not circumvent or avoid the administrative review by central authorities.

With respect to the Organisational Structure of the Association, the Court observed that the proposed structure raises concerns regarding respect for the diversity of communities' resident within the participating municipalities, and the reflection of this diversity in the staffing and structures of the Association. Therefore, the Court concluded that the organisational structure does not entirely meet the constitutional standards. In order to meet the latter, it must be in line with Articles 3, 7, 57.1, 61 and 62 of the Constitution.

With respect to Relations with Central Authorities, the Court found that the Association cannot be vested with full and exclusive authority to promote the interests of the Kosovo Serb community in its relations with the central authorities. In addition, the Court found that the Association cannot be entitled to propose amendments to legislation and other regulations considering that the Constitution recognises such right exclusively to the President of the Republic, the Government, and the deputies of the Assembly or to at least ten thousand citizens. Similarly, the Court found that in order for the Association to file a referral with the Court, it must comply with the provisions of Article 113 of the Constitution.

With regards to Legal Capacity, Budget and Support and General and Final Provisions, the Court found that the legal act and Statute shall ensure financing and expenditure of the Association in compliance with Article 124.5 of the Constitution. The procedural principles enumerated under general and final provisions must also be harmonised in order to meet the constitutional standards.

In its final conclusions, the Court found that the referral is admissible. The First Agreement foresees the establishment of the Association and the requirement that it be established has become part of the internal legal system. The First Agreement defines the structures of the Association to follow the

same basis as the existing statute of the Association of the Kosovo municipalities. The Principles elaborated in the document entitled "Association/Community of Serb majority municipalities in Kosovo – general principles/main elements" are not entirely in compliance with the spirit of the Constitution, Article 3.1, Chapter II and III of the Constitution. The Court specifically referred to Articles 3, 7, 12, 21, 44, 79, 81, 93, 101, 113, 123, 124 and 137 of the Constitution. The elaboration of the Principles into the legal act and the Statute, which will be reviewed by the Court, shall follow the reasoning of Court in its judgment.

Languages:

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



Kyrgyzstan

Constitutional Court

Important decisions

Identification: KGZ-2013-3-005

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 30.12.2013 / **e)** 17-p / **f)** Sultanov K.K., Nasirov T.J. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)**.

Keywords of the systematic thesaurus:

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

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

4.7.4.3. Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**

4.7.16.2. Institutions – Judicial bodies – Liability – **Liability of judges.**

Keywords of the alphabetical index:

Prosecutor, power.

Headnotes:

Judicial independence and immunity are not privileges for judges, but safeguards against external pressures in their decision-making.

Summary:

The Constitutional Chamber was asked to assess the constitutionality of Article 30.1 of the Constitutional Law on the Status of Judges (hereinafter, “Constitutional Law”).

Following a resolution by a prosecutor of the Osh region on 16 October 2012, criminal proceedings against the Chairman of the Uzgen District Court for the Osh region were instigated for a crime under Article 313.2.1 and 313.2.2 of the Criminal Code.

The decision on the issue of criminal proceedings against a judge was taken by a prosecutor of Osh region in accordance with Article 30.1 of the Constitutional Law.

In the applicant's view, the decision contradicted paragraph 2 of Article 11.2 of the Constitutional Law, under which guarantees of independence of judges stipulated by the Constitution cannot be cancelled or diminished under any circumstances. Paragraph 2 of Part 1 of Article 11 of the Constitutional Law imposes a prohibition on any interference whatsoever in the activity of a judge. This regulation is also secured in Article 94.4 of the Constitution. The applicant observed that, for the purposes of law enforcement, prosecutors from Bishkek and Osh seemed to be able to interfere in the implementation of justice.

The judiciary, as one of the branches of government, is designed to protect the legal foundations of public life from all violations. Judges have the responsibility of taking the ultimate decisions on the freedoms, rights, duties and property of citizens and legal entities. For that reason, judicial independence is of vital importance in upholding the law and pivotal to all those seeking justice and protection of human rights.

Judicial power is exercised by means of constitutional, civil, criminal, administrative, and other forms of legal proceedings (Article 93.2 of the Constitution). It belongs only to the courts through judges (Article 1.1 of the Constitutional Law). However, every individual has the right to judicial protection, under the Constitution, laws and international treaties ratified by the Kyrgyz Republic and the generally recognised principles and norms of international law (Article 40.1 of the Constitution).

Judicial protection is a universal legal instrument of the state, designed to protect human rights and freedoms. This legal remedy can only be efficient and effective in conditions of independence of the judiciary and judges. Judicial independence is for this reason enshrined in the Constitution.

The legal status of judges is defined by constitutional regulations on independence, immunity, subordination to the Constitution and laws and the prohibition of interference in the implementation of justice. This serves to secure the judiciary as an independent and impartial branch of government (Article 94.1, 94.2 and 94.3 of the Constitution).

The rationale behind the principle of judicial independence is to provide an environment where judges can be free in their decision-making, subordinate only to the Constitution and laws, and can act without any restriction, external influence or pressure from any quarter.

Consideration of a case by an independent and impartial judge is proclaimed in a number of international treaties ratified by the Kyrgyz Republic.

The Universal Declaration of Human Rights provides that everyone is entitled to have their rights and obligations determined by public hearing and in compliance with all requirements of justice by an independent and impartial tribunal (Article 10). The International Covenant on Civil and Political Rights, to which the Kyrgyz Republic acceded by resolution of Parliament of 12 January 1994 no. 1406-XII, enshrines the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14). The CIS Convention on Human Rights and fundamental Freedoms Rights, ratified by Law no. 182 of 1 August 2003, sets out the universal right to a fair and public hearing within a reasonable time by an independent and impartial tribunal.

The UN General Assembly, by resolutions of 29 November 1985 and 13 December 1985, endorsed the Basic Principles on the Independence of the Judiciary, adopted at the Seventh United Nation Congress. These principles established that independence of the judiciary is to be guaranteed by the state and enshrined in Constitutions and laws. Government and other institutions must respect and observe the independence of the judiciary (Article 1).

The United Nations Social and Economic Council, in its resolution 2006/23 of 27 July 2006 invited Member States to take into consideration the Bangalore Principles when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary. Judicial independence lies at the core of the Bangalore Principles, a fundamental guarantee of fair resolution of court proceedings.

The Kyrgyz Republic has committed itself to ensuring that cases are heard by an independent and impartial tribunal by enshrining the independence of the judiciary within its Constitution, by joining, signing and ratifying several international legal instruments in the field of human rights and freedoms and by being a member of the UN.

The independence of the judiciary and judges should not be regarded as a privilege of the judge but rather as a safeguard against external pressures, justified by the need to give judges an opportunity to fulfil their obligation to protect human rights and freedoms.

Therefore, in accordance with Article 97.6.1 of the Constitution, Articles 42, 46, 47, 48, 51 and 52 of the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, the Constitutional Chamber resolved to recognise unconstitutional that part of Part 1 of Article 30 of the Constitutional Law which allowed prosecutors authorised by General Prosecutor who were from

Bishkek and Osh Cities and who had attained at least the status of Regional Prosecutor to institute criminal proceedings against judges.

It requested that Parliament should make the appropriate changes and additions to the legislation arising from the decision.

Languages:

Russian.



Identification: KGZ-2014-1-009

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 31.01.2014 / **e)** 8-p / **f)** North PMC / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.10. General Principles – **Certainty of the law.**
 5.3.13.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
 5.3.13.5. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Suspensive effect of appeal.**
 5.3.13.17. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**

Keywords of the alphabetical index:

Evidence, new.

Headnotes:

The Civil Procedure Code should set out strict boundaries regarding newly discovered facts which form the basis for judicial review. This should not be perceived as a restriction on access to justice.

Summary:

Suspension of execution of a judgment pending resolution of an appeal, supervisory complaint or presentation does not detract from the role, significance and consequences of a judicial act. This

option must remain open to a debtor during this period. It cannot become a restriction of the right to judicial protection; rather, it is one of the mechanisms for the implementation of law.

The provisions of the Civil Procedure Code adopted by the legislator in the implementation of the constitutional guarantees of judicial protection of human rights and freedoms, and the universal right to a retrial by a higher court are not subject to any restriction. Under the rules of civil procedure law, newly discovered facts are circumstances that were not and could not have been known at the time of the proceedings. Thus, “newly discovered facts” are by their legal nature new circumstances, combined in one step in civil proceedings, as a basis for review of judicial acts. The hallmark of “new circumstances” is their appearance after proceedings and adjudication. Their legal effect is judicial review.

New circumstances (as newly discovered facts), as a basis for review of judicial decisions should have strictly defined boundaries and contain no abstract definitions. Otherwise, legal stability and the certainty of legal acts (and consequences of violation) could be put at risk. The Constitutional Chamber does not therefore perceive an exhaustive list of newly discovered circumstances as a restriction on access to justice. The confusion which the legislator has brought about between “newly discovered fact” and “new fact” could be dealt with by making changes and additions to the Code of Civil Procedure. The Chamber decided unanimously that the contested provisions were not contrary to the Constitution.

III. Oskonbaev E.J attached a dissenting opinion on the reasoning Section of the Constitutional Chamber’s decision; diverging positions emerged on the evaluation of the substance and content of the articles of the Civil Procedure Code. No doubts should be allowed to develop over the irrefutability and exclusivity of a judicial act that has entered into force. This is its highest value. Without these properties, justice acquires a formal nature and loses its real value to society. The Constitutional Chamber has incorrectly viewed the appeal courts and supervisory mechanisms as the immediate realisation of the universal constitutional right to retrial by a higher court. “Re-examination of the case” (a full trial of the case in accordance with civil procedural law) is possible only in the appellate court and concerns judicial acts which have not entered into force. In cassation and supervisory instances, the relevance of the case, the Court’s findings and the correct application will be evaluated; this cannot be regarded as “a retrial by a higher court.” The Cassation and supervisory authorities, in line with their intended purpose, allow

judicial review of an act which has entered into force, before an actual miscarriage of justice has been detected, but cannot overturn a judicial act which has come into force. The Constitution favours legal certainty and the stability of judicial acts which have come into force. This legal concept should be followed when procedures are applied for the suspension of the execution of a judgment which has entered into force. The legislation should accordingly contain provisions with clearly defined terms and strictly regulated procedure.

Languages:

Russian.



Identification: KGZ-2014-1-010

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 07.02.2014 / **e)** 10-p / **f)** Osinzev E.V. / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.10. General Principles – **Certainty of the law.**
 4.7.4.3.1. Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**
 4.7.8.2. Institutions – Judicial bodies – Ordinary courts – **Criminal courts.**
 5.3.13.1.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
 5.3.13.17. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**

Keywords of the alphabetical index:

Evidence, new.

Headnotes:

Rules governing the right to initiate a review in criminal proceedings of a decision already in force, due to newly-discovered evidence, are in line with the principles of fair trial and legal certainty and stability.

Summary:

The Criminal Procedure Law regulates procedure in criminal cases before courts and provides for the review of judicial acts that have come into force, in the light of newly discovered circumstances.

The rules relating to cases of newly discovered circumstances only apply to decisions which have already come into force. The legislator has established comprehensive and specific rules corresponding to the principles of fair trial, legal certainty and stability. Their constitutionality is not questioned.

The right to initiate a review, based on newly discovered circumstances, covers both the prosecutor and the court. A distinction needs to be drawn between the grounds on which prosecutors and courts may initiate reviews in such cases, due to the nature of their powers.

The role of a prosecutor in these cases relates to the implementation of supervision over the legality of actions of officials of the relevant bodies.

Courts can revise judicial acts where fresh evidence has arisen, and eliminate or mitigate punishment. It is not part of their inherent function to investigate and obtain evidence. On this basis, the legislator has ruled out the possibility of citizens appealing directly to the court. This would lead to unnecessary difficulties in law enforcement, as the courts are only empowered once research has actually corroborated evidence.

The Constitutional Chamber saw no necessity for a comprehensive list of instances where cases might be resumed due to newly discovered evidence.

A dissenting opinion was attached to the decision. The justice in question was of the view that the legislator should set out procedural rules, to regulate fully the production of newly-discovered evidence, as part of the protection of human rights and freedoms in terms of judicial errors.

Languages:

Russian.

*Identification: KGZ-2014-2-016*

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 11.04.2014 / **e)** 25-p / **f)** Government of Kyrgyz Republic / **g)** Official website and Bulletin of Constitutional Chamber 2014 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
4.5. Institutions – **Legislative bodies.**
4.10.2. Institutions – Public finances – **Budget.**

Keywords of the alphabetical index:

Republican budget.

Headnotes:

Legislation which provided for capital investments from the state budget in execution of the republican budget; it was at odds with the principle of separation of powers.

Summary:

The constitutional basis of the legal regulation of social relations in the public sector is enshrined within the Constitution. In accordance with the Constitution, the Government develops the national budget and submits it to Parliament. Parliament in turn approves the national budget. The Law on Basic Principles of Budget Law defines the fundamental principles of the formation and execution of the national budget. In this way, certainty, stability and continuity are achieved in terms of the cost of legal relations and the legal position of their subjects.

Under the Act, the budget process is a set of inter-related steps covering all stages from the design of the budget to the law approving the report on its implementation.

In providing for capital investments from the state budget in execution of the republican budget, the legislator went beyond the constitutional precepts, in terms of differentiation of functions and powers of public authorities. The Constitutional Chamber therefore decided unanimously that the provisions of the above law were contrary to the Constitution.

Languages:

Russian.



Identification: KGZ-2016-1-001

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 11.03.2015 / **e)** 4-p / **f)** / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Kyrgyz, Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

The Bar, organisation.

Headnotes:

The Constitution guarantees freedom of association for all. It also provides for safeguards for a fair and independent system of justice as well as access to qualified legal assistance, in some cases at the expense of the state. In this regard, the Bar enjoys an exceptional public status under the Constitution, which in turn places a direct obligation on the state to regulate the law on the organisation of the activities of the Bar, along with the rights, obligations and responsibilities of lawyers. Such an activity does not, therefore, contravene the Constitution.

Summary:

I. The Constitutional Chamber was asked to examine various provisions of the Law on the Bar and Advocacy, which effectively force lawyers to engage in advocacy. The suggestion was made that these provisions violated the right of lawyers to form public associations or to join them on a voluntary basis and the right free expression enshrined in the Constitution. It was also contended that these provisions limited the right to join political parties, trade unions and other public associations on a voluntary basis.

A particular feature of the right to association is that it does not only embrace the freedom of expression between citizens and associations; it also covers autonomy in determining goals and objectives and the development of solutions. The goals and objectives of advocacy arise from constitutionally significant public legal relations.

The specific requirements for admission to the profession, such as compulsory membership of a professional self-governing community, payment of membership fees, continuing education, compliance with the Code of Professional Ethics, responsibility for improper conduct or performance of duties should be considered to be socially justified and essential in order to protect the vital public interest in the administration of justice.

The Constitution establishes guarantees for an independent and fair system of justice, as well as access to qualified legal assistance, in certain cases at the expense of the state. In this regard, the Bar is granted with an exceptional public status by the Constitution, which places a direct obligation on the state to regulate the law on the organisation of the activities of the Bar, along with the rights, obligations and responsibilities of lawyers.

However, the provisions of the Law on the Bar and Advocacy are not regulated to an appropriate degree; legal *lacunae* exist in many issues directly related to the implementation of advocacy.

Uncertainty in the legal regulation of disciplinary proceedings and the revocation of licenses of lawyers in the absence of a formal organisational structure to regulate lawyers' activities and of mechanisms to ensure the independence and autonomy of each lawyer pose a threat to the proper functioning of the legal profession.

When amending the Law on the Bar and Advocacy, the legislator must observe the principle of proportionality of state intervention whilst at the same time assessing the actual abilities of the organisation and its institutional capacity. It must also prevent the violation of the principle of independence and independence of each lawyer.

Once the appropriate changes and additions have been made, Article 32.6 of the above Law must be implemented.

Languages:

Kyrgyz, Russian (non-official translation by the Chamber).



Identification: KGZ-2016-1-003

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 24.06.2015 / **e)** 9-p / **f)** / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.9.8.3. Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Access to media.**

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

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

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

Keywords of the alphabetical index:

Media, foreign, elections.

Headnotes:

The rule prohibiting the retransmission of foreign television and radio programmes which disseminate information discrediting the honour, dignity and business reputation of candidates cannot be considered a violation of the right to freedom of expression and freedom of information.

Summary:

I. Citizens Osmonbaev B.K. Osmonalieva A.M. and Sutalinov G.A. filed a petition with the Constitutional Chamber seeking recognition of the regulations of Article 22.16 of the Constitutional Law on Elections of the President and Deputies of the *Zhogorku Kenesh* (Parliament) of the Kyrgyz Republic as being in breach of the Constitution. They claimed that the regulation restricted citizens' right to freedom of expression and information and that local media was unfairly bearing the responsibility for disseminating material which discredited the honour, dignity and business reputation of candidates.

II. The Constitutional Chamber observed that the right to campaign belongs to the citizens of the Kyrgyz Republic, candidates and political parties. The media is simply a conduit for information services, a tool in election campaigning.

The right to pre-election campaign is not comparable to the right to freedom of expression, freedom of

speech and information. It is implemented in a strict manner, only during the election campaign and exclusively within the framework of the electoral legal relations.

The right of a State to regulate the electoral process does not require conformity with other international bodies. The existence of such legal statutes cannot be considered as a violation of the constitutional right of everyone, including foreign media, to freedom of expression and freedom of information. By retransmitting foreign television and radio programmes, they are not deprived of the right of access to full information on elections and the electoral process.

The Constitution puts individuals and their rights first in all spheres of public life, thus guaranteeing to all the right of protection of honour and dignity (Article 29.1 of the Constitution). No one should be restricted in their right to defend honour and dignity and related rights and freedoms before the court. There must be real protection of the rights and legitimate interests of persons whose honour and dignity has suffered damage due to the spread of negative information. At the same time, it is not possible to resolve issues of rebuttal in defence of honour, dignity and business reputation of the candidate in the foreign media, when such a possibility should be provided on a mandatory basis according to the law.

Languages:

Russian.

*Identification: KGZ-2016-1-005*

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 14.09.2015 / **e)** 11-p / **f)** Toktakunov N. (Biometrical registration of citizens) / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Biometric data, storage / Biometric data, use.

Headnotes:

The biometric registration of citizens is carried out for the purposes of protection of national security; it does not contradict the Constitution.

Summary:

I. Toktakunov N. and Umetalieva T., Chairman of the Association of Legal Entities “Association of non-governmental and non-profit organisations” asked the Constitutional Chamber to recognise the provisions of the Law on the Biometric Registration of Citizens of the Kyrgyz Republic as being in breach of Articles 5.3, 6, 16.1, 16.2, 20.1, 20.3, 24.1, 29.1, 29.3, 29.4 and 52.1.1 of the Constitution.

According to Toktakunov N., the principle of mandatory biometric registration involves coercion, bringing with it the potential for physical violence, as biometric data cannot be collected without the participation of the person concerned. It also conflicts with the constitutional bar on the collection, storage, use and dissemination of confidential information about the private life of a person without their consent. Legal provisions to the effect that the database of biometric data is the property of the Kyrgyz Republic allow government representatives to use and distribute biometric data without the consent of the bearer.

According to T. Umetalieva, the provisions allow the unauthorised collection of confidential information about a person without his or her consent and without a court decision. Under the Law on Information of a Personal Nature, citizens' biometric data is personal data and subject to the safeguards and principles of privacy stipulated in Constitution. The applicant considers that no law can oblige and no public authority may require citizens to provide their personal data compulsorily, since Article 20.3 of the Constitution does not permit restrictions on the rights and freedoms for other purposes and to a greater extent than is provided for by the Constitution.

II. The Constitutional Chamber noted that, in the framework of the Commonwealth of Independent States (hereinafter, “CIS”), an agreement was signed (Chişinău, 14 November 2008) which stipulated the establishment of public informational systems of new generation passport and visa documents with the use of biometric data, in order to improve the national security of the states who were parties to the

Agreement. The introduction of new technologies with the use of biometrics is an important means of ensuring national security. Consequently, the principle of mandatory biometric registration, which means the obligatory passing of biometric data (Article 5.1 and 5.4.1 of the Law) cannot be regarded as a violation of Articles 5.1, 6, 24.1 and 29 of the Constitution, provided that Article 20.2 of the Constitution is respected.

Biometric registration of citizens for the purpose of timely registration of citizens and issuance of identification documents, as well as the preparation of an updated voters' list as an integral part of the electoral process with a view to ensuring fair, free and transparent elections, is proportionate to the restriction of the right to privacy, in the framework of protection of national security.

Securing the right of the Kyrgyz Republic to the database is simply aimed at eliminating uncertainty in data management; it cannot serve as a basis for the violation of anyone's constitutional rights.

Languages:

Russian.

*Identification: KGZ-2016-1-006*

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 23.09.2015 / **e)** 12-p / **f)** / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Election, universal suffrage / Data, biometrical.

Headnotes:

Norms which only allow citizens to be included in the list of voters and to exercise their right to vote if they have undergone biometric registration should not be perceived as being in breach of the principle of universal and equal suffrage and the right of citizens to elect and be elected to bodies of state power and local self-government.

Summary:

I. Citizens Osmonalieva A.M., Osmonbaev B.K., Sutalinov G.A., filed a petition with the Constitutional Chamber asking it to recognise the regulatory provision of Article 14.2 of the Constitutional Law on Elections of the President of the Kyrgyz Republic and deputies of the *Zhogorku Kenesh* (Parliament), expressed by the words “and those who passed a biometric registration in the manner established by legislation” unconstitutional. In their view, the inclusion in the voters’ list of only those citizens who have submitted biometric data is an unreasonable restriction on citizens’ voting rights.

II. The Constitutional Chamber observed that on 15 October 2013, in a review of the electoral legislation and practices of the States parties to the Organisation for Security and Cooperation in Europe (OSCE), prepared by the Office for Democratic Institutions and Human Rights with respect to Kyrgyzstan, the absence was noted “of clear and formal rules for the system of voter registration management in Kyrgyzstan, which creates the potential risks of manipulation of voter lists”.

In this context, the legislator introduced a new procedure for drawing up electoral lists in the Constitutional Law on Elections of the President of the Kyrgyz Republic and deputies of the *Zhogorku Kenesh* (Parliament), combining both declarative and imperative approaches, aimed at removing the possibility of double or multiple entries in the voters’ lists of the same people. The legislator also provided a mechanism for tracking the voters due to changes in their place of residence on the basis of the Unified State Register of population.

The Constitutional Chamber in its decision dated 14 September 2015 did not find separate provisions of the Law on the Biometric Registration of Citizens of the Kyrgyz Republic and the requirement of mandatory biometric registration of citizens of the Kyrgyz Republic with a view to the preparation of an updated voters’ list to be in contravention of the Constitution.

The state is entitled to develop and use a variety of tools to ensure transparency, integrity and fairness of elections. One such tool is the use of new technologies in the preparation of an updated voters’ list.

III. Judge Osmonbaev E. filed a dissenting opinion in this matter.

Languages:

Russian.

*Identification:* KGZ-2016-1-008

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 09.12.2015 / **e)** 16-p / **f)** Imomnazarova / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.14. Institutions – Judicial bodies – **Arbitration.**

Keywords of the alphabetical index:

Arbitration Court, nature.

Headnotes:

The legal nature of arbitral courts is based on the principles of autonomy of the will and freedom of contract. Parties which agree to apply for a dispute to be resolved by an arbitration court also agree to perform all duties that may arise from it and to put the court’s decision into effect.

Summary:

I. Citizens B. Imomnazarova, G. Myrzakulova and V. Myachin asked the Constitutional Chamber to recognise Article 28 of the Law on the arbitration courts as unconstitutional, on the basis that arbitration court decisions pose a restriction on the right of citizens to judicial protection of the rights and freedoms guaranteed by the Constitution, because they are final and not subject to appeal.

II. The Constitutional Chamber held that the judicial protection of human rights and freedoms is exercised by the courts within the national judicial system, which has been established by the Constitution and laws. The judicial system is composed of the Supreme Court and local courts, therefore other courts or entities engaged in the resolution of disputes or other conflicts outside the judicial system cannot administer justice in the Kyrgyz Republic.

However, under the Constitution, through the guarantee of the right to judicial protection, everyone is entitled to protect their rights by all means not prohibited by law and the development of extra-judicial and pre-trial methods is assured.

One legal method of resolving civil disputes, which is generally accepted in modern society, is an application to the arbitration court. The Constitution allows civil disputes between individuals to be resolved through the procedure of arbitration hearings, and the arbitration court acts as an institute of civic society.

Allowing interested parties the discretion to apply to the court of general jurisdiction for the resolution of their disputes or to choose an alternative way of protecting their rights and to apply to the arbitration court in accordance with the guarantees secured in Articles 40, 42 and 58 of the Constitution cannot be regarded as a violation. Rather, it expands opportunities for the resolution of disputes in the civil forum.

Under the Law on Arbitration Courts, parties in civil law matters can, without the case being considered by a court of general jurisdiction, conclude an agreement, (this can also take the form of an arbitration clause in a contract), and resolve the dispute through arbitration. Such a waiver of the right to have one's dispute heard by a court of a general jurisdiction is not a violation of the right to judicial protection, provided it is made without coercion.

Thus, the establishment of arbitration courts to resolve disputes between individuals and legal entities is not excluded. In this context, the word "court" should not necessarily be understood as a classic type of court, but rather as a body established to address a limited number of disputes.

The provisions under dispute, which provide that an arbitral award is final and not subject to appeal, arise from the legal nature of the institution of arbitration courts, which are based on the principle of autonomy of the will and freedom of contract. When parties agree to their dispute being resolved by the arbitration court, they agree to perform all the duties that may arise from this and, in particular, to carry out the court's decision.

III. Judge Ch. Osmonova submitted a dissenting opinion in this case.

Languages:

Russian.



Identification: KGZ-2016-1-010

a) Kyrgyzstan / **b)** Constitutional Court / **c)** Plenary / **d)** 17.02.2016 / **e)** 2-p / **f)** / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Legal entity / Statute of limitations.

Headnotes:

Legal entities and individuals engaged in entrepreneurial activities may restore a missed limitation period for valid reasons. Provisions preventing them from doing so run counter to the principle of equality before the law and judicial protection.

Summary:

I. A representative of the "Farmaciya Jsc.", Mrs Kochkorbaeva N.B., filed a petition with the Constitutional Chamber, asking it to declare Article 215.2 of the Civil Code unconstitutional. This norm prevents legal entities and citizens engaged in entrepreneurial activities from restoring the limitation period under any circumstances. Once this period has expired (three years in total), the court has to refuse to accept any case seeking redress for violated rights; there is no possibility of verifying the validity of the reasons for having missed the deadline. The applicant contended that this norm deprived these subjects of the possibility of judicial protection, which is guaranteed by the Constitution and not open to restriction by the legislator.

II. The Constitutional Chamber noted that there are situations in legal practice where a party cannot embark on the judicial protection of his or her rights because the limitation period has expired, although he or she might not realise (or have a proper opportunity to realise) that his or her rights have been breached. This is because, under the Civil Law, a certain category of persons (in particular legal entities and those engaged in entrepreneurial activities), have no opportunity to restore the limitation period. This is a legal restriction, preventing the realisation of the right to judicial protection.

The Chamber also noted that the different approach of the legislator to different groups of subjects of civil relations as provided in the Article 215.2 of the Civil Code, some of whom do not have the right to restore a limitation period, runs counter to the constitutional principle of equality of all before the law and the court, and cannot offer all citizens equal protection.

Languages:

Russian.



Latvia Constitutional Court

Important decisions

Identification: LAT-2004-1-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 09.03.2004 / **e)** 2003-16-05 / **f)** On the Compliance of the Minister of Regional Development and Municipal Affairs' Order no. 2-02/57 of 27 May 2003 on Suspension of the Enforcement of the Jurmala City Dome's Binding Regulation no. 17 of 24 October 2001 on the Jurmala Detailed Land-Use Plan for the Territory between the Bulduri Prospect, Rotas Street and 23-25 Avenues; the Minister of Regional Development and Municipal Affairs' Order no. 2-02/60 of 2 June 2003 on Suspension of the Enforcement of the Jurmala City Dome's Binding Regulation no. 10 of 9 October 2002 on the Confirmation of the Detailed Land-Use Plan for the Public Centre "Vaivari" as well as the Minister of Regional Development and Municipal Affairs' Order no. 2-02/62 on Suspension of the Enforcement of the Jurmala City Dome's Binding Regulation no. 18 of 7 November 2001 on the Confirmation of the Detailed Land-Use Plan for the Plot Bulduri 1001, Jurmala with Article 1 of the Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), 38 (2986), 10.03.2004 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

3.3. General Principles – **Democracy**.
 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**.
 4.6.2. Institutions – Executive bodies – **Powers**.
 4.8.3. Institutions – Federalism, regionalism and local self-government – **Municipalities**.

Keywords of the alphabetical index:

Local self-government, regulation, suspension / Good administration, principle / Procedural economy, principle / Land-use plan.

Headnotes:

The principle of legal certainty and the principle of good administration require that the Minister of Regional Development and Municipal Affairs use his or her authority to suspend an illegal binding regulation or another normative act issued by the city dome (rural district council) within a reasonable period of time. However, the State Administration, having found a violation of essential public interests, has not only the right but also the duty to act. The elimination of a violation of essential public interests shall be given priority over the principle of legal certainty.

Summary:

This is the first judgment to be delivered under Article 16.5 and 17.7.1 of the Constitutional Court Law. Even though there are no statements in the judgment about procedure, the judgment deals with matters that show the Court's appreciation for those very specific types of cases.

Three cases were joined into one case, dealing with three applications brought by the submitter, the Jurmala City Dome (Council). The Jurmala City Dome (Council) had adopted several binding regulations on the Detailed Land-Use Plan in Jurmala concerning different territories. The Minister of Regional Development and Municipal Affairs (hereafter – the Minister) subsequently passed three orders suspending the enforcement of those regulations. As reason for passing those orders, the Minister stated that the above-mentioned regulations of the Jurmala City Dome (Council) violated the requirements of legal norms.

The Jurmala City Dome (Council) contended that the Minister's orders did not comply with the principles of a law-based state, *inter alia*, the principles of legitimate trust, proportionality and legal security, all of which follow from Article 1 of the Constitution.

The submitter argued that the principle of proportionality limited the freedom of performance and arbitrariness of the executive power, and was based on certain criteria. The submitter contended that in light of that principle, the Minister had failed to adequately assess the effect of his orders on the rights of private persons, rights that had lawfully arisen on the basis of the suspended binding regulations of the municipality.

The Minister argued that the detailed land-use plans, confirmed by the suspended binding regulations of the municipality, had not been drawn up in conformity with several legal acts.

The Minister argued that the principle of legal security had not been violated as no normative act concerning land-use planning established a time-limit within which the Minister had to exercise his or her right to suspend an illegal binding regulation or another normative act issued by the city dome (rural district council).

The Court reiterated that several fundamental principles of a law-based state, including the principles of proportionality and trust in law follow from the concept of the democratic republic, which is enshrined in the Article 1 of the Constitution.

The Court stressed that the main function of the above-mentioned principles was to protect a private person from an unfounded use of public power, and those principles were to be applied only as far as permitted by the specific rules pertaining to public-law subjects. The principle of trust in law regarding the legal relations in the dispute protects individuals, who – trusting in the lawfulness of the adopted Dome regulations – have carried out certain activities. Therefore, the Constitutional Court, when taking a decision on the conformity of the orders with the Constitution, must consider the following issues:

1. whether the orders in question of the Minister comply with the law; and
2. whether the procedure of the drawing-up and adoption of the Dome documents in question comply with normative acts.

The Court pointed out that under the State Administration Structure Law, supervision means the rights of higher institutions or officials to examine the lawfulness of decisions taken by lower institutions and to revoke unlawful decisions, as well as to issue an order to take a decision in case of an unlawful failure to act. Thus, in the sphere of supervision of autonomous functions, the institution named by the Cabinet of Ministers has the right to review the legality of the decisions (regulations) issued by a Dome.

The Court held that unlike decisions taken by a public-law subject that are addressed to private persons and whose legal argumentation must be exhaustive, relations of legal persons of public rights shall be guided by the principle of procedural economy; therefore, direct or indirect reference to a previously-mentioned factor may be permissible.

The Court examined in detail whether each Dome act suspended by Minister met the requirements of the law and found that the Dome regulations in question did not in substance comply with the specific legal status of the protected zone of the dunes as well as the principles of territorial principles, environmental protection and state administration.

The Court made a declaration that the impugned orders of Minister were in conformity with Article 1 of the Constitution.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2005-1-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 15.02.2005 / **e)** 2004-19-01 / **f)** On the Compliance of Section 21.3 of the Civil Procedure Law with Articles 1 and 92 of the Republic of Latvia Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), no. 30(3188), 22.02.2005 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.3.1. Constitutional Justice – Jurisdiction – **Scope of review.**

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

3.19. General Principles – **Margin of appreciation.**

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

Keywords of the alphabetical index:

Recusal, judge, refusal, appeal / Procedure, economy, principle / Judge, recusal / Civil procedure.

Headnotes:

In cases of conflict between legal principles contained in the Constitution, these principles shall be assessed by taking into consideration the particular situation and circumstances of the case. Assuming that the regulation pertaining to the adjudication of the self disqualification of a judge (recusal) would serve the respect of the principle of court impartiality, this regulation first has to be distinguished from the contested norm and should nonetheless provide for the respect of the procedural economy. The regulation allowing for the removal application to be adjudged by the judge complies with Article 92 of the Constitution that encompasses the right to a fair trial.

Summary:

I. Section 21.3 of the Civil Procedure Law (hereinafter, the “impugned norm”) determines:

“in a matter adjudicated by a judge sitting alone, the removal application shall be adjudged by the judge himself or herself”.

In accordance with Section 19.4 of the Civil Procedure Law, a participant in the matter may apply for removal of a judge if the judge has not recused himself or herself, stating the reasons for the recusal. The obligation of the recusal is established in paragraphs 2 and 3 of this Section, in its turn the first paragraph enumerates the cases when the judge shall recuse himself or herself if there are concrete circumstances not connected with the individual attitude of a judge. In accordance with paragraph four, a judge does not have the right to participate in the adjudicating of a matter if he or she “has a direct or indirect personal interest in the outcome of the matter or if there are other circumstances which create well-founded doubt as to his or her objectivity”.

The applicant of the constitutional claim is the defending party in a civil matter, which is being adjudicated by the judge sitting alone. During the process of adjudication of the matter, the defendant had doubt about the objectivity of the judge and he applied for removal of the judge. The judge did not recuse herself on the basis of the impugned norm. The submitter holds that in such a way his right to a fair court, fixed in Article 92 of the Constitution (*Satversme*), has been violated.

II. The Constitutional Court reiterated that the contents of the human rights norms, incorporated in the Constitution, shall be interpreted as read together with the norms included in international human rights instruments. With reference to Article 6 ECHR, Article 14 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, the Court pointed out that there is no doubt that the right to a fair court, guaranteed in Article 92 of the Constitution, includes the right to an impartial court.

The Court established that the institution of recusal is subordinated to the duty of a judge to abstain from the adjudication of a matter, but besides that, the concept of this legal institute is not logically connected with a particular procedure for its implementation. It is possible to secure court impartiality in several ways. Moreover, it is possible to do it without using the institution of recusal. Even non-acceptance of the application for recusal may serve as the basis for an appeal and thus the right of

the person to impartial court is protected. This viewpoint is substantiated by an essential principle: the procedure for the adjudication of removal established in the impugned norms serves the procedural economy.

The Court stressed that according to Recommendation Rec (1995) 5 of the Council of Europe concerning the "Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases", the states are requested to consider the possibility of "postponing the right to appeal in certain interlocutory matters to the main appeal in the substantive case".

The Court reiterated that procedural economy is an element of the contents of Article 92 of the Constitution. However, deciding from the context of the applicant's statement, one may conclude that it is more directed to the conflict between the principle of procedural economy and the principle of impartiality of the court. However, even then the viewpoint of the applicant on the mutual hierarchy of this principle is unfounded. The legal science acknowledges that in cases of conflict among legal principles, they shall be assessed by taking into consideration the particular situation and circumstances. Even assuming that a regulation on the adjudication of the recusal, which would differ from the impugned norm, would advance the observation of the principle of court impartiality, one has to admit that the gain shall be proportionate to the interests of procedural economy.

The Constitutional Court does not deny that another procedure for the adjudication of applications for the recusal is possible, however, in accordance with Article 19.1 of the Constitutional Court Law, its duty is to assess the compliance of the impugned norm with fundamental rights determined in the Constitution, but not to substitute the freedom of action of the legislator with its viewpoint on a more rational solution.

The Court pointed out that in accordance with the case-law of the European Court of Human Rights, the errors resulting from the decisions of the court of the first instance may be rectified by the appellate instance. The issue on the violation of the right to a fair court "shall be assessed by considering the proceedings as a whole including the decision of the appellate court" and taking into account its role in the proceedings. In accordance with the Civil Procedure Law the appellate instance adjudicates matters on the merits, therefore it may rectify any of the errors done by the court of the first instance.

The Court declared the Section 21.3 of the Civil Procedure Law as in conformity with Article 92 of the Constitution.

Cross-references:

Constitutional Court:

- no. 2001-10-01, 05.03.2002;
- no. 2001-17-0106, 20.06.2002, *Bulletin* 2002/2 [LAT-2002-2-006];
- no. 2003-04-01, 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-009];
- no. 2003-08-01, 06.10.2003, *Bulletin* 2003/3 [LAT-2003-3-010];
- no. 2004-06-01, 11.10.2004;
- no. 2004-10-01, 17.01.2005, *Bulletin* 2005/1 [LAT-2005-1-001].

Judgments of other Constitutional Courts:

- Federal Constitutional Court of Germany, *BVerfGE* 90, 145 (182).

European Court of Human Rights:

- *Adolf v. Austria*, no. 8269/78, 26.03.1982, Series A, no. 49;
- *Edwards v. the United Kingdom*, no. 13071/87, 16.12.1992, Series A, no. 247-B;
- *De Cubber v. Belgium*, no. 9186/80, 26.10.1984, Series A, no. 86;
- *Helmers v. Sweden*, no. 11826/85, 29.19.1991, Series A, no. 212-A;
- *Ekbatani v. Sweden*, no. 10563/83, 26.05.1988, Series A, no. 134.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2008-2-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 17.01.2008 / **e)** 2007-11-03 / **f)** On Compliance of the Part of Riga Land Use Plan 2006 – 2018 Covering the Territory of the Freeport of Riga with Article 115 of the *Satversme* (Constitution) of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 12(3796), 23.01.2008 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

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

1.3.5.8. Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

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

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

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

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

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

3.19. General Principles – **Margin of appreciation.**

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

5.1.1.5.2. Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law.**

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

Keywords of the alphabetical index:

Land-use plan / Territory, protected / Environment, protection / Environmental impact, assessment / Precaution, principle.

Headnotes:

The right to live in a benevolent environment is of direct application. An individual has the right to apply to the court about action (or lack of it) on the part of the public law subject, which has infringed his or her rights and legitimate interests. These individual rights derive from the specific nature of environmental law.

The rights to a benevolent environment include three procedural elements – first, the right of access to information on the environment, second, the right to participate in environmental decision-making, and third, the right of access to the courts in environmental matters. These procedural elements form part of the obligations of the State to ensure a benevolent environment for future generations.

The objectives and tasks faced by modern society may be achieved only by close collaboration between the State, local government, non-governmental organisations and the private sector. Therefore, the term “the State” should be construed here to include local authorities and other derived public persons, whose duty, together with that of the public administration institutions, is to protect the universal right to live in a benevolent environment.

Legal persons under private law, and not only private law persons, clearly have rights regarding the environment.

Local government has extensive discretionary power over land use planning, under the legislation. However, this power is not unlimited. The principles of land use planning and general principles shall serve as guiding lines for freedom of action in the sector of land use planning. The objective of a land use plan is to ensure economic development and implementation of social and cultural interests, and protection of the environment. The contents of a land use plan should be determined by acknowledging limits of discretion of local government and the objective of the land use plan to ensure a coordinated implementation of economic, environmental, social and cultural interests.

Although in specific cases the Constitutional Court may or even must go beyond the strict formulation of a claim in order to ensure effective protection of individual rights and judgment enforcement, the assessment of the constitutional compliance of such acts, which are not subject to review in the respective case, would be contrary to the procedural principles of the Constitutional Court.

According to the precautionary principle, environmental protection is not limited to protection of the environment to prevent impairment and damage occurring. It is often impossible to return a site to its previous state after an adverse event. The objective of the precautionary principle is to minimise possible negative future effects. This requires assessment and elimination of potential risks at an early stage of activities or decision-making. This makes sound economic sense, as it is usually far more expensive to remedy environmental damage after the event. Reference to the precautionary principle ensures prevention of potential risks at an early stage.

The principle of rule of law, a fundamental principle of a democratic state under the rule of law, provides that laws should be predictable and clear as well as sufficiently stable and constant. Therefore, legal regulation should be sufficiently stable to enable individuals to make long-term plans as well as short-term decisions.

Upon ratification of the Treaty on Accession of Latvia to the European Union, the European Union law became an integral part of the Latvian legal system. Therefore, legal acts of the European Union and interpretation provided by case-law of the European Court of Justice should be taken into account when applying national law.

Summary:

I. The association “Coalition for Nature and Cultural Heritage Protection” submitted a constitutional complaint maintaining that part of the land use plan regarding the territory of the Freeport of Riga is in conflict with Article 115 of the Constitution.

The complainant argued that implementation of the plan had already given rise to several breaches of procedural and substantive law. Were it to remain in force, irreversible harm might be inflicted on the environment. Activities were already taking place in the Freeport of Riga that were unlawful until the strategic assessment required by legislation had been carried out.

II. The Constitutional Court ruled that a strategic assessment is indispensable to the process of adoption of planning documentation. The strategic assessment of the plan was vitiated by a manifest procedural defect. The Court accordingly held that that part of the Riga City Land Use Plan 2006-2018 relating to the territory of the Freeport of Riga was in breach of Article 115 of the Constitution of the Republic of Latvia. It was void from the date of coming into force.

Cross-references:

Constitutional Court:

- no. 2000-03-01, 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2000-07-0409, 03.04.2001, *Bulletin* 2001/1 [LAT-2001-1-002];
- no. 2001-07-0103, 05.12.2001;
- no. 2001-12-01, 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2002-04-03, 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-14-04, 14.02.2003, *Bulletin* 2003/1 [LAT-2003-1-002];
- no. 2003-16-05, 09.03.2004, *Bulletin* 2004/1 [LAT-2004-1-003];
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-10-03, 14.12.2005;
- no. 2005-12-0103, 16.12.2005;
- no. 2006-09-03, 08.02.2007;
- no. 2006-38-03, 26.04.2007;
- no. 2007-12-03, 21.12.2007;
- no. 2007-13-03, 19.12.2007.

European Court of Human Rights:

- *Hatton and Others v. the United Kingdom*, no. 36022/97, 02.10.2001, paragraph 97.

Court of Justice of the European Communities:

- C-44/95 *Regina v. Secretary of State for the Environment* [1996] ECR I-03805;
- C-3/96 *Commission v. the Netherlands* [1998] ECR I-3031;
- C-180/96 *United Kingdom v. Commission* [1998] ECR I-2265;
- C-371/98 *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd.* [2000] ECR I-9235;
- C-67/99 *Commission v. Ireland* [2001] ECR I-5757;
- C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405;
- C-6/04 *Commission v. United Kingdom* [2005] ECR I-9017.

Languages:

Latvian, English (translation by the Court).

*Identification:* LAT-2009-3-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 21.12.2009 / **e)** 2009-43-01 / **f)** On the compliance of Section 2.1 of the Law on State Pension and State Allowance Disbursement between 2009 and 2012” with Articles 1 and 109 of the Constitution of the Republic of Latvia and on the compliance of Section 3.1 of the above Law with Articles 1, 91, 105 and 109 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 22.12.2009, no. 201(4187) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.6. Constitutional Justice – **Effects**.
 1.6.6. Constitutional Justice – Effects – **Execution**.
 2.1.1.4.4. Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.1.4.9. Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966.**
 3.4. General Principles – **Separation of powers.**
 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.**
 3.19. General Principles – **Margin of appreciation.**
 3.21. General Principles – **Equality.**
 4.5.2.3. Institutions – Legislative bodies – Powers – **Delegation to another legislative body.**
 5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
 5.2.1.3. Fundamental Rights – Equality – Scope of application – **Social security.**
 5.3.39. Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Pension, reduction / Pension, amount / Solidarity principle / Aim, legitimate / Budget.

Headnotes:

The provisions of the Constitution do not bestow the right to a specific amount of social security, and the State should refrain from excessive interference in its citizens' financial affairs. The amount of social security granted by the State may vary depending on the amount of funds at its disposal. However, the fundamental rights of persons established by the Constitution are binding on the legislator irrespective of the economic situation in the State.

In determining appropriateness, the Constitutional Court cannot replace the legislator and present more appropriate political decisions or advise how to allocate the State budgeted funds.

In a situation of extremely limited State financial resources of the State, the latter has freedom of action to change the conditions for pension disbursement – with the aim of sustaining a just social insurance system.

Conceptual decisions over the receipt of an international loan and its terms and conditions are an important matter for State and public life. In compliance with the procedure established by the Constitution, these decisions must be taken by the legislature itself.

The amount of pension working pensioners receive can be restricted, taking into account their income from employment.

Summary:

The point at issue here was the ten percent reduction in old age and service pensions granted by regulations, and a 70% reduction in the old-age pensions and service pensions of employed pensioners.

The Constitutional Court was charged with determining whether the rights of persons to social security were infringed, and whether the principle of legal security was breached.

The Court concluded that the amount of social security paid may be changed if the State's financial situation alters, and the State has the right to reduce the amount of social security if the amount of public financial resources is reduced. However, irrespective of the economic situation prevailing in the State, the fundamental rights of persons enshrined in the Constitution are binding on the legislator.

The Court indicated that the pension system should be sustainable; so that it should be guided not only towards current recipients of pensions, but also towards ensuring the security of subsequent generations.

The economic situation influenced the stability of the special budget on social insurance. Consequently, the sustainability of the social budget came under threat.

In earlier case-law, the Court had concluded that the reduction of pensions may have a legitimate objective – solving financial problems in the social budget. The Parliament and the Cabinet of Ministers were therefore duty-bound to act in such a way as to ensure the long-term welfare of society.

Savings in the social budget achieved by cutting pensions comply with consequences caused by an economic recession; this is a way of achieving a legitimate aim.

In assessing the compliance of the norms with the principle of proportionality, the Constitutional Court reviewed opinions from the Parliament and the Cabinet of Ministers as to the fact that cuts in pensions are connected with requirements by international creditors. The Court indicated that international liabilities cannot serve as an argument in favour of restricting fundamental rights. Moreover, the Cabinet of Ministers could not conclude any such agreement without due authorisation by Parliament.

The material submitted in the case indicated a lack of appropriate planning in the social budget. The budget deficit was advanced by several unconsidered decisions which would also have an impact on future pensioners.

In assessing the proportionality of the norms, the Court investigated whether, when considering possible alternatives, the most lenient solution was selected. The legislation was adopted on an urgent basis and applies to all pensioners, with no scope for analysis of the impact on different groups of pensioners.

Parliament had also failed to take into account the fact that pensioners are a group within society in need of particular protection. Pensioners' rights to social security were not respected, even during the period of economic growth, as the non-uniformity of incomes and the risk of poverty for elderly persons increased in this period, too.

The State is also obliged to ensure a minimum level of social security. Therefore, by temporarily withholding payment of pensions, the State should have provided special protection for those pensioners who receive pensions that do not comply with social security and who might need to apply for social assistance. In the judgment, the Constitutional Court suggested methods that could be applied to establish those groups of pensions whose pensions cannot be cut, even on a temporary basis.

Given the lack of assessment of alternatives by the legislator, and lack of provision for a more lenient solution, the Court found that the contested norms did not comply with the Constitution.

The Court also assessed the observance of the principle of legal certainty. The legislator had made no provision either for a transitional period or for compensation. The Court therefore concluded that a fair balance between the interests of the society and those of particular pensioners had not been achieved.

The Constitutional Court declared the contested provisions void from the date of their adoption. Deductions of pensions would be terminated by 1 March 2010 at the latest. Parliament was directed to establish a procedure for recompense for any such deductions by 1 March 2010.

Cross-references:

Constitutional Court:

- no. 2000-08-0109, 13.03.2001, *Bulletin* 2001/1 [LAT-2001-1-001];
- no. 2001-02-0106, 26.06.2001, *Bulletin* 2001/2 [LAT-2001-2-003];
- no. 2001-11-0106, 25.02.2002, *Bulletin* 2002/1 [LAT-2002-1-003];
- no. 2001-12-01, 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2002-04-03, 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2003-05-01, 29.10.2003, *Bulletin* 2003/3 [LAT-2003-3-011];
- no. 2003-14-01, 04.12.2003;
- no. 2004-21-01, 06.04.2005;
- no. 2005-08-01, 11.11.2005;
- no. 2006-04-01, 08.11.2006;
- no. 2006-13-0103, 04.01.2007;
- no. 2007-01-01, 08.06.2007, *Bulletin* 2007/3 [LAT-2007-3-004];
- no. 2007-03-01, 18.10.2007, *Bulletin* 2007/3 [LAT-2007-3-005];
- no. 2007-04-03, 09.10.2007;
- no. 2007-23-01, 03.04.2008;
- no. 2007-24-01, 09.05.2008, *Bulletin* 2008/2 [LAT-2007-2-003];
- no. 2009-08-01, 26.11.2009, *Bulletin* 2007/3 [LAT-2007-3-005].

European Court of Human Rights:

- *Lithgow v. the United Kingdom*, nos. 9006/80 9262/81 9263/81, 9006/80 9262/81 9263/81 9265/81 9266/81 9313/81 9405/81, 08.07.1986, paragraphs 120-122;
- *Guillemin v. France*, no. 19632/92, 02.09.1998, paragraph 24;
- *Jucys v. Lithuania*, no. 5457/03, 08.01.2008, paragraphs 37, 39;
- *Stec and Others v. the United Kingdom*, nos. 65731/01 and 65900/01, 12.04.2006, paragraph 51;
- *Moskal v. Poland*, no. 10373/05, 15.09.2009, paragraph 61;
- *Kjartan Ásmundsson v. Iceland*, no. 60669/00, 30.03.2005, paragraph 39.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2010-2-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 13.05.2010 / **e)** 2009-94-01 / **f)** The Conformity of the words in the first sentence of Paragraph 1 of the Transitional Provisions of the Citizenship Law "if the registration takes place by 1 July 1995" and of the second sentence with Articles 1 and 2 of the Constitution of the Republic of Latvia, as well as with the Preamble of 4 May 1990 Declaration of the Supreme Soviet of Latvian S.S.R. "On the Restoration of the Independence of the Republic of Latvia" / **g)** *Latvijas Vestnesis* (Official Gazette), no. 77(4269), 18.05.2010 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

2.3.6. Sources – Techniques of review – **Historical interpretation.**

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

3.16. General Principles – **Proportionality.**

3.19. General Principles – **Margin of appreciation.**

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

Keywords of the alphabetical index:

Citizenship, dual / Occupation, consequences / Occupation, period / Citizenship, deprivation / Independence, state / Citizenship, continuity, principle / Annexation / Legal capacity, state / Diplomatic representatives / Political question, review / State, continuity.

Headnotes:

Dual citizenship acquired under the conditions of state occupation cannot be regarded as unlawful.

The principle of the continuity of citizenship envisages the legal duty of the state to restore, to the extent that is possible, the rights of those citizens who had them prior to the unlawful occupation of the state. At the same time it must be noted that in the context of the continuity doctrine, the state is not under a duty to register as citizens all persons who were the citizens of this state before it *de facto* lost its independence, and the descendants of such persons.

The adoption of the legal regulation on citizenship has a political aspect, which indirectly defines the limits of review by the Constitutional Court.

Summary:

I. The applicant, the Department of Administrative Cases of the Senate of the Supreme Court, argued that the impugned provision did not comply with Article 1 of the Constitution providing that Latvia is an independent democratic republic and the doctrine of continuity of the State of Latvia.

II. The Court notes the fact that the Citizenship Law *de jure* in force during the occupation of Latvia was binding on persons emigrating from Latvia. The Law provided for a prohibition of dual citizenship and provided that a person would lose Latvian citizenship if conferred citizenship of another state. However, the Constitutional Court notes that the Law could not be applied formally. Acts of Latvian diplomats during the occupation period were the only expression of Latvian statehood and their actions the only manifestation of the legal capacity of the Latvian State. Thus, according to the State continuity doctrine, the legislator is bound to observe the practice established by the diplomats abroad during the occupation period.

During the occupation, Latvian representations allowed Latvian foreign passports to be retained in cases where persons had acquired another citizenship. At that time, the Latvian representations had to ensure, as far as possible, the preservation of statehood; therefore, the formal application of the Citizenship Law was impossible. Consequently, dual citizenship acquired by persons during the occupation cannot be recognised as illegal.

Upon restoration of independence, the rights of Latvian citizens had to be restored. This was done by introducing a registration procedure, namely, in the early 90s, Latvian citizens living either in Latvia or abroad had to register in the Population Register. The Court recognises that any person who was a citizen of Latvia during the pre-occupation period, irrespective of his or her place of residence, was regarded as a Latvian citizen. However, the legislator could not deliberately and unilaterally impose Latvian citizenship by ignoring the person's relations with other states. The free will of a person is of particular importance when citizenship rights are restored. Therefore, the requirement to register was justified.

Latvian citizens living abroad had the possibility of registering before a certain date and of keeping another citizenship. Although the 1994 Citizenship Law provided for less than one year for the registration, the period should start running from 1991, when the Supreme Council adopted the resolution on restoration of rights of Latvian citizens. The resolution allowed dual citizenship to be retained. Consequently, the total time was about three and a

half years. Therefore, there are no grounds for arguing that persons who wished to have their Latvian citizenship restored did not have the possibility to register.

The Court notes that the Parliament, when adopting the Law on Citizenship, decided to observe the historical principle of prohibition of dual citizenship. The impugned provision provides for a special legal regime for persons who were forced to leave Latvia and acquired citizenship of another state during the occupation. In attempting to eliminate the negative consequences caused by the occupation, the Parliament provided for a mechanism that would ensure as fair a transition as possible.

Consequently, the Constitutional Court recognises that the impugned provision complies with the Constitution, as well as with the doctrine of continuity of the state.

The Constitutional Court recognises that the issues related to dual citizenship fall within the competence of legislator rather than the court. According to the established state practice, dual citizenship has always been regarded as an undesirable phenomenon. It can be derived from international law and the legal literature that dual citizenship is a political issue rather than one subject to judicial proceedings. Consequently, the issue on the admissibility of dual citizenship should be decided on by the legislator or the body of citizens.

Cross-references:

Constitutional Court:

- no. 04-03(98), 10.06.1998, *Bulletin* 1998/2 [LAT-1998-2-004];
- no. 04-07(99), 24.03.2000, *Bulletin* 2000/1 [LAT-2000-1-001];
- no. 2005-12-0103, 16.12.2005;
- no. 2006-04-01, 08.11.2006;
- no. 2007-07-01, 21.08.2007;
- no. 2007-10-0102, 29.11.2007, *Bulletin* 2008/2 [LAT-2008-2-001].

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2012-1-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 03.02.2012 / **e)** 2011-11-01 / **f)** On Compliance of Sub-programme 23.00.00 of the Law “On the State Budget 2011” with Article 1 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 07.02.2011, no 21(4624) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

- 1.3.1. Constitutional Justice – Jurisdiction – **Scope of review.**
- 1.3.4.12. Constitutional Justice – Jurisdiction – Types of litigation – **Conflict of laws.**
- 3.9. General Principles – **Rule of law.**
- 3.10. General Principles – **Certainty of the law.**

Keywords of the alphabetical index:

Legislative procedure / Budget, state.

Headnotes:

The State budget, as a governance plan, shall be regarded as an external normative act approved through an established legislative procedure.

A law is a legal act issued according to the procedure established in the Constitution. This definition of a law includes both the term’s material and formal meaning.

Limiting the Constitutional Court’s review to only legal norms regarded as law in the formal and material meaning would threaten the guarantee of comprehensive priority accorded to constitutionally important norms. The restriction would also limit the competence of the Constitutional Court, resulting in cases where people’s fundamental rights would be denied.

The funding established in the State budget is an issue of political decision-making. The budget amount cannot be reviewed by the Constitutional Court because it cannot reassess actions taken by the Cabinet of Ministers and the Parliament that have been elaborated and adopted based on an economic assessment or prognosis of the State’s economic issues.

As long as the resolution of issues related to the State budget does not exceed the principle of separation of powers, including the denial of a constitutional institution the possibility to exercise its tasks or functions set in the Constitution, the Cabinet of Ministers and the Parliament shall enjoy freedom of prognostication and decision-making in this respect.

When deciding on the State budget, it is necessary to assure the long-term balance between the State's economic possibilities and the welfare of the entire society.

Summary:

I. In Section 12.4 of the Law "On Roads", the legislator set out an amount of resources to be used for a State road fund programme. The norm provides that the grant cannot be less than the income of the State budget from the annual vehicle tax planned in the respective year or less than 80 % of the planned income into the State budget from the excess duty from oil products, or less than the one granted the previous year. Nevertheless, the contested provision in the Law "On the State Budget 2011" established that in 2011, the State road fund shall be granted resources for covering its expenses at the amount of 80,675,980 lats, whereas the income from the excess duty from oil products was planned at the amount of 220,200,000 lats.

According to the Applicants (twenty members of the Parliament), the contested sub-provision infringes on the principle of the rule of law and the principle of the legitimate expectations of merchants participating in public procurements of reconstruction and construction of roads, and drivers who purchase oil products and pay excess duty.

II. Since 1 January 2012, the contested provision was no longer enforced, but the Constitutional Court Law did not terminate the proceedings. The Constitutional Court reasoned that it is an important constitutional issue, and the decision may play an important role in assuring the principle of the rule of law for future preparation, elaboration and adoption of the State budget.

The Constitutional Court asserted that it has jurisdiction to assess whether, in the process of elaborating and adopting the State budget, the constitutional institutions have observed the principle of legitimate expectations and the rule of law.

The Constitutional Court determined that the contested provision did not create any legitimate expectations to private persons and that merchants do not have any subjective right to request from the State administration, organisation of a particular procurement procedure or performance of particular works, or establishment of a particular remuneration. Likewise, the contested provision did not create any legitimate expectations of drivers who purchase oil products that certain amount of budget resources would be transferred to maintain the roads. It does not follow from the Constitution that the legislator

would have the duty to cover expenses, by means of incomes from a certain kind of tax, incurred in a certain field.

The Court also considered whether the stipulated budget elaboration procedure has been observed and whether public institutions involved in the budget elaboration had the duty to ensure the compatibility of the contested provision and Section 12.4 of the Law "On Roads".

The Court indicated that in 2009, as the economic situation of the State rapidly deteriorated, public institutions necessarily and urgently had to revise the budget elaboration methodology and to balance the budget by reducing resources pursuant to realisable possibilities to cover for planned expenses. This meant that the legislator had the duty to introduce amendments into normative acts, establishing necessary funding to cover the cost of planned expenses to ensure observance of the principle of the rule of law. This did not release the Cabinet of Ministers from the duty to ensure that the effective legal norms and the draft State budget did not conflict with each other.

The Court noted that the insufficient cooperation between the Cabinet of Ministers and the Parliament to ensure the principle of the rule of law when adopting the Law "On State Budget 2011" was insufficient, even though the formal procedure for adoption of the draft State budget has been observed.

The Court, nevertheless, determined that there is no reason to hold that non-compliance of the contested provision and Section 12.4 of the Law "On Roads" would have denied any constitutional institution's ability to fulfil its duties and functions established in the Constitution.

The Court concluded that the constitutional institutions have not arbitrarily breached procedural rules for adoption of the contested provision. The funding established in the contested provision testifies that, in the particular situation, the balance between State economic possibilities and the necessity to ensure welfare of the society has been observed. Likewise, funding granted to the State road fund in the frameworks of the contested provision has not caused any considerable threat to the interests of society or the State.

Cross-references:

Constitutional Court:

- no. 04-03(98), 10.06.1998;

- no. 03-04(98), 13.07.1998, *Bulletin* 1998/2 [LAT-1998-2-005];
- no. 01-05(98), 27.11.1998, *Bulletin* 1998/3 [LAT-1998-3-007];
- no. 04-03(99), 09.07.1999, *Bulletin* 1999/2 [LAT-1999-2-003];
- no. 03-05(99), 01.10.1999, *Bulletin* 1999/3 [LAT-1999-3-004];
- no. 04-06(99), 05.04.2000;
- no. 2001-06-03, 22.02.2002, *Bulletin* 2002/1 [LAT-2002-1-002];
- no. 2005-12-0103, 16.12.2005;
- no. 2006-04-01, 08.11.2006;
- no. 2007-03-01, 18.10.2007, *Bulletin* 2007/3 [LAT-2007-3-005];
- no. 2007-10-0102, 10.05.2010, *Bulletin* 2008/2 [LAT-2008-2-001];
- no. 2007-15-01, 12.02.2008;
- no. 2008-35-01, 07.04.2009, *Bulletin* 2009/2 [LAT-2009-2-002];
- no. 2009-08-01, 26.11.2009;
- no. 2009-11-01, 18.01.2010, *Bulletin* 2010/2 [LAT-2010-2-001];
- no. 2009-42-0103, 17.02.2010;
- no. 2009-43-01, 21.12.2009, *Bulletin* 2009/3 [LAT-2009-3-005];
- no. 2010-06-01, 25.10.2010, *Bulletin* 2011/1 [LAT-2011-1-001];
- no. 2010-22-01, 27.01.2011;
- no. 2010-40-03, 11.01.2011, *Bulletin* 2011/2 [LAT-2011-2-003];
- no. 2010-51-01, 14.03.2011;
- no. 2011-44-01, 20.12.2010;
- no. 2011-03-01, 19.12.2011;
- no. 2011-05-01, 03.11.2011.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2013-3-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 18.12.2013 / **e)** 2013-06-01 / **f)** On the compliance of Section 23.5.2 and 23¹.1 of Law on National Referenda, Legislative Initiatives and European Citizens' Initiative with Article 1 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 20.12.2013, no. 250(5026) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

- 3.1. General Principles – **Sovereignty.**
- 3.3.2. General Principles – Democracy – **Direct democracy.**
- 3.4. General Principles – **Separation of powers.**
- 3.9. General Principles – **Rule of law.**
- 3.19. General Principles – **Margin of appreciation.**
- 4.7.9. Institutions – Judicial bodies – **Administrative courts.**
- 4.9.1. Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting.**
- 4.9.2. Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**
- 4.9.2.1. Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility.**

Keywords of the alphabetical index:

Power, constitutional / Legislation, initiation / Administrative Court, jurisdiction.

Headnotes:

When setting out the procedure for national referenda and the implementation of electoral legislative initiatives, the legislator enjoys discretion to the extent it is not limited by constitutional norms. It also has the discretion to select, from a number of laws, the law in which the corresponding regulation will be included, and also in terms of issues linked to legislative technique within the framework of a single law.

A draft law cannot be considered to be fully elaborated in terms of content if:

1. it envisages deciding on issues which are not to be regulated by law at all;
2. it would be incompatible, were it to be adopted, with the norms, principles and values of the Constitution;
3. it would be incompatible, were it to be adopted, with international commitments.

A distinction should be drawn between legal assessment as to whether draft legislation should be deemed to be fully elaborated and the assessment of its usefulness, admissibility or its political assessment, which can only be performed by the legislator or the people.

Anyone applying the law must apply the Constitution directly and immediately. The courts of general jurisdiction and administrative courts must verify the

way the party applying the law has interpreted the content of a concept and whether the outcome of applying the legal norms complies with the fundamental principles of a judicial and democratic state.

Summary:

I. The applicant, the Administrative Department of the Supreme Court, had been examining the case concerning the decision by the Central Election Commission (hereinafter, the "CEC") not to submit the draft law "Amendments to the Citizenship Law" for collection of signatures.

In the applicant's opinion, the contested norm is incompatible with the principle of the separation of powers enshrined in the Constitution. The jurisdiction of the CEC and the Supreme Court, as defined by the contested norms, was too broad. CEC should verify the constitutionality of the submitted draft law. The Supreme Court, in its turn, in examining the legality of the CEC's decision, must perform the control of the legislative initiative as to its content. Issues like these should only be within the jurisdiction of the Constitutional Court.

II. The Constitutional Court noted that the Central Election Commission had to determine whether the submitted draft law was fully elaborated as to its content.

In establishing the scope of the CEC's jurisdiction in assessing the content of draft legislation submitted by the electorate, the Constitutional Court noted that people should be able to influence decision-making within the state and that the will of the people should be the source of state power. The right to legislative initiative, in its turn, is a powerful tool, which the people can use to act as legislator. The CEC must accordingly register all draft laws submitted by the electorate, except for cases when it is not fully elaborated as to its content.

The Supreme Court verifies the lawfulness of decisions taken by the CEC and must establish whether the draft legislation submitted is definitely not fully elaborated as to its content and whether the incompatibility of the draft law with the respective requirement has been legally substantiated in the decision adopted by the CEC.

The Constitutional Court also noted that it had exclusive jurisdiction to recognise legal norms as being incompatible with legal norms of a higher legal force and declare them invalid. However, the Administrative Court must, within the framework of each case, verify the compatibility of the applicable legal norms with legal norms of a higher legal force.

It therefore recognised the contested norms as being compatible with the principle of the separation of powers and with the Constitution.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 2006-04-01, 08.11.2006;
- no. 2006-05-01, 16.10.2006, Bulletin 2006/3 [LAT-2006-3-004];
- no. 2006-12-01, 20.12.2006, Bulletin 2006/3 [LAT-2006-3-006];
- no. 2007-10-0102, 29.11.2007, Bulletin 2008/2 [LAT-2008-2-001];
- no. 2008-40-01, 19.05.2009;
- no. 2010-09-01, 13.10.2010;
- no. 2011-15-01, 13.10.2011;
- no. 2011-18-01, 08.06.2012;
- no. 2010-02-01, 19.06.2010;
- no. 2012-03-01, 19.10.2012.

Languages:

Latvian, English (translation by the Court).



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2004-2-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 25.05.2004 / **e)** 24/04 / **f)** On the Law on Presidential Elections / **g)** TAR (Register of Legal Acts), 85-3094, 26.05.2004, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.3.1. General Principles – Democracy – **Representative democracy.**
 3.4. General Principles – **Separation of powers.**
 3.16. General Principles – **Proportionality.**
 4.4.4.2. Institutions – Head of State – Appointment – **Incompatibilities.**
 4.9.5. Institutions – Elections and instruments of direct democracy – **Eligibility.**
 5.3.41.2. Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Election, presidential / President, candidate, requirement / Oath, breach / Impeachment, proceedings.

Headnotes:

Under the Constitution, where a person has grossly violated the Constitution, breached the oath or committed a crime whereby the Constitution has also been grossly violated and the oath has been breached, and the person has been removed in accordance with the procedure for impeachment proceedings from the office of the President of the Republic, President or a justice of the Constitutional Court, President or a justice of the Supreme Court, President or a judge of the Court of Appeal, or has had his or her mandate of member of the parliament (*Seimas*) revoked, that person may never be elected President of the Republic, or member of the parliament, and may never hold the office of justice of the Constitutional Court, justice of the Supreme Court, judge of the Court of Appeal, judge of another

court, member of the Government or State Controller. Such a person may never hold the offices established in the Constitution that require the taking of the oath provided for in the Constitution before taking office.

The Constitution does not establish that a person, who has been removed from office, or has had his or her mandate of a member of the parliament revoked in accordance with the procedure for impeachment proceedings for the commission of a crime by which the Constitution has not been grossly violated and the oath has not been breached, may not be elected President of the Republic.

Summary:

I. The applicants, a group of members of parliament, asked the Constitutional Court to assess certain provisions of the Law on Presidential Elections, which stipulate that a person who has been removed from office or whose mandate as a member of parliament has been revoked by parliament in accordance with the procedure for impeachment may not stand for election as President of the Republic if less than five years have elapsed since they were removed from office or their mandate as member of parliament was revoked. The applicants contended that these provisions imposed an additional sanction on a person who was subject to impeachment proceedings because it limited their passive electoral rights. Moreover, by establishing an additional sanction for impeachment, parliament undertook the function of administration of justice. In the Republic of Lithuania, justice may be only administered by court.

II. The Constitution consolidates the organisation of the institutions executing state power and the process of their formation. This ensures a balance between the institutions of state power, the counter-balance of the power of certain state institutions with the power of other state institutions, the harmonious activity of all institutions executing state power and the execution of their constitutional duty to serve the people.

Under the Constitution, the President of the Republic, as Head of State, when exercising the powers established for him in the Constitution and laws, is under an obligation to act in such a way as to maintain harmonic interaction between the institutions executing state power, to ensure that citizens and the state community can have trust in the institution of the President of the Republic, to ensure that the State of Lithuania is properly represented in its relations with other countries and international organisations and able to perform its international obligations, and so that other entities of international relations (such as foreign states and international organisations) can fulfil their obligations to the State of Lithuania.

Proper fulfilment of this constitutional duty by the President of the Republic is an essential condition of the trust of the citizens in the State of Lithuania itself, as the general good of society as a whole and its institutions, as well as a condition of the trust of other entities of international relations within Lithuania.

The legal status of the President of the Republic is not only the sum of powers established *expressis verbis* by the Constitution. The elected President of the Republic the Head of State elected directly by the Nation is the sole person indicated in the Constitution who takes an oath to the special subject holding the sovereignty, i.e. the Nation.

The oath of the President of the Republic is not simply a formal or symbolic act or a solemn utterance of the words of the oath and the signature of the act of the oath. The institute of the oath of the President of the Republic and the content of the oath are entrenched in the Constitution; the oath bears constitutional legal significance and gives rise to constitutional legal effects. The President of the Republic may not begin to hold office before he or she takes the oath. Refusal to take the oath, taking it with certain reservations or changing its text or refusing to sign the text of the oath would mean that, under the Constitution, the President could not begin to hold office. The act of the oath of the President of the Republic also has legal significance because the President, by taking an oath to the Nation, publicly and solemnly accepts an obligation to act in line with the obligations of the oath and not to break it under any circumstances.

A person who was elected President of the Republic, took the presidential oath and then broke it, thus grossly violating the Constitution, and who was, in accordance with the impeachment process, removed from office by parliament may not, under the Constitution, take an oath to the Nation again. There would always be a lingering doubt over the certainty and reliability of their oath and whether they would actually perform their duties as President in the manner prescribed by the oath or whether they might break the oath again and a suspicion that the oath repeatedly taken by this person to the Nation might be fictitious.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2011-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 31.01.2011 / **e)** 3/2009-24/2009-37/2009-1/2010-3/2010-4/2010-5/2010-11/2010-17/2010-26/2010-45/2010-57/2010-58/2010-59/2010-60/2010-61/2010 / **f)** On the legal consequences of unlawful construction / **g)** *Valstybės Žinios* (Official Gazette), 14-602, 03.02.2011 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality**.
3.17. General Principles – **Weighing of interests**.
3.18. General Principles – **General interest**.
5.3.13.1.2. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.

Keywords of the alphabetical index:

Building, unlawful / Building, demolition / Court, jurisdiction, limitation.

Headnotes:

The legislator may not establish a legal regulation which would limit or even deny the powers of the court to administer justice. Legislation which only gives the court two options when a building has been erected in an unauthorised manner or in breach of legislation (namely to remodel the building or to demolish it altogether), and no opportunity to arrive at a different decision, having assessed all the circumstances of the case and having followed the principles of justice, reasonableness and proportionality, is unconstitutional.

Summary:

I. Sixteen petitions were sent from the ordinary courts, requesting an assessment of the constitutional compliance of a legal provision on buildings which had been erected in an unlawful manner or in breach of the law. It only gave the court two options when deciding on the consequences of unlawful construction, both of which, it was suggested, were “over-stringent” and not always relevant to the situation in hand. In a case of unlawful construction, the court could order the builder either to remodel the building or to demolish it. There was no leeway for the court to follow the criteria of reasonableness, proportionality and justice, to take stock of the realities of the situation, the nature and extent of the violation of the law, or significant circumstances, some of which could serve to mitigate liability.

II. The Constitutional Court observed that the provision under scrutiny had been formulated in an imperative manner which gave no scope to the Court to find the appropriate solution in a concrete case. It covered situations which were fundamentally very different; for example, a situation where the unlawful building was not allowed in that particular location at all, and the problem could only be resolved by its remodelling or total demolition, and a situation where the unlawful building was allowed in that location and the problem could be resolved without having to redesign it or pull it down.

The Court emphasised that the legislator, whilst seeking to secure the public interest protected by the Constitution including the protection of the natural environment, individual species, protected territories and areas of special interest, as well as the proper and reasonable use of land, must provide for various measures in order to eliminate the consequences of construction in breach of legislation. In so doing, it must adhere to the principle of proportionality; the measures provided for in the legislation must be in line with the objectives sought, which must be necessary to society and constitutionally justified. The legislator is therefore under a duty, arising from the constitutional principles of justice and a state under the rule of law, to establish a legal regulation which allows a court, when considering a case on the civil law consequences of construction in breach of legislation, to assess all the circumstances of the case and arrive at a decision, not necessarily a formal one, whereby the measure the builder is required to take is proportionate to the breach which has been committed and in line with the legitimate and generally important objectives sought in order to defend the violated rights of other persons and to maintain a fair balance between individual rights and the interests of society as a whole.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2011-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 14.02.2011 / **e)** 27/2009-29/2009-30/2009-31/2010-53/2010-55/2010 / **f)** On remuneration of judges / **g)** *Valstybės Žinios* (Official Gazette), 20-967, 17.02.2011 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

4.6.9.3. Institutions – Executive bodies – The civil service – **Remuneration.**

4.7.4.1. Institutions – Judicial bodies – Organisation – **Members.**

4.7.15.1.4. Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Status of members of the Bar.**

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

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

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

Keywords of the alphabetical index:

Judge, remuneration, calculation, period of work as advocate / Judge, remuneration, judicial independence / Lawyer, remuneration, nature.

Headnotes:

A period of work as an advocate will not count towards a person's work record for the purpose of calculating additional pay for years in the service of the State of Lithuania. This can be objectively justified, due to the differences that exist between advocates and those working for state or municipal institutions.

Summary:

I. The Constitutional Court was asked to assess the compliance with the Constitution and the constitutional principle of a state under the rule of law of a regulation which provided that a period of work as an advocate was not included within a person's work record for the purpose of calculating additional pay for years in the service of the State of Lithuania. The applicant suggested that this regulation set the scene for a decrease in additional pay to supplement the occupational salary of judges who have also worked as advocates.

The applicant also challenged the legal regulation governing remuneration for overtime work and work during days off and on holidays.

II. In regard to the first question, the Court noted that a judge, who is charged with resolving conflicts arising in society as well as those arising between an individual and the state, must not only be highly professionally qualified and of impeccable reputation, but also materially independent and secure as to his future; the

constitutional imperative of the constitutional protection of remuneration and other social and material guarantees of judges arises from the principle of the independence of the judge and courts.

The Court examined the concept of “remuneration of the judge”. It includes all payments made to the judge from the State Budget. Account should be taken of the fact that remuneration, which is one of a judge's social/material guarantees, is comprised of several constituent parts, including occupational salary and additional and extra pay.

The Constitution prohibits a reduction in remuneration and other social (material) guarantees of judges. However, the reduction of a constituent part of a judge's remuneration by an increase in another constituent part of his or her remuneration does not represent a reduction in the judge's remuneration.

One of the constituent parts of a judge's remuneration is additional pay for years spent in the service of the State of Lithuania. This additional pay is calculated and paid not only to those judges who have worked for a certain period of time as judges in courts, but also to those who have held office as Civil Servant or as an official in another state or municipal institution. The Court noted that the activities of an advocate can be described as independent professional duties related to the rendering of legal services. They cannot be equated with holding office as a Civil Servant or as an official in other state or municipal institutions. Advocates are paid for their professional legal services by their clients whereas Civil Servants and officials from other state or municipal institutions are paid for their services from the state or municipal budget. Advocates can therefore be distinguished from the persons mentioned above, whose employment is included within their work record in order to calculate additional pay for years in the service of the State of Lithuania, this being a constituent part of a judge's remuneration. There are sufficient differences between advocates and persons working in state or municipal institutions to objectively justify the legal regulation that a period of time working as an advocate does not count towards the calculation of additional pay for years in the service of the State of Lithuania.

Concerning the second question, the Court noted that under the disputed legal regulation, situations may arise where the one-off extra pay which is payable to judges who have, whilst performing the judicial functions mentioned earlier, worked overtime, on their days off and during holidays is not proportionate to the time they have worked. Thus, there may be cases where judges are not remunerated (or not remunerated fairly) for their work. The disputed legal

regulation also precludes the possibility of individualising one-off extra pay for judges according to the overtime hours they have worked. The Constitutional Court held that this situation does not comply with the Constitution.

III. This ruling had one concurring opinion.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2012-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.02.2012 / **e)** 46/2010-47/2010-48/2010-49/2010-51/2010-52/2010-70/2010-77/2010-82/2010-83/2010-84/2010-85/2010-86/2010-87/2010-94/2010-100/2010-101/2010-109/2010-114/2010-123/2010-124/2010-128/2010-129/2010-133/2010-134/2010-142/2010-143/2010-1/2011-2/2011-5/2011-8/2011-16/2011-21/2011-23/2011-25/2011-29/2011-32/2011-37/2011-39/2011/ **f)** On the recalculation and payment of pensions upon occurrence of an especially difficult economic and financial situation in the state / **f)** / **g)** *Valstybės Žinios* (Official Gazette) / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 5.2.1.3. Fundamental Rights – Equality – Scope of application – **Social security.**
 5.4.14. Fundamental Rights – Economic, social and cultural rights – **Right to social security.**
 5.4.16. Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

Keywords of the alphabetical index:

Budget, deficit / Crisis, economic, pension, reduction, temporarily / Pension, old-age, reduction / Pensioner, working / Social payment, reduction / Social security fund, deficit.

Headnotes:

Under the Constitution, upon occurrence of an extreme state situation, *inter alia*, a very difficult economic and financial situation, it is impossible to

accumulate the amount of funds necessary to pay pensions. Legal regulation of pensionary relations may be amended, *inter alia*, by reducing the awarded and paid pensions. However, the legislator must heed the constitutional principles of equality of rights and proportionality, and establish an equal and non-discriminatory scale to reduce the pensions. The reduced pensions may be paid only temporarily after proving for a mechanism of compensation for incurred losses.

Summary:

I. The case was initiated by 39 petitions from the administrative courts, asking the Constitutional Court to review whether legal provisions addressing the state's extremely difficult economic and financial situation actually conflict with the Constitution. The petitioners challenged legal provisions related mostly to the reduction of social payments for, *inter alia*, old-age pensions and state pensions, and legal provisions that would significantly reduce the old-age and state pensions for pensioners who were working at the moment of paying the pensions.

The petitioners' doubts are substantiated by the fact that because the challenged legal regulation reducing the social payments implies legal uncertainty and indefiniteness of acquired rights, it denies a person's legitimate expectations and violates the principle of inviolability of ownership. In addition, upon recalculating the pensions, the constitutional principles of a state under the rule of law and proportionality were also violated. The reason is that the awarded pensions were disproportionately reduced for working pensioners through the disputed legal regulation only because they were receiving a salary at the same moment. Meanwhile, the constitutional principle of equality of rights was also violated.

II. After examining all the circumstances, the Constitutional Court noted that the Provisional Law was adopted with the aim to limit the rising deficit of the state budget and the budget of the State Social Insurance Fund caused by the economic crisis. The Court stated that such a procedure to recalculate and pay social payments, which implied reduction of awarded social payments, was established in light of the state's particularly difficult economic and financial situation, and in pursuit of decreasing, *inter alia*, the expenditures of the State Social Insurance Fund.

Thus, by establishing such a procedure to recalculate pensions, which created preconditions to reduce awarded pensions, the legislator was addressing an extreme situation whereby, *inter alia*, the difficult economic and financial situation had made it impossible for the state to accumulate the amount of

the funds necessary to pay pensions. Envisaging the reduction of pensions including old-age pension, the legislator applied to everyone the same amount of the current year's insured income, which the Government had approved. As such, the Court stated that the social payments were reduced proportionately, uniformly and indistinguishably, with exception of the old age pension amount received by people who did not exceed the established limit of LTL 650.

The Court noted that the constitutional principles of a state under the rule of law and of proportionality do not mean that the state is prohibited from establishing a pension amount limit below an amount that the pension would not be reduced even when there is a particularly difficult economic and financial state situation. The Court emphasised that a pension that secures only minimal socially acceptable needs and living conditions compatible with human dignity to the person who receives the pension, however, may not be reduced at all. Thus, the legislator did not violate the requirements arising from the constitutional principles of equality of rights and proportionality because the Provisional Law set forth that old-age and state pensions that did not exceed the marginal amount (established in the law), which was LTL 650, could not be recalculated (reduced). For pensions that exceeded the said amount in the course of their recalculation, they could not be reduced below this amount either.

In establishing the procedure to recalculate pensions in Article 6.1 of the Provisional Law, it also stipulated that the reduced pensions would be paid only temporarily, namely until 31 December 2011.

And lastly, by proposing that the Government prepare and approve the inventory schedule of such a procedure to compensate for the reduced state social insurance pensions of old-age and of lost capacity to work, the legislature has undertaken an obligation to establish the essential elements of compensation for the reduced pensions and provide for compensation for the losses incurred due to the reduced old-age pensions. Hereby, the legal regulation to reduce awarded social payments was recognised as compatible with the Constitution.

While assessing the major reduction of pensions for the pensioners who had been working at the moment of paying pensions, the Court held that the challenged regulation created a legal dilemma whereby a person had to choose either to have a certain job or conduct a certain business and receive a pension reduced to a greater extent; or not to have any job and not to conduct any business and receive such a pension that is paid to all the receivers of the same pension who do not have any job and do not

conduct any business. The disputed legal regulation created preconditions to reduce the pensions of pension recipients who have a certain job or conduct a certain business due to the fact that they have a job or conduct a business, to a greater extent than pension recipients who neither have any job nor conduct any business. By distinguishing pension recipients in this way, the legislator restricted the right of the said former persons to freely choose a job or conduct a certain business, which is entrenched in Article 48.1 of the Constitution. That is, upon the implementation of that right, the pension awarded to these persons, solely due to the fact that they had a job or conducted a business, was reduced to a greater extent in comparison to pension recipients who did not have any job and did not conduct any business.

III. This ruling had one dissenting opinion in which one judge disagreed with the method of interpretation chosen by the Constitutional Court.

Cross-references:

European Court of Human Rights:

- *Fredin v. Sweden* (no. 2), no. 28394/95, 23.02.1994, Vol. 283-A, Series A, *Bulletin* 1994/1 [ECH-1994-1-003];
- *Döry v. Sweden*, no. 28394/95, 12.11.2002;
- *Håkansson and Sturesson v. Sweden*, no. 11855/85, 21.02.1990;
- *Helmers v. Sweden*, no. 11826/85, 29.10.1991;
- *Schuler-Zgraggen v. Switzerland*, no. 14518/89, 24.06.1993;
- *Lundevall v. Sweden*, no. 38629/97, 12.11.2002.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2014-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 18.03.2014 / **e)** 31/2011-40/2011-42/2011-46/2011-9/2012-25/2012 / **f)** On criminal liability for genocide / **g)** TAR (Register of Legal Acts), 103-5079, 01.10.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

2.1.1.4.17. Sources – Categories – Written rules – International instruments – **Statute of the International Criminal Court of 1998.**

2.1.3.2.3. Sources – Categories – Case-law – International case-law – **Other international bodies.**

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

2.3.6. Sources – Techniques of review – **Historical interpretation.**

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

Keywords of the alphabetical index:

Genocide, liability / Protected groups / Social, political groups / Retroactive effect / No statute of limitations / International law / Convention on the Prevention and Punishment of the Crime of Genocide / Significant part of group / Soviet occupation, resistance / Destruction, nation.

Headnotes:

Actions may be recognised as genocide if they are deliberate actions aimed at destroying certain social or political groups that constitute a significant part of any national, ethnical, racial, or religious group and the destruction of which would impact the respective national, ethnical, racial, or religious group as a whole.

Under the Constitution as well as universally recognised norms of international law, the exception to the principle of *nullum crimen, nulla poena sine lege*, which permits the retroactivity of the criminal laws establishing criminal liability for crimes recognised under international law or the general principles of law, is also applicable to crimes against humanity and war crimes, which may be directed, *inter alia*, against certain social or political groups of people.

Summary:

I. In this case, subsequent to the application of a group of members of the *Seimas* and some general jurisdiction courts, the Constitutional Court considered whether the provisions of the Criminal Code (hereinafter, the “CC”) regulating criminal liability for the crime of genocide were unconstitutional. The applicants argued that Article 99 CC consolidates a broader *corpus delicti* of genocide if compared to the norms of international law providing for liability for this crime. That is, under the norms of

international law, genocide means only actions committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, while under national regulation, genocide also means the aforesaid deeds committed against any social or political group. Also it is provided that the legal norms establishing liability for genocide have retroactive effect, and no statute of limitations applies to the crime of genocide. Thus, criminal law has retroactive effect and statutes of limitation neither apply to the actions qualified under international law as genocide against all or part of the persons belonging to a national, ethnic, racial, or religious group, nor to the actions qualified under national law as genocide against a social or political group. From the point of view of international law, this has not been regarded as genocide.

II. The Constitutional Court emphasised that the Constitution creates obligations to adhere to universally recognised principles and norms of international law. Lithuania is obliged to fulfil, in good faith, its international obligations arising under the universally recognised norms of international law (general international law), *inter alia*, *jus cogens* norms, that prohibit international crimes and are consolidated, *inter alia*, in the international treaties that are a constituent part of the national legal system. The constitutional principle of respect for international law, i.e. the principle of *pacta sunt servanda*, means the imperative of fulfilling in good faith the obligations assumed by Lithuania under international law, *inter alia*, international treaties.

After analysing international legal provisions, the Court noted that under the universally recognised norms of international law, the list of protected groups against genocide is exhaustive and does not include any social and political groups. The Court stipulated further that no statutory limitation may be applied to the crime of genocide as defined under the Convention against Genocide and other international legal acts (i.e. the crime of genocide aimed exclusively at national, ethnical, racial, or religious groups).

On the other hand, the universally recognised norms of international law do not preclude from establishing, in national law, other crimes that would not be subject to any statute of limitations, *inter alia*, any statute of limitations for delivering a judgment of conviction. The universally recognised norms of international law permit an exception to the principle of *nullum crimen, nulla poena sine lege*. That is, they provide for the retroactivity of the national laws establishing criminal liability for the crimes recognised under international law or the general principles of law. This exception does not apply to the other crimes specified under

national law. Thus, the aforesaid exception is applicable to, *inter alia*, the crime of genocide as defined under the universally recognised norms of international law (i.e., the crime of genocide directed exclusively against national, ethnical, racial, or religious, but not social or political, groups).

Moreover, the Court stated that actions may also be recognised as genocide if they are deliberate actions aimed at destroying certain social or political groups that constitute a significant part of any national, ethnical, racial, or religious group and the destruction of which would impact the respective national, ethnical, racial, or religious group as a whole. Thus, under the universally recognised norms of international law, the exception to the principle of *nullum crimen, nulla poena sine lege* is also applicable to the deliberate actions considered to constitute genocide. Specifically, they are the deliberate actions aimed at destroying a significant part of any national, ethnical, racial, or religious group that would have an impact on the survival of the whole respective group, comprising, *inter alia*, certain social or political groups.

The Court considered the international and historical context. It noted that, in the course of qualifying the actions of the participants of the resistance against Soviet occupation as a political group, one should take into account the significance of this group in light of the entire respective national group (Lithuanian nation) that is covered by the definition of genocide according to the universally recognised norms of international law. The actions carried out during a certain period against certain political and social groups of residents in Lithuania might be considered to constitute genocide if such actions – provided this has been proven – were aimed at destroying the groups that represented a significant part of the nation and whose destruction impact the survival of the entire nation. In the absence of any proof of such an aim, it should not mean that, for their actions against the residents (e.g., killing, torturing, deportation, forced recruitment to the armed forces of an occupying state, persecution for political, national, or religious reasons), respective persons should not be punished according to universally recognised norms of international law and national laws. In view of concrete circumstances, one should assess whether those actions also entail crimes against humanity or war crimes.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2014-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.01.2014 / **e)** 22/2013 / **f)** On the Law Amending Article 125 of the Constitution / **g)** TAR (Register of Legal Acts), 103-5079, 01.10.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

1.3.5.4. Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation.**

2.2.1.6.1. Sources – Hierarchy – Hierarchy as between national and non-national sources – Law of the European Union/EU Law and domestic law – **EU primary law and constitutions.**

3.3. General Principles – **Democracy.**

Keywords of the alphabetical index:

Fundamental values / Amendment, constitutional / Material and procedural limitations / Geopolitical orientation / Commitment, membership, European Union / Constitution, motion to amend / Amendments, substantial, scope.

Headnotes:

The Constitution prohibits any substantive change, during the consideration in Parliament, of the content of a proposed draft law amending the Constitution, submitted by special subjects enjoying the right to amend the Constitution. The change includes, *inter alia*, a way that would distort the objective of the proposed constitutional legal regulation, alter the scope of the proposed constitutional legal regulation, introduce essentially different means to achieve the objective sought by the proposed constitutional legal regulation, or propose that a different provision of the Constitution be altered. A substantially amended draft law that changes the Constitution must be regarded as a new draft law. That means a new motion to amend or supplement the Constitution that can be submitted, by a group of no less than 1/4 of all the members of the *Seimas* or no less than 300,000 voters, but not of the Committee of *Seimas*, giving some remarks on the draft law.

Summary:

I. The *Seimas* requested an investigation into whether the Law Amending Article 125 of the Constitution, in view of the manner of its adoption, was constitutional. It doubted as to whether, in the course of adopting the said Law, the legislature had observed the requirement that a motion to alter or supplement the Constitution may be submitted to the *Seimas* by a group of not less than 1/4 of all the members of the *Seimas* (36 parliamentarians). The reason is that, in the course of the consideration of the said Law, the Committee on Legal Affairs of the *Seimas* had in substance changed the content of the Draft Law Amending Article 125 of the Constitution, which had been submitted by a group of 45 members of the *Seimas*.

II. The Constitutional Court stated that the concept, nature, and purpose of the Constitution, the stability of the Constitution as a constitutional value, and the imperative of the harmony among the provisions of the Constitution imply certain material and procedural limitations on amendments. The material limitations relevant in this case are the limitations consolidated in the Constitution regarding the adoption of amendments of certain content. The procedural limitations on the alteration of the Constitution are related to the special procedure for the alteration of the Constitution that is consolidated therein.

The material limitations on altering the Constitution stem from the overall constitutional regulation. They are designed to defend universal values, upon which the Constitution as the supreme law and as a social contract and the state as the common good of the entire society are based. They are also designed to protect the harmony of these values and the harmony of the provisions of the Constitution. The Constitution does not permit any such amendments thereto that would deny at least one of the constitutional values lying at the foundation of Lithuania as the common good of the entire society consolidated in the Constitution. Such values include the independence of the state, democracy, the republic, and the innate character of human rights and freedoms. The fundamental constitutional values are closely interrelated with the geopolitical orientation, which is established in the Constitution and implies European and transatlantic integration pursued by Lithuania.

Thus, under the Constitution, as long as the constitutional grounds for membership of Lithuania in the European Union have not been annulled by referendum, any amendments to the Constitution that would deny its commitments arising from its membership in the European Union are not permitted. The Constitution neither permits any such amendments to

the Constitution that would deny the international obligations of Lithuania (*inter alia*, the obligations arising from its membership in NATO are preconditioned by the geopolitical orientation) nor permits the constitutional principle of *pacta sunt servanda*. This is under the condition that the said international obligations have not been renounced in accordance with the norms of international law.

The procedural limitations on the alteration of the Constitution are related to the special procedure to amend the Constitution that is consolidated therein. The special procedure includes special requirements, such as, special subjects who enjoy the right to submit a motion to alter or supplement the Constitution to the *Seimas*. That is, a group of not less than 1/4 of all the members of the *Seimas* or not less than 300,000 voters. This requirement, according to the applicant, was not respected while the Constitution was amended. The exclusive right to make a motion to amend or supplement the Constitution that is enjoyed by special subjects leads to the statement that the *Seimas*, while considering the submitted motion, is not allowed, in general, essentially to amend the text of a draft law amending the Constitution.

Under the Constitution, when the *Seimas* considers certain draft laws amending the Constitution, which have been submitted by the special subjects, it may introduce only such modifications to the proposed draft laws that do not affect the content of these draft laws in substance. That is, they are modifications aimed at editing the proposed draft amendments to the Constitution in order to improve the texts of these draft laws in terms of the Lithuanian language and legal technique or that make the proposed draft formulations more accurate or concrete without changing the scope of the proposed constitutional legal regulation.

Therefore, under the Constitution, structural sub-units of the *Seimas*, *inter alia*, its committees, as well as individual members of the *Seimas*, do not have the right to submit a draft law amending the Constitution that would differ in substance from the draft law amending the Constitution that was submitted by a group of not less than 1/4 of all the members of the *Seimas*. This includes, *inter alia*, where the difference constitutes a different scope of the proposed constitutional legal regulation, or virtually different means of the constitutional legal regulation in order to achieve the objective sought, or a proposal for an amendment of a different provision of the Constitution. When, at the *Seimas*, a draft law amending the Constitution is being considered, structural sub-units of the *Seimas*, *inter alia*, its committees, as well as individual members of the *Seimas*, have the right to

propose non-substantial amendments to the draft law considered by the *Seimas*. It also possesses the right to propose that the draft law be rejected, and to propose that the group of not less than 1/4 of all the members of the *Seimas* that has submitted the draft law under consideration submit a new and substantially changed draft law amending the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2014-3-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 11.07.2014 / **e)** 16/2014-29/2014 / **f)** On organising and calling referendums / **g)** TAR (Register of Legal Acts), 10117, 11.07.2014 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

1.3.4.6.1. Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of referendums and other instruments of direct democracy – **Admissibility** .
 2.1.1.1. Sources – Categories – Written rules – **National rules**.
 2.2.2.1. Sources – Hierarchy – Hierarchy as between national sources – **Hierarchy emerging from the Constitution**.
 3.1. General Principles – **Sovereignty**.
 3.3.2. General Principles – Democracy – **Direct democracy**.
 4.9.1. Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting**.
 4.9.2.1. Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility**.

Keywords of the alphabetical index:

Referendum, organisation / Nation, actual will / Sovereignty, nation / Constitution, supremacy / Constitution, amendment, substantive limitation / Referendum, requirement / Sovereign power, limitation.

Headnotes:

The Constitution reflects the obligation of the national community T the civil nation to create and reinforce the state by following the fundamental rules consolidated in the Constitution. The Constitution is the legal foundation for the common life of the nation as the national community. The Constitution equally binds the national community i the civil nation itself. Therefore, the supreme sovereign power of the nation may be executed, *inter alia*, directly by referendum, only in observance of the Constitution.

The citizens' direct participation in state governance is a very important expression of their supreme sovereign power. Therefore, a referendum must be a testimony to the actual will of the nation. In view of this fact, where the most significant issues concerning the life of the state and the nation are put to a referendum, they must be issues that relate to the actual will of the nation. Formulated clearly, the issues must not be misleading. Also, they must not be unrelated by their content and nature, unrelated to the amendments to the Constitution, or unrelated to the provisions of laws.

The legislator has a constitutional obligation to establish regulations concerning the organisation and proclamation of a referendum. The laws must clarify the content and form of the issues submitted to a referendum, such as requirements that it must be germane, clear and not misleading, and complies with the Constitution. The legislator must also set requirements for a citizens' initiative group. The issue proposed to be put to a referendum, besides the decision, must be constitutional and the institution must ensure that the Constitution and laws are observed in the course of organising the referendum, besides verifying that the issue is consistent with requirements regarding the content and form. The legislator must also set regulations to refuse to register a citizens' initiative group for a referendum that fails to meet these requirements.

Summary:

I. The applicants (Parliament and Supreme Administrative Court of Lithuania) initiated the case, raising concerns about the proclamation and organisation of a referendum. The applicants sought to verify the constitutionality of a legal regulation that obliges competent subjects to organise a referendum even if the question to vote brought *inter alia* by the nation (not less than 300,000 nationals) conflicts with the Constitution.

II. The Constitutional Court construed constitutional provisions related to the referendum. Under the Constitution, a referendum is a form of direct execution of the supreme sovereign power of the nation.

The national community T the civil nation itself, while executing its sovereign power, as well as all the legal subjects, *inter alia*, law-making subjects, institutions organising elections (referendums), initiative groups for referendums – are equally bound by the Constitution. The principle of the supremacy of the Constitution, *inter alia*, gives rise to the imperative that it is not permitted to put to a referendum any decision that would potentially conflict with the requirements of the Constitution.

The Constitution provides that the most significant issues concerning the life of the State and the Nation shall be decided by referendum. The Court pointed out that these issues include the alteration of the provisions of the Constitution, which may be decided only by referendum.

The *Seimas* cannot call a referendum where the decision proposed to be put to the referendum fails to observe the Constitution. This may occur when it is impossible to determine the actual will of the nation based on the issue, as it may be unclear or misleading, included several issues unrelated by their content and nature, not related to the amendments to the Constitution, or several unrelated provisions of laws. This may also transpire where the provisions of law proposed to be put to the referendum would conflict with the Constitution, or where the proposed amendment to the Constitution would not comply with the requirements stemming from the Constitution. The requirement that the Constitution be observed may not be regarded as an additional condition for calling a referendum. The duty of the *Seimas* not to call a referendum if the issue to be put to the referendum fails to comply with the Constitution may not constitute the *Seimas*' power to adopt a preliminary decision to determine the calling of a referendum, i.e., which limits the supreme sovereign power of the nation.

The Court recalled substantive limitations imposed on the alteration of the Constitution. It noted that they are equally applicable in the event of the alteration of the Constitution by referendum. It is not permitted to put to a referendum any such draft amendment to the Constitution that would disregard substantive limitations set on the alteration of the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2015-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.04.2015 / **e)** KT10-N6/2015 / **f)** On the selection of the company implementing the project of a terminal of liquefied natural gas and on funding this project / **g)** TAR (Register of Legal Acts), 5147, 03.04.2015, www.tar.lt / **h)** Constitutional Court's website, www.lrkt.lt, 03.04.2015; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Economic activity / Economic activity, freedom / Energy, fee / Energy, provider, determination / Energy security / Energy source, regulation / Energy, tax / European Union, membership, obligation, implementation / General economic interest / Tax, compulsory.

Headnotes:

The provision of the law under which a state-controlled company was identified as the developer of a liquefied natural gas terminal that was envisaged to safely and reliably supply natural gas to all Lithuanian consumers, had not denied the freedom of individual economic activity and initiative, provided by the Constitution.

Summary:

I. The applicants (a group of members of Parliament, the Court of Appeal and the Vilnius District Administrative Court) contested the constitutionality of the legislation on a liquefied natural gas project and that a state-controlled company (“Klaipėdos Nafta”) was identified as the developer of the project. The applicants also challenged that the Liquefied Natural Gas Supplement shall be one of the financing sources of the project.

II. The Constitutional Court stated that economic activity in the field of energy, including the provision of consumers with energy resources (natural gas as well), is a specific activity that impacts the State economy. The security and reliability of the energy system is a constitutionally important objective, namely a public interest, which justifies specific regulation to address the activity in this field.

Special projects intended to eliminate economic dependence on a monopoly supplier of certain energy resources (including natural gas) are State priorities. The legislator may establish legal regulations regarding the financing of these projects from various sources, including incomes of energy consumers. Also, a control framework should be in place to monitor the project implementation costs in order to prevent abuse and damage to the consumers interests if these costs were absorbed in the price of energy resources.

Although a company was selected to implement the liquefied natural gas terminal, the State created legal preconditions to effectively control the aforesaid company. The decision was strategically important to national security, in such a way that a constitutionally important objective, a public interest the security and reliability of the energy system would be ensured, as well as to the timely implementation of the commitments arising out of the country's membership in the European Union, which aim at guaranteeing the security of the supply of natural gas.

The Constitutional Court also concluded that the Liquefied Natural Gas Supplement, which is consolidated in the law as one of the financing sources of the project, should not be regarded as a state tax or other compulsory payment within the meaning of the Constitution. Instead, it should be viewed as a constituent part of the price, regulated by the State, of natural gas that is paid for the public services rendered by independent economic entities. That is, it is the installation and operation of the natural gas infrastructure, which aims at ensuring that natural gas is supplied to all consumers in a secure and reliable manner. The duty imposed on all the consumers who use the natural gas transmission system to pay the said part of the price of natural gas may not as such be treated as a limitation on the rights of ownership and all the more so, as taking property over for the needs of society.

The Constitutional Court referred to the case-law of the Court of Justice of European Union, underlining that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence in terms of the economy, its

institutions, essential public services, and even the survival of its inhabitants. An interrupted supply of petroleum products, with the resulting dangers to the country's existence, could therefore seriously affect public security.

Also based on the European case-law, the Court noted that services of general economic interest are services having special characteristics in relation to those of other economic activities. Member states enjoy the right to determine the scope and the organisation of services of general economic interest, taking into account the purposes of their national politics. The authorities in member states have a large discretion in what are determining services of general economic interest.

Cross-references:

Court of Justice of the European Union:

- C-72/83, 10.07.1984, *Campus Oil*, [1984]; *European Court Reports* 02727;
- C-179/90, 10.12.1991, *Merci convenzionali Porto di Genova*, [1991] *European Court Reports* I-05889;
- C-266/96, 18.06.1998, *Corsica Ferries France*, [1998] *European Court Reports* I-03949;
- C-67/96, 21.09.1999, *Albany International*, [1999] *European Court Reports* I-05751;
- C-265/08, 20.04.2010, *Federutility and Others*, [2010] *European Court Reports* I-03377;
- T-17/02, 15.06.2005, *Fred Olsen, SA v. Commission of the European Communities*, [2005] *European Court Reports* II-02031;
- T-309/04, T-317/04, T-329/04 and T-336/04, 22.10.2008, *TV 2/Danmark A/S and Others v. Commission of the European Communities*, [2008] *European Court Reports* II-02935;
- C-280/00, 24.07.2003, *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] *European Court Reports* I-7747.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2015-3-009

a) Lithuania / b) Constitutional Court / c) / d) 20.10.2015 / e) KT27-N16/2015 / f) On different number of voters in single-member constituencies / g) TAR (Register of Legal Acts), 15777, 20.10.2015, www.tar.lt / h) CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

4.5.3.1. Institutions – Legislative bodies – Composition – **Election of members.**
 4.9.4. Institutions – Elections and instruments of direct democracy – **Constituencies.**
 5.3.41.1. Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**
 5.3.41.2. Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Election, constituency, boundaries, voters, number / Election, voters, equality / Election, votes, inequality / Election, votes, weighing, value.

Headnotes:

Having opted for an electoral system under the Constitution where a portion of members of parliament are elected in single-member constituencies, the legislature must ensure that the number of voters in such constituencies does not differ so significantly from the national average that it has the capacity to distort the equal value of voters' votes in establishing the results of voting. There is no constitutional justification for such differences in the number of voters and for denying the essence of equal suffrage as such.

Summary:

I. The case was initiated by a group of members of Parliament. The applicant argued that the provision of Article 9.1 of the Law on Elections to the *Seimas* (national parliament), under which deviation by 20% of the number of voters in each single-member constituency from the average number of voters in all single-member constituencies is allowed, creates preconditions for distorting the equal value of voters' votes in establishing the results of voting and for denying the essence of equal suffrage as such.

II. The Constitutional Court recalled the fact that the principle of equal suffrage is one of the generally recognised principles of democratic elections to political representative institutions consolidated in the

Constitution. This principle means that in the course of organising and conducting elections, all voters must be treated equally and that the vote of each voter has an equal value with regard to votes of any other voters and is of equal significance in establishing the results of voting. Under the Constitution, when regulating electoral processes by law, one must ensure an equal active electoral right of all the voters, as well as an equal passive electoral right of all the candidates.

It is noted in the ruling that the bigger the difference in the number of voters among separate constituencies, the bigger possible distortion of the equal value of voters' votes in establishing the results of voting. However, it does not mean that, under the Constitution, any differences in the number of voters among separate constituencies are impossible. The number of voters in the constituencies is subject to change due to various objective reasons (for example, migration of voters, other demographic factors), therefore, while forming the constituencies, it is impossible to assess exactly what the number of voters will be in each constituency on the day of election. The Constitution does not require unreasonable things, and legal acts may not demand impossible things, either. Thus, under the Constitution, there is no requirement for all constituencies to contain precisely the same number of voters.

The Constitutional Court also noted that ensuring such generally recognised democratic principles of elections as fair competition between subjects implementing passive electoral rights and the transparency of the electoral process implies certain requirements for the formation of constituencies: constituencies must satisfy the principle of connectivity, they must be compact, and their boundaries must be clear and easy to understand.

Thus, having chosen an electoral system where members (or part thereof) of the *Seimas* are elected in single-member constituencies, a duty arises from the Constitution for the legislator, after it has taken into account all the significant circumstances, to establish such a legal regulation regarding the formation of constituencies, whereby an even distribution (as much as possible) of the number of voters among them would be ensured.

The Constitutional Court also held that, due to such a deviation from the size between the largest and smallest constituency, according to the number of voters, an obvious disproportion of the number of voters is created – as regards the number of voters, the largest constituency is 1.5 times larger than the smallest constituency. It was recognised that the legal regulation, whereby the deviation of the number of

voters of up to 20% is allowed, does not ensure an even distribution (as much as possible) of the number of voters among single-member constituencies. Thus, this legal regulation was in conflict with Article 55.1 of the Constitution.

Supplementary information:

In this ruling, attention was paid to the standards of international good practice in electoral matters consolidated in the documents of the European Commission for Democracy through Law (the Venice Commission) – Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 51st and 52nd Plenary sessions (Venice, 5-6 July and 18-19 October 2002), CDL-AD(2002)023-e. It showed that substantially smaller differences in the number of voters in constituencies are typical of democratic states – usually the deviation of the number of voters allowed does not exceed 10%. The Constitutional Court held that there are no constitutional arguments that these standards of international good practice in electoral matters could not be deemed constitutionally grounded, thus, when establishing the legal regulation on the formation of constituencies and heeding the Constitution, the legislature should take such standards into consideration.

As a consequence of this ruling, the provision of the Law on Elections to the *Seimas* was amended. The deviation of the number of voters which is allowed in each single-member constituency was reduced from 20% to 10% from the average number of voters in all single-member constituencies.

Cross-references:

Judgments of other Constitutional Courts:

- no. 22/2005 (VI.17.), 14.06.2005, Constitutional Court of Hungary;
- no. 2008-573 DC, 08.01.2009, Constitutional Council of France;
- no. U-X-6472/2010, 08.12.2010, *Bulletin* 2010/3 [CRO-2010-3-018], Constitutional Court of Croatia.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2016-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.12.2015 / **e)** KT34-N22/2015 / **f)** On annual reports submitted by institutions to the Parliament (*Seimas*), the account of the Prosecutor General to the *Seimas* and a proposal to release him or her from duties / **g)** TAR (Register of Legal Acts), 21030, 20.10.2015, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 4.5.2. Institutions – Legislative bodies – **Powers.**
 4.5.8. Institutions – Legislative bodies – **Relations with judicial bodies.**
 4.7.4.3. Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**

Keywords of the alphabetical index:

State institution, head / Interference, unjustified / Independence, prosecutor / Prosecutor, dismissal.

Headnotes:

In order for the Parliament (*Seimas*) to operate efficiently in pursuance of the national interest and for it to carry out its constitutional duties, exhaustive and objective information is needed about the processes taking place in the state and society. In a democratic state under the rule of law, state officials and institutions must follow the law when carrying out their duties and when acting in the national interest, they require protection from pressures and unreasonable interference.

Summary:

I. Two groups of members of the Parliament (*Seimas*) asked the Constitutional Court to assess the constitutionality of the legal regulation governing accounting to the *Seimas* by the heads of state institutions (with the exception of courts but including the Prosecutor General), who are appointed by the *Seimas* or whose appointment requires the assent of the *Seimas*, for the activity of their respective institution.

II. The Constitutional Court held that in order to ensure the fulfilment of its powers, the *Seimas* may provide for a legal regulation that would create legal preconditions for receiving information about the activities of state institutions whose heads are appointed by the *Seimas*, or the appointment of whose heads requires the approval of the *Seimas*.

This would include circumstances where such information is received in the form of a report submitted by the heads of these institutions on the annual activities of their respective institutions.

The principle of the separation of powers and the functions of the *Seimas* do not imply any regulation to the effect that the process of accounting to the *Seimas* by the institution (or its head) would not be considered complete until the *Seimas* had approved the report containing the appropriate information which the head of the institution had submitted.

If the *Seimas* were vested with the powers to adopt a resolution to give or withhold its approval of annual activity reports submitted by the heads of state institutions, these heads would not be protected against possible pressure or unjustified interference with their activities, even though they would be performing their duties in compliance with the Constitution and law and while acting in the national interest. Such a legal regulation would be incompatible with the Constitution and its enactment would unreasonably expand the constitutional powers of the *Seimas*.

If the information provided in a report made it clear that the head of a particular state institution might have broken the law or placed personal or group interests above the interests of society, it would be in order from a constitutional perspective for the *Seimas* to consider and adopt a resolution of no confidence in the head of the institution in question, as provided for in Article 75 of the Constitution. It could also, through an act on expressing the will of the representation of the Nation concerning issues significant to the state, publicly address the President and propose that the head of a state institution appointed by the President upon the approval of the *Seimas* be dismissed from office after applying the appropriate grounds of dismissal provided for by the law (such grounds may not include the application to the President by the *Seimas*, as this application is not binding on the President).

The Constitutional Court also noted that the legislator must reconcile the constitutional provision that state institutions serve the people with the constitutional principle of the independence of prosecutors. The information (public reports) can be submitted in the form of an annual report on the activity of the Prosecution Service. The establishment of a regulation that would oblige prosecutors to submit accounts on the performance of their constitutional functions to the legislative and executive authorities, or which would oblige the Prosecutor General to submit accounts on the activity of the Prosecution Service that would need to be approved by the *Seimas*, the President of the Republic, or the Government would not be permitted.

The Prosecutor General is accountable to the *Seimas* only in having to submit an annual report on the activity of the Prosecution Service and this should be related only to the obtaining and discussion of the information necessary for the legislation and the performance of other functions of the *Seimas*. Interpreted in this way, this legal regulation creates no preconditions for the *Seimas* to interfere with the activity or restrict the independence of prosecutors performing the functions provided for in the Constitution.

The provisions of the Statute of the *Seimas* giving the power to the *Seimas* to adopt a resolution on giving or withholding assent to an annual report submitted by the head of an institution about its activities, who is either appointed by the *Seimas* or whose appointment requires the assent of the *Seimas*, were in conflict with the Constitution. The *Seimas* resolution, whereby the *Seimas* did not give its assent to the annual report of the activities of the Prosecution Service, was also ruled to be in conflict with the Constitution.

The provision of the Law on the Prosecution Service by which the Prosecutor General gives an account of the activities of the Prosecution Service to the *Seimas* by submitting an annual report of the activities of the Prosecution Service and the provision of the same Law to the effect that the *Seimas* may propose that the Prosecutor General be released from his or her duties are not in conflict with the Constitution.

Supplementary information:

In this ruling, attention was paid to the standards of the European Commission for Democracy through Law (the Venice Commission) consolidated in a Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-AD(2010)040.

Languages:

Lithuanian, English (translation by the Court).



Moldova Constitutional Court

Important decisions

Identification: MDA-2015-1-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 16.04.2015 / **e)** 7 / **f)** On constitutional review of certain provisions of the Law no. 325 of 23.12.2013 on professional integrity testing / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) 115-123, 15.05.2015 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.3.4.1. Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.3.4.2. Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

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

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

3.16. General Principles – **Proportionality.**

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

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

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.**

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

Keywords of the alphabetical index:

Public servant, integrity / Agent provocateur / Agent provocateur, integrity testing, justified risk.

Headnotes:

The Constitution guarantees free access to justice, a right that presumes an effective protection on the part of competent courts against acts that violate the rights, freedoms and interests of a person. The Constitution also provides that the State respects and protects one's intimate, family and private life.

According to the Basic Law, the legislative, executive and judiciary powers are separate and cooperate in the exercise of their prerogatives.

The challenged Law on professional integrity testing targeted public servants.

Summary:

I. On 16 April 2015, the Constitutional Court delivered a judgment of constitutional review on certain provisions of the Law no. 325 of 23 March 2013 on professional integrity testing. The case originated in an application lodged with the Constitutional Court on 20 June 2014 by four Members of Parliament.

The applicants asked the Court to review the conformity of the phrases “The Constitutional Court” and “The Courts of all levels” provided by the Annex to Law no. 325 of 23 December 2013 on professional integrity testing with the constitutional provisions of the right to a fair trial, the right to respect for private life and the separation of powers.

Holding its jurisdiction, the Court mentioned that the Annex cannot exist separately from the Law and that it would be examined together with the provisions of the Law. The Court also noted that the rights and the principles invoked by the applicants do not only refer to the employees of the institutions mentioned in the application, but to all the public agents indicated in the Annex.

II. Because the contested Law provided for the application of some disciplinary sanctions when public agents received negative results on the professional integrity test, the Court noted that the guarantees of the right to a fair trial in criminal matters are equally applicable in cases of disciplinary proceedings, considering both the severity of charges against the public agent and the seriousness of consequences, i.e. job loss.

The Court observed that the professional integrity test can be initiated by the National Anticorruption Centre (hereinafter, the “NAC”). This institution can dispose the test’s administration if there exist “risks and vulnerabilities to corruption” in case of some public agents or if it holds “information” and has received “notifications or motivated requests” from the management of a public entity. The Court notes that the legal provisions allow both testing focused on target groups and random testing, so that the integrity tester has unlimited discretion in carrying out this task. The Court noted that the professional integrity tests could be justified only if there are existing preliminary and objective grounds to suspect that a certain public agent is inclined to commit acts of corruption.

The Court found that the legal provisions define the term “justified risk”, the rationale of which is that the tester is allowed to enter into potentially criminal behaviour because less interfering measures would not make it impossible to reach the goal of the test. This concept is questionable not only because it allows for criminal behaviour to instigate the public agent but casts a general shadow of suspicion on the integrity of every public agent.

In terms of the right to defence and the right to a fair trial, the Court found that the legal provision does not allow the aggrieved public agent an effective assessment of evidence gathered within the professional integrity testing procedure since it is classified as “confidential”.

The Court found that the legal provision according to which the public agents should “not admit in their activity any corruption acts, corruption-related acts and deeds of corruptive behaviour” are of a generic, hybrid and vague nature and even overlap. It bears serious risks related to the foreseeability of what would and what would not be considered as a disciplinary offence within professional integrity testing.

Regarding the applicable disciplinary sanctions for a negative test result, the Court noted that these should follow the principle of proportionality, between the seriousness of the offence and the quality and size of the sanction. However, the Law provides for the automatic dismissal from office of all public servants, who admit in their activity any corruption acts, corruption-related acts and deeds of corruptive behaviour.

The Court noted that the assessment of professional activity of the employees must be the competence of the public entities where they work. It is an improper competence of the NAC. The intervention of a body, which is part of the executive, into administrative matters of a body belonging to the judiciary is unacceptable in light of the principles of separation of powers and good governance.

The Court observed that the challenged Law permits the professional integrity tester the use of a false identity and admits the incitement of the public agents to commit offences. Thus, the testers should be considered as *agents provocateurs*. According to the relevant European Court of Human Rights case-law, the public interest cannot justify any use by the courts of evidences gained by incitement, as it would expose the public agent to the risk of being abridged from the start of the right to a fair trial.

With regard to the incidence of the right to respect for private life, the Court noted that according to the challenged Law, in order to objectively assess the results of the professional integrity test, it shall be recorded on a mandatory basis by audio/video means and the communication means in the tester's possession or used by the tester. The Court mentioned that these means can be ordered only by the instruction judge or an authority that offers the largest guarantees of independence and impartiality. Their absence is equivalent with the inadequacy of the procedural guarantees necessary for protecting the right to respect of private life.

With reference to the professional integrity testing of judges, the Court observed that Article 123.1 of the Constitution provides that the authority that ensures the appointment, transfer, removal from office, upgrading and imposing of the disciplinary measures on the judges is the Superior Council of Magistracy. The professional integrity testing of the judges by the NAC employees contradict with this Article. Moreover, the Court noted that NAC, which is led by a director appointed and dismissed at the proposal of the Prime Minister, is a body under the control of the executive and therefore, it cannot meet the requirements of the independence.

In the light of the above arguments, the Court declared unconstitutional the legal provisions that regulated the execution mechanism of the professional integrity testing.

The Court noted, as a principle, that professional integrity testing may be applied to all professional categories of public agents. No professional category is, by its nature, excluded from professional integrity testing. At the same time, the legal provisions must respect the guarantees of the right to a fair trial and of the right to respect for private life, as well as those referring to the separation of powers and independence of the judiciary.

Supplementary information:

Legal norms referred to:

- Articles 6, 20, 28, 54, 123 and 134 of the Constitution;
- Law no. 325 of 23.12.2013 on professional integrity testing.

Languages:

Romanian, Russian.



Identification: MDA-2015-1-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 14.05.2015 / **e)** 12 / **f)** On the constitutionality of Article 287.1 of the Criminal Procedure Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 2015/254-257 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.10. General Principles – **Certainty of the law.**
 5.3.13.1.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
 5.3.13.17. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**
 5.3.13.22. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**
 5.3.14. Fundamental Rights – Civil and political rights – **Ne bis in idem.**

Keywords of the alphabetical index:

Proceedings, resumption, grounds / Criminal proceedings, guarantees.

Headnotes:

According to the *ne bis in idem* principle, no one shall be punished or tried repeatedly for having committed the same cause of action. The observance of this principle is guaranteed by international and national rules.

Under the challenged criminal procedure rules, the resumption of criminal proceedings is allowed after termination of criminal investigation, dismissal of the case or when charges against someone have been dropped. The condition is that it must be shown that the cause triggering these measures had not existed or that the circumstances substantiating the aforementioned situations had disappeared.

Summary:

I. On 14 May 2015, the Constitutional Court ruled on the constitutionality of Article 287.1 of the Criminal Procedure Code.

The case originated in an exception of unconstitutionality raised by a lawyer before an ordinary court. On 9 April 2015, the Supreme Court of Justice lodged the application with the Constitutional Court.

The author of the exception of unconstitutionality claimed that the challenged provisions, under which the criminal proceedings could also be resumed in other cases than those concerning the appearance of new or newly discovered facts or of a fundamental defect in the previous criminal proceedings, are contrary to the *ne bis in idem* principle.

II. The Court emphasised that Article 21 of the Constitution guarantees the presumption of innocence. Any person accused of committing an offence shall be presumed innocent until proven guilty on legal grounds, brought forward in a public trial, and all the necessary guarantees for his or her defence are safeguarded.

The Court pointed out several constitutional and legal norms. It held that the guarantees provided for by Article 21 of the Constitution incorporate the right not to be tried or punished twice for the same offence (*ne bis in idem* principle). Also, under Article 4.1 Protocol 7 ECHR, no one shall be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he or she has already been finally acquitted or convicted, in accordance with the law and penal procedure of that State.

The Court also noted that under Article 4.2 Protocol 7 ECHR, the *ne bis in idem* principle shall not prevent the reopening of a case in accordance with the law and penal procedure of the State concerned. However, to reopen a case, there must be evidence of new or newly discovered facts or a fundamental defect in the previous proceedings, which could affect the outcome of the case. In line with Article 4.3 Protocol 7 ECHR, no derogation from this Article shall be made under Article 15 ECHR. Therefore, states are not entitled to provide for, by law, other grounds for reopening the previously terminated proceedings.

The Court underscored that under the European Convention on Human Rights, the two grounds for a criminal case to be reopened are the following:

1. evidence of new or newly discovered facts; or
2. fundamental defect in the previous proceedings.

The Court held that “new facts” represent information about circumstances that the criminal investigation authority was unaware of at the date of the issuance of the contested order or that could not have been known at that time. “Newly discovered facts” represent facts that existed at the date of issuing of the contested order, but could not be found.

The Court determined that the order to terminate the criminal investigation or dismiss the criminal case or to drop charges against someone may be cancelled, with the resumption of criminal proceedings, at any time within the statute of limitations if there were new or newly discovered facts.

Under Article 6.44 of the Criminal Procedure Code, “fundamental defect” is an essential violation of rights and freedoms guaranteed by the European Convention on Human Rights, other international treaties, the Constitution and other national laws.

The Court contended that if a fundamental defect is discovered, the criminal investigation may be resumed no later than one year from the date of entering into force of the order terminating the criminal investigation, dismissing the criminal case or dropping the charges against someone.

The rules of criminal procedure provide for the resumption of criminal proceedings only where there is evidence of new or newly discovered facts or when a fundamental defect has been found. The national legislator has sought to establish a fair balance between the tasks of criminal proceedings – finding the truth and delivering a fair trial. In the course of the proceedings, criminal investigation authorities and the courts shall act in such a manner that no one is unjustifiably suspected, accused or convicted and no one is arbitrarily or unnecessarily subjected to coercive procedural measures.

In fact, Article 287.1 of the Criminal Procedure Code grants the higher-level prosecutor the right to resume criminal proceedings at any time and in the absence of clearly defined grounds that could be considered judicious in each individual case.

The challenged provisions place the person in a state of uncertainty for an indefinite period of time and for circumstances that may be invoked randomly at the reopening of the criminal case.

The Court underscored that, with the termination of the criminal investigation, dismissal of the criminal case and when dropping charges against a person, the individual shall have certainty and confidence that he or she will no longer be suspected and prosecuted. Omissions or errors of authorities must serve the benefit of the suspect, accused, and defendant. In other words, the risk of any errors committed by the criminal investigation authority or by a court shall be borne by the state and the person concerned should not be charged for its correction, with the exceptions mentioned above.

The Court concluded that the resumption of a criminal investigation following its termination, dismissal of a criminal case or when the charges against a person have been dropped by order of a higher-level prosecutor, if it is found that there were no grounds for these measures or that the circumstances substantiating the aforementioned situations have ceased to exist, is contrary to Article 21 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 6, 20, 21 and 23 of the Constitution;
- Articles 6, 22 and 287 of the Criminal Procedure Code;
- Article 4.1 and 4.2 Protocol 7 ECHR.

Cross-references:

European Court of Human Rights:

- *Maaouia v. France*, no. 39652/98, 05.10.2000;
- *Stoianova and Nedelcu v. Romania*, nos. 77517/01 and 77722/01, 04.08.2005;
- *Radchikov v. Russia*, no. 65582/01, 23.05.2007;
- *Sutyazhnik v. Russia*, no. 8269/02, 23.07.2009.

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2016-1-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 23.02.2016 / **e)** 3 / **f)** on the exception of unconstitutionality) of Article 186.3, 186.5, 186.8 and 186.9 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 04.03.2016/49-54 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Arrest, preventive / Arrest, preventive, extension / Preventive arrest, grounds, extending / Arrest, preventive, duration / Criminal procedure.

Headnotes:

Under Article 25 of the Constitution, no one can be apprehended and arrested except for cases and in a manner provided for by law. The arrest shall be carried out under a warrant issued by a judge for a period of 30 days at the most, a term which can only be extended by the judge or by the court of law to 12 months at most.

The express, unequivocal provisions of Article 25 of the Constitution regulate constitutional guarantees in view of protecting the citizen against excessive enforcement of such measures.

At the same time, according to the provisions of criminal procedure, the extension of preventive arrest is permitted, and any extension of the duration of preventive arrest may not exceed 30 days during a criminal investigation and 90 days during a case hearing. Also, custody during a criminal investigation, in exceptional cases, shall not exceed 12 months.

Summary:

I. On 23 February 2016, the Constitutional Court delivered a judgment on the exception of unconstitutionality of Article 186.3, 186.5, 186.8 and 186.9 of the Code of Criminal Procedure.

The case originated in an application lodged with the Constitutional Court on 17 February 2016 by Mrs Viorica Puica, judge at the Botanica District Court of Chişinău (the applicant).

The applicant claimed that, in particular, the cumulative application of the challenged provisions allow the extension of the preventive arrest for periods that exceed the limits expressly laid down by Article 25.4 of the Constitution, *i.e.*, 30 days for a warrant of arrest and 12 months for the total duration of arrest.

II. The Court held that according to Article 25 of the Constitution, no one can be apprehended and arrested except for cases and manner provided for by law. The express, unequivocal provisions of Article 25 of the Constitution regulate constitutional guarantees in view of protecting the citizen against excessive enforcement of such measures.

The Court held that the rule resides in the liberty of the person, while the arrest represents an exceptional measure, when less restrictive measures cannot be applied, as a measure of last resort and not as a measure of punishment. Subsequently, the arrest may only be ordered in certain cases, and only for certain reasons, to be shown in a concrete and convincing way by the decision of the body ordering it.

The Court held that the arrest is a temporary measure, as it is ordered for a fixed period of time. Also, it is a temporary measure, since it lasts as long as there are present the circumstances for which it was ordered and it is withdrawn as soon as these circumstances are not present anymore.

The Court underscored the obligation of the authorities to provide for a substantive and thorough reasoning on the persistence of the grounds for maintaining an individual in custody and if there are no grounds that allow the use of a more lenient measure than the arrest.

The Court mentioned that any extension of the arrest in fact takes place according to a procedure similar to the initial use of arrest. Therefore, in case of the extension of arrest, the judge shall be guided by the same rules and grounds that determined the initial use of arrest.

The Court remarked that the national legislation, similar to Article 5.1.c ECHR, allows for the deprivation of liberty of a person only if there is "reasonable suspicion" that the person has committed an offense. A reasonable suspicion presumes the existence of facts or information that would convince an objective observer that the concerned individual might have committed the offense.

The existence of plausible reasons that would legitimate the suspicion that an individual has committed the offense, for which he or she is prosecuted, must be regarded as a general condition and independent from the four grounds that may justify the use or extension of the preventive arrest:

1. danger of absconding – the risk that the accused will fail to appear for trial;
2. risk that the accused, if released, would take action to prejudice the administration of justice;
3. prevention of repetitive offending;
4. preservation of public disorder.

The Court mentioned that these grounds are not to be met cumulatively, the presence of a single ground being sufficient to apply the measure of preventive arrest.

Therefore, a person can be placed under arrest only when the suspicions of committing a crime are corroborated with the existence of justifying grounds.

In this context, the Court held, as a principle, that the seriousness of the alleged offence itself does not justify the application of the measure of preventive arrest.

The Court held that under Article 25.4 of the Constitution, the arrest shall be carried out under a warrant issued by a judge for a period of maximum 30 days. Therefore, each extension of the preventive arrest cannot exceed 30 days, both at the prosecution stage and the trial stage of the case.

Thus, the legislator cannot regulate by law the length of arrest that exceeds constitutional legal framework.

The Court noted that by the Code of Criminal Procedure, the Parliament allowed for the extension of the length of the preventive arrest for a period of 90 days at the most.

In this context, the Court held that Article 25 of the Constitution provides, in clear terms, that detention is only possible under a warrant for a period of 30 days at the most. Any interpretation of national legislation allowing for longer periods for an arrest warrant would be contrary to the Fundamental Law.

Therefore, the Court held that the provisions of the Code of Criminal Procedure, which govern the possibility of issuing an arrest warrant for a period exceeding 30 days, are contrary to Article 25.4 of the Constitution.

The Court held that under Article 25.4 of the Constitution, the arrest may be continued for a period not exceeding 12 months.

In this context, the Court noted that the beginning of the length of the preventive arrest corresponds to the moment of apprehending the individual and ends upon the issuance of the judicial decision by which that person is released from custody, or upon sentencing him or her by the court of first instance.

The Court found that the provisions of the Code of Criminal Procedure allow the detention of the person in custody for a period exceeding the constitutional limit of 12 months (Article 25.4 of the Constitution).

Supplementary information:

Legal norms referred to:

- Articles 4 and 25 of the Constitution;
- Articles 176 and 186 of the Criminal Procedure Code.

The Court requested that within a period of 30 days following the delivery of the judgment, the courts of law to repeal the preventive measure of arrest for individuals held in custody for more than 12 months and to check the existence of grounds for continued preventive detention of individuals who are held under an arrest warrant exceeding the period of 30 days and the total period of detention does not exceed 12 months.

Languages:

Romanian, Russian (translation by the Court).

*Identification:* MDA-2016-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 10.05.2016 / **e)** 10 / **f)** On the constitutionality of certain provisions of Article 345.2 of the Contravention Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 12.07.2016, 204-205 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.7.1.2. Institutions – Judicial bodies – Jurisdiction – **Universal jurisdiction.**

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

Keywords of the alphabetical index:

Penalty, administrative, appeal / Penalty, petty offence / Punishment, flexibility.

Headnotes:

Under the Constitution, there is a universal entitlement to effective remedy from competent courts of law against acts which impinge on individuals'

legitimate rights, freedoms and interests. The right of access to justice makes it incumbent on the legislator to grant all persons every opportunity to access a court of law and to ensure the effectiveness of the right of access to justice by adopting an appropriate legislative framework.

Parliament has the power, under the Constitution, to regulate criminal offences, punishments and the process of their execution. However, the constitutional principle of legality requires differentiation between penalties established for infringements of the law.

Summary:

I. On 10 May 2016, the Constitutional Court delivered a judgment on the constitutionality of certain provisions of Article 345.2 of the Contravention Code.

The case originated in the exception of unconstitutionality of the phrase “fine of 300 conventional units for legal entities ((letters d) and e)) and officials ((letters a) – f))” from Article 345.2 of the Contravention Code, raised by the lawyer Vladimir Grosu, in case-files nos. 5r-110/16 and 5r-109/16, pending before the Centru District Court of Chişinău.

Under Article 345 of the Contravention Code, the violation of metrology rules constitutes an offence. Infringement of the rules set out in Article 345.2 is sanctioned by a fine of 300 conventional units for legal entities and for officials.

The applicant questioned the compliance of the sanction set out in Article 345.2 with Article 20 of the Constitution, as it allows courts no scope to individualise sanctions in relation to the unusual circumstances of the case.

II. The Court noted that under the right of access to justice, the legislator must grant all persons all possibilities to access a court of law and to ensure the effectiveness of the right of access to justice by adopting an appropriate legislative framework.

The Court held that the exclusive jurisdiction of Parliament to define a contravention and to decide the sanctions which should apply does not preclude the duty to respect the principle of legality derived from Article 1.3 of the Constitution (the rule of law).

The constitutional principle of legality requires a differentiation between penalties established for infringements of the law. In this regard, the Court held that legislative individualisation of the sanction does not suffice in achieving the goal of the law

on contraventions, to the extent that judicial individualisation is not possible.

In terms of legal individualisation, the legislator must provide the judge with the power to establish the penalty within certain predetermined limits, more specifically the minimum and maximum of the penalty. Judges must also be provided with the instruments which will allow them to select a concrete sanction in relation to a particular offence and the person who committed it.

The Court noted that the system of contravention sanctions needed to allow for individualisation of sanctions in relation to the circumstances of the deed. When establishing sanctions, the legislator must therefore provide judges or other authorities vested with the right to apply contravention sanctions the possibility to establish the sanction within minimum and maximum limits, taking into account the nature and degree of prejudice caused by the contravention, the personality of the perpetrator and any mitigating or aggravating circumstances. Unless such a system is in place, individuals have no real and adequate possibility of benefiting from the protection of their rights through judicial means.

The Court held that the legislator is entitled to establish contravention sanctions, but must observe strictly the proportionality between the circumstances of the deed, its nature and degree of prejudice.

The Court found that, in the absence of mechanisms for sanction individualisation in the case concerned, the court of law lacks the possibility to conduct an effective judiciary review and litigants are deprived of the right to a fair trial.

Pursuant to the constitutional principle of legality, the legislator cannot regulate a sanction in a way which would deprive the court of law of the opportunity to individualise the sanction in light of the circumstances of the case. In such a situation, the court of law would only have limited competences, which could pave the way to infringement of constitutional rights, including that of the right to a fair trial.

The Court held that the absence of mechanisms which would allow for judicial individualisation distorts the effective, proportionate and dissuasive nature of the contravention sanction and gives courts of law no scope to exercise effective judicial control. It also infringes the individual's right of access to justice.

The Constitutional Court declared unconstitutional the text "fine of 300 conventional units for legal entities (letters d) and e)) and for officials (letters a) – f))" of Article 345.2 of the Contravention Code of the

Republic of Moldova no. 218-XVI, 24 October 2008, to the extent that it did not allow for the individualisation of the sanction.

Supplementary information:

Legal norms referred to:

- Articles 1, 20 and 54 of the Constitution;
- Contravention Code of the Republic of Moldova no. 218-XVI, 24.10.2008.

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2016-2-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 25.07.2016 / **e)** 23 / **f)** On the exception of unconstitutionality of Article 27 of the Law on the Government Agent / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 21.10.2016/361-367 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

- 4.7.1.1. Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**
- 4.7.3. Institutions – Judicial bodies – **Decisions.**
- 4.7.16.1. Institutions – Judicial bodies – Liability – **Liability of the State.**
- 4.7.16.2. Institutions – Judicial bodies – Liability – **Liability of judges.**

Keywords of the alphabetical index:

Decision, judicial, criticism / Judiciary, independence / Judge, sanctions.

Headnotes:

Judicial independence is not a privilege or a prerogative granted to a judge for his or her own interests, but a guarantee against external pressures in the decision-making process, justified by the necessity to allow judges to fulfil their attributions as guardians of human rights and freedoms. Judicial independence is a fundamental aspect of the rule of law and a guarantee of a fair trial.

The State is entitled to establish its own national mechanisms for holding judges liable for disciplinary, civil or criminal infringements, provided that the guarantees inherent in the independence of judges are observed.

However, exercising the right of the State to a recourse action simply on the grounds of a judgment by the European Court of Human Rights, a friendly settlement or a unilateral declaration in which a violation of the Convention is found, with no judicial sentence which actually proves the culpability of the judge concerned, affects the independence of the judiciary and is out of line with the Constitution.

Summary:

I. The case stemmed from complaints lodged by a group of former and current judges, parties to cases pending before the courts of law, opened on the grounds of Article 27 of Law no. 151, 30 July 2015, on the Government Agent (hereinafter, the "Law no. 151/2015"). Under this provision, the State has the right of recourse against individuals whose actions or inaction determined or significantly contributed to the violation of the European Convention of Human Rights, found by a judgment, a friendly settlement of a case pending before the European Court of Human Rights or the submission of a unilateral declaration.

The applicants claimed that this provision, which could be lodged against judges inclusively, affected the principles of the separation of powers and independence of the judiciary, as guaranteed by Articles 6 and 116 of the Constitution.

II. In the course of its deliberations, the Court requested the opinion of the European Commission for Democracy through Law of the Council of Europe (the Venice Commission) on the right of the State to recourse against judges provided by Article 27 of the Law no. 151/2015. On 13 June 2016 the Venice Commission communicated to the Court its *amicus curiae* (CDL-AD (2016)015) adopted at the 107th plenary session (Venice, 10-11 June 2016).

The Court held that the provisions of Article 27 of Law no. 151/2015, unlike those of Article 1415 of the Civil Code, do not provide for the guilt of the person concerned to be proved by a judicial sentence, which means that the recourse action of the State could be initiated simply on the grounds of a judgment or decision of the European Court of Human Rights.

In accordance with European standards, liability of judges may not result only from findings of the European Court of Human Rights to the effect that a

violation of the Convention has occurred. The national judge must take international case-law into account, if this is well established.

Previously (no. 12, 07.06.2011, *Bulletin* 2011/2 [MDA-2011-2-002]) the Court had held that in order for a judge to be held individually liable, he or she must have exercised his or her duties in bad faith or with gross negligence. The existence of a judicial error affecting human rights and fundamental freedoms does not suffice.

Judicial independence requires judges to be protected from the influence of other branches of State power and that each judge shall enjoy professional freedom in interpreting the law, in evaluating the facts and assessing the evidence in each individual case. Incorrect decisions are to be corrected through the appeal process; they are not to lead to individual liability of judges.

Judges cannot be compelled to perform their duties under threat of sanction. This could adversely influence the decisions they take.

In this case, the Court observed that the provision on recourse action from Article 27 of Law no. 151/2015 exceeds the general framework of judges' liability in relation to existing legal provisions, including the special law on the status of judges, because it allows judges to be held liable with no judicial sentence proving their guilt.

The Court emphasised that the institution of recourse action itself is not contrary to constitutional principles, provided that the mechanism of holding a judge financially liable is in line with the guarantees inherent in judicial independence.

The Court concluded that exercising the right of the State to recourse action in terms of Article 27 of the Law no. 151/2015 only on the grounds of a European Court of Human Rights judgment, a friendly settlement or a unilateral declaration in which a violation of the Convention was found, with no judicial sentence proving the guilt of the judge, affects the independence of the judiciary and is contrary to Articles 6, 116.1 and 116.6 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 1, 116.1 and 116.6 of the Constitution;
- Article 27 of the Law no. 151, 30.07.2015, on the Governmental Agent.

Cross-references:

Constitutional Court:

- no. 12, 07.06.2011, *Bulletin* 2011/2 [MDA-2011-2-002].

European Court of Human Rights:

- *Giuran v. Romania*, no. 24360/04, 21.06.2011, *Reports of Judgments and Decisions* 2011.

Languages:

Romanian, Russian (translation by the Court).



Montenegro Constitutional Court

Important decisions

Identification: MNE-2011-2-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 08.12.2011 / **e)** UŽ-III 439/10 / **f)** / **g)** “*Sluzbeni list Crne Gore*” broj:6/12 (Official Gazette of Montenegro), no. 6/12 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Judge, participation in previous proceedings.

Headnotes:

A situation where, in the same proceedings, a judge has participated in the adjudication of the complaint and in subsequent review proceedings could cast doubt over his or her impartiality and that of the Court, giving rise to potential for a breach of the right to a fair trial.

Summary:

I. In the case at issue, Judge B.F. was a member of the Court panel that handed down Judgment Rev. IP no. 74/10 dated 22 September 2010 and then, as a judge of the Appellate Court, sat on the panel of that Court which ruled in the second instance. In the same legal matter, Judge B.F. participated in the ruling of the Appellate Court Pz. no. 274/07 dated 1 July 2008 after the defendant, HTP “Budvanska Rivijera”, filed a complaint challenging the ruling of the Commercial Court in Podgorica P.no. 638/05 dated 15 February 2007. The applicant could not have requested the exemption of the judge as he only found out the composition of the judicial review panel when he was served with the ruling of the Supreme Court.

The applicant submitted a constitutional complaint against the decisions of the Commercial Court in Podgorica, the Appellate Court and the Supreme Court on the grounds of violation of the right to a fair trial.

The applicant noted that the judge, in his capacity as a member of the Appellate Court panel, took part in the earlier adjudications overturning the rulings of the Commercial Court and referring them to the First Instance Court for repeat adjudication, and suggested that a violation of the right to a fair trial had taken place, from the perspective of impartiality, in view of the fact that, in the process of judicial review of the case, the adjudicating judge took part in the adjudication of the Appellate Court.

There is a consistent case-law by the Constitutional Court to the effect that the existence of impartiality for the purposes of Article 6.1 ECHR must be determined according to a subjective test where regard must be given to a specific judge's personal convictions and behaviour (i.e. whether he or she held any personal prejudice or bias in a given case) and according to an objective test, where assessment is undertaken as to whether the tribunal itself and its composition offered sufficient guarantees to exclude any legitimate doubts over its impartiality.

The applicant did not question the subjective impartiality of the Court; the Constitutional Court should not consider this aspect. The applicant was, however, challenging the judge's impartiality from an objective standpoint, as the judge was a member of the panel that decided about the review and of the panel that ruled in the proceedings following the complaint. The applicant contended that the judge could adopt the same stance in the proceedings that led to the repeal of the First Instance Court ruling and in the proceedings where the case was returned for re-adjudication and could therefore have influence over the panel that presided over the review proceedings.

II. Assessment is necessary, in carrying out the objective test, as to whether, aside from the judge's conduct, ascertainable facts exist to cast doubt over his impartiality. In this connection, the Constitutional Court noted that Article 69 of the Law on Civil Obligations stipulates the reasons for exemption of judges. Under Article 69.4, a judge cannot adjudicate a case in which he or she has been involved at a lower instance or in some other judicial capacity. The legislator was seeking, through the enactment of this provision, to eliminate all reasonable doubt over the impartiality of the Court. The Constitutional Court maintained that the provisions of Article 69 should not be understood as pertaining to the "Court" as an

institution; rather, it pertains to higher or lower instances trying cases on their merits at various procedural stages. Any other interpretation would be contrary to the objective and purpose of Article 69.

The Constitutional Court therefore found that a situation where, in the same proceedings, a judge has participated in the adjudication of the complaint and in subsequent review proceedings could cast doubt over his or her impartiality and that of the Court, giving rise to potential for a breach of the right to a fair trial. It stressed that the existence of procedures for ensuring the impartiality of the Court is a relevant factor which must be taken into account.

Having established a violation of the right to a fair trial (as a result of a breach of the principle of impartiality of the Court), the Constitutional Court did not proceed to examine the arguments the applicant had put forward regarding breaches of other constitutional rights indicated within the complaint.

It accordingly upheld the constitutional complaint, repealed the ruling of the Supreme Court and returned the case to the Supreme Court for repeat adjudication.

Cross-references:

European Court of Human Rights:

- *Meznaric v. Croatia*, no. 71615/01, 15.07.2005, paragraphs 27, 29 and 31;
- *Fey v. Austria*, no. 14396/88, 24.02.1993, Series A, no. 225, paragraph 27;
- *De Cubber v. Belgium*, no. 9186/80, 26.10.1984, Series A, no. 86, paragraph 26;
- *Oberschlick v. Austria*, no. 11662/85, 23.05.1991, Series A, no. 204.

Languages:

Montenegrin, English.



Identification: MNE-2012-1-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 19.01.2012 / **e)** U-I 2/11 / **f)** / **g)** / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

5.2.2.11. Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

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

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

Keywords of the alphabetical index:

Discrimination, prohibition / Initiative / Family.

Headnotes:

One of the highest constitutional values is the principle of the rule of law (Article 1.2 of the Constitution). The law shall conform with the Constitution and international agreements (Article 145 of the Constitution).

Apart from direct discrimination targeted at certain category of persons, Article 8.1 of the Constitution prohibits indirect discrimination, which occurs when the effects of a legal provision are discriminatory.

Apart from the right to marry and establish a family, Article 8 ECHR guarantees the right to respect family life and private life and respect for the home.

The sphere of family and marital social relations are subject to a broad appreciation of the state.

Summary:

I. In the case before the Constitutional Court, the applicants argued that provisions of Article 12 of the Family Law conflict with provisions of Articles 8 and 17 of the Constitution.

The applicants contended that the provisions are also contrary to international law, Article 26 of the International Covenant on Civil and Political Rights that guarantees equal and effective protection against discrimination, including sexual orientation, and Article 14 ECHR.

During the course of the proceedings before this Court, one applicant withdrew his request for constitutional review, choosing instead to defer to the Government.

The Government opined that the contested provisions are neither in contravention to the provisions of Article 8 of the Constitution nor the quoted provisions

of the international act since they pertain to the codification of a civil union, defined as a union between a man and a woman.

Family relations and the right to marry constitute constitutional rights that are stipulated by law. The legislator is authorised to regulate the way that these rights are to be exercised consistent with the law. In deciding on the applicants' initiative, the Constitutional Court reviewed the challenged provision of Article 12 of the Family Law in relation to the provisions of the Constitution that stipulate the term "marriage" (Article 71 of the Constitution), "family" (Article 72 of the Constitution) and prohibition of discrimination (Article 8 of the Constitution).

II. After reviewing the initiative, the Constitutional Court found that the legislator did not overstep its constitutional competence by enacting the contested provisions, which defined civil union as a lasting union between a man and woman, marriageable without obstacles, and accorded civil union the same status as a marriage in relation to mutual support and property – legal relations. The Court posited that because the distinction was reasonable and justifiable, it was not discriminatory.

The contested provisions of Article 12.1 of the Family Law, where different sex is a mandatory element for a common law union, is put into the context of family and family relations.

The Court determined that the legislator had full justification for the legislative solution and for different treatment of lasting unions of same sex individuals. Also, the Court decided that the sphere of family and marital social relations are subject to broad, state discretion. Thus, there are no legal impediments to recognising certain rights to the same sex partners in lasting economic and emotional union in the same way as these rights are enjoyed by marital partners.

Therefore, the Constitutional Court did not accept the initiative to review the constitutionality of the provision in Article 12 of the Family Law.

Cross-references:

European Court of Human Rights:

- *Mata Estevez v. Spain*, no. 56501/00, 10.05.2001;
- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010, 92, 93, 94 and 105;
- *Mellacher and others v. Austria*, nos. 10522/83, 11011/84 and 11070/84, 19.12.1989, Series A, no. 169, page 28;

- *Adriana C. Goudswaard – van der Lans v. the Netherlands*, no. 75255/01, 22.09.2005;
- Decision of the Human Rights Committee in relation to *Young v. Austria*, no. 941/2000.

Languages:

Montenegrin, English.



Identification: MNE-2013-2-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 18.07.2013 / **e)** Reg. 90-08, 96-08 / **f)** / **g)** *Sluzbeni list Crne Gore* (Official Gazette), no. 43/13 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Communication, interception / Communication, surveillance / Communication, telephone, evidence / Telephone conversation, confidentiality / Telephone, tapping, necessary safeguards.

Headnotes:

Following the case-law of the European Court, the identity check of telecommunication addresses and the time of the connection being established (information related to the dialled numbers and the length of a telephone conversation) constitute an “integral part of a telephone conversation”, which enjoys constitutional protection under the inviolability of the confidentiality of telephone communications, as well as in relation to the content and the data on published electronic communications.

In order for secret surveillance measures to have a legitimate goal, for the above constitutional reason, the same can be applied solely to a person for whom, prior to the application of secret surveillance measures, there exist specific “grounds for suspicion”

of his or her having committed a criminal act (i.e., both objective and subjective elements of a criminal act).

Summary:

I. Six Members of Parliament (MPs) and the Network for the promotion of the NGO sector (MANS) submitted to the Constitutional Court a motion and initiative for review of the constitutionality of Article 230.2 of the Criminal Procedure Code and the Action Plan for the implementation of the programme for the fight against corruption and organised crime (page 19), which had been passed by the Government.

In the motion and initiative the MPs contended that the part of Article 230.2 of the Criminal Procedure Code by which the police are authorised to obtain information related to the identity of telecommunication addresses which managed to establish a connection at a given time (so called itemised billing statements) without any review by a court or another independent body, is contrary to the provisions of the Article 42 of the Constitution and the provisions of Article 8 ECHR.

The provisions of Article 42 of the Constitution guarantee the inviolability of the confidentiality of correspondence, telephone conversations and other means of communication, which may be deviated from solely on the basis of a judicial decision for the purpose of conducting criminal investigations or for reasons of national security. The guarantee of the right to confidentiality is not directed towards total prohibition of any possibility of secret data gathering, but to finding a balance between the interests of security and the need for the protection of individuals from illicit interference with their privacy.

In this way, the challenged part of the provision of Article 230.2 of the Code gives the police the discretionary power to collect data, without restrictions, from the operators of electronic communication net-works and services that keep official records on the identity of subscribers and registered users of fixed and mobile telephony, and to acquire data on the date, beginning and end of communication and the length of the same, where there are grounds for suspecting that a person has committed a criminal act.

II. The Constitutional Court held that the challenged part of the provision of the Article 230.2 of the Code breaches the inviolability of the right to the secrecy of telephone conversation (without the inspection of their content), or the secrecy of communication of the users of communication networks, guaranteed by

Article 42.1 of the Constitution and allows “arbitrary interference of public authorities” with the right to privacy, contrary to the Article 8.2 ECHR.

The Court noted that international law and the constitutions of most countries in the world proclaim the protection of individuals from illicit interference with his or her privacy as a fundamental human right which enjoys legal protection.

In the concrete case this is the right to the inviolability of the confidentiality of correspondence, telephone conversations and other means of communication, which can be deviated from solely on the basis of a judicial decision, if this is necessary for a criminal investigation or for reasons of national security.

The European Court of Human Rights, in its case-law on Article 8 ECHR (right to respect for private and family life, home and correspondence), holds that it is desirable for the review of secret surveillance measures to be entrusted to courts, since judicial review offers the best guarantees to independence, impartiality and respect for procedure.

The Constitutional Court deemed that the challenged provision violates the inviolability of the right to confidentiality of telephone conversations, not only of the person against whom there exist “grounds of suspicion”, but also, indirectly, of every third person (who is not subject to any secret surveillance measures), with whom the suspect establishes telephone connection.

For that reason, the Court established that the police, without an appropriate court decision, have no right to obtain data from the sphere of private communications, from telecommunication operators about the users of their services – who are not subject to any secret surveillance measures (“third persons”), about the communication performed and the time of connection being established, since even these data constitute integral elements of protected telephone communication. The Court accordingly held that the challenged provision of the Law is not in harmony with the provisions of Article 42 of the Constitution.

Having considered the content, the subject matter being regulated and the legal nature of the Action Plan, the Constitutional Court established that in the specific case it was not the matter of a general act, which regulated certain legal relations or questions in a general way, but of a strategic act for the implementation of the policy of the Government in the area of the fight against corruption and organised crime, which did not have normative character and the meaning of a general act or another regulation

and that it was not suitable for the assessment of the Constitutional Court, in the sense of the provision of the Article 149.2 of the Constitution.

Since the issue of competence is a procedural one, which is deliberated upon by the Court in the preliminary procedure, the Constitutional Court held that, pursuant to Article 8.1 of the Law on the Constitutional Court, there was no procedural basis for the procedure to be conducted and for deliberation, or for the evaluation of the measures (page 19) of the Action Plan of the Government, which, among other things, had been requested in the motion and the initiative.

The Constitutional Court therefore established that the part of Article 230.2 of the Criminal Procedure Code, which states, “to request from the legal entity which provides telecommunication services that the identity check be performed of telecommunication addresses that managed to establish connection at a given time”, at the time of validity, was not in conformity with the Constitution of Montenegro. In addition, the Court dismissed the proposal and the initiative for the review of constitutionality and legality of the Action Plan for the implementation of the programme for the fight against corruption and organised crime (page 19), which was passed by the Government of Montenegro.

Cross-references:

European Court of Human Rights:

- *Van Oosterwijck v. Belgium*, no. 7654/76, 06.11.1980, Series A, no. 40;
- *Rotaru v. Romania* [GC], no. 28341/95, 04.05.2000, *Reports of Judgments and Decisions* 2000-V;
- *Malone v. the United Kingdom*, no. 8691/79, 02.08.1984, Series A, no. 82;
- *Copland v. the United Kingdom*, no. 62617/00, 03.04.2007, *Reports of Judgments and Decisions* 2007-I;
- *Klass and others v. Germany*, no. 5029/71, 06.09.1978, Series A, no. 28.

Languages:

Montenegrin, English.



Identification: MNE-2013-3-002

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 14.11.2013 / **e)** U-VI 9/13 / **f)** / **g)** *Sluzbeni list Crne Gore* (Official Gazette), no. 54/13 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

1.3.4.5. Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

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

5.3.41. Fundamental Rights – Civil and political rights – **Electoral rights.**

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

Keywords of the alphabetical index:

Election, voting right / Electoral Commission / Remedy, effective / Remedy, violation, constitutional right.

Headnotes:

According to Article 35.1 of the Law on the Election of Councillors and Members of Parliament and the Constitutional Court's case-law, the protection of the right to vote includes the right to file objections or complaints to competent bodies and courts and it applies to all stages of elections including issues pertaining to the appointment of the bodies for administering election procedure, which are also entrusted with the appointment of nominees of submitters of electoral lists for the authorised representatives to the extended formation of the polling board.

Summary:

I. Following the Constitution, the way in which the freedoms and rights of citizens are exercised include the right to vote and, as such, this right is exercised at elections and protection of the right is defined by laws which are to be in compliance with the Constitution. The manner in which voting rights are exercised in the procedure for the election of councillors to municipal assemblies, the assembly of the capital city, the assemblies of urban municipalities and the Royal Capital and for members of the Parliament of Montenegro is regulated by the Law on the Election of Councillors and Members of Parliament. The Law prescribes, *inter alia*, the manner in which the right to vote is protected in relation to the procedure of electing councillors and members of parliament. In

that sense, an electoral dispute refers to the examination by competent bodies of all violations of the rules of electoral procedure from the moment of calling for election to the moment of confirmation of the seats won at elections.

The electoral list “*Srcem za Cetinje*” of the political party *Pozitivna Crna Gora* submitted to the Constitutional Court a constitutional complaint against a Decision of the State Election Commission, whereby the Commission rejected their complaint against the Conclusion of the Election Commission of the Royal Capital Cetinje no.01-14/13-88 dated 10 November 2013 on the basis of a lack of jurisdiction.

The complaint argued that the contested decision is illegal and unconstitutional, because the complainants were deprived of the right to a legal remedy under Article 20 of the Constitution and of the right to file a complaint stipulated in Article 108.2 of the Law on the Election of Councillors and Members of Parliament (hereinafter, the “Law”), given that the Commission by its decision acted in contravention to the provision of Article 32.1.1, 32.1.2 and 32.1.3 of the Law and entitled municipal commissions to pass conclusions in future which can, for example, reject proposals of all parties submitting electoral lists to appoint authorised representatives to polling boards or do any other infringement on the right stipulated by this law.

The State Election Commission rejected the complaint of the applicant against the conclusion of the election commission of the Royal Capital Cetinje, dated 10 November 2013, due to lack of competence, on the basis that the concrete case concerned, not violation of an electoral right, but the appointment of authorised representatives to a polling board, which does not fall within the remit of the Commission.

II. The Constitutional Court, having considered the contested decision and relevant submitted documentation held that the complaint was lodged in timely manner, was admissible and well-founded. Accordingly, the Constitutional Court approved the constitutional complaint and revoked the contested decision of the State Election Commission.

The Court held that those submitting electoral lists are eligible to nominate their authorised representatives to the extended formation of the polling board, are entitled to appoint their authorised representative each, and are to notify municipal election commission of such nominations. Within 24 hours the commission must send notices listing names of each and every person appointed into the extended polling board (Article 36 of the Law).

The Constitutional Court found that, in compliance with Article 108.2 of the Law, submitters of election lists are entitled to submit a complaint to the competent body, namely, the State Election Commission, if they think that an act or decision of the municipal election commission violated their right to nominate a representative to the extended formation of electoral board in the election process.

Starting from the quoted constitutional and legal provisions and the facts of the case, the Constitutional Court held that the State Election Commission had failed to vindicate the complainant's right to vote, in the procedure for establishing the list of nominees to be appointed representatives to the extended polling board for the election of the councillors in the assembly of the Royal Capital Cetinje, rejecting the complaint as inadmissible, due to its lack of jurisdiction.

The Constitutional Court therefore established that the contested decision of the State Election Commission was legally unfounded and the complaint legally founded. The State Election Commission must therefore decide about the applicant's complaint within the time prescribed by the law.

Languages:

Montenegrin, English.



Identification: MNE-2014-1-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 17.04.2014 / **e)** U-I 6/14, 9/14 / **f)** / **g)** *Sluzbeni list Crne Gore* (Official Gazette), no. 20/14 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 3.10. General Principles – **Certainty of the law.**
 5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
 5.3.13.1.1. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings.**

Keywords of the alphabetical index:

Bankruptcy, proceedings / Mining and metallurgy.

Headnotes:

Any restrictive measures brought in by the state will only be considered “legal” in the spirit of the European Convention on Human Rights if they comply with the principles of a basis in domestic law, quality of law, accessibility of domestic law, predictability of domestic law and legal protection in domestic law against arbitrary interferences.

The legislator is authorised under the Constitution to regulate issues that are in the interests of Montenegro and those of the mining and metallurgy sector. The legislator must do this in line with the Constitution by enacting laws that determine rights and obligations regarding legal issues of interest to Montenegro.

Parties affected by a legal norm can only comprehend their concrete rights and duties and the effects of their behaviour if the norm is sufficiently precise and clear. However, this does not mean that the legislator, on the basis of its margin of appreciation, has a totally free rein to pass laws which deviate from the principles determined by the Constitution and systemic laws.

Summary:

I. The rationale behind the Law on the Protection of the Interest of the State in the Mining and Metallurgical Sector (hereinafter, the “Law”) was to preserve the national interest in the mining-metallurgy sector by regulating the process of selling companies going through bankruptcy proceedings. The legislator also regulated the conditions of sale of these companies; under the law, companies in this sector must perform activities of significance for Montenegro and its citizens.

The Supreme Court of Montenegro and the Government of Montenegro asked the Constitutional Court to review the constitutionality of certain provisions of Articles 1, 2.1 and 3.2 of the Law.

The Supreme Court contended in its petition that Article 3.4 of the Law was out of line with the Constitution, as it made decisions of the court acting in its sole jurisdiction conditional on the prior approval of Parliament. It also argued that bankruptcy proceedings are solely a matter of court procedure because under Article 6 of the Bankruptcy Law, once bankruptcy is filed, the competent court conducts

the procedure *ex officio*. Bankruptcy procedure is defined by law as imperative (Article 7.1).

The Government of Montenegro argued that the provisions of Articles 1, 2, 3 and 4 of the Law ran counter to Articles 11, 17, 19, 20, 58, 118 and 139 of the Constitution and that they deviated altogether from the general principles of the Bankruptcy Law. These provide safeguards for bankruptcy creditors, their equal treatment and equality, economy of operation, the exclusively judicial process of administering bankruptcy, its regulation by law, the preclusive effect of judgment, swiftness of proceedings, two instance proceedings and transparency.

II. The Constitutional Court considered the constitutional principle of the integrity of the legal order as set out in the provisions of Article 145 of the Constitution, given that the legal regime governing bankruptcy proceedings is regulated by the Bankruptcy Law and other laws (Article 7.2 of the Bankruptcy Law). It noted the importance of an assessment as to whether the contested provisions impinged upon the principle of the separation of powers between legislative, executive and judicial and upon the principle of the rule of law as one of the highest values of the legal order.

It found that Parliament had exceeded its competence and violated the provisions of Articles 11.3 and 32 of the Constitution and Article 6.1 ECHR on the division of power and right to fair trial before an independent and impartial tribunal established on the basis of law. The legislator had also infringed the principle from Article 10.2 of the Constitution, that everyone must observe the Constitution and law, as well as the basic presumption of legal security and legality which, under Article 25.3 of the Constitution, cannot be limited, whether in war or due to out of the ordinary states of affairs.

The Constitutional Court observed that the legislator had effectively made the administration of justice (in terms of selling a company to a strategic investor and concluding sales agreements in bankruptcy cases) conditional on obtaining the prior approval of Parliament. It had also imposed the condition on the state that it could only take over a company with prior approval from Parliament and if the contract was concluded in a manner prescribed by Article 3 of the Law. By granting this power to itself, under Articles 3.4 and 4 of the Law, Parliament had acted in a way that ran counter to the Constitution, as a new bankruptcy authority with unacceptable arbitrariness in the ensuing proceedings. Moreover, by enacting Articles 2.2 and 3.1 of the Law, the legislator deprived the authorities in charge of bankruptcy proceedings of

the right to select the most appropriate model of sale as set out in Article 134.2 of the Bankruptcy Law. It also narrowed the field of competence of the bankruptcy authorities. Measures will only be deemed to comply with the principle of proportionality if they are necessary in the sense that no alternatives or better options can be found.

The Constitutional Court therefore found that the contested provisions of Articles 2.2, 3.1 and 3.3 of the Law did not meet the standard of “in accordance with the law” in line with the positions of the European Court of Human Rights. It also found that, due to the potential for ambiguity in the application of the provisions, the legislation could not be considered to be based on the rule of law or to establish legal certainty or predictability. Articles 2.2, 3.1 and 3.3 of the Law accordingly contravened the principle of the rule of law as the supreme principle of the constitutional order (Articles 10.2 and 145 of the Constitution).

As regards the legal solutions set out within Articles 1, 2.1 and 3.2 of the Law, the Constitutional Court found that these fell within the “constitutionally-legally accepted” limits and remits of the legislator to regulate issues of interest for Montenegro. The proposal to review their constitutionality was refused. The Court did not weigh the claims that were listed in the motion on breach of the right to legal remedy and the right to property from Articles 20 and 58 of the Constitution since these, as already found by the Constitutional Court, could not be relevant for deciding otherwise in this case.

Cross-references:

European Court of Human Rights:

- *Stran Greek Refineries and Stratis Andreadis v. Greece*, no. 13427/87, 09.12.1994;
- *Sunday Times (no. 1) v. the United Kingdom*, no. 6538/74, 26.04.1979, Series A, no. 30; *Special Bulletin – Leading Cases ECHR* [ECH-1979-S-001];
- *Huvig v. France*, no. 11105/84, 24.04.1990.

Languages:

Montenegrin, English.



Identification: MNE-2014-3-002

a) Montenegro / b) Constitutional Court / c) / d) 17.04.2014 / e) Uz-III 455/10 / f) / g) *Sluzbeni list Crne Gore* (Official Gazette), no. 39/14 / h) CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality.**

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

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

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

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

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

Keywords of the alphabetical index:

Indemnification / Journalist, investigative / Media / Journalist, legitimate right / Public interest, legitimate / Freedom to publish information in the press.

Headnotes:

Following Article 10 ECHR, freedom of expression represents one of the essential foundations of a democratic society. It applies not only to “information” or “ideas” favourably received or regarded as inoffensive, but also to those that offend, shock or disturb. Protecting this freedom is of particular importance to the press, as the press is tasked, among other things, to publicise information of public importance.

The freedom to publish information in the press is limited by the need to protect the reputation and rights of other people. When assessing whether a breach of the freedom of expression occurred, each individual case must be considered in light of all the circumstances, including the contents of the contested assertions and the context in which they were made. In particular, it is necessary to establish whether the measures taken to limit the freedom of expression are proportionate to the legitimate aim pursued by that restriction. It is important to determine under what circumstances state authorities take measures that could affect the operation of the press in cases that are of legitimate public interest. Also, in accordance with Article 10.2 ECHR, the government can interfere with the exercise of the

freedom of expression only if three cumulative conditions are fulfilled:

- a. interference is prescribed by law;
- b. interference aims to protect one or several specified interests or values;
- c. interference is necessary in a democratic society.

Courts must follow these three conditions when hearing and deciding cases concerning the freedom of expression. Article 47 of the Constitution, which guarantees political rights and freedoms, states that everyone shall have the right to freedom of expression that covers speech, writing, pictures or in some other manner, which may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro.

Summary:

I. The applicant submitted a constitutional appeal against the Judgment of the High Court in Podgorica Gz. no. 3031/10-07, dated 9 July 2010. In the complaint, the applicant contended that the judgment at issue infringed upon his rights enshrined in Article 47 of the Constitution and in Article 10 ECHR. The applicant works as an investigative journalist for the weekly *Monitor* and the radio and television channel *Vijesti*. As the author of the disputed article published in the *Monitor*, he aimed to inform the public about the existence of organised drug-trafficking groups in the country. Regarding the article, the applicant claimed that he had literally transposed information published by another paper, which described that the plaintiff was associated with members of drug-trafficking groups by designating him as their protector. The applicant added that if the plaintiff denied the media reports, he was supposed to do it after the publication of the first article, not by filing a lawsuit against the journalist who quoted another paper.

The judgment of the Basic Court in Podgorica P. no. 1424/07 dated 14 May 2010 rejected as unfounded the claim seeking to oblige the applicant (who lodged the constitutional appeal) to pay to the plaintiff the sum of € 1.00 as non-pecuniary damage for mental anguish suffered as a result of injury to his honour and reputation, with the corresponding statutory default interest starting from the date of adjudication, until the final payment.

The Judgment of the High Court in Podgorica Gz. no. 3031/10-07 dated 9 July 2010 reversed the first instance judgment. It upheld the plaintiff's claim to oblige the respondent to pay to the plaintiff the

amount of € 1.00 as non-pecuniary damage for mental anguish suffered as a result of injury to honour and reputation.

II. The Constitutional Court reviewed the plaintiff's claim filed to the Basic Court in Podgorica against the respondent (the applicant). The claim pointed to an article on page 15 titled *Colombia on the Lim River* in the weekly *Monitor* no. 861 of 20 April 2007. In the article, "the Belgrade NIN named Rozaje resident S.K. as the boss of D.V., and the high-ranking official of the Montenegrin National Security Agency Z.L. as their protector". Furthermore, on the same page, the text reads: "The Belgrade NIN writes about that in the latest number and names D.V. "an important member of the Berane-Rozaje group".

In the proceedings before the Constitutional Court, the High Court upheld the plaintiff's claim and imposed on the respondent (the applicant) the obligation to pay non-pecuniary damages to the plaintiff suffered as a result of mental anguish and injury to honour and reputation. The Court expressed the view "that the actions of the respondent resulted in presenting false information available to the general public, which injure the honour and reputation of the plaintiff". It added that "this is a clear case of presentation of factual assertions that are susceptible of a potential truth verification and that the assertions from the concerned text inflicted mental anguish to the plaintiff because he had been presented, as a human being and a senior official of the National Security Agency, as the protector of persons who are connected with the criminal milieu, which undoubtedly had a harmful effect on his psychological experience of the text".

In the concrete case, it is undisputed, under the finding of the Constitutional Court, that the decision of the High Court constituted an "interference" with the applicant's right to freedom of expression and that it was "prescribed by law". The reason is that the challenged judgment was rendered on the basis of the Law on the Media and the Law on Obligations, in a civil action launched by the plaintiff due to damage caused to his reputation. Moreover, under the finding of the Constitutional Court, interference with the applicant's right pursued the legitimate aim of "protection of the reputation of another person". The Constitutional Court found that the information concerning the public life of Z.L. can be considered to be a matter of public interest, especially because he is a high official of the National Security Agency.

Further, the Constitutional Court found that the interference with the applicant's right to freedom of expression was not justified and "necessary in a democratic society". It emphasised that there was no

"pressing social need" to restrict freedom of expression. In not taking into account the essential meaning of the right to freedom of expression, the High Court disregarded the legitimate right of journalists to use the press to respond publicly and polemically to specific assertions made by other media in the context of matters focusing on issues of public interest (activities of criminal groups), which stem from the content of the text and from its overall context.

Therefore, the Constitutional Court determined that the High Court did not base its decision on an acceptable analysis of the relevant facts and of all circumstances important in this particular case in connection with the injury of the plaintiff's reputation. Hence, the High Court's decision breached the principle of proportionality in respect of the balance between limiting the rights of the applicants to freedom of expression and protecting the reputation of a public figure, in this case that of the plaintiff.

As such, the Constitutional Court established that the reasons given in the impugned judgment by the High Court cannot be regarded as a sufficient and relevant justification for the interference in the applicant's right to freedom of expression. The High Court did not convincingly establish that there is any "pressing social need" due to which protection of individual rights should be put above the applicant's right to freedom of expression and the public interest. The interference, according to opinion of the Constitutional Court, therefore, was not "proportionate to the legitimate aim" sought to be achieved. Also, it was not "necessary in a democratic society", which is why the applicant's constitutional right to freedom of expression referred to in the provisions of Article 47 of the Constitution and Article 10 ECHR was breached.

The Constitutional Court therefore upheld the constitutional appeal, overruled the Judgment of the High Court in Podgorica Gz. br. 3031/10-07, 9 July 2010 and remanded the case to the High Court in Podgorica for retrial.

Cross-references:

European Court of Human Rights:

- *Dalban v. Romania*, no. 28114/95, paragraph 50, 28.09.1999, *Reports of Judgments and Decisions* 1999-VI;
- *Lepojic v. Serbia*, no. 13909/05, 06.11.2007;
- *Sabanovic v. Montenegro and Serbia*, no. 5995/06, 31.05.2011, paragraph 36;

- *Pedersen and Baadsgaard v. Denmark*, Reports of Judgments and Decisions 2004-XI, paragraph 105, no. 49017/99;
- *Lingens v. Austria*, no. 9815/82, 08.07.1986, Series A, no. 103;
- *Ieremeiov v. Romania*, no. 2 from 2009;
- *Jersild v. Denmark*, 23.09.1994, Series A, no. 298;
- *Thoma v. Luxembourg*, 29.03.2001, no. 38432/97, Reports of Judgments and Decisions 2001-III;
- *Oberschlick v. Austria*, 23.05.1991, p. 57, no. 11662/85.

Languages:

Montenegrin, English.



Identification: MNE-2015-1-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 20.02.2015 / **e)** U-II 58/13 / **f)** / **g)** *Sluzbeni list Crne Gore* (Official Gazette), no. 39/14 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

- 5.2.2.12. Fundamental Rights – Equality – Criteria of distinction – **Civil status**.
- 5.3.32. Fundamental Rights – Civil and political rights – **Right to private life**.
- 5.3.33. Fundamental Rights – Civil and political rights – **Right to family life**.
- 5.3.34. Fundamental Rights – Civil and political rights – **Right to marriage**.
- 5.3.39. Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Marriage, common law relationship, discrimination.

Headnotes:

Under Article 145 of the Constitution, the principle of the rule of law is one of the highest constitutional values. It is achieved by applying the principle of compliance of legal regulations. Under this principle, legislation must be in conformity with the Constitution and ratified international agreements and other regulations. In regulating legal relationships, the

enacting authority is obliged to observe the limits set by the Constitution, particularly those arising from the rule of law and those protecting particular constitutional goods and values. In this case, these are the prohibition of discrimination and the principle of equality set out in the provisions of Articles 8.1 and 17.2 of the Constitution.

Family law regulates marriage and relationships within marriage, relationships between parents and children, adoption, placement within families such as fostering, custody, support, property relationships in the family and actions of authorised bodies with regard to marriage and family relationships. A common law relationship is regarded as being on a par with a marital relationship in terms of the right to mutual support and other property and legal relationships. It is defined as a living arrangement between a man and a woman of a longer-lasting nature. Article 8.1 of the Constitution prohibits any direct or indirect discrimination, on any grounds. The prohibition of discrimination has a general meaning; it is not limited to the enjoyment of constitutional rights and freedoms.

The concepts of discrimination and discriminatory grounds in Montenegrin law is contained in the Law on Prohibition of Discrimination. It includes all discriminatory grounds set forth in Article 14 ECHR and Article 1 Protocol 12 ECHR, along with other specific forms of discrimination. From the principle of equality, guaranteed in Article 17.2 of the Constitution, the conclusion can also be drawn that there is an obligation to prohibit arbitrary interference, that is, an obligation to be strictly bound by the principle of proportionality in the event of different treatment of a person or group of persons on the basis of personal traits who are found to be in the same or similar legal or factual situations.

Protection of family life is not confined solely to marriage-based relationships; it may encompass other *de facto* family ties. Unmarried couples are one example, depending on factors such as whether they live together, the stability and length of their relationship and whether they have children together.

Summary:

I. The applicant in these proceedings sought a review of the constitutionality and legality of the provisions of Article 15.2 of the Rules on the Settlement of Residential Issues nos. 02-6170 and 02-4227 of 6 June 2003 and 16 April 2004 (hereinafter, the "Rules"), adopted by the Board of Directors of "Telekom Crne Gore" a.d. Podgorica. The suggestion was made that these provisions placed employees in common-law marriage relationships in an unequal

and discriminatory position compared to employees living in matrimonial union, because they are evaluated differently in the settlement of residential issues. The Board of Directors of “*Telekom Crne Gore*” a.d. Podgorica argued that the provision under dispute did not violate the constitutional principles of equality and non-discrimination. In the process of settlement of residential issues, the provision was equally applied; employees were obliged to submit, with their applications, evidence of the number of household members, without specifying the marital status of partners. Thus, in this process, married and common law partners received equal evaluation.

II. The Constitutional Court found that the provision under dispute gave no grounds for initiation of proceedings for a review of its constitutionality and lawfulness. The Constitutional Court, in its decision-making, took into account the principle of unity of legal system defined in the provisions of Article 145 of the Constitution; the family relationships and employment rights of an employee in this regard are regulated by more than one law.

On the basis of the Law on Business Organisations, the Constitutional Court concluded that “*Telekom Crne Gore*”, as the holder of the right to dispose of company assets, had the authority to adopt an act in which it would autonomously define the manner of addressing the residential needs of employees and the criteria and standards for determining the order of employees applying for settlement of residential issues.

It found that the provision of Article 15.2 of the Rules violated the constitutional principle of general prohibition of discrimination on any grounds and the principle of equality before the law regardless of any particularity or personal feature, in accordance with Articles 8.1 and 17.2 of the Constitution, Article 2.2 and 2.3 of the Law on Prohibition of Discrimination, Article 14 ECHR and Article 1 Protocol 12 ECHR.

The principle of non-discrimination and the principle of equality are contained in all core international and regional human rights instruments, in particular Article 14 ECHR and Article 1 Protocol 12 ECHR. In these particular proceedings, the Constitutional Court took into account the relevant practice of the European Court of Human Rights which has expressed its position several times regarding the meaning of family and marital relations guaranteed in the provision of Article 8 ECHR and in connection therewith, non-discrimination referred to in the provisions of Article 14 ECHR and Article 1 Protocol 12 ECHR in relation to this Law.

The Court was accordingly of the view that Article 15.2 of the Rules was of a discriminatory character. The provisions of Articles 71, 72.1 and 72.2 of the Constitution and Article 12.1 of the Family Law stipulate that a family enjoys special protection, that parents are obliged to take care of their children, to bring them up and educate them and that children born out of wedlock have the same rights and obligations as those born in marriage. Moreover, common-law community is equalled with marital community in terms of the right to mutual support and other property and legal relationships. It appeared from Article 15.2 of the Rules that the household members of an employee that a distinction was drawn between children born in wedlock and those born outside it; one of the parents of those children was not considered a member of the household if they were not married to the employee.

The Constitutional Court held that the difference that had been established between married persons and those living in common-law community has no objective and reasonable justification in terms of the process of addressing the residential needs of employees. There were no constitutional or legal objectives which could justify this sort of discrimination on the grounds of marital status (inequality in exercising the right to settlement of residential issues) on the basis of citizens’ personal characteristics.

The question the applicant had raised regarding the compliance of the challenged provision of Article 15.2 of the Rules with the provisions of Articles 8.1 and 17.2 of the Constitution, Article 2.2 and 2.3 of the Law on Prohibition of Discrimination, Article 14 ECHR and Article 1 Protocol 12 ECHR, was well founded.

Cross-references:

European Court of Human Rights:

- *Marckx v. Belgium*, no. 6833/74, 13.06.1979;
- *Abdulaziz, Cabales and Balkandali v. United Kingdom*, nos. 9214/80, 9473/81 and 9474/81, 28.05.1985;
- *Johnston and others v. Ireland*, no. 9697/82, 18.12.1986;
- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010.

Languages:

Montenegrin, English.



Identification: MNE-2015-2-002

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 24.07.2015 / **e)** U-I 13/13, 17/13, 19/13 / **f)** / **g)** *Sluzbeni list Crne Gore* (Official Gazette) / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

3.21. General Principles – **Equality.**

4.5.6. Institutions – Legislative bodies – **Law-making procedure.**

5.2.1. Fundamental Rights – Equality – **Scope of application.**

5.2.2. Fundamental Rights – Equality – **Criteria of distinction.**

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

5.3.13.4. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

5.3.37. Fundamental Rights – Civil and political rights – **Right of petition.**

Keywords of the alphabetical index:

Amnesty / Principle of equality / Principle of non-discrimination / Equality of rights and obligations / Principle of unity of legal system / Constitutionality.

Headnotes:

The provisions of items 2, 3 and 4 of Article 3.1 of the Law on Amnesty of Persons sentenced for Criminal Offences Prescribed by the Laws of Montenegro and Persons Sentenced by Foreign Criminal Verdict neither contain discriminatory limitations on any discriminatory ground in relation to the Constitution nor in the sense in which the European Court of Human Rights interprets limitations.

Summary:

I. The applicants requested the Constitutional Court to review provisions of items 2, 3 and 4 of Article 3.1 of the Law on Amnesty of Persons Sentenced for Criminal Offences Prescribed by the Laws of Montenegro and Persons Sentenced by Foreign Criminal Verdict that is served in Montenegro (Official Gazette of Montenegro, no. 39/13). The applicants

challenged that the provisions are discriminatory and contrary to Article 8 of the Constitution, Article 14 ECHR and Article 1 Protocol 12 ECHR and the case-law of the European Court of Human Rights.

They asserted that the provisions allowed for the disparate treatment of persons convicted of essentially identical crimes (aggravated murder referred to in Article 144 of the effective Criminal Code and class 1 felony in items 1-6 of Article 30.2 of the previously effective Criminal Code). Furthermore, they argued that the unconstitutionality of the provisions stems from different norms and legal effects applied to persons in the same and similar situations without any objectivity and reasonability. As such, the group of convicted persons who are not granted amnesty are placed in an unfair and unequal position compared to persons who are included in the provision of Article 1 of the Law and granted amnesty.

II. In deciding the case on the merits, the Constitutional Court considered the principle of unity of the legal system defined in Article 145 of the Constitution. The reason is that the aforementioned Law was adopted conditioned on amnesty being a general institute of criminal law under the Criminal Code of Montenegro (Official Gazette, nos. 70/03, 13/04, 47/06 and nos. 40/08, 25/10, 73/10, 32/11, 64/11, 40/13, 56/13 and 14/15). The Court also took into account the case-law of the European Court of Human Rights and the Federal Constitutional Court of the Federal Republic of Germany, to wit, general legal positions of these courts relating to the regulation of the amnesty institute.

Following its review, the Court opined that an enacting authority possesses the power under the law governing the amnesty institute to define the catalogue of criminal offences for which the convicted persons will be (or not) granted amnesty. Interpreting the Constitution, the Court stipulated that the granting of amnesty is originally within the Parliament's mandate and the Constitution fully leaves that to the enacting authority.

The Court found that the manner of regulating the said matters falls within the domain of legislation policy. As the agent of legislative power, Parliament is authorised to freely determine the level of exemption from the imposed penalty of imprisonment and specify the persons to whom amnesty applies. Therefore, the Court, in accordance with Article 149 of the Constitution, is not competent to evaluate the appropriateness of Parliament's decisions, including challenges to provisions of Articles 1 to 3 of the Law. The Court also ruled that it is not competent to establish the extent to which the natures of particular crimes are similar and/or identical and the reasons why the enacting

authority exempted the persons convicted of acts cited in the challenged provisions of Article 3 of the Law from amnesty application in view of whether such legal solution is rational or appropriate.

The Court held that the challenged provisions of items 2, 3 and 4 of Article 3.1 of the Law cannot be prejudicial to the principle of general prohibition of discrimination, direct or indirect, on any ground and equality before the law. This applies regardless of any particularity or personal feature as per Articles 8.1 and 17.2 of the Constitution, Article 14 ECHR and Article 1 Protocol 12 ECHR.

The Court found that the challenged provisions of items 2, 3 and 4 of Article 3.1 of the Law neither contain discriminatory limitations on any discriminatory ground in relation to the Constitution of Montenegro nor in the sense in which the European Court of Human Rights interprets limitations. Namely, the challenged provisions of the Law do not make any distinction according to the personal features of persons to whom amnesty does not apply. The reason is that all persons (without exception), who are convicted of particular criminal offences (aggravated murder under the Criminal Code) and are convicted on the effective date of this law, of criminal offences of criminal association and creation of criminal organisation as well as of criminal offences of unauthorised production, possession and distribution of narcotics under the Criminal Code are exempted from amnesty. This fact, according to the Constitutional Court, cannot be considered "personal feature" neither in accordance with the said provisions of the Constitution nor within the meaning of the European Convention on Human Rights.

The constitutionality of the challenged provisions of items 2, 3 and 4 of Article 3.1 of the Law, according to the Constitutional Court, also cannot be prejudiced from the perspective of constitutional principle of equality before the law, regardless of any particularity or personal feature (Article 17.2 of the Constitution). They apply to all non-amnestied persons equally.

Upon hearing the content of the challenged provisions of items 2, 3 and 4 of Article 3.1 of the Law, the Constitutional Court found that they are not contrary to the Constitution.

Therefore, the Constitutional Court held that when regulating the right to amnesty in the manner stipulated in the challenged provisions of the Law, the enacting authority did not overstep the boundaries of constitutional powers. Also, it did not violate constitutional principles on prohibition of discrimination and equality of citizens before the law as per provisions of Articles 8 and 17.2 of the Constitution. Perpetrators of those

criminal offences not subject to amnesty, according to the Constitutional Court, may not file complaint of discrimination, specifically the violation of constitutionally guaranteed right to equality of all before the law. Besides, amnesty, according to the challenged provision of item 2 of Article 3.1 of the Law, does not apply, without exception, to all persons who committed an aggravated criminal offence of murder. In that sense, the Court decided to reject the petition to initiate proceedings to review the constitutionality of the provisions of items 2, 3 and 4 of Article 3.1 of the Law on Amnesty of Persons Sentenced for Criminal Offences Prescribed by the Laws of Montenegro and Persons Sentenced by Foreign Criminal Verdict which is Served in Montenegro (Official Gazette of Montenegro, no. 39/13).

Cross-references:

Constitutional Court:

- BVerfGE 10, 234 Platow-Amnestie, Decision of the First Senate, 1 BvL 10/55, 15.12.1959.

European Court of Human Rights:

- *Tarbuk v. Croatia*, no. 31360/10, 11.12.2012.

Languages:

Montenegrin, English.



Identification: MNE-2015-3-003

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 14.10.2015 / **e)** U-I 15/15 / **f)** / **g)** *Sluzbeni list Crne Gore* (Official Gazette), no. 76/15 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

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

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

4.5.10.2. Institutions – Legislative bodies – Political parties – **Financing.**

4.8.4.1. Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.7.3. Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Budget.**

Keywords of the alphabetical index:

Political parties, financing, local government, budget allocation.

Headnotes:

Provisions which impose an obligation on the Ministry of Finance to transfer funds to a political entity if a local administration body has not done so are in breach of the principles of legal certainty, the unity of the legal system and the separation of powers.

Summary:

I. Montenegro is a civil, democratic, ecological state, based on the rule of law; state power is regulated following the principle of the separation of powers into the legislative, executive and judicial. Legislative power is exercised by Parliament, executive power by the Government and judicial power by the courts. Parliament is empowered to adopt laws, the budget and the final statement of the budget, whilst the Government is empowered to enforce laws, other regulations and general acts and propose the budget and the final statement of the budget. These powers are limited by the Constitution and the law. Constitutionality and legality are protected by the Constitutional Court; legislation must be in conformity with the Constitution and confirmed international agreements, and other regulations shall be in conformity with the Constitution and the law.

Under the Constitution, the legislator is empowered to regulate matters of national interest and therefore the matter of financing of political entities and election campaigns. Under Article 53.3 of the Constitution, the state supports political and other associations when it is in the public interest to do so. Political parties and the freedom of their establishment form part of the expression of a democratic multi-party system, as a core value of a democratic society. The financing of political parties is essential for their operation; the realisation of a democratic multi-party system depends on political parties.

Under these powers, Parliament adopted the Law on Financing of Political Entities and Election Campaigns, which regulates the manner of acquisition and provision of financial funds for the regular operation and the election campaigns of political entities, prohibitions and restrictions on disposal of state-owned property, funds from public authorities in the course of the campaign as well as the control, supervision and auditing of financing and financial operations of political entities, in order to achieve legality and transparency in their operation.

Article 11 of this Law prescribes the procedure for allocation of budget funds for regular financing of political entities.

Under Article 1.2 of the Constitution, the principles of legal certainty and the rule of law require legal norms to be accessible and predictable for their addressees, so that they have a thorough knowledge of their rights and obligations and can behave accordingly.

The Government sought a review of the constitutionality of Article 11.8.9 of the Law on Financing of Political Entities and Election Campaigns, contending that it was out of line with the Constitution and published international agreements and that it contravened the provisions of Articles 116.4 and 117.1 of the Constitution, which stipulate the principles of budgetary autonomy and independence of local self-government; that autonomy of local self-government, among other things, is reflected in its financial independence, i.e. the authority of the municipal assembly to take independent decisions on the budget for the fiscal year and the obligation to settle expenditures planned by the decision. Interference by central government in this area derogates from and undermines the concept.

Parliament did not submit a response to these allegations.

II. The Constitutional Court found that the unity of the legal order entails the mutual harmonisation of all legal regulations in Montenegro. This would generally preclude a law regulating one area making amendments to legal solutions contained in the systemic law regulating this or any other area.

Under Article 11 of the Law on Financing of Political Entities and Election Campaigns (hereinafter, the "Law"), if a local administrative body does not transfer funds to a political entity by the fifth day of the month to cover the previous month, the political entity is entitled, within the additional period of fifteen days, to submit an application to the Ministry for the transfer of funds (paragraph 8). The Ministry must then transfer the funds demanded under the previous paragraph to the political entity within fifteen days of receipt of the request (Article 11.8.9 of the Law).

The Constitutional Court found that Article 11.8.9 of the Law violated the constitutional principles of the rule of law, division of powers and unity of the legal order, under the provisions of Articles 1.2, 11.2 and 145 of the Constitution.

Jurisprudence from the European Court of Human Rights shows that the law must be sufficiently clear to show the extent of the discretionary powers of the

competent authorities and the manner in which these rights are exercised. The European Court of Human Rights has also expressed the view that the law must indicate the scope of discretion conferred on the competent authorities and formulate with sufficient clarity the manner of its exercise, in order to provide adequate protection against arbitrary decision-making.

Article 11.8.9 of the Law did not, in the Constitutional Court's opinion, meet the requirements of legal certainty and the rule of law in the Constitution or the legality standard, in terms of the above jurisprudence from the European Court of Human Rights. The provision implies that the funds which the local government body in charge of finance does not transfer to the political entity of local self-government from the municipal budget, the Capital City and the Royal Capital will be transferred to it by the government body responsible for finance from the state budget, within fifteen days of the receipt of the request for funds. Furthermore, the legislator did not specify the budget funds from which the Ministry would have to transfer to the political entity for its regular financing or the process for determining and planning the necessary funds for this purpose, as well as their extent. This has placed the Ministry in a position where it cannot foresee the impact its actions could have on the state budget. The uncertainty brought about by Article 11.8.9 of the Law, in terms of the final effect means that the provision cannot be considered as one that is based on the principle of the rule of law, or one which satisfies the standards of the principle of legal certainty and predictability. The Constitutional Court accordingly found that Article 11.8.9 of the Law ran counter to the principle of the rule of law as the highest value of the constitutional order (Article 1.2 of the Constitution).

The Constitutional Court also noted that Parliament, by enacting Article 11.8.9 of the Law, had violated the constitutional principle of the separation of powers under Article 11 of the Constitution. Individual branches of government can only act within the limits of legal functions and powers entrusted to them by the Constitution. The constitutional division of responsibilities between national authorities means that the legislator cannot interfere with constitutionally established principles, which cannot be either broadened or restricted, i.e. Parliament should not undermine the principle of functional immutability. It cannot violate a functional division or domain of power established by the Constitution, by stipulating either to itself or another state body functional powers which they possess under the Constitution.

The enactment of Article 11.8.9 of the Law resulted in the legislator imposing on the Ministry in charge of finance an imperative obligation to dispose of the Budget of Montenegro in a manner contrary to the Law on Budget and Fiscal Responsibility. In this way, Parliament violated the principle of the separation of powers.

The Constitutional Court also found that Article 11.8.9 of the Law violated the principle of unity of the legal order under Article 145 of the Constitution, which covers the mutual conformity of all national legal regulations and generally excludes the possibility that a law regulating one area can make changes to certain legal solutions in the systemic law regulating this or any other area. Under Article 40 of the Law, spending units are obliged to use the resources within the limits set by the Law on State Budget (paragraph 1). It also covers any new commitments, which will extend into subsequent fiscal year, which a spending unit may undertake, provided that such expenditure is defined in the current budget as a multi-year expenditure, with the previous consent of the Ministry of Finance (paragraph 6). These provisions of the Law on Budget and Fiscal Responsibility do not allow for the possibility of executing the state budget contrary to their purpose, as determined by the Law on Budget for the year for which the budget is passed, which means that these funds and their purpose must be established or planned by that law.

In contrast, Parliament, by bringing in Article 11.8.9 of the Law, has determined the purpose of budget funds, and schedule and method of execution of the state budget, as a multi-year expenditure related to the regular financing of political subjects within local government in a manner that is contrary to the Law on Budget and Fiscal Responsibility.

The Constitutional Court therefore identified an indirect violation of Articles 116.1.2 and 117.1 of the Constitution and Article 9.1 of the European Charter of Local Self-Government. These provisions stipulate that a municipality must be financed from its own resources and the assets of the state; it must have a budget and be autonomous in the performance of its duties; local authorities, within the framework of national economic policy, are entitled to adequate financial resources to be deployed in accordance with their powers.

The Constitutional Court held that Article 11.8.9 of the Law was not in conformity with the Constitution and published international agreements. Its legal force would cease as of the date of publication of this decision. This decision would be published in the Official Gazette.

Cross-references:

European Court of Human Rights:

- *Sunday Times (no. 1) v. United Kingdom*, no. 6538/74, 26.04.1979, Series A, no. 30; *Special Bulletin Leading Cases ECHR* [ECH-1979-S-001];
- *Huvig v. France*, no. 11105/84, 24.04.1990, Series A, no. 176-B;
- *Malone v. United Kingdom*, no. 8691/79, 02.08.1984, Series A, no. 82; *Special Bulletin Leading Cases ECHR* [ECH-1984-S-007].

Languages:

Montenegrin, English.



Netherlands

Supreme Court

Important decisions

Identification: NED-2012-2-002

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 09.04.2010 / **e)** 08/01354 / **f)** The Dutch State (Ministry of the Interior) v. Clara Wichmann Test Trials Foundation / **g)** *Landelijk Jurisprudentienummer*, LJN: BK4549, NJ 2010, 388 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

4.9. Institutions – **Elections and instruments of direct democracy.**

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

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

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

Keywords of the alphabetical index:

Election, candidacy, restriction / Fundamental rights, balance / Religion, religious neutrality of the state.

Headnotes:

The Dutch government is legally obliged to take appropriate measures which ensure that the *Staatkundig Gereformeerde Partij* (the Reformed Protestant Party) does not discriminate against women by denying them the right to stand for election.

Summary:

I. This case concerns the position taken by a Dutch political party, the *Staatkundig Gereformeerde Partij* (the Reformed Protestant Party, hereinafter, the “SGP”), on the eligibility of women to be elected as public officials. The SGP is of the view, based on their interpretation of the Bible, that women are not eligible

to hold public office. They therefore do not allow women on their candidacy lists for public office. The Clara Wichmann Test Trials Foundation and four other non-governmental organisations (NGOs) concerned with women's rights filed a tort action against the Dutch Government claiming that the Dutch State, by not taking appropriate and effective measures against this position of the SGP, is in violation of its obligations under Article 7 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (hereinafter, the "CEDAW"), which stipulates:

"State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right [t]o vote in all elections and public referenda and to be eligible for election to all publicly elected bodies".

Both the District Court of The Hague and the Appellate Court of The Hague held that the Dutch Government was in violation of its obligations under Article 7 of the CEDAW by not taking any appropriate measures against the SGP to require the SGP to reconsider its discriminatory position towards women. Both the Dutch Government and the SGP lodged an appeal on points of law to the Supreme Court. These appeals were joined and led to one judgment.

II. The Supreme Court held that Article 7 of the CEDAW had direct effect in the Dutch legal order and that this Article placed an obligation on the State to take all appropriate measures to ban the discrimination of women in political and public life, and, in addition, an obligation to ensure that political parties do not merely admit women as members, in so far as membership of a party is required for nomination as a candidate, but also to admit them to nomination as candidates itself.

Only by ensuring the latter could the State ensure the right of women to stand for election as guaranteed by Article 7 of the CEDAW. The Supreme Court held that the State has no margin of appreciation on this point. However, this does not alter the fact that the right to non-discrimination of women as set out in the CEDAW can in particular cases come in conflict with other equally important human rights such as the freedom of religion and freedom of association, and that in those cases the conflicting rights must be weighed against each other in order to decide which should take precedence. The basic rights of freedom of religion and freedom of association guarantee that citizens may unite in a political party on the basis of a religious or philosophical conviction and may express their conviction and the political principles and programmes based thereon within the framework of that party.

However, the Supreme Court stressed that, in a democratic state governed by the rule of law, these principles and programmes may only be given practical effect within the limits posed by laws and treaties. The general representative bodies represent the entire population without making distinctions among the citizens of whom the population is made up. They form the heart of the democracy and a guarantee for the democratic content of the State. The rights to vote and to stand for election are essential to guarantee the democratic content of these bodies. Article 4 of the Dutch Constitution and Article 25 of the International Covenant on Civil and Political Rights (ICCPR), taken together with Articles 2 and 7 of the CEDAW guarantee to everyone, without any distinction based on gender, the right to elect members of these bodies as well as to be elected to them. The right to vote and the right to stand for election necessarily go hand in hand in a democratic society, since the voters must be able to determine for themselves who among them should be eligible.

The Supreme Court therefore held that since the possibility to exercise the right to stand for election goes to the core of the State's democratic functioning, it is unacceptable that a political formation in composing its list of candidates violates a basic right that guarantees the elective rights of all citizens, regardless of whether such action reposes on a principle rooted in the religious or philosophical convictions of that political formation. The Supreme Court accordingly held that the Court of Appeal was right to conclude in its judgment that the Dutch State is obliged to take measures that will actually lead to the SGP allowing women to stand for election.

The SGP lodged an application with the European Court of Human Rights in Strasbourg on 6 October 2010 complaining that its rights under Articles 9, 10 and 11 ECHR were infringed by the judgment of the Supreme Court of 9 April 2010.

On 8 April 2011 the Minister of the Interior informed the Lower House of Parliament (*Tweede Kamer*) that he proposed to await the outcome of the SGP application to the European Court of Human Rights in Strasbourg before deciding whether to take any action to execute the decision of the Supreme Court of 9 April 2010.

On 10 July 2012 the European Court of Human Rights (Third Section) declared the application of the SGP inadmissible.

Cross-references:

Administrative Jurisdiction Division, Council of State:

- no. 201101075/1/H2, 27.01.2011, *Bulletin* 2011/1 [NED-2011-1-001].

European Court of Human Rights:

- S.A.S. v. France, no. 58369/10, 10.07.2012.

Languages:

Dutch.



Identification: NED-2012-2-003

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 17.06.2011 / **e)** 10/03626 / **f)** X (a member of the parliament of Aruba) v. Y (a minister in the government of Aruba) / **g)** *Landelijk Jurisprudentienummer, LJN: BQ2302* / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 4.5.9. Institutions – Legislative bodies – **Liability.**
 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:

Fundamental rights, restriction, justification / Parliament, immunity.

Headnotes:

Parliamentary immunity for statements made during a session of parliament is absolute. However, this does not constitute a violation of the right of access to court guaranteed by Article 6 ECHR as it is not an absolute right and interference with the right can be justified when it is in pursuance of a legitimate aim and the interference is necessary and proportional.

Summary:

I. Y, a minister in the local government of Aruba and a member of the political party in government at that time, publicly accused X, a member of the Aruban parliament and leader of the opposition party, of being a paedophile during a session of parliament which was being broadcast live on a local news channel. X sued Y for defamation. Y claimed

parliamentary immunity from suit as laid down in Article III.20 of the Aruban Constitution (*Staatsregeling van Aruba*). The Court of First Instance (*Gerecht in Eerste Aanleg van Aruba*) rejected the defence of immunity from suit and held that upholding the claim to parliamentary immunity by Y would amount to an infringement of X's right of access to court as guaranteed by Article 6 ECHR. The Court of Appeal (*Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba*) overturned this decision and held that the immunity from suit afforded to members of parliament, ministers and other participants in parliamentary debate in Article III.20 of the Aruban Constitution did not amount to a violation of X's right of access to court as guaranteed by Article 6 ECHR. X appealed against this decision on a point of law to the Supreme Court and argued that parliamentary immunity should not attach to statements made outside the scope of parliamentary debate.

II. The Supreme Court held that access to court as guaranteed by Article 6 ECHR is not an absolute right and interference with this right can be justified when it is in pursuance of a legitimate aim and the interference is necessary and proportional. The Supreme Court further held that parliamentary immunity as laid down in Article III.20 of the Aruban Constitution may constitute an interference with the right to access to court, but this interference is justified since it pursues a legitimate aim, which is twofold:

- i. the freedom of expression in the parliamentary debate; and
- ii. the separation of powers: any adjudication of claims regarding the defamatory nature of statements made in parliament would mean a violation of the principle of separation of powers which is at the core of the system of parliamentary democracy.

Cross-references:

Council of State:

- no. AE1544, NJ 2002, 577, 28.06.2002.

European Court of Human Rights:

- *A. v. UK*, no. 35373/97, 17.12.2002.

Languages:

Dutch.



Identification: NED-2012-2-006

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 22.06.2012 / **e)** 11/01017 / **f)** Knooble v. 1. The Dutch State, 2. The Dutch Standardisation Institute / **g)** *Landelijk Jurisprudentienummer, LJN:* BW0393 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.15. General Principles – **Publication of laws.**
4.15. Institutions – **Exercise of public functions by private bodies.**

Keywords of the alphabetical index:

Legislative act, nature / Publication of laws.

Headnotes:

Standardisation norms (construction regulations, in the instant case) issued by the Dutch Standardisation Institute are not legal norms, as the Institute lacks the constitutional authority to issue legal norms. Standardisation norms are non-legally binding technical norms and the publication rules for legal norms, prescribed by Article 89 of the Constitution, are therefore not applicable.

Summary:

I. The Dutch Constitution (Article 89) stipulates that new legislation should be published in government-controlled publications (*Staatsblad* and *Staats-courant*) which are accessible to the public free of charge. Legislation concerning construction regulations (*Bouwbesluit* and *Regeling Bouwbesluit*) is published in that constitutionally prescribed manner. However, the construction regulations contain standardisation norms which are not published in the same free (government) publication. These standardisation norms are issued by the Dutch Standardisation Institute and are protected by copyrights. They are therefore only accessible free of charge at the library of the Dutch Standardisation Institute and the University of Delft, copies are made available to the public after payment to the Dutch Standardisation Institute.

The applicant claimed that this method of publication of construction regulations is unconstitutional on the basis that standardisation norms are legal norms and should therefore be published in the manner

prescribed by Article 89 of the Dutch Constitution. The claim was put forward in both administrative and civil proceedings and was denied in the administrative proceedings. The court of first instance in the civil court action held that the standardisation norms in the construction legislation should be published in the same manner prescribed by the Constitution for the construction legislation itself. However, the Court of Appeal held that standardisation norms are not legal norms and need not be made available to the public free of charge. The applicant appealed this decision to the Supreme Court on a point of law, arguing that standardisation norms become legal norms by their incorporation in the construction regulations and should therefore be published in the manner prescribed by Article 89 of the Dutch Constitution.

II. The Supreme Court held that the Dutch Standardisation Institute did not have the authority derived from the Constitution to issue legal norms and that standardisation norms were therefore non-legally binding technical norms and not legal norms. It held that the incorporation of standardisation norms in legislation did not change their status from technical norms to legal norms. The publication rules prescribed by Article 89 of the Constitution were therefore not applicable to standardisation norms issued by the Standardisation Institute. The copyrights attached to these norms were not nullified after the incorporation of these standardisation norms in the construction regulations. Neither the State nor the Dutch Standardisation Institute were therefore legally obliged to make the standardisation norms referred to in legislation available to the public free of charge.

Cross-references:

Council of State:

- *LJN:* BP2750, AB 2011, 85, 02.02.2011.

Languages:

Dutch.



Identification: NED-2014-S-001

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 28.03.2014 / **e)** 12/03888 / **f)** Treasury v. X / **g)** *ECLI:NL:HR:2014:699* / **h)** BNB 2014/135; CODICES (Dutch).

*Keywords of the systematic thesaurus:*3.17. General Principles – **Weighing of interests.**

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:

Court fees, payment, wherewithal.

Headnotes:

Declaring an appeal by a tax subject inadmissible on the grounds of non-payment of the court fees without investigating whether non-payment was due to lack of financial means is an unjustified interference with the tax subject's access to court, despite there being no statutory duty on the part of a court to conduct such investigations in individual cases.

Summary:

I. The Supreme Court was asked to determine whether the decision of the Court of Appeal to review its decision to declare an appeal inadmissible due to non-payment of court fees, even though there was no statutory duty to do so, was legally sound. The Court of Appeal had at first declared the appeal inadmissible but when the applicant complained that this decision effectively barred him from access to court because he did not have the financial means to pay the court fees, the Court of Appeal reduced the court fees to €20. The Treasury pointed out in the proceedings before the Supreme Court that the Court of Appeal did not have the statutory authority to take such a decision and that the statutory consequence of non-payment of the court fees in the allotted time period was that the appeal would be declared inadmissible.

II. The Supreme Court held that the decision of the Court of Appeal to reconsider the admissibility of the appeal on the basis that otherwise the applicant's right of access to court would effectively be denied, legally sound. The Supreme Court reiterated that the statutory requirement of timely payment of the appropriate court fees in order for an appeal in administrative proceedings to be admissible on formal grounds was not, in general, in violation of the right to access to court as guaranteed in Article 6 ECHR. The Supreme Court held however that this statutory requirement could lead to an effective bar to the access to court in individual cases if there is no opportunity for the judge to investigate whether non-payment is due to an objective lack of financial means and to weigh the competing interests involved

against each other. The Supreme Court held that this balancing of competing interest by judges in individual cases, not just by the legislator in the applicable statute, was especially important in terms of such an essential fundamental right as access to court.

Languages:

Dutch.

*Identification: NED-2014-S-002*

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 18.04.2014 / **e)** 13/02498 / **f)** Public Prosecution Service v. Association Martijn / **g)** ECLI:NL:HR:2014:948 / **h)** NJ 2014/507; CODICES (Dutch).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Sexual contact, children, association / Public policy.

Headnotes:

The ban and dissolution of an association with the stated purpose of promoting sexual contact with children is not an unreasonable limitation on the freedom of expression and association. The Netherlands has undertaken international obligations to protect children against sexual abuse. The activities of the association concerned were incompatible with public policy obligations with regard to the protection of children and merited the ban and dissolution.

Summary:

I. The Prosecution Service applied to the District Court for an injunction banning and dissolving the Association Martijn whose activities, according to its

articles of association, aimed to promote sexual contact with children. The District Court granted the application. This decision was however overturned by the Court of Appeal, which was of the opinion that even though the views promoted by the Association Martijn were repugnant, they did not constitute a criminal offence and a democratic society has to put with views which are abhorrent to the majority but are not a criminal offence. It argued that the legal standard for dissolving and banning an association is whether the activities of the association are disruptive to society as a whole. The Court of Appeal took the view that the activities of the Association Martijn did not meet this legal standard and therefore did not merit the injunction granted by the District Court. The Prosecution Service appealed this decision to the Supreme Court on a point of law.

II. The Supreme Court held that the legal standard applied by the Court of Appeal was not the appropriate standard to be applied to the facts of this case. Its judgment could not therefore stand as a point of law. Instead of referring the case to another Court of Appeal, the Supreme Court decided to apply the appropriate legal standard to the facts itself and assume its jurisdiction as a judge of facts. The Supreme Court reiterated that given the fundamental nature of the freedom of association, the mere fact that the activities of an association pose a threat to public policy does not in itself provide justification for the prohibition and dissolving of an association. The specific facts of the case must provide a justification for the ban which outweighs the freedom of association. The Supreme Court then turned to the facts of the case and held that they clearly showed that the Association trivialised the dangers of sexual contact with young children and promoted contact of this nature. The Court then established that the prevailing view of society in the Netherlands on sexual contact with children was overwhelmingly disapproving since this constituted a grave violation of the physical and psychological integrity of the child. The Netherlands has undertaken international obligations to protect children against sexual abuse. The Supreme Court held, that although great restraint must be exercised in banning and dissolving associations, considering all the rights and interests involved in a democratic society, the facts of this case made it necessary to ban and dissolve the association in the interest of protecting the health, rights and freedoms of children.

Languages:

Dutch.



Identification: NED-2014-S-003

a) Netherlands / **b)** Supreme Court / **c)** Civil Law Chamber / **d)** 16.12.2014 / **e)** 13/01327 / **f)** Public Prosecution Service v. X / **g)** ECLI:NL:HR:2014:3583 / **h)** NJ 2015/108; CODICES (Dutch).

Keywords of the systematic thesaurus:

5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
5.3.21. Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Politician, public debate / Prohibition, intolerance, incitement.

Headnotes:

The freedom of speech of a politician when participating in public debate is not unlimited. The limitation is not simply found in the prohibition on making threats or inciting violence but also in the prohibition on inciting intolerance.

Summary:

I. A politician at the level of the municipality, after participating in a political campaign debate, gave an interview to a local television network in which he made very negative comments about gay people; these comments were of a defamatory and excluding character. He was prosecuted for criminal defamation and incitement of hate and discrimination. The Court of Appeal held that the defendant was not guilty of criminal defamation and incitement of hate and discrimination because his defamatory comments were made in his capacity as a politician in the course of a public debate and were therefore protected by Article 10 ECHR. The Court of Appeal referred in its decision to the case-law of the European Court of Human Rights on the broad freedom of speech of politicians when participating in public debate and the limited grounds for interfering with this freedom of speech. The Supreme Court was asked to assess whether this interpretation of the case-law of the European Court of Human Rights by the Court of Appeal was legally sound.

II. The Supreme Court held that in general the conviction of a politician for criminal defamation and the incitement of discrimination can be a justified interference of the freedom of speech of a politician guaranteed in Article 10 ECHR if the criteria of an interference is prescribed by law, has a legitimate aim and strikes a fair balance between the competing interests.

When determining whether the judicial interference strikes a fair balance, courts must weigh the interest of the politician to be able to make statements which can shock, offend and disturb in the course of a public debate against his responsibility to avoid making statements which are contrary to the basic principles underlying a democratic society based on the rule of law. The Supreme Court held that the limitations on the freedom of speech of a politician are not just the prohibition on making statements which amount to threats and intimidation or incite hate and violence. Statements which amount to incitement of intolerance can also constitute grounds for a justified interference with the freedom of speech of a politician. The judgment of the Court of Appeal was therefore not legally sound.

Languages:

Dutch.



Identification: NED-2015-S-001

a) Netherlands / **b)** Supreme Court / **c)** Criminal Law Chamber / **d)** 03.03.2015 / **e)** 14/04940 / **f)** Public Prosecution Service v. X / **g)** ECLI:NL:HR:2015:434 / **h)** AB 2015/159; CODICES (Dutch).

Keywords of the systematic thesaurus:

5.3.14. Fundamental Rights – Civil and political rights – **Ne bis in idem**.

Keywords of the alphabetical index:

Motorist, alcohol, influence.

Headnotes:

Subjecting a motorist who had been caught driving under the influence of alcohol to criminal prosecution, when she had already received an administrative

sanction for the same offence, was a breach of the principle of *ne bis in idem*.

Summary:

I. The Court of Appeal had held that the criminal prosecution of the defendant, who had already been admitted to the “alcohol lock programme” in order to keep her driving licence after she had been caught driving under the influence of alcohol, procedurally invalid; a criminal prosecution for the same offence for which an administrative sanction had been given violated the principle of *ne bis in idem*. The Supreme Court was asked to judge the legal merits of the Court of Appeal’s decision.

II. The Supreme Court held that the Court of Appeal’s decision to declare the criminal prosecution of the defendant procedurally invalid was legally sound. Although the condition of participating in the alcohol lock programme in order to keep a valid driving licence had not been imposed by a judge in the course of a criminal prosecution, this administrative sanction is imposed for the same offence as the offence in the criminal prosecution (driving under the influence of alcohol) and serves the same purpose as the criminal prosecution (road safety).

In terms of the applicability of the principle of *ne bis in idem*, the European Court of Human Rights does not allow for the national qualification of a sanction as ‘administrative’ or ‘criminal’ to be a leading determination. The European Court of Human Rights applies the test of a sufficiently close connection’ between the two diverging legal procedures. Moreover, in the statute providing the legal basis for the alcohol lock programme, no provision is made for the convergence of this administrative sanction with a criminal prosecution.

These considerations led to the conclusion that the decision of the Prosecutor General to prosecute the defendant after she had already received an administrative sanction for the same offence violated the principle of *ne bis in idem*. The Court of Appeal’s decision to declare the criminal prosecution procedurally invalid was therefore legally sound.

Languages:

Dutch.



Netherlands Council of State

Languages:

Dutch.



Important decisions

Identification: NED-2006-3-003

a) Netherlands / **b)** Council of State / **c)** Chamber 3 – Standard appeals / **d)** 01.11.2006 / **e)** 200602809/1 / **f)** Giebels/directeur Koninklijk Huisarchief / **g)** / **h)** *Jurisprudentie Bestuursrecht (JB)* 2006/324; CODICES (Dutch).

Keywords of the systematic thesaurus:

3.2. General Principles – **Republic/Monarchy**.
3.18. General Principles – **General interest**.
4.4.3. Institutions – Head of State – **Powers**.
5.2.2.4. Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.

Keywords of the alphabetical index:

Archive, document, access / Monarch, archive, private, access.

Headnotes:

No public law remedy is available which would enable access to the Royal Archive.

Summary:

A historian launched proceedings in an administrative law court, in order to gain access to the Royal Archives. Various documents had not been transferred to the National Archives, in spite of a parliamentary motion. The Queen grants access to the Royal Archives in her private capacity. No public law remedy is available, even where it can be shown that access is needed to documents of national interest.

Supplementary information:

The Queen of the Netherlands is a constitutional monarch. The Queen and the ministers together make up the Government. Acts of Parliament and Royal Decrees are always signed by the Queen, who thereby gives them the royal assent, and countersigned by a minister who accepts full constitutional responsibility for them.

Identification: NED-2007-3-006

a) Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 05.12.2007 / **e)** 200609224/1 / **f)** The Reformed Political Party upon appeal against a decision by the District Court of the Hague's judgment (number AWB 06/2696) in the case of the Reformed Political Party and others v. the Minister for the Interior and Kingdom Relations / **g)** / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4.12. Sources – Categories – Written rules – International instruments – **Convention on the Elimination of all Forms of Discrimination against Women of 1979**.
3.3.3. General Principles – Democracy – **Pluralist democracy**.
4.5.10.2. Institutions – Legislative bodies – Political parties – **Financing**.
5.2.2.1. Fundamental Rights – Equality – Criteria of distinction – **Gender**.
5.3.41.2. Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

Keywords of the alphabetical index:

Election, candidate, gender / Election, candidacy, restriction / Political party, subsidy.

Headnotes:

Granting a subsidy to a political party that deems women to be ineligible to stand for elections does not amount to an application of statutory regulations that is in conflict with Article 7 of the UN Convention on Elimination of All Forms of Discrimination against Women, which is binding on all persons in the sense of the Constitution.

Summary:

I. The Minister for the Interior and Kingdom Relations (referred to here as “the Minister”), rejected an

application made by the Reformed Political Party (referred to here as "the RPP") for a subsidy under the Political Parties (Subsidies) Act 1999. The RPP lodged an appeal against this decision in the administrative law Section of the District Court of The Hague. The court upheld the Minister's decision. The Administrative Jurisdiction Division of the Council of State allowed the RPP's appeal.

II. The Political Parties (Subsidies) Act allows ministers to grant subsidies to political parties holding seats in Parliament after elections to the House of Representatives and the Senate (see Section 2). However, this entitlement expires after the imposition of an unconditional fine by a criminal law court on the basis of some specific anti-discrimination provisions in the Penal Code (Section 16). Article 7 of the UN Convention on Elimination of All Forms of Discrimination against Women (referred to here as "the Convention"), requires State Parties to take all appropriate measures to eliminate discrimination against women in national public and political affairs. In particular, it requires them to ensure that women have equal rights to men, to stand for election to all publicly elected bodies (under a) and to participate in non-governmental organisations and associations concerned with national public and political affairs (under c). Under the Constitution, provisions of treaties and of resolutions by international institutions which may be of universal application by virtue of their contents shall become binding after they have been published (Article 93 of the Constitution). Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions (Article 94 of the Constitution).

The Minister had taken the view that he was bound by a judgment given by the civil law Section of the District Court of The Hague, where the Court had declared that the State had acted in breach of Article 7 of the Convention, and therefore unlawfully. The Court had imposed an injunction on the Minister not to apply Section 2 of the Political Parties (Subsidies) Act in relation to the RPP for breach of Article 7 of the Convention, as long as women were not treated equally by the RPP in terms of membership. The RPP was founded in 1918 and calls for government based entirely on biblical teachings. The Administrative Jurisdiction Division of the Council of State acknowledged that the Minister had been bound by the injunction imposed in the course of the civil law proceedings. Nonetheless, this did not preclude the RPP from seeking a judgment from the administrative law courts; such jurisdiction stems from the General Administrative Law Act and the Council of State Act.

The Administrative Jurisdiction Division of the Council of State held firstly that parts of Article 7 of the Convention were of universal application, by virtue of its contents in the sense of the Constitution.

The Administrative Jurisdiction Division held secondly that the Convention did not rule out a balance between the application of Article 7 of the Convention on the one hand and other fundamental rights, including freedom of religion, association and assembly, on the other hand. This followed from the legislative history of the Convention and of the Act of Parliament sanctioning the Convention.

Thirdly, the Administrative Jurisdiction Division held that the Section 2 of the Political Parties (Subsidies) Act must be applied to the application for subsidy lodged by the RPP. The legislative history of the Political Parties (Subsidies) Act showed that the Act was aimed at the maintenance and enforcement of political parties in the Dutch democratic system. The functioning of these parties was vital to that system. Moreover, the legislator had included Article 16 of the Political Parties (Subsidies) Act, having regard to Article 7 of the Convention. The intention of the legislator was that courts should make the decisions about the running and accountability of political parties, rather than subjecting them to political decision-making.

According to the Administrative Jurisdiction Division of the Council of State, the legislator had not been unreasonable in the weighing of interests. There was nothing manifestly wrong with prohibiting discrimination against women and safeguarding their ability to participate in public life on an equal footing with men on the one hand, and securing the proper functioning in democratic society of political parties on the other. The Administrative Jurisdiction Division of the Council of State also attached importance to the fact that women, overall, could obtain full membership of political parties. Parties which had developed a tradition regarding equality between the sexes which differed from prevailing opinions and legal developments must be able to conduct debates unhampered, within the boundaries set by criminal law. This was in line with the case-law of the European Court on Human Rights, regarding the banning of political parties.

Finally, the Administrative Jurisdiction Division of the Council of State held that the RPP fulfilled every legal requirement and was entitled to a subsidy based on the Political Parties (Subsidies) Act.

Supplementary information:

The abovementioned proceedings before the civil law Section of the District Court of the Hague (resulting in the judgment of 7 September 2005, no. HA ZA 03/3395) were initiated by a foundation established to bring test cases in order to improve the legal and social position of women. After that judgment, the Reform Political Party allowed women to apply for full membership. Following the current judgment by the Administrative Jurisdiction Division of the Council of State, the Minister announced that a subsidy would be granted to the RPP.

Languages:

Dutch.

*Identification:* NED-2008-2-005

a) Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 21.05.2008 / **e)** 200706809/1 / **f)** Stichting Triumphant Faith Chapel v. college van burgemeester en wethouders Ouder-Amstel / **g)** *Jurisprudentie Bestuursrecht* (JB) 2008, 145 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

3.18. General Principles – **General interest.**

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

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

Keywords of the alphabetical index:

Land-use plan / Land, industrial, use for worship.

Headnotes:

Planning regulations resulting in a restriction of the right to freedom of religion were justified on the grounds of the protection of public order and the protection of the rights and freedoms of others.

Summary:

I. The Foundation 'Triumphant Faith Chapel' held church services for the benefit of young people or asylum seekers on industrial premises in the town of Duivendrecht. The municipality decided that this use of land was contrary to the planning regulations in force which restricted the use of this piece of land to business and industry. It therefore issued an administrative order. The foundation objected to the decision but the local authority dismissed the objections. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the foundation argued that prohibition of the use of the land for religious services was inapplicable, since it was in breach of Article 9 ECHR.

II. The Administrative Jurisdiction Division of the Council of State held that the Court of First Instance, which referred to the Council of State's judgment of 6 April 2005, was right in ruling that the mere fact that a fundamental right was at stake did not automatically mean that the planning regulations concerned ought to be set aside. In this respect, it was significant that the purpose of the planning regulations was not to define religion or to dictate the way in which it should be practiced. The limitations on the freedom of religion were prescribed by law and in this case the restrictions were necessary in a democratic society in the interests of public order and the protection of the rights and freedoms of others. Importance was also attached to the fact that the planning regulations in force in the municipality did allow other premises to be designated for the church services and other activities organised by the foundation. In the meantime the foundation had been able to hold its church services at different locations, so that the planning regulations concerned did not render it impossible for the foundation to hold church services. The fact that another local authority had allegedly carried out a balancing of interests with a different outcome in similar cases, was held to lack significance in the present case, as the municipal Board of Ouder-Amstel exercised a discretionary power of its own, for the practice of which it carried a responsibility of its own.

Cross-references:

Council of State:

- *Stichting 'Vaders huis is moeders toevlucht' v. college van burgemeester en wethouders Valkenswaard*, ABRvS 06.04.2005, no. 200406278/1, *Bulletin* 2006/3 [NED-2006-3-001].

Languages:

Dutch.

*Identification:* NED-2009-1-001

a) Netherlands / **b)** Council of State / **c)** Third Chamber (sole and last instance) / **d)** 22.04.2009 / **e)** 200809196/1 / **f)** The Provincional Executive of Noord-Holland and others v. the Crown / **g)** *Jurisprudentie Bestuursrecht* (JB) 2009, 144 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 3.9. General Principles – **Rule of law.**
 3.10. General Principles – **Certainty of the law.**
 4.8.8.3. Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision.**
 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:

Decree, royal.

Headnotes:

Provincial and municipal administrative orders to commence collection proceedings against the Icelandic bank Landsbanki should not have been annulled by the Crown on the basis of the reasons given for the reversal; the justification requirements set for this type of Royal Decree had not been met.

Summary:

I. The Administrative Jurisdiction Division of the Council of State quashed the Royal Decree of the Dutch Crown that barred the Province of North Holland, a number of municipalities and some other public bodies from recouping their outstanding deposits worth € 145 million in the Icelandic bank Landsbanki through the Dutch courts. The Administrative Jurisdiction Division of the Council of State gave judgment as a court of sole and last instance. II. Under Article 134.1 of the Constitution, decisions by administrative organs of provinces and municipalities may be annulled only by

Royal Decree and on the grounds that they conflict with the law or the public interest. The Crown had annulled all administrative procedural orders that imposed pre-judgment garnishment on the Landsbanki bank's foreign funds on the grounds that these orders conflicted with the public interest, as these attempts to recover money amounted to a direct infringement of confidential and diplomatic consultations with the Icelandic State, and jeopardised savers' interests. The public authorities concerned argued in appeal *inter alia* that the Royal Decree hampered their access to the civil law courts.

III. The Administrative Jurisdiction Division of the Council of State first held that 'unprompted annulment' is an administrative instrument for central government in order to safeguard the constitutional division of tasks between the various tiers of government. If a Royal Decree is based on the public interest and is subject to parliamentary review, the court must exhibit deference. However, the court does have a legal duty to give judgment on the merits of the case. Unprompted annulment is a measure of last resort and of a drastic nature. Therefore, the justification given by the Crown must be comprehensive and understandable. The Administrative Jurisdiction Division of the Council of State held that it did not follow from the reasons given by the Crown in the present Royal Decree, how the public authorities' interests in terms of legal certainty (access to the civil law courts) had been taken into account in the decision-making process preceding the Royal Decree. This was a very serious matter, as legal certainty is essential to a democratic state under the Rule of Law. Besides, the Crown had not properly explained how the administrative procedural orders concerned endangered the state's financial stability and foreign relations and how the state's interests had been weighed.

Languages:

Dutch.

*Identification:* NED-2011-1-001

a) Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 27.01.2011 / **e)** 201101075/1/H2 / **f)** X v. the principal electoral committee for the elections of the members of the Provincial Council of Utrecht / **g)** AB 2011/105, JB 2011/61, LJN: BP2851, NJB 2011/426 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4.12. Sources – Categories – Written rules – International instruments – **Convention on the Elimination of all Forms of Discrimination against Women of 1979.**

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

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

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

Keywords of the alphabetical index:

Election, candidate, gender / Election, candidacy, restriction.

Headnotes:

It was for the courts and not for the principal electoral committee to review the aims and activities of political groups.

Summary:

The applicant claimed that the principal electoral committee for the elections of the members of the Provincial Council of Utrecht (hereinafter, the “principal electoral committee”) had wrongly issued a declaration of validity with regard to the list of candidates which included the appellation of the political grouping the Reformed Political Party (hereinafter, the “RPP”). The applicant argued that the RPP discriminated against women by denying them, contrary to Article 7 of the UN Convention on Elimination of All Forms of Discrimination against Women (hereinafter, the “Convention”), the right to stand for election to all publicly elected bodies, including provincial councils, and that it followed from a final judgment by the Court of Cassation that the state must take effective measures in this respect. Since the state so far had omitted to take such measures, the principal electoral committee was not, under Article 94 of the Netherlands Constitution, allowed to restrict itself to the requirements listed in the relevant provisions of the Elections Act 1989.

The Administrative Jurisdiction Division of the Council of State held that the argument was based on a misinterpretation of the Court of Cassation’s judgment: it was for the legislator to end the situation which that court had held to be unlawful, as this would require a balancing of interests of a political nature. It followed from the history of the Elections Act that it was for the courts and not for the

administration (in this case: the principal electoral committee) to review the aims and activities of political groups for their conformity with the law. Besides, the legislator had made it sufficiently clear that lists of candidates can only be submitted by individual voters and not by political groups.

For these reasons the Administrative Jurisdiction Division of the Council of State held for the principal electoral committee, as it had lawfully issued a declaration of validity with regard to the list of candidates concerned on the basis of the clear, limitative set of requirements set out in the Elections Act 1989.

Cross-references:

Administrative Jurisdiction Division, Council of State:

- no. 200609224/1, 05.12.2007, *Bulletin* 2007/3 [NED-2007-3-006].

Court of Cassation:

- no. 08/01394, 09.04.2010, *LJN*: BK4547.

Languages:

Dutch.

*Identification: NED-2011-2-005*

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 13.07.2011 / **e)** 201011441/1/H3 / **f)** The priest of the parish of St Margarita Maria Alacoque v. the Mayor and Aldermen of Tilburg / **g)** *Landelijk Jurisprudentienummer: LJN: BN1135, Jurisprudentie Bestuursrecht* 2010, 215, *Gemeentestem* 2010, 77 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Church / Regulation, noise level.

*Headnotes:*

Regulation of the ringing of church bells did not amount to a limitation of the right to freedom of religion.

Summary:

I. The parish priest rang the bells of his church for Holy Mass every day at 7.15 a.m. According to the Mayor and Aldermen, this amounted to a breach of the noise emission standards set by the general municipal bye-laws (*Algemene Plaatselijke Verordening*; hereinafter, the “APV”) of Tilburg. They therefore issued an administrative order. The parish priest objected. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the parish priest relied *inter alia* on Article 6 of the Constitution.

II. The Administrative Jurisdiction Division of the Council of State held that the applicable provision of the APV was binding as it was in conformity with the law. The municipal council's power to set standards for noise emissions was based on Article 10.2 of the Public Assemblies Act. Reasonable interpretation of Article 6 of the Constitution leads the Division to the conclusion that the provision in the Public Assemblies Act did not provide for a basis to restrict the constitutional right to profess freely one's religion, but only to prevent excesses with regard to either the duration or noise level of the bell ringing. Regulation of both the duration and noise level of the bell ringing, which left room for ringing the bells with less noise or during a period further away from the night's rest of the population, must be held not to amount to a limitation of the right to freedom of religion.

Cross-references:

Council of State:

- no. 200906181/1/H1, 14.07.2010, *Bulletin* 2010/2 [NED-2010-2-004] (Administrative Jurisdiction Division).

Languages:

Dutch.

Identification: NED-2012-2-007

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 15.08.2012 / **e)** 201111341 / **f)** De Kampanje and Others v. Minister of Education, Culture and Science / **g)** *Landelijk Jurisprudentienummer*, LJN: BX4695 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.19. General Principles – **Margin of appreciation**.
5.3.13.1.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
5.4.2. Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Procedure, administrative / Constitution, judicial review / Education, school, parents' freedom of choice.

Headnotes:

The binding opinion of the Minister of Education, Culture and Science that an educational institution could no longer be regarded as a ‘school’ in the sense of the Compulsory Education Act 1969 does not constitute a violation of the rights to a fair hearing or to education as the Minister had interpreted the legal criterion ‘education’ in an adequate and proportionate way, the parents had the right to choose an educational institution which met certain minimum criteria set by the State, and the State had a margin of discretion in the matter, the exercise of which the courts should review only with restraint.

Summary:

I. The Minister of Education, Culture and Science (hereinafter, the “Minister”) had issued a binding opinion indicating that De Kampanje, an educational institution (hereinafter, the “school”) based on the Sudbury Valley School concept, which allows students from pre-school to high school age explore the world freely, at their own pace and in their own unique ways (see “www.sudval.org”), could no longer be regarded as a ‘school’ in the sense of the Compulsory Education Act 1969. The applicants (the school, parents, pupils and teachers) lodged objections against the decision, which were rejected.

The applicants appealed to the District Court, which ruled that their appeal was unfounded. The applicants then appealed to the Administrative Jurisdiction Division of the Council of State, arguing, *inter alia*, that their rights under Article 6 ECHR and Article 23 of the Constitution and Article 2 Protocol 1 ECHR had been violated. The Administrative Jurisdiction Division found for the Minister.

II. The Administrative Jurisdiction Division held that Article 6 ECHR was not applicable in the present case. It did not apply to the preparatory stage of the decision-making process, as the decision did not establish any guilt on the part of the applicants. Neither could the institution be regarded as a charged person, nor the decision as a punishment. Besides, the decision and possible (future) prosecution of the parents, who were under a legal obligation to subscribe children in their care to a school in the sense of the Compulsory Education Act 1969, were not closely connected.

The applicants could not rely on their rights under Article 23 of the Constitution, as Article 120 of the Constitution stipulates that the constitutionality of Acts of Parliament, including the Compulsory Education Act 1969, cannot be reviewed by the courts.

The Administrative Jurisdiction Division of the Council of State ruled that Article 2 Protocol 1 ECHR had not been violated. The right protected by this provision was not unconditional, while the Minister had interpreted the legal criterion 'education' in an adequate and proportionate way. The parents had the right to choose an educational institution which met certain minimum criteria set by the State. The State had a margin of discretion in the matter, the exercise of which the courts should review only with restraint. In this case the criteria had been clear, foreseeable and proportionate, leaving room for a variety of pedagogical convictions.

Cross-references:

Council of State:

- no. 201009068/1/1A2, 15.08.2012, *De Koers* (Administrative Jurisdiction Division).

European Court of Human Rights:

- *Hrdalo v. Croatia*, no. 23272/07, 27.09.2011;
- *Konrad v. Germany*, no. 35504/03, 11.09.2006.

Languages:

Dutch.



Identification: NED-2013-2-006

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 24.07.2013 / **e)** 201204274/1/A3 / **f)** X (an American citizen) v. Minister of Foreign Affairs / **g)** *Landelijk Jurisprudentienummer*, BY8012 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

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

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

3.1. General Principles – **Sovereignty.**

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

Keywords of the alphabetical index:

Passport, confiscation / Passport, right to obtain.

Headnotes:

Travel documents are only issued to foreigners in the most exceptional circumstances, as issuing such a document could often be construed as a hostile act towards a sovereign state.

Summary:

I. X, an American citizen and highly skilled immigrant, lived in The Hague and had a valid residence permit. His American passport had been withdrawn due to outstanding maintenance obligations. The Dutch Minister for Foreign Affairs (hereinafter, the "Minister") refused to issue him with a travel document for foreigners, as it was X's own responsibility that he did not hold an American passport. X claimed that the Minister's refusal was unlawful, arguing *inter alia* that the decision violated his right to liberty of movement (including his freedom to leave the country) under Article 12 of the International Covenant on Civil and Political Rights and Article 2.1 and 2.2 of the Fourth Protocol to the European Convention on Human Rights. The District Court found for the Minister. X then lodged an appeal to the Administrative Jurisdiction Division of the Council of State.

II. The Administrative Jurisdiction Division of the Council of State began by recalling the parliamentary history of the Passport Act, from which it derives that travel documents are only issued to foreigners in the most exceptional circumstances, as issuing such a document could often be construed as a hostile act towards a sovereign state. The Administrative Jurisdiction Division of the Council of State held that X was free to move within the country. Besides, there was no evidence that X could not leave the Netherlands, as the American authorities had informed him that they were prepared to issue an American travel document so that X could travel back to the United States of America. Leaving aside whether the Minister's refusal amounted to an interference with X's right to leave the Netherlands, such an interference was necessary in a democratic society for the maintenance of *ordre public* (issuing the travel document required should not enable X to evade his duties under American law) and in the interest of the protection of the rights and freedoms of others (the beneficiaries of the maintenance payments).

Supplementary information:

Article 2.4 of the Constitution stipulates that everyone shall have the right to leave the country, except in the cases laid down by Act of Parliament. This provision, an equivalent to the international clauses relied on in this case, was not invoked, as the Administrative Jurisdiction Division, as any other Dutch court, cannot review the constitutionality of Acts of Parliament (Article 120 of the Constitution). However, an Act of Parliament in force within the Kingdom will not be applied if such application is in conflict with self-executing treaty provisions (Article 94 of the Constitution).

Languages:

Dutch.



Identification: NED-2013-3-009

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 30.03.2011 / **e)** 201006801/1/H2 / **f)** Foundation Islamic Schools Amsterdam v. Minister for Education, Culture and Science / **g)** ECLI:NL:RVS:2011:BP9541 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.5. General Principles – **Social State.**
 3.7. General Principles – **Relations between the State and bodies of a religious or ideological nature.**
 5.4.2. Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

Primary education / Active citizenship / Social integration.

Headnotes:

Schools enjoy a wide margin of discretion in terms of encouraging active citizenship and social integration; the requirements for these matters have not been enshrined formally in regulations or secondary legislation.

Summary:

I. The Primary Education Act requires schools to encourage active citizenship and social integration. The Education Inspectorate had doubts as to whether these goals were met by the As Siddieq school, an orthodox Islamic school in Amsterdam. The Inspectorate set the school an achievement scheme to improve its citizenship education programme. However, the school did not meet each and every requirement set by the Inspectorate. Therefore, the State Secretary for Education, Culture and Science (hereinafter, the "State Secretary") partially suspended the financing of the school. The school board objected, but the State Secretary turned down its objections. The board then appealed to the Council of State.

II. The Council of State noted that the requirements concerning educating for active citizenship and social integration set out in the Primary Education Act have not been specified within regulations formulating concrete targets, nor have they been specified in other secondary legislation. This means schools have a wide margin of discretion in the way they encourage active citizenship and social integration. This margin had been stressed by the drafters of the Act of Parliament who aimed at including active citizenship and social integration aims in the Primary Education Act, while at the same time respecting the freedom of education. Despite the fact that the school may not have fulfilled the requirements set by the Inspectorate for the second period of its achievement scheme, the Council of State quashed the State Secretary's decision, taking into account that the school had

started a project called 'The Peace-Loving School', which was sufficient, given the school's wide discretion in this matter.

Languages:

Dutch.



Identification: NED-2014-1-001

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 23.10.2013 / **e)** 201301126/1/A3 / **f)** Central Office for Motor Vehicle Driver Testing (CBR) v. X (a citizen) / **g)** ECLI:NL:RVS:2013:1643, *Jurisprudentie Bestuursrecht* 2013/247 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality**.
 4.5.2. Institutions – Legislative bodies – **Powers**.
 4.15. Institutions – **Exercise of public functions by private bodies**.
 5.3.13.1.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

Keywords of the alphabetical index:

Driving licence / Alcolock programme.

Headnotes:

Decision to suspend a trucker's driving licence and make him enrol in an Alcolock programme was within the ambit of Article 6 ECHR and proportionate.

Summary:

I. X (a citizen) claimed that the decision of the Central Office for Motor Vehicle Driver Testing (hereinafter, the "CBR") to suspend his driving licence and make him enrol in a breath alcohol ignition interlock device programme (Alcolock programme) violated his right to a fair trial under Article 6 ECHR. The District Court found for X. The CBR then lodged an appeal to the Administrative Jurisdiction Division of the Council of State.

II. The Council of State found that suspending the applicant's driving licence, an administrative sanction, because of the severity of this measure in general could be within the scope of Article 6 ECHR. According to the Council of State, this is in line with the European Court of Human Rights' case-law, determining that the severity of a sanction may amount to a criminal charge despite its administrative law qualification under national law.

X depended on his truck driving licence in order to earn his living. In the present case, his truck driving licence had been suspended for 24 months. In the light of the European Court of Human Rights' case-law, the Council of State ruled that the District Court had rightly held that this measure amounted to a criminal charge. However, the CBR's appeal succeeded, as the Council of State decided that the legislation on which the measure had been based was proportionate to the aims pursued (road and traffic safety) and necessary in a democratic society. The balance was first for the legislature to strike, and not for the court. Therefore, it did not violate Article 6 ECHR.

Cross-references:

European Court of Human Rights:

- *Nilsson v. Sweden*, no. 73661/01, 13.12.2005, *Reports of Judgments and Decisions* 2005-XIII;
- *Malige v. France*, no. 27812/95, 23.09.1998, *Reports* 1998-VII;
- *Maszni v. Romania*, no. 59892/00, 21.09.2006;
- *Mihai Toma v. Romania*, no. 1051/06, 24.01.2012.

Languages:

Dutch.



Norway

Supreme Court

Important decisions

Identification: NOR-1976-S-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 27.01.1976 / **e)** Inr 18/1976 / **f)** Kløfta / **g)** *Norsk Retstidende* (Official Gazette), 1976, 1 / **h)**

Keywords of the systematic thesaurus:

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

1.3.1. Constitutional Justice – Jurisdiction – **Scope of review.**

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

3.19. General Principles – **Margin of appreciation.**

5.2.1. Fundamental Rights – Equality – **Scope of application.**

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

Keywords of the alphabetical index:

Expropriation, compensation / Compensation, amount, calculation / Land, market value / Trading, voluntary, value.

Headnotes:

When the courts are asked to decide on the constitutionality of a statute, the Parliament's (*Storting's*) view of the matter inevitably plays an important role. If there is any doubt as to how a statutory provision should be understood, the courts have a right and duty to apply the statute in the manner which best accords with the Constitution.

Summary:

The case concerned the understanding of Sections 4 and 5 of a now-defunct Act of 26 January 1973 regarding compensation for expropriation of property, especially in light of Article 105 of the Constitution regarding "full compensation" for expropriation. The valuation of land areas under this Act was to be

based on the actual use of the area, pursuant to Section 4 of the Act. The Act permits in Section 5 higher compensation in "certain circumstances". The importance of the zoning plan to the valuation of the land was dealt with in Section 5.3 (cf. Section 5.2 and Section 4.3). According to Section 5.3 of the Act, a higher value could not be taken into account if it depended on a use of the area which conflicted with approved zoning plans for the expropriated property.

A municipality demanded the calculation, under the Building Act, of the amount of compensation payable for expropriation of a stretch of highway E6, approximately 2 km long, east of Kløfta town centre.

In a first valuation concerning 31 valuation items, some of the landowners were awarded compensation for the land at the price of NOK 10 per square metre. The superior valuation which comprised 18 valuation items awarded compensation for some properties according to an agricultural value pursuant to Section 4 of the Act, for other properties an additional compensation was fixed in accordance with Section 5 of the Act at the rate of NOK 6 per square metre.

The superior valuation was appealed to the Supreme Court by nine landowners. They claimed principally that the Superior Valuation Court had established, in conflict with Article 105 of the Constitution, a lower compensation for land than the lawful market value. Alternatively they claimed that the Superior Valuation Court had misapplied the law, partly in respect of the interpretation of Sections 4 and 5 of the Expropriation Compensation Act, partly by applying non-statutory expropriation rules. Finally they maintained that the grounds for the valuation were unclear and/or defective.

Partly on account of misapplication of the law and partly on account of insufficient grounds for the valuation, the Supreme Court, acting in plenary session, declared the superior valuation void. Seven of the seventeen justices dissented, and one of the majority had a different reasoning from his colleagues.

The first voting justice started with some remarks about the Court's competence to test the constitutionality of statutes. In the case of provisions intended to safeguard the personal liberty or safety of individuals, the first voting justice presumed that the constitution's overriding force should be substantial. If on the other hand the constitutional provision governs the mode of operation or mutual competence of the other powers of the state, the first voting justice agreed with his counterpart in the plenary case in *Norsk Retstidende*, 1952, p.1089 (the whale tax case) that the courts had largely to accept the

Storting's view. Constitutional provisions for the protection of financial rights would be in an intermediate position.

The Storting's understanding of the position of the Act relative to such constitutional provisions had to play an important part when the courts were to decide the issue of constitutionality, and the courts should be reluctant to set their views above those of the legislators.

Since the Storting had adopted the Expropriation Act of 26 January 1973, the issue before the courts was whether the rules of the Act lead to results that are compatible with Article 105 of the Constitution, not whether the results would have been the same without the statutory rules. Moreover the first voting justice made it clear that the courts had in any case to accept the legislators' political evaluations.

The question in this case was whether the Act cut back the compensation to the landowners to a greater extent than provided by Article 105 of the Constitution which requires full compensation. Any considerations of reasonable compensation in the specific case would not be decisive.

Subject to certain reservations the first voting justice declared that a landowner would not actually be paid full compensation if the government refused to pay the market value where this was demonstrably the highest value. In the present case it was unanimously held that compensation could not be awarded for land on the basis of Section 4 of the 1973 Act to the effect that the valuation should be based on the use of the property, even if Sections of it had been parcelled off and some of the properties were subject to additional parcelling plans.

The provisions of Section 4 and Section 5 of the Act should be viewed in context as regards their position with regard to the Constitution. Section 5 permitted the payment of compensation in excess of the use value in cases where the valuation under Section 4 would lead to a substantially lower value than the value generally applying to similar properties in the district according to their normal use.

The majority of the justices pointed out that according to its wording, Section 5.1 authorised the Valuation Court to undertake a specific consideration of the fairness of the compensation, but that such a free position would not be compatible with the Constitution's requirement of full compensation. The majority held that in principle the Valuation Court was obliged to provide for additional compensation up to the lawful value in voluntary trading (subject to Section 5.2) in cases of discrepancy between valuation under Section 4 and the higher value under Section 5.1.

The landowners had maintained that the Superior Valuation Court had misapplied the law when failing to award additional compensation for land that had been zoned as a free area. The majority held that the zoning for a free area was a consequence of the highway plan which was at the origin of the expropriation. One should therefore disregard the value reduction which was due to the zoning as a free area. It was the natural and foreseeable regulation before the highway plan existed, which would have to be applied.

The minority of the justices agreed that additional compensation should be paid, but not necessarily to the full value in voluntary trading.

Languages:

Norwegian.



Identification: NOR-2004-3-004

a) Norway / **b)** Supreme Court / **c)** / **d)** 12.11.2004 / **e)** 2004/686 / **f)** / **g)** *Norsk retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

3.18. General Principles – **General interest.**
 3.19. General Principles – **Margin of appreciation.**
 4.5.2. Institutions – Legislative bodies – **Powers.**
 5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
 5.3.21. Fundamental Rights – Civil and political rights – **Freedom of expression.**
 5.3.23. Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**

Keywords of the alphabetical index:

Advertising, political, television, prohibition.

Headnotes:

Legislation that prohibits political advertising on television does not represent a violation of Article 100 of the Constitution or Article 10 ECHR (see Section 3 of the Human Rights Act).

It is essential that the prohibition's purpose was to regulate political debate and not to prohibit freedom of political expression. Failing a common European opinion as to what the law regulating political advertising should be, the political authorities must have a wide margin of appreciation when determining what measures there should be in this area.

Summary:

Section 3-1.3 of the Broadcasting Act prohibits the broadcasting of denominational and political advertisements on television. Prior to the local and county elections in 2003, a local television station – TV Vest – broadcast an advertisement for the Rogaland Pensioners' Party. The National Mass Media Authority imposed a fine on TV Vest AS for breach of the prohibition.

TV Vest brought a civil action against the State and submitted that the fine was invalid on the grounds that the prohibition in Section 3-1.3 of the Broadcasting Act constituted a violation of both Article 100 of the Constitution and Article 10 ECHR. The Oslo City Court found in favour of the State and dismissed the proceedings. TV Vest appealed and the Appeals Selection Committee of the Supreme Court granted leave to bring the appeal directly to the Supreme Court.

The majority of the Supreme Court upheld the judgment of the City Court. With regard to Article 100 of the Constitution, the Supreme Court emphasised in particular that Section 3-1 of the Broadcasting Act did not prohibit political expression itself, but only the use of television for paid political statements. The Norwegian parliament had viewed the Act as regulating the way in which political debate could best take place. This is an area where the views of the parliament as to the constitutionality of the measure must be accorded particular weight. Furthermore, the courts should in general be bound by the purposes that the parliament had for the adoption of legislation. The majority held that there was no breach of Article 100 of the Constitution.

On 30 September 2004, the Norwegian parliament passed an amendment to Article 100 of the Constitution following the recommendations of the Government Commission on Freedom of Speech (*Norwegian Official Reports* 1999:27). The amendment was not directly applicable to the case, since the relevant provision was the provision as it was worded at the time the political advertising took place. Furthermore, it was to be assumed that parliament intended Section 3-1 of the Broadcasting Act to be enforceable after the amendment of the Constitution.

Further, the majority of the Supreme Court held that there had been no violation of Article 10 ECHR, on the ground that the prohibition in Section 3-1 of the Broadcasting Act fell within the exception in Article 10.2 ECHR. The prohibition was "provided by law" and had a purpose as provided in Article 10.2 ECHR. Consequently, the only remaining question was whether the prohibition was "necessary in a democratic society". The majority of the Supreme Court held that that requirement was fulfilled. The fact that a majority of the parliament during the debate on the constitutional amendment in September 2004, had found that the prohibition against political advertising was awkward from a freedom of expression point of view did not mean that the prohibition was unconstitutional. That would imply that the legislator had renounced its margin of appreciation despite clear statements to the effect that parliament did not wish to bind future developments in one direction or the other.

One justice found that the prohibition in Section 3-1 of the Broadcasting Act constituted a violation of Article 10 ECHR. In matters concerning political expression, the State has a narrow margin of appreciation. In light of the Judgment of the European Court of Human Rights in *VgT v. Switzerland* (no. 24699/94, Judgment of 28 June 2001), a minority of the Supreme Court found that an unqualified prohibition against political television advertising is in breach of Article 10 ECHR. In view of the fact that the parliament had changed its views on political advertising, there was little credibility in the argument that there is such an absolute necessity for an unqualified prohibition that it can be considered to be consistent with Article 10.2 ECHR.

Languages:

Norwegian.



Identification: NOR-2005-2-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 10.05.2005 / **e)** 2004/1376 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

3.19. General Principles – **Margin of appreciation.**
 5.3.39.3. Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Property, acquisition, condition / Concession, compensation, determination.

Headnotes:

The legislator can regulate the more detailed conditions for the acquisition of property, without violating Article 105 of the Constitution, which does not protect the right to become an owner. Article 1 Protocol 1 ECHR does not protect a purchaser who is denied a concession – or who is granted a concession on condition that part of the land is transferred.

Until a concession is granted, the purchaser's right is conditional. In these circumstances, the condition in the concession does not represent a compulsory surrender of a proprietary right that could entitle the purchaser to compensation for expropriation, and the value of the land must therefore be fixed in accordance with its customary value.

Summary:

I. The case concerns the principles for valuation that are applicable when part of a plot of land used as a holiday home was required to be sold to the State pursuant to conditions contained in a concession (licence). A. purchased the property Sandholmen on an island outside Grimstad with an area of approximately 29 decares – in 1992 for NOK 1.5 million. The purchase was subject to a concession, and concession was granted on the condition that the property – with the exception of a 10 decares beach around the building – would be separated off and transferred to the Directorate for Nature Management on behalf of the State, for the benefit of the common good. A. instigated legal proceedings before the Nedenes District Court and claimed that the condition in the concession was invalid. The claim was dismissed.

The parties could not agree on the purchase price for the land, and on 17 July 2002, the Sand District Court fixed the value at NOK 90,000. A. petitioned for a reappraisal to the Agder Court of Appeal, which, at reappraisal proceedings on 2 July 2003, came to the same conclusion. The District Court and the Court of Appeal valued the land at its market value, and found

that there were no grounds for granting compensation for the reduction in value that the surrender of land had caused to the remaining property (the difference principle). A. appealed the reappraisal to the Supreme Court and claimed that the Court of Appeal had erred in its application of law. A. claimed that the condition in the concession was an expropriational intervention that entitled A. to full compensation pursuant to Article 105 of the Norwegian Constitution. Furthermore, the assessment of compensation was in breach of Article 1 Protocol 1 ECHR concerning peaceful enjoyment of property, and Article 40 of the EEA Agreement on the free movement of capital and the anti-discrimination principle in Article 4.

II. The appeal was dismissed (dissent 4-1).

The majority of the Supreme Court recalled that the legislator could regulate the more detailed conditions for the acquisition of property, since Article 105 of the Constitution does not protect the right to become an owner. A. had voluntarily entered into an agreement, the implementation of which was subject to a concession.

As a general rule, a purchaser who is denied a concession – or who is granted a concession on condition that part of the land is transferred – is not protected by Article 1 Protocol 1 ECHR. In any event, the State had not exceeded its wide margin of discretion with regard to the measure of compensation when it awarded compensation equivalent to the value of the land to be transferred. Nor was there any breach of the EEA Agreement. The majority pointed out, amongst other things, that the case concerned a property in Norway that was purchased by a Norwegian national and there were no transnational factors that could bring EEA law into play.

The minority of the Supreme Court held that the Concession Act does not contain provisions that regulate how compensation shall be calculated in the event of an order to transfer property pursuant to a condition in a concession and that the question, in these circumstances – within the bounds that are laid down by Article 1 Protocol 1 ECHR – must be solved on the basis of general legal principles, the assumed presumptions of the legislator and free jurisprudential considerations and bearing in mind the views on the importance of private property rights that are inherent in Article 105 of the Constitution. In light of such views on the legal basis for the measure of compensation, the minority held that compensation for the order to surrender land should be calculated in accordance with the principles applicable to compensation in the event of expropriation. Consequently, not only the value of the surrendered

land should be included in the assessment, but also the reduction in value that the remaining property had suffered.

Languages:

Norwegian.



Identification: NOR-2005-2-002

a) Norway / **b)** Supreme Court / **c)** / **d)** 24.06.2005 / **e)** 2005/260 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

3.20. General Principles – **Reasonableness**.
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:

Penal Code, interpretation / Liability, criminal, conditions, strict / Child, sexual abuse, age, knowledge, lack.

Headnotes:

A strict and literal application of Section 195 of the Penal Code, with the consequence that an offender who in every respect is in good faith in his belief that the victim is over 14 years of age may also be criminally liable, is in violation of Article 6.2 ECHR. Strict conditions of criminal liability are only acceptable within reasonable bounds bearing in mind the interests that are at stake.

Summary:

Section 195 of the Penal Code provides that any person who sexually assaults a child below 14 years of age shall be liable to imprisonment for a term not exceeding 10 years, but not less than one year if the assault was sexual intercourse. It is irrelevant for the question of criminal liability that the person who commits the assault believes that the victim is over 14 years of age even if he is in good faith on this

point. Age is a strict condition of criminal liability. The position in Section 196 of the Penal Code is different. This provision criminalises sexual assault of children below 16 years of age and provides that the offender cannot be punished if he believed that the victim was over 16 years of age and no negligence can be attributed to the offender in this respect.

The plenary case before the Supreme Court concerned the question of whether the strict rule in Section 195 of the Penal Code, which provides that mistake as regards the child's age shall not exclude criminal liability, is in violation of the presumption of innocence in Article 6.2 ECHR.

The Supreme Court found that Article 6.2 ECHR imposes limits on the power to impose criminal liability where there is no fault on the part of the offender. Strict conditions of criminal liability are only acceptable within reasonable bounds bearing in mind the interests that are at stake. The Supreme Court found that a strict and literal application of the Penal Code Section 195, with the consequence that an offender who in every respect is in good faith in his belief that the victim is over 14 years of age may also be criminally liable, is in violation of the European Convention on Human Rights.

This was also the finding of the Gulating Court of Appeal in the case in question, which concerned sexual intercourse with a girl aged 13 years and 3 months. The Court of Appeal had quashed the District Court's conviction on the grounds that the District Court had failed to consider whether the accused had been in good faith regarding the victim's age.

The appeal by the Public Prosecution against the Court of Appeal's application of law was dismissed. The decision was unanimous, although two justices gave different reasons for their verdicts.

Languages:

Norwegian.



Identification: NOR-2015-1-002

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 29.01.2015 / **e)** HR 2015-206-A / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2015, 93 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

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

5.1.1.1. Fundamental Rights – General questions – Entitlement to rights – **Nationals.**

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

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

Keywords of the alphabetical index:

Immigrant, expulsion / Child, custody / Citizenship / Child, best interest / Family reunification.

Headnotes:

An expulsion order made by the Immigration Appeals Board against a mother violated her daughter's right to family life under Article 8 ECHR.

Summary:

I. A Kenyan woman, who remained in Norway illegally after her application for asylum had been rejected, had an expulsion order imposed on her by the Immigration Appeals Board. At the same time, her application for a residence permit on the basis of family reunification with her five-year-old daughter, who is a Norwegian citizen, was also rejected.

II. In a lawsuit brought by the mother and daughter, the Supreme Court found both decisions to be null and void, and rendered a declaratory judgment establishing that the administrative decisions contravened the right to family life guaranteed by Article 8 ECHR. Initially, it was established that the daughter had legal standing, both in the validity suit and in the declaratory suit, pursuant to Section 1-3 of the Dispute Act. The fact that a potential violation of the European Convention on Human Rights might constitute a legal controversy, without prejudice for subsequent litigation in a parallel validity suit, did not reduce the daughter's legal interest in obtaining judgment for violations of the European Convention on Human Rights.

In the validity suit, the Supreme Court concluded that a procedural error had failed to establish the daughter as a party to the immigration authority's hearing of the case, and that the actual situation the forced expulsion of her mother would create for the daughter, could not be equated to a decision to expel Norwegian nationals. The Supreme Court, furthermore, made reference to Sections 102 and 104 of the

Constitution, which, pursuant to an amendment of the Constitution of 6 May 2014 to incorporate human rights protection, relate to the right of family life and children's rights respectively. The Court concluded that the child's interests weigh heavily in any consideration of interests pursuant to Section 102 of the Constitution.

In the assessment of this specific case, it was found that there were no alternatives to the mother's role as her daughter's care-giver. The fact that the daughter is a Norwegian citizen, with the rights this status entails, is a key factor. Her care situation would be difficult if her mother were to move to Kenya with the child. The daughter's interests carried considerable weight in favour of allowing the mother to remain in Norway, and against the expulsion of her mother, who is her only care-giver. The circumstances on which the expulsion order was based, i.e. illegal residence in the realm and providing a false identity in her asylum application, could not outweigh these factors. Finally, the Supreme Court concluded that the immigration authorities' decision violated the daughter's rights under Article 8 ECHR.

Languages:

Norwegian, English (translation by the Court).

*Identification: NOR-2015-1-003*

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 06.02.2015 / **e)** HR-2015-289-A / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2015, 155 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Extradition / War crime.

Headnotes:

The extradition of a foreigner charged with war crimes is not in contravention of Article 8 ECHR or Article 3 of the UN Convention on the Rights of the Child of 1989.

Summary:

I. The case concerned an extradition request to the Norwegian authorities regarding a man from Rwanda, who in that country had been charged with participating in genocide and crimes against humanity in 1994. He has been resident in Norway as a refugee since 1999, is married, and has three children in Norway.

II. The Supreme Court based its assessment on the fact that basic human rights, as incorporated in Sections 102 and 104 of the Constitution, Article 8 ECHR and Article 3 of the UN Convention on the Rights of the Child, are central to the interpretation of what constitutes “basic humanitarian considerations” pursuant to Section 7 of the Extradition Act. Accordingly, it was necessary to weigh society’s interest in extraditing criminals, on the one hand, against the effect of such interventions on individuals’ constitutional rights on the other. The Court pointed out that the crux of this assessment is the fact that it is in the interest of involved states that serious crimes are prosecuted in the country where the crimes were committed, and, in the case of genocide, this is an expectation and a condition of international agreements and conventions.

The Court stated that the right to respect for private and family life under Article 8 ECHR has limited validity in terms of preventing extradition in cases involving serious crimes, and that the threshold for giving the best interests of children absolute priority similarly must be very high in such cases. Given a specific assessment of the circumstances in this case, the court found no grounds on which to give the interests of the children absolute priority. Consequently, there were also no grounds on which to refuse extradition on the grounds of basic humanitarian considerations.

Languages:

Norwegian, English (translation by the Court).

*Identification:* NOR-2015-3-005

a) Norway / b) Supreme Court / c) Chamber / d) 20.11.2015 / e) HR 2015-2308-A / f) / g) / h) CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Criminal proceedings / Journalist, source, disclosure / Terrorism, fight.

Headnotes:

The seizure of unpublished film material by police from a documentary maker, who was working on a film to depict why Norwegian citizens enlist as foreign fighters in Syria, could not be upheld. Although the police had seized the material as part of an on-going terror investigation, Norwegian criminal law and Article 10 ECHR guarantee protection from search and seizure of unpublished journalistic material that has not been edited in order to anonymise sources. On the basis of a weighing of interests and the broad protection the European Convention on Human Rights affords to unpublished material that can reveal unidentified sources, there was no basis to set aside the principle of protecting journalists’ sources in this case.

Summary:

I. In April 2015, the Police Security Service (hereinafter, the “PST”) initiated covert investigations to prevent several persons, including A and B, from infringing Section 147d of the General Civil Penal Code by taking part in a terror organisation and/or recruiting members of such a group. The investigation showed that B was increasingly radicalised, and that he planned to travel to Syria.

Via the preventive investigation, the PST was also aware that a Norwegian film maker was working on a film on extreme Islamism and the recruitment of foreign fighters, and that in this regard film recordings were being made in which A and B participated. On 7 June 2015, A was arrested as he was about to

travel to Syria and charged for attempting to join the ISIS terror organisation. B was also charged.

The day after the arrest, the PST searched the film maker's home and seized six to eight hours of unpublished film material. The material was sealed and handed over to the courts without being reviewed.

II. The Supreme Court revoked the seizure, assuming that the material could reveal unidentified sources. It was held that the journalists' right to refuse to disclose their sources in accordance with Section 125 of the Criminal Procedure Act and Article 10 ECHR also gives protection from search and seizure of unpublished journalistic material in the form of notes, sound recordings and film that have not been edited in order to anonymise sources.

The Court discussed whether the seizure nevertheless could be maintained according to Section 125.3 of the Criminal Procedure Act, which states:

When information should be disclosed due to important public interests and the information is of vital significance to the clarification of the case, based on an overall assessment the court may nonetheless require the witness to disclose the name (...).

It was clear that important public interests indicated that the prosecuting authority should have access to the material. On the other hand, however, it was shown how there was a particularly strong need for protection of sources. On the basis of a weighing of interests and the broad protection afforded by the European Convention on Human Rights (to unpublished material that can reveal unidentified sources, there was no basis to set aside the principle in this case.

Languages:

Norwegian, English.



Portugal Constitutional Court

Important decisions

Identification: POR-2016-1-002

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 02.02.2016 / **e)** 55/16 / **f)** / **g)** *Diário da República* (Official Gazette), 51 (Series II), 14.03.2016, 8944 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.9. General Principles – **Rule of law.**
- 3.10. General Principles – **Certainty of the law.**
- 3.13. General Principles – **Legality.**
- 3.16. General Principles – **Proportionality.**

Keywords of the alphabetical index:

Wrongful facts, liability / Compensation, right / Compensation, duty / Medical malpractice / Birth, wrongful / Life, wrongful.

Headnotes:

Questions had arisen over an interpretation of Civil Code norms regarding aspects of the liability for wrongful facts which allowed the norms to be applied to a claim for compensation made by the parents of a child born with a congenital disability which, due to medical error, was not detected in a timely manner and about which the parents were not told in time, with the claim made in relation to the damages suffered because the parents were not told about the medical staff's knowledge of the disability at a point when that information would have enabled them to potentially make or model choices available to them within the framework of the free exercise of their reproductive options.

The constitutional right to life is not affected by whether or not parents are compensated for damages resulting from the non-transmission of knowledge about elements that are important to the exercise of their reproductive options. In such cases, the award of compensation is neither an expression nor a denial of the protection afforded to the right to life. What was at stake here was the parents' right to determine their reproductive choices from among the lawful

possibilities available to them – a right that was damaged by the applicants' failure to provide them with adequate information that was contractually due to them. The right to compensation – for medical malpractice in this case – lies solely within the framework of the reparation for damages caused by a failure to provide information that was contractually owed to the parents.

Where awarding or not awarding someone a right to compensation has the effect of affirming, compressing or eliminating that right altogether, the decision to award or otherwise has implications for the substance of a right to which the Constitution affords its protection. When interpreted in such a way as to permit the compensation sought in this case, the norms in question were not in breach of the applicable constitutional precepts.

Summary:

I. This concrete review case arose from a request made by the parents of a minor for compensation for failure to fulfil a contractual responsibility to provide a result – a failure they alleged was due to negligence. A medical error during a prenatal ecographic diagnosis made it impossible for the parents to choose to terminate the pregnancy, because they were not in possession of information that was due to them. The question of constitutionality focused on the constitutional conformity of the compensatory protection granted to the minor's parents as a result of a situation which the lower courts and the Supreme Court of Justice considered deserving of compensation for wrongful birth. The appellants against those earlier decisions alleged that a number of Civil Code norms on which they were based were unconstitutional when interpreted such as to make life with disability, and deprivation of the ability to choose to terminate a pregnancy, forms of injury that warrant compensation.

II. The Constitutional Court began by opining that both the original English 'wrongful birth' and 'wrongful life' and their Portuguese equivalents '*nascimento indevido*' and '*vida indevida*' were unfortunate choices of terminology; what was at stake here was a question of civil liability for compensation with a far more limited scope than that suggested by the literal forcefulness of those expressions. The applicants argued that at issue were the constitutional norms regarding the rights to life and family planning. The Court rejected the view that this case was linked to a violation of the right to life, inasmuch as there was no injury to the legal asset protected by that particular constitutional norm. It also excluded the existence of an issue regarding the rights to family planning and conscious motherhood and fatherhood which, among

other things, require the state to organise itself in such a way as to provide positive services (e.g. the provision of public information, or the creation of units to accompany and inform potential parents) that enable people to form the clarified will to procreate. The hypothesis of an initially desired pregnancy that might then have given rise to the option to terminate because the foetus was malformed has nothing to do with either the clarified and informed will to procreate, or the resources that should be placed at people's disposal within the overall family planning framework. The Court said that what was at stake was the right to compensation and the corresponding obligation to compensate, which must be viewed with reference to the right whose disrespect has led to a demand for reparation in the form of compensation. The latter is not important as such, but as an expression of the protection granted or denied to a right protected by the Constitution.

The Court said that this conclusion was valid in the extra-contractual field, and could be transposed to that of contractual liability in cases in which the violation of absolute rights arises within the context of unfulfilled contractual obligations. In the past the Court had already recognised that the right to compensation for damages is an imposition derived from the principle of a democratic state based on the rule of law, and that it also forms a specific aspect of the protection afforded to individual rights.

The Court recalled that:

- i. Doctrine and case-law have both used the term 'action for wrongful birth' to refer to suits in which parents of a child born with a congenital disability which was not detected or which they were not told about in a timely manner due to medical error, claim reparation for damages resulting from the failure to inform them of that fact.
- ii. Qualifying a birth as "unwanted" "effectively constitutes a statement that characterises a past fact which has become an immutable given in the present, the compensatory approach to which is limited to monetary compensation.
- iii. There is no question here of any modification of an existential physical reality – everything takes place on an abstract level. This is an intellectual operation to establish the assumptions on the basis of which the way in which the medical staff were duty-bound to behave will be determined.
- iv. In the discussion on the viability of 'wrongful birth' suits, there is no validity in the type of argument that entails denying the existence of an obligation to compensate on the grounds of the recreation of a hypothetical situation which would presuppose the absence of any

compensable injury because one could retrospectively say that the subject who has allegedly been injured would never have existed in that situation.

- v. This construction can be called the 'problem' or 'paradox of non-existence', which initially contributed to courts refusing to award compensation in wrongful-birth claims, in the sense that if the medical staff had behaved in the legally required manner and the parents had been told about their gestating child's disability in time, they would have opted for termination of the pregnancy and thus the suppression of the life in relation to which the compensation is later demanded.
- vi. With reference to the inviolable nature of human life, a denial of the ability to construct a case for damages on this basis would have to be based on a refusal to see someone's life as a possible source of injury.

The Court noted that these reservations had been progressively rejected by legal theorists and jurisprudence alike, as they gradually characterised the reality in question. The issue here was simply the need to determine an amount or form of compensation for an unchangeable present injury, necessarily without reference to any framework of some kind of 'natural reconstitution'. This position, which is more favourable to the viability of such suits, is underlain by the view that it is not justifiable to exclude medical malpractice from the compensatory protection available in such situations, which are seen as corresponding to obligations to secure a result, and that it would be unfair not to confer that protection on the supposed recipients of the information contained in such a diagnosis.

III. One Justice dissented from the Ruling, on the basis that the preconditions for the Constitutional Court to hear this case in the first place were not met.

Cross-references:

Constitutional Court:

- no. 363/15, 09.07.2015.

Languages:

Portuguese.



Identification: POR-2016-1-004

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 03.02.2016 / **e)** 76/16 / **f)** / **g)** *Diário da República* (Official Gazette), 67 (Series II), 06.04.2016, 11477 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.9. General Principles – **Rule of law.**
- 3.10. General Principles – **Certainty of the law.**
- 3.13. General Principles – **Legality.**
- 3.14. General Principles – ***Nullum crimen, nulla poena sine lege.***

Keywords of the alphabetical index:

Administrative offence, employment-related, sanction, imposition / Accident, work-related.

Headnotes:

A norm requiring employers to notify the Inspectorate-General of Labour (hereinafter, "IGT") of any accident that was fatal or revealed the existence of a particularly serious situation within twenty-four hours of the incident was unconstitutional; the way in which the norm was configured in terms of how employers had to behave failed to respect the constitutional principle that interventions which impose sanctions must be clearly provided for by law. The conduct that constituted an administrative offence was so imprecisely defined that it did not fulfil the demands imposed by the principles of a democratic state based on the rule of law, legal certainty, and trust.

Summary:

I. This concrete review case resulted from a mandatory appeal by the Public Prosecutors' Office against a decision in which the court *a quo* had refused to apply a norm on the grounds of its unconstitutionality. The lower court declined to apply the final part of the norm, which required employers to notify the IGT (the then equivalent of the current Working Conditions Authority – ACT) about accidents that revealed "the existence of a particularly serious situation".

II. The Constitutional Court recalled that the duty to notify imposed on employers in this precept formed part of the overall framework of measures designed to prevent work-related accidents and occupational illnesses. In this respect, the Constitution of the Portuguese Republic, International Labour Organisation Convention no. 155 and Directive no. 89/391/EEC of the Council of the

European Union all require both public authorities and employers to ensure that work is done under hygienic, safe and healthy conditions.

The administrative offence here was the failure to notify IGT/ACT of a work-related accident suffered by a person employed by the company that originally challenged the administrative decision to impose a sanction. The description of the accident was as follows: (the employee was) “working in the line of cashiers when she picked up a till and sprained her shoulder, which left her in pain (...)” ... This resulted in the worker “taking sick leave because she was unfit for work...”

The court *a quo* took the view that, as a significant restriction on fundamental rights, any public law that can entail the imposition of administrative sanctions is subject to the guarantees which are explicitly enshrined in relation to the Criminal Law.

In its jurisprudence, the Constitutional Court has consistently and repeatedly said that the constitutional principle that sanctions must be provided for by law is applicable to the law governing mere social administrative offences. This principle implies that the law must be sufficiently specific about the facts which constitute the legal type of crime or administrative offence (or the prerequisites for one to have been committed), and must make the necessary connection between the crime or offence and the type of penalty or fine with which it can be punished.

This concept of ‘typicity’ precludes the legislator from using vague formulations to describe legal types of crime or administrative offence, and from either providing for penalties that are indeterminate, or penalties which are so broadly defined that it is impossible to determine what concrete punishment should be imposed.

The Court considered that the fact that administrative offences form part of the overall framework of situations in which the state has the power to punish, the maximum expression of which is to be found in the Criminal Law, means it is justifiable for the legal regime governing them to be influenced by the principles and rules that are common to the whole of the part of the public law which can entail the imposition of sanctions. The law governing mere social administrative offences is a law that imposes sanctions and allows the Administration to participate in the exercise of the state’s power to punish by imposing penalties on the citizens and other entities it administers. Thus, as elements which emanate from the *jus puniendi*, that law and that power must be governed by the various ‘penal’ principles and rules. The principles that are especially important in criminal

matters, such as those of legality, innocence, *non bis in idem* and non-retroactivity, that penalties cannot have automatic effects, and that criminal liability cannot be transferred to someone else, can be extended to the administrative offence field simply because they are derived from principles linked to the rule of law and legal certainty. The Court recognised that there are differentiations when these principles are extended to administrative offences. The fact that unlawful acts which constitute mere social administrative offences are materially autonomous in relation to unlawful acts which constitute crimes gives rise to a specific regime for punishing the former, with different kinds of sanction, punitive procedures and agents to impose those sanctions and punishments. There can therefore be no automatic transposition of the constitutional principles governing penal legislation to the law governing mere social administrative offences. This distinction is relevant to the relationship between those areas of the law and the Constitutional-Law order. In its jurisprudence the Constitutional Court has used the criteria of the different ethical implications and the different legal assets that are at stake in the two areas to distinguish between the two types of unlawful act.

The purpose of the principle that for an act to be a crime it must be specifically provided for as such by law is to ensure that citizens are not subject to arbitrariness and excess when the state exercises its punitive power. The fact that this is a constitutional parameter means the penal norm must be precise and clearly determinate. The Court had in fact already recognised that it may sometimes prove justified for legal types to be relatively indeterminate without the principles of legality and ‘typicity’ being breached. However, for this to be the case the type must nevertheless be determinate enough not to undermine the essential content of the principle of legality. The principle of *nullum crimen* can only fulfil its role as a guarantee if, notwithstanding a certain degree of indeterminateness and openness, the typical regulation is materially sufficient and appropriate enough to ensure that citizens know what actions and omissions they must avoid.

In the other fields in which sanctions can be imposed, such as the law governing mere social administrative offences and disciplinary law, the intensity of the ‘typicity’ requirement is not as great as it is in Criminal Law. However, the typifying norm or set of norms must describe the objective and subjective elements of the essential core of the unlawful act with sufficient clarity, otherwise they will be in breach of the principles of legality and ‘typicity’ and above all their teleological quality of guarantees. Accordingly, where administrative-offence types of unlawful conduct are concerned, the *lex certa* requirement is not prejudiced

if unlawful acts are identified with reference to indeterminate legal concepts or general clauses, on condition that it can nevertheless be fulfilled using logical, technical or experience-based criteria that allow the nature and essential characteristics of the forms of conduct which constitute the typified infraction to be predicted with a sufficient degree of certainty.

In terms of the part of the norm before it, the Court considered that the wording left doubts as to the types of accident that ought to be communicated to the authorities.

The norm *sub iudicio* required the employer to notify IGT/ACT of any “accident that was fatal or reveals the existence of a particularly serious situation” within 24 hours of its occurrence. While the formulation “fatal accident” is easy to interpret, the expression “reveals the existence of a particularly serious situation” was incapable of expressing which work-related accidents should be communicated to the authorities that inspect safety conditions in the workplace with adequate clarity. It made it clear that not all work-related accidents had to be communicated to the authorities, but left an area of lack of definition and certainty between those that need not be communicated and those that must, which is not compatible with the minimum degree of determinability demanded of the administrative-offence type.

Besides the goals which the legislator said led to the imposition of the duty to notify, the norm did provide a guideline that was determinate enough to enable employers to accurately know what work-related accidents they were obliged to communicate. As a prerequisite for IGT/ACT to take action, the indeterminate concept “particularly serious situation” was perfectly capable of coexisting with the principle of administrative legality. It is different with norms that prohibit actions or establish omissions that are punishable by sanctions. Here the function of legality is to serve as a guarantee that is demanded by the principle of the rule of law and is only fulfilled if the prohibited forms of behaviour possess a minimum degree of determinability. The norm must be minimally clear and precise, so that agents can use the legal text to know what acts or omissions generate a liability on their part.

The Court considered that this was not the case with regard to the norm before it, and therefore found it unconstitutional.

III. One Justice dissented from the ruling. He said that when taken in its linguistic context the norm not only performed a negative function, to the extent that it

made it possible to exclude situations which did not match the useful sense contained in the text, but also a positive one inasmuch as it specified a required behaviour with reference to work-related accidents which a criterion of evidence revealed to be particularly serious. In his view, if one interpreted the norm in a way that also took into account the unity of the system and the general regime governing work-related accidents, “particularly serious accidents” could be those which presumably caused a permanent, or a temporary but lengthy, incapacity for work. Among other things, the norm therefore served the purpose of excluding accidents that only subsequently, and as a result of changes in the victim’s clinical condition, led to consequences which were initially not foreseeable in the light of the nature and severity of the injury, from the requirement to notify whose lack of fulfilment could constitute the commission of an administrative offence.

Cross-references:

Constitutional Commission:

- Opinion no. 32/80, *Pareceres da Comissão Constitucional*, vol. 14, accessible at: www.tribunalconstitucional.pt/tc/content/files/biblioteca/cc/ccvolume14.pdf.

Constitutional Court:

- nos. 282/86, 21.10.1986; 158/92, 23.04.1992; 344/93, 12.05.1993; 666/94, 14.12.1994; 469/97, 02.07.1997; 168/99, 10.03.1999; 278/99, 05.05.1999; 93/01, 13.03.2001; 547/01, 07.12.2001; 41/04, 14.01.2004; 160/04, 17.03.2004; 358/05, 06.07.2005; 102/08, 19.02.2008; 115/08, 20.02.2008; 338/03, 07.07.2003; 351/11, 12.07.2011; 559/01, 07.12.2001; 461/11, 11.10.2011; 537/11, 15.11.2011; 635/11, 20.12.2011; 85/12, 15.02.2012; 397/12, 28.08.2012; 397/12, 28.08.2012; 466/12, 01.10.2012; 45/14, 09.01.2014; 180/14, 26.02.2014 and 201/14, 03.03.2014.

Languages:

Portuguese.



Identification: POR-2016-2-009

a) Portugal / b) Constitutional Court / c) Third Chamber / d) 18.05.2016 / e) 309/16 / f) / g) / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Parentage, right to know / Paternity, contested / Right to personal identity.

Headnotes:

A Civil Code norm, under which a son or daughter has three years in which to bring an action challenging his or her presumed father's paternity, counting from the date on which he or she becomes aware of circumstances which could lead to the conclusion that he or she is not the biological child of his or her mother's husband (these three years can be added to the ten years that any child has for this purpose following his or her coming of age or emancipation), is constitutional.

The normative scope of the right to personal identity includes not only each human person's natural right to their own difference, but also the right to one's 'personal historicity', as expressed in each person's relationship with those who gave rise to him or her. This relational dimension includes the right to know who one's parents are or were, and it is this that leads on to the right to investigate one's paternity and/or maternity. However, the right to establish a bond of filiation is not an absolute one. It falls to the legislator to use its freedom to shape legislation in order to choose the way or ways that seem most appropriate to it in order to concretely implement that right, naturally within the limits imposed by the Constitution.

Summary:

I. The Public Prosecutors' Office was legally required to bring this concrete review case in the form of an appeal against a decision in which the Supreme Court of Justice (hereinafter, "STJ") refused to apply a norm on the grounds that it was unconstitutional. The norm in question is contained in the Civil Code (hereinafter, "CC"), and states that when sons or daughters become aware of circumstances which suggest their mother's husband is not their biological father, they have three years in which to legally

challenge his paternity. The paternity in this situation is one that results from the (rebuttable) legal presumption that the husband of a mother whose children are born or conceived during the couple's marriage is the children's father. The norm sets a subjective *dies a quo* time limit that is available in addition to an objective *dies a quo* limit under which a son or daughter can challenge presumed paternity for up to ten years after coming of age or emancipation.

II. The Constitutional Court had already considered the constitutionality of norms according to which the ability to investigate or challenge paternity lapses, both before and after the significant amendments to them made by a 2009 Law, under which the applicable time limits were substantially increased.

In its jurisprudence on the subject of time limits on the ability to bring filiation actions – i.e. paternity investigations and challenges – the Court had never absolutely rejected the constitutional admissibility of a system under which that right can lapse with time, nor had it ever said there is any constitutional requirement for an unlimited determination of the biological truth of parenthood. It had, however, considered that the existence of excessively short objective or subjective *dies a quo* time limits (which start counting when the holder of the right becomes aware of the fact that leads him or her to act) is capable of reducing the scope of the essential content of the constitutional rights to personal identity and to form a family, which include the right to know who one's mother and father are or were, and that such limits could violate the principle of proportionality.

The Court had also already pronounced itself on the specific norm before it in the present case, but on those occasions the issue was the concrete time limit set in the norm and not the inability to ever challenge paternity once the limit is passed.

Norms that establish a time limit for bringing filiation actions always involve a weighing up of various rights and interests to which the Constitution affords its protection, and the ensuing balance can vary one way or the other, depending on the greater or lesser weight attached to each of the values or assets the legislator is seeking to protect. In the light of the constitutional principle under which the ordinary law is only allowed to restrict constitutional rights, freedoms and guarantees in cases in which the Constitution itself expressly permits it, and that such restrictions must be proportional to that which is necessary in order to safeguard other such rights, freedoms and guarantees, it is thus possible to conclude that in some cases the legislator has disproportionately restricted a fundamental right, and in others, not.

As the Court had repeatedly said in the past, the right to know one's biological paternity and the right to form and/or destroy the respective legal bond fall within the scope of protection applicable to the fundamental rights to personal identity and to form a family.

The normative scope of the right to personal identity includes not only each human person's natural right to their own difference, but also the right to one's 'personal historicity', as expressed in each person's relationship with those who gave rise to him or her. This relational dimension includes the right to know who one's parents are or were, and it is this that leads on to the right to investigate one's paternity and/or maternity.

It is in the interest of public order that filial bonds be constituted and determined, inasmuch as the legal efficacy of the genetic bond of filiation not only has repercussions for the parent/child relationship, but is also projected beyond it. It is in the public interest to establish the match between biological parenthood and legal parenthood, thereby rendering the legal bond of filiation and all its effects operable, as soon as possible. This interest is also projected into the subjective dimension, in the form of security for the investigated party and his family. The Court noted that it is important for someone whom it is suggested may or may not be someone else's father (a bond with both personal and material effects) not to be subject to the possibility of an investigation action for an unlimited period of time.

The attribution of paternity on the basis of the general rule that the mother's husband is the father, which is itself based on judgments of normality and probability, results in the formation of a filial relationship that possesses significance on the constitutional level. The Constitution recognises that the family possesses a specific importance, both within the dimension of the fundamental rights of family members, and as an institution which structures life in society. This family relationship would be seriously undermined if actions to challenge paternity could be brought at an unlimited point in time. The life of the family community and the stability of family and social relations would be compromised. Notwithstanding the firmly established nature of the right to know one's biological origins, the law must also consider the need to protect constituted families.

To allow legal bonds that are not in line with the biological truth to be ended at any time would be to ignore any interest on the part of the presumed father in maintaining a fatherhood which he had thus far assumed. Even if the legal and biological bonds between the two individuals do not match, there is a

point in time at which the presumed father's personal and material interests justify the definitive legal consolidation of a paternity that does not correspond to the biological truth.

It is justifiable to say that a presumed child who finds out that his or her mother's husband is not his or her biological father should declare whether he or she wants to maintain or extinguish the existing legal bond between them as soon as possible.

The means *par excellence* of protecting these deserving public and private interests is the setting of time limits after which the ability to exercise the right in question lapses. Such limits serve as a way of inducing the right-holder to exercise his or her right quickly.

However, notwithstanding their constitutional-law nature, these rights are not absolute, nor do they always project the same intensity of value when confronted with other values and interests that also warrant constitutional protection. It falls to the legislator to use its freedom to shape legislation in order to choose the way or ways that seem most appropriate to it in order to concretely implement that right, naturally within the limits imposed by the Constitution.

If there were no time limit on paternity investigation actions, and someone at a later stage of their life were to be able to exercise a right they had previously neglected, the right to personal identity might enjoy the highest possible level of protection, but this optimised protection is not necessarily what the Constitution demands.

Objective reasons linked to legal certainty and security, themselves dictated by society's interest in the stability of established family relationships, justify placing a certain time limit on the right to challenge one's paternity, thereby ensuring that once that limit has passed, the core family is unalterably defined and its members can orient their own lives on the basis of an existing legal reality. Assuming the right-holder is in possession of the facts that enable him or her to exercise the right, it is legitimate for the legislator to set a time limit from the moment at which that knowledge is acquired for bringing an action to challenge paternity, thereby preventing the interest in legal certainty and security from being undermined at a later date by a consciously omissive and uninterested attitude on the part of the presumed offspring.

The Court said that when the legislator opted to simultaneously protect other relevant legal values by imposing time limits following which the right to

challenge lapses, it did not disrespect the requirement that the protection afforded to this right be sufficient, inasmuch as the restriction only places the right-holder under the burden of exercising his or her right within a given period of time.

The Court thus concluded that the Constitution does not preclude subjecting the bringing of actions to challenge presumed paternity, when filed by the offspring, to a statute of limitations. Based on its assessment of the relative values present before it, the Court found no unconstitutionality in the norm in question.

Supplementary information:

One Justice dissented from the majority decision, arguing that there should be no time limit on a presumed son or daughter's right to challenge paternity. She took the view that the rights to personal identity and the free development of one's personality trump the interests in legal certainty, the protection of constituted families and the privacy of personal life, and society's interest in the stability of family relations.

Cross-references:

Constitutional Court:

- nos. 23/06, 29.03.2006; 609/07, 11.12.2007; 99/88, 28.04.1988; 413/89, 31.05.1989; 456/03, 14.10.2003; 486/04, 07.07.2004; 23/06, 10.01.2006; 626/09, 02.12.2009; 65/10, 04.02.2010; 401/11, 22.09.2011; 247/12, 22.05.2012; 547/14, 15.07.2014; 704/14, 28.10.2014; 14/09, 13.01.2009; 589/07, 28.11.2007; 593/2009, 18.11.2009; 179/10, 12.05.2010; 279/08, 14.05.2008; 546/14, 15.07.2014; 446/10, 23.11.2010; 39/11, 25.01.2011; 449/11, 11.10.2011; 634/11, 20.12.2011 and 441/13, 15.07.2013.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2010-2-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 07.06.2010 / **e)** 820/2010 / **f)** Decision concerning the application for review of the constitutionality of the provisions of the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 / **g)** *Monitorul Oficial al României* (Official Gazette), 420/23.06.2010 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

3.16. General Principles – **Proportionality.**

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

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

Keywords of the alphabetical index:

Penalty, collective / Lustration, delay.

Headnotes:

The Law of Lustration regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 establishes a new basis for limiting access to public offices, consisting in affiliation to the structures of the communist regime. However, a law cannot introduce collective penalties, based on a presumption of guilt resulting from a mere affiliation to the regime. A law cannot be adopted in violation of the principle of non-retroactivity, and, moreover, the delay in passing this Law – 21 years after the fall of communism – is relevant in determining the disproportionate nature of the restrictive measures.

Summary:

Acting in accordance with Article 146.a of the Constitution, within the context of a *a priori* review, a group of 29 senators and 58 deputies made an application for the review of the constitutionality of the provisions of the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989.

The applicants alleged that the Lustration Law breached Article 37.1 of the Constitution in conjunction with Articles 16.3 and 40.3 of the Constitution, in that the Law provided for a new situation which would justify a restriction on the right of access to public offices – a situation not provided for by Article 53 of the Constitution. Even if it were possible to restrict the right of access to public offices on grounds of membership in certain bodies of the communist regime, the question would still arise of the proportionality and legal effectiveness of such measures in the light of their adoption more than 21 years after the fall of the communist regime. Thus, the Law violated the requirement of foreseeability of the rule of law by introducing a limitation on the right to stand for election on the basis of a general guilt founded on the mere criterion of membership in the structures of a system which, at the time of its existence, was consistent with the constitutional and statutory provisions applicable in the Romanian State. The applicants further submitted that the Lustration Law clearly created discrimination between Romanian citizens with respect to access to public functions, appointed or elected, on the ground of membership in the Communist Party between 6 March 1945 and 22 December 1989. The Lustration Law contravened Articles 11.2 and 20 of the Constitution on the supremacy of international legal instruments ratified by Romania in the field of human rights.

The main flaw of the Lustration Law was that it created a genuine collective sanction, based on a form of collective responsibility and general guilt based on political criteria. Thus, mere membership in a political structure or a body belonging to a political regime amounted to a presumption of guilt, regardless of how a person acted and behaved while holding a position. In that connection, the applicants invoked the conclusions by the Venice Commission in Opinion no. 524/2009 (CDL(2009)132) with respect to the Lustration Law of Albania stating the provisions of the Lustration Law on the termination of mandate violated the constitutional guarantees of their [the persons holding the offices in question] mandate, and it found “there are several elements which indicate that the

Lustration Law could interfere in a disproportionate manner with the right to stand for election, the right to work and the right of access to the public administration.”

Analysing the application to the Court alleging the unconstitutionality of the law as a whole, the Constitutional Court holds as follows:

In Romania, communism was condemned as doctrine, and the change of the regime was established by legal acts which rank as constitutional law, such as the Message to the People of the Council of the National Salvation Front (FSN), published in the Official Gazette, Part I, no. 1 of 22 December 1989, and the Legislative Decree on the establishment, organisation and functioning of the National Salvation Front and of regional councils of the National Salvation Front, published in the Official Gazette, Part I, no. 4 of 27 December 1989.

Every country faced with the problem of lustration has adopted a certain method of achieving lustration based on the aim pursued and the national specific situation. The Czech Republic adopted a radical model, Lithuania and the Baltic countries adopted an intermediate model, and Hungary, Poland and Bulgaria adopted a moderate model.

After an unsuccessful attempt – that of 1997 – the adoption of the Lustration Law in Romania has no legal effect – it is not up-to-date, necessary or useful; it is only of moral significance, given the long period of time which has elapsed since the fall of the communist totalitarian regime. Citing Article 53 of the Constitution, the initiators of the Law themselves state that the Lustration Law refers to the constitutional rule that the “the exercise of certain rights or freedoms may solely be restricted by law, and only if necessary, as the case may be: for the defence of [...] morals, [...]”, morals tainted by customs of communism.

With respect to high public positions in Romania, non-affiliation with the old communist structures is currently not a condition of employment; there is only an obligation for such persons to declare their affiliation or non-affiliation with the former political police.

The Court notes the imprecise, confusing and inadequate wording of the preamble to the Law, which leads to the conclusion that the restrictions and prohibitions in this Law are aimed at the “restriction on the exercise of the right to be appointed or elected to public offices of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989”.

The Court also notes that the provisions of the Lustration Law, not being sufficiently clear and precise, have no regulatory rigour.

The Court observes that according to the impugned law, liability and penalties are based on the fact that a person held an office in the structures and repressive apparatus of the former communist totalitarian regime. Liability, regardless of its nature, is primarily an individual responsibility, and it arises only on the basis of acts and actions carried out by a person and not on presumptions.

The Lustration Law is excessive in relation to the legitimate aim pursued, since it does not allow for the individualisation of its measures. The Law establishes a presumption of guilt and a genuine collective punishment, based on a form of collective responsibility and a generic, comprehensive guilt, established on political criteria; this contravenes the principles of the rule of law, the legal order and the presumption of innocence laid down by Article 23.11 of the Constitution. Even if the impugned law allows recourse to justice for justifying the prohibition of the right to stand for election and be elected to certain offices, it does not provide for an adequate mechanism for determining the actual activities carried out against fundamental rights and freedoms.

No one shall be subjected to lustration for his or her personal opinions and own beliefs, or for the mere reason of association with any organisation which, at the time of association or carrying out of the activity, was legal and did not commit any serious human rights violations. Lustration is permitted only with respect to those persons who actually took part, together with State bodies, in serious violations of human rights and freedoms.

Article 2 of the law under constitutional review provides for one of the major collective penalties listed concerning the right to stand for election and the right to be elected to high public offices for persons who belonged to certain political and ideological structures. The statutory provisions of that article are contrary to the constitutional provisions of Articles 37 and 38, which enshrine the right to be elected, with the prohibitions being expressly and exhaustively listed. It is clear that the provisions of Article 2 of the Lustration Law exceed the constitutional framework, creating a new ban on the right of access to public office, which fails to comply with Article 53 of the Constitution relating to restrictions on the exercise of certain rights or freedoms.

The Court considers that the Lustration Law infringes the non-retroactivity principle enshrined in Article 15.2 of the Constitution, which states: "The law shall only take effect for the future, except the more favourable

law which lays down penal or administrative sanctions." A law applies to facts occurring and acts committed after its entry into force. Therefore, it cannot be maintained that when respecting the laws in force and acting in the spirit thereof, citizens should consider any possible future regulations.

The Court notes that the Lustration Law was passed 21 years after the fall of communism. Consequently, the late enactment of this law, without being decisive in itself, is considered by the Court as relevant with respect to the disproportionate nature of the restrictive measures, even if they pursue a legitimate aim. The proportionality of the measure to the aim pursued must be considered in each case in the light of an assessment of the country's political situation as well as other circumstances.

In this respect, the case-law of the European Court of Human Rights on the legitimacy of lustration law over time is relevant; here, the Court refers to the case of *Zdanoka v. Latvia*, 2004.

For the reasons set forth herein, the Constitutional Court finds that the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 is unconstitutional.

Languages:

Romanian.



Identification: ROM-2011-2-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 17.06.2011 / **e)** 799/2011 / **f)** Decision on the draft law for the revision of the Constitution / **g)** *Monitorul Oficial al României* (Official Gazette), 400/23.06.2011 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

1.2.4. Constitutional Justice – Types of claim – **Initiation ex officio by the body of constitutional jurisdiction.**

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

2.2.2. Sources – Hierarchy – **Hierarchy as between national sources.**

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

4.4.3. Institutions – Head of State – **Powers.**

4.5.1. Institutions – Legislative bodies – **Structure.**

4.7.5. Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

4.7.16.2. Institutions – Judicial bodies – Liability – **Liability of judges.**

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

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

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

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

5.3.45. Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Constitution, revision / Protection, supervision by the Constitutional Court / Police custody, length / Judicial error / Parliament, immunity / Parliament, unicameral.

Headnotes:

Police custody of up to 48 hours is justified to ensure the effectiveness of the measure.

The deletion of the second part of Article 44.8 of the Constitution, which establishes the presumption of lawful acquisition of property, is unconstitutional because its effect is to remove a guarantee of the right to property.

The constitutional principle of the independence of justice cannot be interpreted as exempting those who apply it from liability for judicial errors committed, in view of the consequences of those errors for citizens seeking justice and for the Romanian state.

The adoption of a unicameral parliament and the limitation of the number of members of parliament to 300 are not inconsistent with any of the limits to revision of the Constitution provided for in Article 152 thereof, but represent exclusively a political choice.

The President's power to confer decorations and honorary titles also implies the power to withdraw them.

The well-established constitutional maxim that “judges are independent and subject only to the law” represents the constitutional guarantee of the “non-submission” of judges to any other authority, persons or interests, inside or outside the judicial system, and their “submission” to the law only, so that any mechanisms of subordination or control which might affect them are precluded and may not affect their independence.

The creation, by means of infra-constitutional legislation, of new categories of administrative acts exempt from judicial supervision is contrary to the constitutional principle enshrined in Article 1.5 on the supremacy of the Constitution, as well as to the principle laid down in Article 21 on free access to justice and, implicitly, to Article 152.2, which prohibits the revision of constitutional provisions where the effect would be to deprive citizens of fundamental rights and freedoms.

The appointment of the 6 representatives of civil society by the parliament and by the President of Romania as representative of the executive represents interference by the other constitutional powers in the activities of the judiciary, calling into question the role of the Supreme Council of the Judiciary as guarantor of the independence of justice.

Summary:

I. In accordance with Article 146.a of the Constitution, the Constitutional Court automatically assumed jurisdiction in respect of a government bill concerning a revision of the Constitution.

The most significant changes concerned the following aspects:

- a. the taking of supplementary measures to protect the identity of national minorities;
- b. an increase in the length of police custody from 24 to 48 hours;
- c. removal of the provision under which the acquisition of property is presumed lawful;
- d. establishment of the liability of judges for judicial errors committed;
- e. the adoption of a unicameral parliament; the abolition of parliamentary immunity;
- f. establishment of the right of the President of Romania to withdraw previously awarded decorations and honorary titles;
- g. the placing of an obligation on the Prime Minister to consult the President before making proposals for the dismissal or appointment of members of the government;

- h. establishment of the binding nature of the Constitutional Court's decision in the procedure for suspending the President of Romania from office;
- i. the placing of limits on the government's possibility of committing its responsibility on the adoption of a bill;
- j. establishment of an obligation for judges to obey only the Constitution and to comply with the decisions of the Constitutional Court;
- k. exemption of administrative acts concerning fiscal and budgetary policy from judicial supervision; and
- l. an increase in the number of representatives of civil society in the structure of the Supreme Council of the Judiciary.

II. Having examined the draft law on the revision of the Constitution, the Constitutional Court found that some of the proposed amendments were unconstitutional.

The right to identity – Article 6 of the Constitution. The draft law places an obligation on public authorities to consult organisations of citizens belonging to national minorities on decisions relating to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity, and an obligation on the state to recognise and guarantee the right of this category of persons to the preservation, development and expression of their identity as provided for in paragraph 1 of that Article, this being one of the means of guaranteeing the right established by the Constitution.

This amendment does not mention any of the limits to revision provided for in Article 152.1 and 152.2 of the Constitution. If these rules were to be retained, to ensure that decisions taken by organisations of citizens belonging to national minorities on the preservation, development and expression of their ethnic, cultural, linguistic and religious identity are not contrary to the principles of equality and non-discrimination towards other Romanian citizens, an obligation should be placed on those organisations to consult the public authorities in writing on the decisions they plan to take.

This proposed amendment is therefore constitutional.

Individual freedom – amendment to Article 23.3 of the Constitution extension of the maximum period of police custody from 24 to 48 hours. The proposed amendment is designed to meet the obligation placed on the state to ensure a proper balance between the interest in defending the individual's fundamental rights and the interest in defending the rule of law, while taking account of the problems which the

current length of police custody has created in practice for the work of the prosecution service, with direct consequences for the protection of society's general interests and the rule of law. Police custody of up to 48 hours is therefore justified to ensure the effectiveness of the measure.

This proposed amendment is therefore constitutional.

The right to private property – Article 44 of the Constitution. The proposed amendment concerns the deletion of the second part of Article 44.8 of the Constitution, which provides that “[t]he legality of acquisition shall be presumed”. The Court notes that it has given rulings on other occasions on initiatives to revise the same constitutional provision pursuing substantially the same aim: to remove from the Constitution the presumption of the lawful acquisition of property. For example, in Decision no. 85 of 3 September 1996 published in the Official Gazette (*Monitorul Oficial*) of Romania, Part I, no. 211 of 6 September 1996, the Court gave a ruling on an initiative to revise the Constitution, which proposed replacing the text establishing this presumption with the following text: “Property whose lawful acquisition cannot be proved shall be confiscated”. On this occasion the Court held that the presumption of the lawful acquisition of property was one of the constitutional safeguards of the right to property, in accordance with Article 41.1 of the Constitution [now Article 44.1], under which the right to property is guaranteed. This presumption is also based on the general principle that any juridical act is deemed lawful unless proved otherwise, which creates an obligation to prove that a person's property was acquired unlawfully. While noting that this proposed amendment reversed the burden of proof regarding the lawfulness of the acquisition of property, so that a person's assets were presumed to have been acquired unlawfully unless proved otherwise by their owner, that legal certainty as to the right of ownership of the assets constituting a person's property was indissolubly linked to the presumption of lawful acquisition and that the removal of this presumption meant removing a constitutional guarantee of the right to property, the Court held that the proposed amendment was unconstitutional. Without the presumption of lawful acquisition, a property owner would be exposed to constant uncertainty because, whenever the unlawful acquisition of that property was alleged, the burden of proof would not fall upon the person making that allegation, but upon the owner of the property.

Pursuant to Article 152.2 of the Constitution, under which no revision shall be made which results in the suppression of citizens' fundamental rights and freedoms, or of the safeguards thereof, the Court

finds that the deletion of the second part of Article 44.8 of the Constitution, providing that “[t]he legality of acquisition shall be presumed”, is unconstitutional because its effect is to remove a guarantee of the right to property.

The right of a person prejudiced by a public authority – Article 52 of the Constitution. It is noted that, by removing the terms “bad faith” and “serious negligence”, which constitute detailed conditions of the liability of judges, the proposed amendment brings into line the two sentences of the same paragraph of Article 52 concerning respectively the liability of the state and the liability of judges for judicial errors committed, so that the conditions of liability may then be laid down by law. The amendment therefore draws a distinction between a constitutional principle the material liability of the state and judges for judicial errors, and infra-constitutional rules the conditions under which such liability may be incurred. There is no reference to the limits to revision of the Constitution because the constitutional principle of the independence of justice cannot be interpreted as exempting those who apply it from liability for judicial errors, in view of the consequences of those errors both for citizens seeking justice and for the Romanian state.

This proposed amendment is constitutional.

The role and structure of parliament – Article 61 of the Constitution. The proposed amendment concerns the adoption of a unicameral parliament and the limitation of the number of members of parliament to 300. First of all, the Court notes that the proposed amendment to this effect is consistent with the result of the national referendum of 22 November 2009 initiated by the President of Romania, which was confirmed by the Constitutional Court in its Decision no. 37 of 26 November 2009. This amendment is not inconsistent with any of the limits to revision provided for in Article 152 of the Constitution, but represents exclusively a political choice which will be analysed by the parties to the constitutional revision procedure.

This proposed amendment is therefore constitutional.

Parliamentary immunity – Article 72 of the Constitution. The constitutional rules on parliamentary immunity are justified by the need to protect the mandate of parliamentarians as a guarantee of the exercise of their constitutional powers and, at the same time, a condition for the proper functioning of the law-based state. While noting that the draft law for the revision of the Constitution removes the procedural immunity which protects parliamentarians from unreasonable or vexatious criminal proceedings, thus rendering parliamentary immunity devoid of

substance, the Court finds the proposed amendment unconstitutional because it leads to the removal of a safeguard of a fundamental right of persons holding public office and thus violates the limits to revision as provided for in Article 152.2 of the Constitution.

Appointment of the government – Article 85.2 of the Constitution. Through the addition of the requirement that the Prime Minister must consult the President before proposing the dismissal or appointment of members of the government, the solution advocated by the Constitutional Court is incorporated into this constitutional provision.

The proposed amendment is therefore constitutional.

Other powers (conferring decorations and honorary titles) – Article 94.a of the Constitution. In its new form the text empowers the President to withdraw decorations and honorary titles previously awarded to certain persons. Although the Constitution did not expressly confer on the President, in addition to the power to award decorations and honorary titles, the power to withdraw them, the Constitutional Court finds that the former implies the latter, and that the fact of withdrawing decorations derives from the constitutional power to award them.

This proposed amendment is therefore constitutional.

Suspension from office – Article 95 of the Constitution. The proposed amendment gives binding force to the Constitutional Court’s opinion and provides for its legal effects. A favourable opinion from the Court is needed to continue the suspension procedure. If the opinion is unfavourable, the suspension procedure is discontinued. If the opinion is favourable, it is impossible to see how it could be binding on parliament, which is required to take a decision by a majority of its members’ votes. Furthermore, in such a situation, the Constitutional Court’s opinion would lead directly to the holding of a referendum, parliament’s role being confined to initiating the suspension procedure. In the light of these observations, it is proposed that the word “binding” be deleted from the Article as it is sufficient to make express provision for the extinctive effect of a negative opinion from the Constitutional Court.

Commitment of legal responsibility by the government – Article 114 of the Constitution. A quantitative limitation of the government’s possibility of resorting to this procedure during a session of parliament precludes any possible misuse by the government of the constitutional right to commit its responsibility before parliament, and the legislature, for its part, can exercise its full power as conferred by Article 61.1 of the Constitution.

The Court recommends expanding the provision in Article 114.1 of the Constitution in order to limit the subject-matter on which the government can commit its responsibility to: a programme, a general policy declaration or a draft law regulating social relations in a specific field in a unitary manner.

This proposed amendment is constitutional.

The administration of justice – Article 124 of the Constitution. The Court considers that the proposed addition to Article 124.3 of the Constitution is unnecessary because the obligation placed on judges to obey the Constitution and comply with the decisions of the Constitutional Court is already enshrined in the Constitution. Furthermore, the well-established constitutional maxim that “judges are independent and subject only to the law” represents the constitutional guarantee of the “non-submission” of judges to any other authority, persons or interests, inside or outside the judicial system, and their “submission” to the law only, so that any mechanisms of subordination or control which might concern them are precluded and may not affect their independence.

Courts of law – Article 126.6 of the Constitution. The purpose of the proposed amendment is to make an addition to paragraph 6 excluding the government’s fiscal and budgetary policies from judicial supervision of administrative acts. An interpretation allowing the ordinary legislature to add to the Constitution, by means of infra-constitutional legislation, a new category of constitutional acts exempt from judicial supervision is contrary to the constitutional principle of supremacy of the Constitution enshrined in Article 1.5, to the principle of free access to justice in Article 21 and, indirectly, to Article 152.2, which prohibits any revision of constitutional provisions resulting in the suppression of citizens’ fundamental rights and freedoms.

The Court notes that the proposed amendment is unconstitutional.

The Supreme Council of the Judiciary – Article 133 of the Constitution. The main amendment concerns paragraph 2 on the structure of the Supreme Council of the Judiciary: the total number of members is still 19, but the number of representatives of civil society increases (from 2 to 6) and the number of members having the status of judge or prosecutor decreases correspondingly (from 14 to 10). By virtue of its powers, the composition of the Supreme Council of the Judiciary must reflect the specific nature of its activity, the judicial status of its members, inherent in the name of this supreme representative body, and their direct knowledge of the implications of judicial activity being of decisive

importance for the decisions taken by the Council. The appointment of the 6 civil society representatives by the parliament and the President as representative of the executive represents interference by the other constitutional powers in the activity of the judiciary, calling into question the role of the Supreme Council of the Judiciary as guarantor of the independence of justice.

The Court notes that the proposed amendment is unconstitutional.

Languages:

Romanian.



Identification: ROM-2012-2-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 09.07.2012 / **e)** 727/2012 / **f)** Decision on the referral of unconstitutionality of the Law amending Article 27.1 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court / **g)** *Monitorul Oficial al României* (Official Gazette), 90, 03.02.2012 / **h)** CODICES (English, Romanian).

Keywords of the systematic thesaurus:

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

1.1.4.3. Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**

1.3.1. Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.5.9. Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules.**

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

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

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, limit / Constitutionalism, protection / Powers, separation and inter-dependence, principle.

Headnotes:

The amendment of the organic law of the Constitutional Court, which abolishes the power of this Court to rule on the constitutionality of resolutions by the Plenary of the Chamber of Deputies, the Plenary of the Senate, and the Plenary of the two Joint Chambers of Parliament, without any distinction, diminishes the authority of the Constitutional Court, fundamental institution of the State.

Summary:

I. Pursuant to the provisions of Article 146a of the Constitution and Article 15.1 and 15.4 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, the Secretary General of the Chamber of Deputies requested the Constitutional Court to review the constitutionality of the Law amending Article 27.1 of Law no. 47/1992 on the Organisation and Operation of the Constitutional Court. It was signed by 67 Deputies of the parliamentary group of the Liberal Democrat Party.

The applicants contend that the impugned law is unconstitutional, depriving the Constitutional Court of its competence to review resolutions of the Plenary of the Chamber of Deputies, of the Senate and of the Plenary of the joint Chambers of Parliament. The applicants claim that the effect of the legal act (the above-mentioned resolutions) issued by a public authority is that the Court can no longer review the lawfulness or constitutionality of a legal act. Therefore, the Parliament could decide anything, including matters contrary to the Constitution, which is unconceivable.

In support of the referral, the applicants invoked Article 1.3 of the Constitution concerning the characteristics defining Romania as a democratic state and Article 1.4 of the Constitution concerning the principle of separation and balance of powers within constitutional democracy.

II. By majority vote to allow the referral of unconstitutionality, the Court held the following:

1. Separate from the challenges of unconstitutionality, the Court noted that after the Government's referral of the above-mentioned law and before the Court could rule upon it, the Government adopted an emergency ordinance that enshrined an identical legislative solution with exactly the same legislative content. From this perspective, the Court outlined the solution chosen by the Government. The solution was to adopt it shortly before the Court could rule upon the constitutionality of the Law amending Article 27.1 of

Law no. 47/1992 – an emergency ordinance (of immediate application) that fully incorporated the legislative content of the impugned law. The Court pointed out that the Government's behaviour was unconstitutional and abusive towards the Court.

The Court also held that according to its case-law, the subsequent primary regulation acts cannot incorporate the legislative content of an unconstitutional legislative norm and thus extend its existence (see, to that effect, Decision no. 1615, 20 December 2011, published in the Official Gazette of Romania, Part I, no. 99, 8 February 2012).

2. As for the complaints of unconstitutionality, the Court held, firstly, that its power to rule upon the resolutions by the Plenary of the Chamber of Deputies, by the Plenary of the Senate or by the Plenary of the joint Chambers of Parliament was implemented by Article I.1 of Law no. 177/2010 amending and supplementing Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, the Civil Procedure Code and the Criminal Procedure Code of Romania, published in the Official Gazette of Romania, Part I, no. 672, 4 October 2010.

Examining, within the *a priori* constitutional review, the provisions of Article I.1 of the mentioned law, the Court found that the respective regulation enshrines a new power of the Court. The power clearly circumscribed to the constitutional framework enshrined by Article 146, which establishes under paragraph I) that the Court “also fulfils other prerogatives as provided by the Court's organic law”.

In its case-law concerning this power, the Court defined its power established following the amendment and completion of Article 27 of Law no. 47/1992. It specified that resolutions subject to constitutional review can be only resolutions of Parliament adopted following the granting of the new power. These are resolutions that affect constitutional values, rules and principles. They could also include, as the case may be, the organisation and operation of constitutional authorities and institutions (see Decision no. 53, 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90, 3 February 2011 and Decision no. 1631, 20 December 2011, published in the Official Gazette of Romania, Part I, no. 84, 2 February 2012).

The Court also held that the granting of the power to exercise such constitutional review represents a diversification and strengthening of the competence of the Court. This power would increase efforts to achieve a democratic State governed by the rule of law and thus, it cannot be considered a circumstantial action or one justified on grounds related to

necessity. However, even the legal, political and social reality proves its actuality and usefulness, since the Court was asked to rule on the constitutionality of certain resolutions of Parliament questioning the constitutional values and principles.

Consequently, the impugned legislative amendment does nothing but to diminish the authority of the Court, a fundamental institution of the State, and to infringe on the principles of the rule of law. Exclusion from constitutional review of all resolutions issued by Parliament is not based on the rule of law but, possibly, on grounds of necessity.

The Court also held that this power cannot mean an "excessive" burden for the Court, as stated in the explanatory memorandum to the law subject to review. Rather, it is inextricably integrated, once legitimately granted, into a legal mechanism likely to contribute to the separation and balance of powers in a democratic and social State governed by the rule of law. To assess and decide on the activity of the Court, especially in terms of quantitative standards, is to incorrectly perceive it and furthermore, to ignore the substance of its fundamental role.

Languages:

Romanian.



Identification: ROM-2013-S-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 12.12.2013 / **e)** 511/2013 / **f)** Decision on the exception unconstitutionality of Article 125.3 of the Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 75, 30.01.2014 / **h)** CODICES (Romanian).

Headnotes:

The right to life, the supreme value in the hierarchy of human rights, is inalienable. The primacy of this right justifies the legislative decision to not apply the statute of limitation to enforce the main criminal penalties for homicide and intentional crimes followed by the victim's death. These are crimes for which, on the date of entry into force of the provisions of law, the limitation period for enforceability had not expired.

Summary:

I. On the grounds of Article 146.d of the Constitution, the Timisoara Court of Appeal Criminal Chamber requested the Constitutional Court to review the constitutionality of provisions under Article 125.3 of the Criminal Code. Following the adoption of Law no.27/2012, the aforementioned provisions enshrined the statute of limitation, which does not preclude enforcing the main penalty for crimes of homicide and intentional crimes followed by the victim's death. These are crimes where, at the date of the law's entry into force, the limitation period had not expired. In other words, the limitation period was deemed applicable also in relation to crimes committed before the entry into force of Law no.27/2012, should the limitation period be not attained at that time.

The request for constitutional review of these legal provisions relied on Article 15.2 of the Constitution, which states:

"The law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions".

The challenge also referred to Article 16.1 of the Constitution on the equality of citizens before the law and public authorities, without any privilege or discrimination.

II. By a majority vote, the Court dismissed the constitutional challenge to Article 125.3 of the Criminal Code. The seriousness of violating social values protected by criminalising the acts requires the State to issue a strong response. The need for justice cannot be satisfied by the mere lapse of time from the perpetration thereof. The psychological impact of such acts does not decrease over time within the time of a usual limitation period. The community's reaction creates a moral duty and constitutes a proof of respect for the fate of the victims.

According to the European Court of Human Rights, the right to life, enshrined in Article 2 ECHR, constitutes the king of all rights', a right that enshrines one of the fundamental values of a democratic States forming part of the Council of Europe and is amongst the key provisions of the Convention. Furthermore, the Strasbourg Court gives particular prominence in its case-law to Article 2 ECHR as the right to life enjoys a special status within the provisions of the Convention considered essential by the Court.

Therefore, the Constitutional Court ruled that the right to life is an inalienable attribute of the person and the supreme value in the hierarchy of human rights.

Without it, the exercise of all other rights and freedoms guaranteed by the Constitution and by the international instruments for the protection of fundamental rights would be illusory. Hence this right is considered to have an axiological nature, consisting both a subjective right and an objective function. That is, it is the guiding principle of the State's activity, given that the latter has the obligation to protect the fundamental right to life of the person. The primacy of the right to life does therefore justify the possibility for the legislature to establish the non-applicability of the statutory limitation regarding the enforcement of the main criminal penalties for the crimes set forth in Articles 174 to 176 and for intentional crimes followed by the victim's death. These are crimes for which, on the date of entry into force of the provisions of law subject to criticism, the limitation period for enforceability had not expired.

In such a case, the legislature had to choose between the principle of legal certainty of legal relations and fairness, both fundamental components of the rule of law. It was upon the legislature to decide which principle will be granted precedence, arbitrarily and without taking into account the overriding value of the right to life enshrined in Article 22.1 of the Constitution. The legislature opted for the immediate application of the more stringent provisions on limitation with regard to crimes priory committed, crimes for which the limitation period for enforcement of the sentence had not expired yet.

The Court also found that the legislature's choice to regulate the non-applicability of the statutory limitation with regard to the enforcement of the main criminal penalties for the crimes set forth in Articles 174 to 176 and for intentional crimes followed by the victim's death did not violate the constitution. Therefore, the rules contained in Article 125.3 of the Criminal Code do not violate the Constitution and are compatible with the principles established by the provisions of the Basic Law.

III. Three judges have formulated a dissenting opinion.

Languages:

Romanian.



Identification: ROM-2014-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 10.01.2014 / **e)** 1/2014 / **f)** Decision on the objection of unconstitutionality of the Law establishing some measures of decentralisation of the powers exercised by some ministries and specialised bodies of the central public administration, as well as some public administration reform measures / **g)** *Monitorul Oficial al României* (Official Gazette), 123, 19.02.2014 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

- 3.9. General Principles – **Rule of law.**
- 3.10. General Principles – **Certainty of the law.**
- 3.12. General Principles – **Clarity and precision of legal provisions.**
- 3.13. General Principles – **Legality.**
- 4.8.4.1. Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**
- 5.3.39. Fundamental Rights – Civil and political rights – **Right to property.**

Keywords of the alphabetical index:

Law, precision, need / Local self-government, right.

Headnotes:

Establishing without clarity and precision a mechanism of exemptions from the law generally applicable in a matter represents a violation of the principle of legality. Although, in principle, the legislator may establish at any time exemptions from the effective normative framework, under the principle of law according to which *specialia generalibus derogant*, the normative act establishing such exemptions must not deprive the constitutional provisions from their efficiency. Such conduct of public authorities infringes the certainty of legal relationships since it is tantamount to the possibility to circumvent the legal framework at any time and in any circumstances while citizens are required to comply with the same.

Summary:

I. The Constitutional Court has been referred, on the grounds of Article 146.a of the Constitution, with the objection of unconstitutionality of the provisions of the Law establishing some measures of decentralisation of the powers exercised by some ministries and specialised bodies of the central public administration, as well as some public administration reform measures. The impugned Law comprises ten titles.

Eight of these titles regulate measures of decentralisation in the field of agriculture and rural development, culture, tourism, pre-university education, environment and climate change, health, youth and sport, transports, while two titles concern amendments to Law no. 273/2006 on local public finances, published in the Official Gazette of Romania, Part I, no. 618 of 18 July 2006, as amended and completed, and completions to Law no. 213/1998 on publicly owned property, published in the Official Gazette of Romania, Part I, no. 448 of 24 November 1998, as amended and completed, as well as transitional and final provisions.

As grounds for the objection of unconstitutionality, the authors formulated challenges of both extrinsic and intrinsic unconstitutionality.

In terms of extrinsic unconstitutionality, it was argued that the Government's assumption of responsibility on this law infringes the provisions of Article 1.4 on the principle of separation and balance of powers, Article 61.1 on the role of Parliament, as well as Article 114 of the Constitution, concerning assumption of responsibility by the Government, as interpreted by the Constitutional Court. From this perspective, it was also invoked the violation of the provisions of Article 147.4 of the Constitution on the generally binding nature of the decisions of the Constitutional Court.

In terms of the intrinsic unconstitutionality, it violated provisions of Article 1.1, 1.3, 1.5 of the Constitution (The Romanian State), Article 102.1 of the Constitution (on the role of Government), Articles 120, 121, 122 of the Constitution (Local public administration), Article 123 of the Constitution (The Prefect) and Article 136 of the Constitution (Property).

II. Examining the objection of unconstitutionality, the Court held the following:

1. The challenges of extrinsic unconstitutionality

Examination of the Government Programme 2013-2016, integral part of Resolution no. 45/2012 of Parliament of Romania granting confidence in the Government, published in the Official Gazette of Romania, Part I, no. 877 of 21 December 2012, as well as of the other documents submitted to the case file, reveals the importance of this Law's regulatory field, inclusively in view of the Government objectives. The explanatory memorandum and the viewpoint submitted by the Government to the case file give arguments on the urgency of the measure, celerity of the procedure, immediate application of the respective Law, corresponding to the other criteria established by the Constitutional Court in relation to assumption of

responsibility on a bill. Therefore, the subject matter of the impugned regulation is circumscribed in the main objectives contained in the Government Programme, whose achievement requires adoption of measures characterised by a certain degree of celerity, namely by immediate applicability, given the overall complexity of the issues pertaining to the administrative decentralisation process.

For these reasons, by majority vote, the Court dismissed the challenges of extrinsic unconstitutionality raised.

2. The challenges of intrinsic unconstitutionality

Analysing the regulation at issue, the Court held that its enactment failed to comply with the Framework Law no. 195/2006, which represents an infringement of the provisions of Article 1.5 of the Constitution regarding the obligation to respect the laws. Thus, as concerns of the decentralised domains, neither cost standards have been developed for funding the decentralised public services and public utility services nor quality standards to ensure supply thereof by the local public administration authorities. Likewise, the transfer of powers established by the law subject to constitutional review does not comply with the Framework-Law no. 195/2006 in terms of clarity, precision and foreseeability of the norm. The analysis of the provisions of the law shows the legislator's deviation from a set of rules imposed by the legal texts on legislative technique. This pertained to the need to organically integrate the normative act into the legislation system, to establish rules that are necessary, sufficient and possible and that would create a higher legislative stability and efficiency, to draft rules in a legal language and style, concise, sober, clear and precise, that would exclude any doubt, to express the same concepts using the same words.

Likewise, the Court analysed the Law subject to constitutional review in relation to Articles 1.5, 120, 136.2 and 136.4 of the Constitution. It held that the Law establishes a mechanism that departs from the framework-laws in the matter of property (Law no. 287/2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, no. 505 of 15 July 2011, as subsequently amended, Law no. 213/1998, as subsequently amended and completed, Law no. 7/1996, republished, as subsequently amended and completed). By doing so, it achieved a massive transfer of property from the public/private domain of the State into the public/private domain of administrative-territorial units. Although, in principle, the legislator may establish at any time exemptions from the effective normative framework, under the principle of law according to which *specialia*

generalibus derogant, the normative act establishing such exemptions must not deprive the constitutional provisions of their efficiency. This would be tantamount to failing to comply with the requirements of clarity of the law.

In this regard, the Court considered the absence of a clear distinction of assets that constitute the object of the transfer in between domains, in terms of their affiliation to the public or private domain of the State at the time of transfer. It held that in light of the imprecise nature of the legal regime of certain immovable property or in absence of a clear regulation of the measure itself as established by law on some of the assets, the derogatory mechanism of the impugned law is likely to contravene the principle of certainty of legal relationships, in terms of its component on the clarity and foreseeability of the law. This would lead to the violation of the legal regime of public property. On the other hand, some terminological inconsistencies, omissions or contradictions in the text of the Law itself, likely to create uncertainty in terms of legal transactions and situation of the assets covered, generates a lack of consistency, clarity and foreseeability of the legal norm. This is likely to infringe on the principle of legal certainty in terms of its component on clarity and foreseeability of the law.

Thus, having analysed the assets inserted in the annexes to the impugned Law, it results that the transfer refers to immovable property (buildings, land), fixed assets, and inventories. By their nature, they are not likely to constitute the exclusive object of public property, according to the listing under Article 136.3 of the Constitution. On the contrary, according to their destination, respectively their use or the national, county or local interest, they may belong either to the public domain of the State or to the public domain of the administrative-territorial unit. If so, the provisions of Article 869.3 last sentence of the Civil Code are deemed applicable, i.e. transfer from the public domain of the State into the public domain of the administrative-territorial unit can take place only on compliance with Article 9 of Law no. 213/1998, as subsequently amended and completed.

In this context, the Court held that the Law subject to constitutional review establishes an exemption from the statutory provisions cited above. It substituted individual acts (resolutions of the Government) of transfer of certain assets from the State's public domain into the public domain of the administrative-territorial unit, without establishing the legal regime of the transferred assets in terms of their affiliation to the national, county or local domain, according to their use, or according to the national, county or local interest. Thus, it circumvented judicial review on

administrative acts, exercised under the terms of the Administrative Contentious Law no. 554/2004, published in the Official Gazette of Romania, Part I, no. 1.154 of 7 December 2004, as subsequently amended and completed, review guaranteed by Article 126.2 of the Constitution. The derogatory mechanism of transmission of property, established by the impugned Law, without complying with the legal procedure in force and without a proper individualisation of the assets, represents, in fact, a violation of the legal framework of public property.

Furthermore, the mechanism of transmission of property, covered by the impugned Law, from the private domain of the State into the private domain of administrative-territorial units, by operation of law and without having obtained the consent of administrative-territorial units, violates the constitutional principle of local self-government. This is governed by Article 120.1 of the Constitution, concerning both the organisation and functioning of local public administration and the management, under its own responsibility, of the interests of the communities represented by those public authorities.

The Court also held that the way in which a management right was established over public property, subject to transfer in between domains, under the terms of the impugned Law, is incompatible with the concept and legal features of the real right of management. This corresponded to the right to public property and, consequently, comes against the provisions of Article 136.4 of the Basic Law, which enshrine at constitutional level the ways in which the right to public property may be exercised.

Analysing the lists contained in Annexes 1 to 8 to the Law, the Court found that the assets subject to transfer in between domains are not precisely identified, in terms of their affiliation to the State public or private domain (Annexes 1 and 2 merely refer to assets in the public property; Annex 3 does not specify, from this viewpoint, the legal regime of the listed assets), the holder of the management right is not indicated (Annex 3) or specified, and in case of transfer of immovable property, the legislator failed to indicate State's title to property in case of assets in the private domain, respectively the modality of acquisition of the property belonging to the public domain. Likewise, in case of transfer of immovable property, the legislator failed to indicate the framework elements of technical description, namely areas, land book number, cadastre data. The Court also found that, in the vast majority of cases, some of the inventory values had not been updated. The incomplete and vague regulation is likely to lead to the violation of Article 1.5 of the Constitution on the clarity of the law.

Apart from the issues regarding the relevance of Articles 1.5 and 136 of the Constitution, the Court ascertained the violation of the principle of local self-government lack the local public administration acceptance of the transfer into the private domain of administrative-territorial units of certain assets that were previously in the private domain of the State.

For these reasons, by unanimous vote, the Court upheld the objection of unconstitutionality in terms of the challenges of intrinsic unconstitutionality. It also found that the Law establishing some measures of decentralisation of the powers exercised by some ministries and specialised bodies of the central public administration, as well as some public administration reform measures, is unconstitutional as a whole.

III. Three judges formulated concurring opinion in relation to the decision to dismiss the extrinsic challenges of unconstitutionality.

Languages:

Romanian.



Identification: ROM-2014-S-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.02.2014 / **e)** 80/2016 / **f)** Decision on the legislative proposal concerning the revision of the Constitution / **g)** *Monitorul Oficial al României* (Official Gazette), 246, 07.04.2014 / **h)** CODICES (Romanian).

Headnotes:

The State character, pursuant to Article 152 of the Constitution, cannot be amended. Likewise, any revision to the Constitution cannot be rendered if it suppresses citizen's fundamental rights and freedoms. Also, it cannot be revised during a state of emergency.

Summary:

I. Pursuant to Article 146.a of the Constitution, the Constitutional Court examined *ex officio* the legislative proposal to revise the Constitution of Romania, as signed by 108 senators and 236 deputies.

II. Concerning the limitations on revisions provided by Article 152 of the Constitution, the Court held:

1. By a majority, the unconstitutionality of the supplementation to Article 3.3 of the Constitution, referring to the possibility of recognising traditional areas as administrative subdivisions of regions;

The Court noted that the administrative structures put into question the national character of the country, a trait that, according to Article 152.1 of the Constitution, cannot be subject to revision. Accepting another administrative-territorial organisation, with a substantiation different from that of the underlying delineation of territorial-administrative units expressly and exhaustively provided by the Constitution, is likely to affect the unitary character of the State. As such, it would constitute a violation of the revision limits.

2. By a majority, the unconstitutionality of the supplement to Article 6.1 of the Constitution, referring to the introduction of the possibility for the legal representatives of national minorities to establish, according to the statute of national minorities adopted by law, their own decision-making and executive bodies;

The Court held that the creation of “*own decision-making and executive bodies*” of some communities of citizens, based on the status as “*national minorities*” (ethnic criteria) is likely to cause confusion. It would give rise to the idea of autonomy and execution thereof, which is incompatible with the concept of the unitary state. Each national minority may have their own decision-making and executive bodies whose status and relations with the decision-making and executive bodies of the State is in no way defined, with the consequent achievement of a political collective autonomy on ethnic criteria.

3. By a majority, the unconstitutionality of the supplementation to Article 12.4 of the Constitution, referring to the use of symbols specific to national minorities;

The Court noted that the provisions of the newly-introduced paragraph 4 concern symbols of national minorities and not “national symbols”, so that they cannot be placed under Article 12 of the Constitution, but, possibly, under Article 6 (Right to identity). Given the wording of paragraph 4 and the lack of a specific indication on the obligation that the symbols be accompanied by national symbols, it would result that national minorities have a right of option between using their own symbols and the national symbols.

4. Unanimously, the unconstitutionality of the amendment of Article 15.1 of the Constitution, referring to the introduction of the phrase “Romanian citizens are born and live free”;

The Court held, on the one hand, that the phrase proposed for insertion is not a regulatory text but a proclamation. Therefore, there is no reason to have it included in the Constitution. However, the applicability of the principle to be introduced in the Constitution is not only for citizens but also aliens and stateless persons.

5. Unanimously, the unconstitutionality of the amendment of Article 21.4 of the Constitution, referring to the removal of the optional nature of special administrative jurisdictions;

The Court held that the removal of the optional nature potentially creates the imposition of mandatory administrative jurisdictions, which effectively excludes the possibility for citizens to choose between the two paths to access the courts since the State will impose a single result that implies a compulsory administrative-jurisdictional procedure.

6. Unanimously, the unconstitutionality of the supplementation to Article 23.13 of the Constitution, referring to the use of illegally obtained evidence;

The Court noted that the legislative proposal for the revision of the Constitution, on the one hand, accepts the possibility of obtaining evidence outside the legal framework and on the other hand, gives legal efficiency to those obtained unlawfully. Accordingly, the Court considered that, by means of revision of the Constitution, it is not permitted to abolish the guarantee to the right to a fair trial and thus the setting of premises for observance of the law, i.e. criminal procedure law.

7. Unanimously, the unconstitutionality of the amendment of Article 26.2 of the Constitution referring to the removal of the word “morals”;

The constitutional amendment proposed, supplementing the guarantees of the natural person's right to dispose of himself under the active aspect, effectively annuls guarantees of this right as regards to its passive aspect. The Court found that the proposed amendment removes a guarantee of the natural person's right to dispose of himself or herself by removing the constitutional protection granted to one of the passive element of this right.

8. By a majority vote, it finds unconstitutional the amendment of Article 28 of the Constitution referring to the secrecy of correspondence;

The Court considered that, in terms of the elements newly introduced in Article 28.1 of the Constitution, it cannot be claimed that there is a legal protection identical to that of the traditional meaning of correspondence, even as it has been developed by the European Court of Human Rights in its Judgment *Copland v. the United Kingdom*, 3 April 2007, paragraphs 41 and 42. The Court noted that also traffic and location data also benefit from legal protection, but it cannot be assimilated to the protection ensured for legal means of communication, as they do not subsume under concept.

9. By a majority vote, it finds unconstitutional the supplementing of Article 32.8 of the Constitution referring to the definition of the university autonomy;

The Court concluded that the definition of university autonomy is inappropriate. It generates an absolute independence of higher education institutions both in the management of their heritage and in the designation of management structures and positions. This leads to cancellation of a guarantee of the right to education, conferred by the university autonomy.

10. By a majority vote, it finds unconstitutional the supplement to Article 37.2 of the Constitution, referring to the condition of domicile in Romania for at least six months prior to the elections for the Senate, the Chamber of Deputies or for the office of President of Romania;

Imposing temporal conditions to the present case (citizens must reside in Romania for at least six months before the elections) comes against the limits of revision of the Constitution. This suppresses the principle of universal rights, covered by Article 15.1 of the Constitution, the right to stand as a candidate for citizens residing in Romania who do not meet the new restrictive rule, as well as a guarantee thereof (equal rights).

11. Unanimously, it finds unconstitutional the removal of the current second sentence of Article 44.1 of the Constitution, referring to the conditions and limits that apply to the right to property;

Deletion of the second sentence of Article 44.1 renders the right to property absolute, and the legislator will no longer be able to protect concurring fundamental rights and freedoms of other citizens.

12. Unanimously, it finds the unconstitutional the amendment of Article 50 of the Constitution, referring to the elimination of the special protection that disabled persons benefit from;

The current constitutional text substantially establishes a special regime for the protection of persons with handicap/disabilities, an aspect overlooked by the new regulatory solution envisaged. The amendment of Article 50 of the Constitution may concern only an improvement of this regime and in no case a reduction of the degree of protection afforded to persons with handicap/disabilities or even abolishment of the right of persons with handicap/disabilities to a special protection regime.

13. Unanimously, it finds unconstitutional the amendment to Article 52.1 of the Constitution, referring to a reparation *in integrum* for the damage incurred by the person aggrieved by a public authority;

The Court noted that the proposed amendment to paragraph 1 refers to the entitlement of a person aggrieved by a public authority to “reparation for the damage suffered by means of a fair compensation”. In the legislative proposal to revise the Constitution, the reparation of the damage is going to be achieved through a fair compensation. However, fairness does not amount to a full reparation, such that the aggrieved person will see himself in the situation where his damage will be repaired only in part and not in full. See *mutatis mutandis*, regarding the concept of complete and full reparation, also Decision no. 395 of 1 October 2013, published in the Official Gazette of Romania, Part I, no. 685 of 7 November 2013.

14. Unanimously, it finds unconstitutional the replacement of the word “individual” with the word “citizens” in Article 58.1 of the Constitution;

Article 18.1 of the Constitution provides that aliens and stateless persons who reside in Romania shall enjoy general protection of person and wealth as guaranteed by the Constitution and other laws. Even if the proposed text is interpreted under the principle *ubi lex non distinguit, nec nos distinguere debemus* in the sense that it refers not only to Romanian citizens, but also to foreign ones, a category of individuals would still remain outside the protective action of the Advocate of the People where there is nothing to justify discriminatory treatment, namely the stateless persons.

15. By a majority vote, it finds unconstitutional the supplementing of Article 58.1 of the Constitution by the phrase “in their relations with public authorities”;

The entry proposed to be introduced in Article 58.1 of the Constitution is capable of calling into question the possibility of effective and efficient exercise by the Advocate of the People of that right, since there are also laws and simple or emergency Government

Ordinances that do not concern citizens' relations with public authorities. Article 146.d of the Constitution, which states that the Advocate of the People has the specific power to refer to the Constitutional Court on laws and Government Ordinances, without making any distinction whether their regulatory object contain provisions that relate to the protection of human rights.

16. By a majority vote, it finds unconstitutional the supplement to Article 64.4 referring to the obligation of any person of public law, private legal person and individual to appear, directly or through legal representative, as appropriate, before a parliamentary committee;

The Court found that establishing the obligation of the persons of public law other than those covered by Article 111 of the Constitution (private legal persons and individuals) to appear directly or through a legal representative, as appropriate, before parliamentary committees is contrary to the role and purpose of these committees. It is also contrary, implicitly, to the constitutional role of Parliament as legislative authority, breaching the constitutional principle of separation and balance of powers enshrined in Article 1.4 of the Constitution. The proposed changes confer wide powers to this committee, which creates confusions as to the legal nature of its activity that may be described as a form of special jurisdiction. Although it does not replace judicial authority, it carries out activity in parallel with the latter.

17. By a majority vote, it finds unconstitutional the supplementing of Article 70.2.e, referring to the cessation of the capacity as Deputy or Senator on the date of resignation from the political party or formation on behalf of which she or he was elected or on the date of his or her registration to another political party or formation;

The provisions contained in the legislative proposal are aimed at suppressing the freedom of the MP to join a parliamentary group or another or to become independent from all the parliamentary groups. This freedom of choice should be expressed according to their own political affinities and the possibilities offered by different parliamentary groups to the MP in order for the plenary to valorise the voters' interests.

18. Unanimously, it finds unconstitutional the removal of the second and third sentences in Article 72.2 on the competence of the Prosecutor's Office attached to the High Court of Cassation and Justice to investigate and prosecute, respectively on the jurisdiction of the High Court of Cassation and Justice involving Senators and Deputies;

The regulation in the Constitution of the Prosecutor's Office, attached to the High Court of Cassation and Justice competence, to carry out the search and prosecution and the High Court of Cassation and Justice competent to carry out the search and prosecution and the High Court of Cassation and Justice jurisdiction for settlement of cases relating to Senators and Deputies, constitutes, in relation to the latter, a constitutional guarantee of a procedural nature. It is meant to protect the public interest, namely carrying out the act of law-making through the exercise of their mandate. By repealing the provisions, the constitutional guarantee is removed, which is likely to infringe on the provisions of Article 152.2 of the Constitution.

19. By a majority vote, it finds unconstitutional the amendments of Article 103.1 and 103.3 of the Constitution, as well as the supplement to Article 103 of the Constitution, paragraphs 3.1 to 3.3, referring to the method of nominating a candidate for Prime Minister by the President;

The Court finds that the proposed text establishes a monopoly on the nomination process for the political party or political alliance participation in elections that obtained the highest number of seats, without holding an absolute majority. The proposal fails to take account the need to ensure parliamentary support to allow for the investiture vote and the implementation of the governance programme.

20. Unanimously, it finds unconstitutional the amendment of Article 110.1 of the Constitution, referring to the duration of the Government's term of office;

The Court noted that the proposed text removes a guarantee of the right to vote, namely the respect for the outcome of free suffrage. The Court noted that the current wording of Article 110.1 of the Constitution provides that the Government exercises office until the validation of the general elections for Parliament. Not taking into account the fact that citizens have elected a new Parliament is to undermine the guarantees of the right to vote (respect for the outcome of free suffrage).

21. Unanimously, it finds unconstitutional the introduction of Article 119.2 of the Constitution on the binding nature of the rulings of the National Security Council;

The Court noted that the decisions of the National Security Council will be binding for all public institutions and public administration authorities, without any differentiation. Furthermore, the Court noted that the general binding effect attributed to the decisions of the National Security Council may affect the independence

of justice, as intangible constitutional value, which cannot be the subject of revision.

22. By a majority vote, it finds unconstitutional the amendment to the introduction and to Article 133.2.b, referring to the increase in the number of members of the Superior Council of Magistracy representing the civil society;

The Court noted that the present proposal left unchanged the number of magistrates of the Superior Council of Magistracy, increasing the number of civil society representatives, resulting in a change in the proportion of representation on the Board. The change in the proportion of representation, by increasing the number of persons coming from outside the judiciary members of the Council, is likely to negatively impact the activity of the judiciary.

23. Unanimously, it finds unconstitutional the amendment of Article 135.2.d, referring to the exploitation of the production resources with maximum economic efficiency and by granting non-discriminatory access to all those interested;

The Court noted that State action in line with the national interest provide a guarantee for citizens in terms of protection of their rights and freedoms. Accordingly, the Court found that, as result of the amendment, the general interest is ignored, as the concept of national interest is presented as a particular interest, of "those interested", the only condition being its exercise with the greatest possible economic efficiency.

24. Unanimously, it found unconstitutional the amendment of Article 135.2.e, referring to economic development while safeguarding the environment and maintaining an ecological balance;

The proposed amendment brings forward the economic development, the latter being ensured and promoted by the State. The Court considered that this results in an amendment to the text drafting formula, which rules out the obligation of the State to restore and preserve the environment and maintain the ecological balance.

25. Unanimously, it found unconstitutional the repeal of Article 146.l of the Constitution, insofar as it challenges the powers of the Constitutional Court to review the last revision of the Constitution adopted by Parliament and, respectively, to review the by-laws of the Plenum of the Chamber of Deputies, the by-laws of the Plenum of the Senate and the by-laws of the Plenum of the two joint Chambers of Parliament affecting constitutional values, rules and principles or, where appropriate, the organisation and operation of constitutional authorities and institutions;

The repeal of the constitutional text under which the powers were regulated is likely to violate access to constitutional justice for the safeguard of constitutional values, rules and principles (i.e. the removal of a guarantee for such values, rules and principles) that also include the scope of fundamental rights and freedoms.

26. Unanimously, it found unconstitutional the amendment of Article 148.2, according to which Romania ensures the observance, within its domestic legal order, of the EU law, pursuant to the obligations undertaken by the accession document and the other treaties signed within the Union;

The new wording proposed in Article 148.2 would equal to setting the premises necessary for limiting the Constitutional Court's power, in the sense that only the normative acts adopted in fields not subject to the transfer of powers to the European Union could still be subject to constitutional review. Meanwhile, from a material point of view, the normative acts regulating the shared fields would be exclusively covered by the legal order of the European Union, thus excluded from constitutional review. The Court found that such an amendment would limit the citizens' rights to address the constitutional justice to safeguard certain constitutional values, rules and principle (i.e. discarding a guarantee of these values, rules and principles), which include the scope of fundamental rights and freedoms.

III. Three judges have formulated dissenting opinions.

Languages:

Romanian.



Identification: ROM-2015-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 12.11.2014 / **e)** 669/2014 / **f)** Decision on the exception of unconstitutionality of the provisions of Article 9.1 and 9.2 of Education Law no. 84/1995, Article 18.1 and 18.2 of Law on National Education no. 1/2011, as well as the provisions of Article 61.3 of the Law no. 47/1992 on the organisation and operation of the Constitutional Court / **g)** *Monitorul Oficial al României* (Official Gazette), 59, 23.01.2015 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Education, compulsory / Education, duty of the State / Religion, sensibility, protection / Religion, state.

Headnotes:

In adopting its regulations on education, the legislator must take into account that the Constitution guarantees the right to religious education and does not place any obligation on students to attend Religion classes. In this respect, it should be a person's free choice to attend Religion classes, and the person's tacit consent should not be presumed, nor should express refusal to attend be required. In no case shall a person be put *ab initio* in a position to defend or protect his or her freedom of conscience, as such an approach would be contrary to the negative obligation of the State, which precludes the State from requiring persons to study Religion. Thus, a positive obligation rests on the State to ensure the necessary above-mentioned environment shall be applicable solely on foot of the expression of the student's willingness to study the specific precepts of a certain religion, if the student is an adult, or if the student is a minor, his or her parents or legal guardian.

Summary:

I. A challenge was brought to the Constitutional Court claiming the unconstitutionality of Articles 9.1 and 9.2 of Education Law no. 84/1995, as subsequently amended and supplemented, until the entry into force of the new Law (i.e. Law no. 1/2011), and of provisions of Article 18.1 and 18.2 of the Law on National Education no. 1/2011. These impugned laws (hereinafter, the "1995 Law" and the "2011 Law") regulate, on the one hand, the inclusion of Religion in the curriculum frameworks of primary, secondary and vocational education, as a school subject, part of the core curriculum and, on the other hand, the student's choice not to attend Religion classes, provided he or she expresses this choice in writing, if the student is an adult, or by his or her parent or legal guardian, if the student is a minor.

As grounds for the exception of unconstitutionality, it was claimed that the provisions of the 1995 Law, superseded by the 2011 Law, are unconstitutional given that children are obliged to attend Religion classes, which violates their and their parents' right to freedom of thought, conscience and religion. Although it was acknowledged that the impugned legal provisions allow parents to request in writing that the student shall not attend these classes, this regulation does not cancel the binding requirement to study the subject of Religion, as the child must study this subject until a written request for his or her exclusion from Religion classes is made.

In support of the exception, the following constitutional provisions were invoked: Article 1.3 of the Constitution (the rule of law); Article 4.2 of the Constitution (the equality of citizens); Article 11 of the Constitution (international law and domestic law); Article 15.1 of the Constitution (the universality of rights and freedoms of citizens); Article 16.1 of the Constitution (equal rights); Article 20 of the Constitution (international human rights treaties); Article 21.3 of the Constitution (right to a fair trial); Article 23 of the Constitution (individual liberty); Article 29.1, 29.5 and 29.6 of the Constitution (freedom of conscience); as well as Article 6 ECHR (right to a fair trial); Article 9 ECHR (freedom of thought, conscience and religion); and Article 14 ECHR (prohibition of discrimination).

In addition, a number of international instruments were invoked: all of the European Convention on Human Rights; Article 2 Protocol 1 ECHR (right to education); Article 1 Protocol 12 ECHR (general prohibition of discrimination); Articles 18 and 26 of the International Covenant on Civil and Political Rights (ICCPR) (freedom of thought, conscience and religion, and the right to equality respectively); Article 13.3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (freedom of parents to choose their child's school); Article 2 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (prohibition of discrimination); and Articles 1, 3.d and 5.1.b of Section 2 of the Convention against Discrimination in Education, ratified by Decree no. 149 of 2 April 1964 (concerning discrimination and the liberty of parents to choose their child's school).

II. Having examined the exception of unconstitutionality, the Court held as follows.

First, as concerns the exception of unconstitutionality of the provisions of Article 9.1 and 9.2 of the 1995 Law, and of Article 18.1 and 18.2 of the 2011 Law, the Court found that the inclusion of Religion as a

school subject and part of the core curriculum does not represent in itself a problem likely to generate non-compliance with the freedom of conscience, as long as the impugned provisions do not give rise to obligations to attend courses covering a particular religion, contrary to one's beliefs.

Thus, the Court found that the provisions of Article 9.1 of the 1995 Law and of Article 18.1 of the 2011 Law reflect the constitutional provisions of Article 32.7, which states: "The State shall ensure freedom of religious education, subject to the specific requirements for each religious cult. In public schools, religious education is organised and guaranteed by law." The mandatory nature of Religion is enforceable only against the State, which shall organise religious education by making provision for the teaching of Religion for the 18 religions recognised under Romanian law. Article 9.2 of the 1995 Law and Article 18.2 of the 2011 Law render Religion classes optional by giving the student the right to choose not to attend these classes, whether through the direct choice of the adult student, or for a minor student, through his or her parents or legal guardian. Consequently, the Court rejected as unfounded the exception of unconstitutionality of Article 9.1 and 9.2 second and third sentence of the 1995 Law, as well as the provisions of Article 18.1 and 18.2 second and third sentence of the 2011 Law.

Second, the Court nevertheless found that the way in which the legislator has regulated the educational provision of religious education (by Article 9.2 first sentence of the 1995 Law and by Article 18.2 first sentence of the 2011 Law) is likely to affect the freedom of conscience. Under Article 29.1 of the Constitution, the individual enjoys unrestricted freedom of thought, conscience and religious belief, a situation that gives consistency to the free development of human personality as a supreme value guaranteed by Article 1.3 of the Basic Law. Likewise, according to Article 32.5 of the Constitution, "Education at all levels is conducted in public, private or confessional schools, according to the law."

This means that religious education aims at both educational institutions organised by religious bodies for training their own staff according to the law, and religious education conducted in public schools so as to be in compliance with the freedom of conscience, as well as with the right of parents or legal guardians to ensure education to their minor students according to their own convictions. This entire framework is established to protect each person's convictions. Furthermore, in accordance with the last sentence of Article 29.1 of the Constitution, "No one may be compelled to embrace an opinion or religion contrary to his own convictions". In addition, Article 29.6 of

the Constitution states: "Parents or legal tutors are entitled to ensure for children under their responsibility the upbringing which accords with their own convictions." The Court found that the Constitution guarantees parents the right to the care and education of their children and includes the right to religious education.

Therefore, the right of parents to pass on to their children their own convictions related to religious issues is essential. Likewise, parents are entitled to keep their children away from religious belief. It results that, on the one hand, there is a negative obligation of the State not to interfere in forming or joining a religious conviction or belief and, on the other hand, there is a positive obligation to create the necessary legal and institutional environment to exercise the rights provided for in Articles 29 and 32 of the Constitution, to the extent that a person shows willingness to study or receive the teachings of a particular religion or religious belief. In no case shall a person be put *ab initio* in a position to defend or protect his or her freedom of conscience, as such an approach would be contrary to the negative obligation of the State, which, under this obligation, cannot require any person to study Religion.

Thus, the positive obligation of the State to ensure the necessary above-mentioned environment shall intervene only after the expression of the adult student's willingness, or in the case of a minor student, expression of willingness by his or her parents or legal guardian, to study the specific precepts of a certain religion. In adopting its regulations on education, the legislator must take into account that Article 29.6 of the Constitution guarantees the right to religious education and not the obligation to attend Religion classes. In this respect, it should be the individual's free choice to attend the subject of Religion and their tacit consent should not be presumed, nor should express refusal to attend Religion classes be required.

To be fully observed, the freedom of conscience and religion, which includes the freedom to belong or not to any religion, enshrined in Article 29.1, 29.2 and 29.6 of the Constitution, requires that the legislator must remain neutral and impartial. This obligation is carried out when the State ensures compliance with these freedoms, giving the parents and legal guardians of minor students, as well as adult students, the possibility of attending religious classes if they choose to do so.

That being so, by majority vote, the Court allowed the exception of unconstitutionality and found that the provisions of Article 9.2 first sentence of Education Law no. 84/1995 and of Article 18.2 first

sentence of Law on National Education no. 1/2011 are unconstitutional.

Languages:

Romanian.



Identification: ROM-2015-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 21.01.2015 / **e)** 17/2015 / **f)** Decision on the objection of unconstitutionality against the provisions of the Law on cybersecurity of Romania / **g)** *Monitorul Oficial al României* (Official Gazette), 79, 30.01.2015 / **h)** CODICES (Romanian, English).

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.10. General Principles – **Certainty of the law.**
 3.12. General Principles – **Clarity and precision of legal provisions.**
 3.13. General Principles – **Legality.**
 5.3.32.1. Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**
 5.3.36.3. Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications.**

Keywords of the alphabetical index:

Law, precision, need / Legislative omission / Legislator, omission.

Headnotes:

A new Law on cybersecurity is unconstitutional in three aspects. First, the failure to comply with the legal obligation that requires approval from the Supreme Council for National Defence for drafts of regulatory acts initiated or issued by the Government on national security violates the principle of legality and the constitutional powers of the Supreme Council for National Defence. Second, in order to ensure a climate of order, governed by the principles of the rule of law and democracy, the establishment or identification of a body responsible for coordinating security issues of cyber systems and networks, as well as those related to information, acting as a

contact point for relations with similar bodies abroad, must be a civilian body that functions entirely on the basis of democratic oversight and not an authority operating in the field of intelligence, law enforcement or defence or as a structure of anybody working in these fields (Romanian Intelligence Service). Third, the legislator must adopt rules that meet the requirements of clarity, precision and foreseeability.

Summary:

I. An application was brought to the Constitutional Court claiming the unconstitutionality of provisions of the draft Law on cybersecurity. It was argued that the legal provisions are contrary to Article 1.3 and 1.4 of the Constitution regarding the rule of law and the obligation to observe the Constitution and the laws. It was contended that the impugned law introduces confusion and conditionality for holders of cyber infrastructures, which are likely to restrict the fundamental rights and freedoms of citizens. It was also contended that the legal provisions do not comply with Article 6 of Law no. 24/2000 on the rules of legislative technique for drafting normative acts, and consequently, they infringe the principle of legality, which is essential for the proper functioning of the rule of law.

Furthermore, the applicants argued that the Law had fundamental conceptual problems, as it proposes a series of measures having a limiting effect on the right provided by Article 26.1 of the Constitution on personal, family and private life, and clearly infringes proposed European Union legislation concerning the security of information in the digital environment. The rights and freedoms of citizens are restricted by enabling access to a cyber infrastructure and to the data contained therein, based on a simple reasoned request from the institutions set forth in the Law, addressed to the infrastructure owners, without the prior approval of a judge. This results in a violation of the constitutional provisions contained in Article 23.1 on the inviolability of personal freedom and safety, as well as in Article 28 on the secrecy of correspondence.

Likewise, under the provisions of Article 10 of the Law, the Romanian Intelligence Service is appointed as national authority in the field of cybersecurity, in which capacity it ensures the technical coordination, organisation and execution of activities related to Romania's cybersecurity. The European Union (EU), in the draft NIS (Network and Information System) Directive (2013/0027 (COD), 7 February 2013), proposes that authorities dealing with cybersecurity be "civilian bodies, subject to full democratic oversight, that should not fulfil any tasks in the field of intelligence". However, in the challenged Law, the

Parliament of Romania grants unlimited and unattended access to all computer data held by persons of public and private law to institutions not fulfilling any of the above conditions.

The applicants argued that the possibility to have access, without a court order, to electronic data originating from any computer, irrespective of its owner, is an unjustified interference with the right to the protection of correspondence, i.e. with the right to privacy, as guaranteed by Articles 26 and 28 of the Constitution. They also argued that Article 148.2 of the Constitution, concerning the primacy of EU law, is infringed, given the failure to transpose correctly the EU rules in this area.

II. By majority vote, the Court allowed the objection of unconstitutionality raised and found in essence, as follows.

First, as regards the procedure for adopting the Law, the Court found that during the legislative procedure, the initiator had not complied with the legal obligation requiring that the Supreme Council for National Defence endorse any draft legislative acts initiated or issued by the Government concerning national security. Consequently, the Court noted that the legislative act was adopted in breach of the relevant provisions of Article 1.5 of the Constitution, which enshrine the principle of legality, and of Article 119 concerning the powers of the Supreme Council for National Defence.

Second, by examining the normative content of the Law, the Court noted that a novelty introduced by the impugned law, under Article 10.1, is the designation of the Romanian Intelligence Service as the national authority in the field of cybersecurity, in which capacity it ensures the organisation and implementation of activities related to the cybersecurity of Romania. To this end, the National Cybersecurity Centre (NCSC) has been set up, organised and already operates within the Romanian Intelligence Service, with specialised military staff, according to certain decisions of the Supreme Council for National Defence.

The Court turned to verifying whether or not the legislation in the field concerned is consistent with the right to personal, family and private life, with the inviolability of the secrecy of correspondence, and with the right to the protection of personal data, which should constitute fundamental guiding principles of cybersecurity policy at the national level. In doing so, the Court considered that, in order to encourage a climate of order, governed by the principles of the rule of law and democracy, the establishment or identification of a body responsible for coordinating

security issues of cyber systems and networks, as well as those related to information, acting as a contact point for relations with similar bodies abroad, must be a civilian body that functions entirely on the basis of democratic oversight. It must not be an authority operating in the field of intelligence, law enforcement or defence or a structure operating within any of these fields.

The need to designate a civilian and not a military body acting in the field of intelligence as national authority in the field of cybersecurity is justified by the need to prevent the risk of deviation from the purpose of cybersecurity legislation, in the sense of the intelligence services using the powers conferred by this law in order to obtain information and data leading to the infringement of the constitutional rights to personal, family and private life and to the secrecy of correspondence.

For these reasons, the Court found that the provisions of Article 10.1 of the Law infringe Article 1.3 and 1.5 of the Constitution concerning the rule of law and the principle of legality, as well as Articles 26 and 28 of the Constitution concerning personal, family and private life, in particular the secrecy of correspondence, due to the lack of safeguards required to guarantee these rights.

Furthermore, the Court noted that the terms used by the Law do not clearly define the scope of the rules contained in the impugned Law. The Law therefore does not have a precise and foreseeable nature, and, consequently, the provisions of Article 2 are in breach of Article 1.5 of the Constitution.

In this connection, the definition of the term “holders of cyber infrastructures” is particularly important because inclusion in this category involves, for the persons concerned, the obligation to comply with the law, on the one hand, and the justification, for the authorities designated by law with powers in the area of cybersecurity to order specific measures in their regard.

Likewise, the provision under which access shall be made with regard to “the data held, relevant in the context of the request” allows the interpretation that the authorities designated by law must be allowed access to any data stored on these cyber infrastructures, if the authorities deem those data to be relevant. One can thus note the unforeseeable nature of the rule; both in terms of the type of data accessed and in terms of assessment of the relevance of the data requested, likely to allow a discretionary application by the authorities listed in the provision.

The Court also found that the impugned law merely specifies which authorities may request access to data held, relevant in the context of the request, without regulating the manner in which the effective access to such data is accomplished. As a result, people whose data have been retained do not benefit from sufficient safeguards in order to ensure their protection against abuses and against any unlawful access and use of such data. The Law does not provide for objective criteria to limit to a minimum the number of persons who have access, and who can subsequently use, the data retained and it does not establish that access by national authorities to the data stores is conditional upon prior review carried out by a court, thus limiting this access and their use to what is strictly necessary for achieving the objective pursued. The legal safeguards on the actual use of the data retained are not sufficient and appropriate to remove the fear that personal rights, of a personal nature, are infringed upon, so that the expression thereof can take place in an acceptable manner. Requests for access to the data retained for use thereof as provided by law, filed by State bodies designated as cybersecurity authorities for their fields of activity, are not subject to authorisation or approval by the court, thereby discarding the guarantee of effective protection of the data retained against the risk of abuse and against any unlawful access and use of such data. This situation is likely to constitute an interference with the fundamental rights to personal, family and private life and to the secrecy of correspondence, and is thus contrary to the constitutional provisions guaranteeing and protecting these rights.

Further, in its analysis, the Court considers that the method for determining the criteria for conducting the selection of cyber infrastructures of national interest (hereinafter, “CINI”) and, hence, of CINI holders does not comply with the requirements of transparency, certainty and foreseeability. Thus, the reference to infra-legal legislation (i.e. Government Decisions, or legislative acts characterised by a high degree of instability) for governing the criteria according to which obligations in matters of national security become applicable, violates the constitutional principle of legality enshrined in Article 1.5 of the Constitution. Criteria for the selection of CINI and the modality in which they are established must be provided for by law and the primary regulatory legislative act should contain a list as exhaustive as possible of areas in which the legal provisions are deemed applicable.

Furthermore, the Court considered that the obligations arising from the Law on the cybersecurity of Romania must be applicable solely to legal persons of public or private law, holding or having in

their responsibility a CINI (also including, under the law, public administrations), as only situations of risk to an infrastructure of national interest may have implications for the security of Romania. However, the legal provisions in the wording subject to constitutional review are very general, the obligations being aimed at all holders of cyber infrastructures, consisting of computer systems, related applications, networks and electronic communications services regardless of their importance, which may concern the national interest or merely the interest of a group or of an individual. For the above reasons, the Court considered that the provisions of Articles 19.1 and 18.3 of the Law on the cybersecurity of Romania infringe the provisions of Article 1.5 of the Constitution, since they do not meet the requirements of foreseeability, stability and certainty.

Next, the Court noted that the provisions of Articles 20 and 21.2 of the impugned law establish the obligations incumbent on legal persons of public or private law, those in ownership of or responsible for a CINI. These include the obligation to carry out annual cybersecurity audits or to allow such audits upon reasoned request by the competent authorities in accordance with this Law, to set up structures or appoint persons responsible for the prevention, detection and response to cyber incidents, to immediately notify, where appropriate, the National Cybersecurity Centre (NCSC), the Centre for Response to Security Incidents (CERT-RO), National Authority for Management and Regulation in Communications (ANCOM) or the authorities designated, in accordance with the law, in the field of cybersecurity on cyber incidents and risks, which, by their effect, can be detrimental in any way to users or beneficiaries of their services.

In accordance with Article 20.1.c of the Law, legal persons of public or private law, holding or being responsible for a CINI, must allow cybersecurity audits upon receipt of a reasoned request by the competent authorities. Audits are conducted by the Romanian Intelligence Service or by cybersecurity service providers. In other words, as the Romanian Intelligence Service is the national authority in the field of cybersecurity, and therefore the competent authority under the law to request legal persons of public or private law who own or are responsible for CINIs, to conduct cybersecurity audits, there is a real possibility that this institution could be concomitantly in the position of the authority requesting the audit, the authority performing the audit, and the authority to which the result of the audit is communicated and, finally, in the position of the authority that ascertains a possible offence, according to Article 28.e of the Law, and applies a penalty regarding an offence, according to Article 30.c of the Law.

Such a situation is unacceptable in a society governed by the rule of law. The legal provisions are likely to generate a discretionary, even abusive application of the law, as it is impermissible to have all the tasks in this field concentrated within a single institution. The Court considered that the audit must be carried out by internal auditors or by a qualified independent body that would verify the compliance of cybersecurity policy implementation at the level of cyber infrastructures and send the result of the assessment to the competent authority or to the single point of contact.

From its analysis of the Law, the Court held that the Law does not regulate the right of subjects of the Law, on whom obligations and responsibilities have been imposed, to challenge in court the administrative acts concluded with respect to the fulfilment of such obligations, and which are likely to adversely affect a right or a legitimate interest. The lack of any provision in the Law that would ensure the possibility, for a person whose rights, freedoms or legitimate interests have been affected by acts or facts that are based on the provisions of the Law on the cybersecurity of Romania, to address themselves to an independent and impartial court is contrary to Articles 1.3, 1.5 and 21 of the Constitution (concerning the democratic nature of the State, rule of law and free access to the courts) and Article 6 ECHR concerning the right to a fair trial.

In the same way, the choice of the legislator to confer jurisdiction for monitoring and controlling the implementation of legal provisions on the Chamber of Deputies, the Senate, the Presidential Administration, the General Secretariat of the Government and the Supreme Council for National Defence, whereas Article 10.1 and 10.2 of the impugned law lays down the competent authorities in the field of cybersecurity concerning their own cyber infrastructures or of those under their responsibility, without including in this category the authorities listed above, which are mentioned throughout the entire legislative act as legal persons of public law, and which must comply with the obligations set by law, indicates inconsistency and generates confusion as to the legal regime applicable to these institutions. Thus, by virtue of the impugned law, the legislative authority, the Presidential Administration, the Government or the Supreme Council for National Defence, authorities of constitutional status, whose powers are specifically provided for in the Constitution, are subrogated to the tasks that, according to Government Ordinance no. 2/2001 on the legal regime of infringements (which is, moreover, referred to in the impugned law), lie with central or local government bodies.

Beyond the above reasons for finding provisions of the Law to be unconstitutional, the Court noted that the entire legislative act is marked by flaws in terms of compliance with the rules of legislative technique, clarity, coherence, foreseeability, in a manner likely to entail a breach of the principle of legality enshrined in Article 1.5 of the Constitution. The Law makes references, in several cases, to the regulation of aspects which are essential in the field governed by secondary legislation, such as Government decisions, methodological standards, orders or decisions or “mutually agreed procedures”.

For all of the foregoing considerations, by majority vote, the Court held that the Law on the cybersecurity of Romania is vitiated in its entirety, so that the objection of unconstitutionality is to be accepted and the legislative act is to be declared unconstitutional in its entirety. In accordance with its case-law, the Court noted that once the Law is declared unconstitutional in its entirety, such a decision has a final effect on the legislative act, i.e. the legislative process in respect of that provision ceases as of right.

Cross-references:

Court of Justice of the European Union:

- C-293/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others*;
- C-594/12, *Kärntner Landesregierung and Others*, 08.04.2014.

European Court of Human Rights:

- *Golder v. United Kingdom*, no. 4451/70, paragraph 36, 21.02.1975;
- *Dokic v. Serbia*, no. 16702/08, paragraph 35, 20.12.2011;
- *Lungoci v. Romania*, no. 62710/00, paragraph 36, 26.01.2006;
- *Rotaru v. Romania*, no. 28341/95, paragraph 52, 04.05.2000, *Reports of Judgments and Decisions* 2000-V;
- *Sissanis v. Romania*, no. 23468/02, paragraph 66, 25.01.2007;
- *Anghel v. Romania*, no. 28183/01, paragraph 68, 04.10.2007.

Languages:

Romanian.



Identification: ROM-2016-1-001

a) Romania / b) Constitutional Court / c) / d) 20.01.2016 / e) 22/2016 / f) Decision on the objection of unconstitutionality against the provisions of the Law supplementing Law no. 393/2004 on the Statute of local elected representatives / g) *Monitorul Oficial al României* (Official Gazette), 160, 02.03.2016 / h) CODICES (Romanian).

Keywords of the systematic thesaurus:

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

3.21. General Principles – **Equality.**

3.23. General Principles – **Equity.**

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

5.2.2. Fundamental Rights – Equality – **Criteria of distinction.**

Keywords of the alphabetical index:

Justice, principle / Mayor, remuneration.

Headnotes:

A provision which provides for the payment of old-age benefits in respect of mayors, deputy mayors, presidents and vice-presidents of county councils but not of other local elected officials, does not meet the requirements of clarity, precision and foreseeability in terms of legal nature of such benefits, it creates an unacceptable unequal legal treatment between local elected representatives, and also calls into question the observance by the legislator of the constitutional principle of justice.

Summary:

I. On the basis of Article 146.a of the Constitution and of Article 15.1 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the Romanian Government referred to the Constitutional Court an objection of unconstitutionality regarding the provisions of the Law supplementing Law no. 393/2004 on the Statute of local elected representatives. In essence, the legislative proposal aimed to establish some old-age benefits (hereinafter, “allowance”) in respect of mayors, deputy mayors, presidents and vice-presidents of county councils. To qualify for this allowance, the right holder must fulfil three conditions: standard pension age; at least one full mandate, and he or she must not have been irrevocably sentenced for committing, as mayor, vice-mayor, president or vice-presidents of county councils, corruption offences from amongst those

provided for in Chapter I – Corruption Offences under Title V – Corruption and Service Offences included in the special Section of Law no. 286/2009 on the Criminal Code, with subsequent amendments and supplementations. As grounds for the objection of unconstitutionality, it was argued that the wording of the impugned law is vague, unclear, ambiguous, imprecise and unpredictable because it does not mention the way in which the allowance is granted and it does not establish to what extent a person who has held over time two or more of the positions for which the allowance is granted is eligible for allowance for each of those positions. It was further claimed establishes a regime of privileged treatment for mayors, deputy mayors, presidents and vice-presidents of county councils which is deeply immoral, whereas persons who have been convicted for corruption offences in exercising public functions other than the four specifically listed positions will qualify for the allowance.

II. Having examined the objection of unconstitutionality, the Court found as well founded the objection based on the fact that the law is not clear, precise and predictable as regards the calculation of allowances granted to persons who held over time two or more of the positions for which the allowance is granted. Furthermore, the latter concept, as detailed in impugned law, does not fall, from a conceptual point of view, in the legislative system, nor is it defined therein. The law also does not define clearly its regulatory scope. The wording of the law does not appear to indicate whether this text relates only to mayors, deputy mayors, presidents and vice-presidents of county councils that have been democratically elected, that is, after the revolution of 22 December 1989, or does it also apply to those holding these positions without being democratically elected by citizens in the regime preceding the revolution of 22 December 1989.

The Court also noted that, under Law no. 57/1968 on the organisation and functioning of People's Councils, republished in Official Gazette no. 96 of 3 October 1980, People's Councils were composed of members elected by universal, equal, direct and secret ballot in electoral constituencies, one Deputy for each constituency, from amongst citizens with voting rights, who had reached the age of 23, without distinction based on nationality, race, gender or religion (Articles 1 and 43); People's Councils were either county councils or Bucharest councils, with a term of 5 years, or of the cities, Bucharest sectors, towns, communes, with a terms of 2 years and a half (Article 44.1), whilst the chairs of the committees and of executive offices of the People's Councils of cities, towns and communes were at the same time mayors of such cities, towns and communes (Article 56).

However, all these aspects demonstrate only the existence of administrative structures elected for managing local issues, which had no democratic legitimacy. These structures were not attached to democratic values, aiming at "strengthening the Socialist system, enshrining socialism principles in all localities of the country" (Article 1.3), where their activity was taking place "under the direction of the Romanian Communist Party, the leading political force of the entire society" (Article 2). That being so, the Court found that there was a terminological equivalence, but not also an equivalence in terms of democratic legitimacy and powers, between the position of a mayor before and after 1989, whilst, by contrast, the positions of president, first vice-president or vice-president of the Executive Board of County People's Council or first vice-president or vice-president of the Executive Board/ Committee of the People's Council at cities, towns or communes level, as the case may be, have no equivalence in terminology or in terms of democratic legitimacy or powers with the position of the president/vice-president of the county council or with the position of deputy mayor. Moreover, it is questionable whether a retirement allowance may be paid to People's Board members by the Romanian State by reason of the principles governing the Constitution of 1991, whereas that would mean to disregard "justice" as the supreme value of the Romanian State laid down in Article 1.3 of the Constitution.

Regarding the unconstitutionality issues with regard to Article 16.1 of the Constitution which enshrines the principle of equal treatment, the Court held that, as regards the category of persons elected by the electorate, namely the President of Romania, the parliamentarians and the local elected officials, it is the exclusive right of the legislator to grant such allowances, as it has the power, pursuant to Article 61.1 of the Constitution, to establish such allowances only in respect of one or other of the three subcategories listed. However, when deciding that the allowance is granted to a certain subcategory, the legislator may not make any distinction within the respective subcategory as regards the entitlement of one or the other of those included in the subcategory concerned to such allowance, but in breach of Article 16.1 of the Constitution. Thus, the Court found that that by granting that allowance only to local elected representatives (mayors, deputy mayors, presidents and vice-presidents of county councils), the legislator has infringed Article 16.1 of the Constitution, setting a differentiated legal treatment within the same legal subcategory.

The Court further found that the impugned law has increased the expenditure foreseen in the State Budget Law for 2016, and that would have not caused any issue of constitutionality if the expendi-

ture set forth in the examined law had been included in the State budget for 2016. But, the law was adopted after the enactment of the State Budget Law, and no correlation had been made between the provisions of the two laws. The indication in the examined law of the fact that “the old-age benefits shall be granted from the State budget, through the budget of the Ministry of Regional Development and Public Administration” is only a formal indication of the source of funding, which, however, does not meet the requirements of the constitutional text of reference, namely those of Article 138.5 of the Constitution, which requires that the indicated source of funding be effectively able to cover the expenditure under the terms of the annual budget law.

In conclusion, the Court found that law subject to constitutional review violated Article 1.5 of the Constitution, since the rules therein did not fulfil the requirements of clarity, precision and foreseeability in terms of the legal nature of the “old-age benefits”, the scope of its beneficiaries and the method for determining and calculating the allowance. Moreover, the law was contrary to the constitutional provisions contained in Articles 16.1 and 138.5, whereas, on the one hand, it created an unacceptable unequal legal treatment between local elected representatives and, on the other hand, it established the budgetary expenditure without establishing an actual funding source, contrary to the requirements of certainty and budgetary predictability inherent in the regulatory content of the constitutional text referred to.

III. The Court unanimously upheld the objection of unconstitutionality raised and stated that the provisions of the provisions of the Law supplementing Law no. 393/2004 on the Statute of local elected representatives are unconstitutional.

Languages:

Romanian.



Identification: ROM-2016-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.02.2016 / **e)** 51/2016 / **f)** Decision on the exception of unconstitutionality of the provisions of Article 142.1 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 190, 14.03.2016 / **h)** CODICES (Romanian).

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

Keywords of the alphabetical index:

Law, precision.

Headnotes:

Taking into account the intrusiveness of technical surveillance measures, it is imperative that they are carried out on the basis of a clear legislative framework that is precise and foreseeable for persons subjected to such measures, similar to criminal prosecution bodies and the courts. Therefore such measure can be carried out by the prosecutor and criminal investigation bodies and by trained officers working in the police but not by “other specialised State organs” provided for in Article 142.1 of the Code of Criminal Procedure. Attributing these powers also to “other specialised State organs” is unconstitutional, in that it lacks sufficient clarity, precision and foreseeability so as to allow legal subjects to understand which of these organs are empowered to carry out such measures with the consequent violation of the fundamental rights provided by Article 26 of the Constitution (personal, family and private life) and Article 28 of the Constitution (secrecy of correspondence) and the provisions of Article 1.3 of the Constitution according to which Romania is a State governed by the rule of law in which human rights shall be guaranteed.

Summary:

I. On the basis of Article 146.d of the Constitution, the Constitutional Court has been requested to assess the constitutionality of the provisions of Article 142.1 of the Code of Criminal Procedure, which read as follows:

“The prosecutor shall enforce an electronic surveillance measure or may order that this be enforced by the criminal investigation body or trained personnel working in the police, or by other specialised state bodies.”

It is argued that the impugned text violates the constitutional provisions of Article 1.5 of the Constitution on the Romanian State, Article 20 of the

Constitution relating to international treaties on human rights, Article 21 of the Constitution on free access to the courts, Article 53 of the Constitution on the restriction of certain rights or freedoms, as well as the provisions of Articles 6 and 8 ECHR concerning the right to a fair trial, and the right to respect for private and family life. It has been shown that the impugned phrase has enabled the Romanian Intelligence Service, which is an authority with responsibilities only in the area of national security and not in the area of prosecution, to carry out this activity to enforce the technical surveillance warrant.

II. Having examined the exception of unconstitutionality, the Court first established the legal framework applicable to special methods of surveillance, the conditions in which the Judge for Rights and Liberties orders the technical surveillance, the offences for which technical surveillance can be ordered, the procedure for issuing the technical surveillance warrant, and the enforcement of the technical surveillance warrant.

The Court concluded that acts carried out by the State bodies under the second sentence of Article 142.1 of the Code of Criminal Procedure are part of the evidentiary process taken as the basis for reporting on technical surveillance activities, which constitutes evidence. For that reason, no agency other than criminal prosecution bodies may take part in such activities. The latter are those specifically mentioned in Article 55.1 of the Code of Criminal Procedure, namely: the prosecutor, the criminal investigation bodies of the judicial police and the special criminal investigation bodies. However, the legislator has included in Article 142.1 of the Code of Criminal Procedure, besides the prosecutor, also the criminal investigation body and the trained personnel working in the police and in other specialised State bodies.

These specialised State bodies have not been defined elsewhere in either explicit or indirect manner in the Code of Criminal Procedure. Likewise, the criticised norm does not provide for a specific scope to their activity, although there are numerous specialised bodies and agencies in Romania whose work is carried out subject to special regulations. And so, apart from the Romanian Intelligence Service to which the authors of the exception refer and whose powers, according to Articles 1 and 2 of Law no. 14/1992 on the organisation and functioning of the Romanian Intelligence Service, published in the Official Gazette of Romania, Part I, no. 33 of 3 March 1992, and Articles 6 and 8 of Law no. 51/1991 concerning national security of Romania, republished in the Official Gazette of Romania, Part I, no. 190 of 18 March 2014, only concern national security,

excluding those of criminal investigation, as established under Article 13 of Law no. 14/1992, there are also other agencies having responsibilities in the area of national security, as well as a variety of specialised State bodies with responsibilities in various other fields such as, by way of example, the National Environmental Guard, the Forest Guards, the National Authority for Consumer Protection, the State Inspectorate in Constructions, the Competition Council, or the Financial Surveillance Authority, none of which has any duties related to criminal investigation. In light of these arguments, the Court holds that the phrase “or other specialised State organs” appears to lack sufficient clarity, precision and foreseeability as to allow legal subjects to understand which of these organs are empowered to carry out measures with so high a degree of intrusion into the private lives of individuals.

The Court further finds that no regulation under the national legislation in force, except for Article 142.1 of the Code of Criminal Procedure, does not contain any rule whatsoever affording competencies to some other State body, outside the field of criminal prosecution, to carry out interceptions and to enforce a technical surveillance warrant, respectively. Starting from the particularities of the instant case under review, the Court stated that regulation in this area is only possible by statutory law and not by lower ranking regulations which are adopted by administrative organs instead of the legislative authority, and are characterised by a higher degree of instability or inaccessibility.

Taking into account these arguments and also the intrusiveness of the technical surveillance measures, the Court found that it is imperative to have them carried out on the basis of a clear legislative framework that is precise and foreseeable for the person who is subject to this measure just like for the criminal prosecution bodies and the courts. Otherwise, it would lead to the possibility of discretionary action in violation of certain fundamental rights which are essential in a State governed by the rule of law: the respect for personal, family and private life, and the secrecy of correspondence. It is widely accepted that the rights set forth in Articles 26 and 28 of the Constitution are not absolute rights, yet limitation of those rights must be in compliance with Article 1.5 of the Constitution, which requires a high degree of precision in the terms and concepts used, given the nature of the fundamental rights affected by the limitation. Consequently, the constitutional standards of protection for the personal, family and private life and for the secrecy of correspondence require that such limitations be achieved through a regulatory framework that determines in a clear, precise and foreseeable manner which bodies shall

be authorised to carry out operations that interfere with the sphere of constitutionally protected rights.

The Court therefore held that the legislator's choice is justified insofar as it concerns the technical surveillance warrant being enforced by the prosecutor and criminal investigation bodies, which are judicial bodies according to Article 30 of the Code of Criminal Procedure, and by trained officers working in the police, since these may have received the assent to act as judicial police officers subject to Article 55.5 of the Code of Criminal Procedure. Nevertheless, this option is not justified where it relates to the phrase "other specialised State organs" included under Article 142.1 of the Code of Criminal Procedure, without further specification anywhere in the Code of Criminal Procedure or other special laws.

For all these reasons, the Court found unconstitutional the phrase "or other specialised State organs" contained in the provisions of Article 142.1 of the Code of Criminal Procedure in relation to the provisions of Article 1.3 in terms of the rule of law, i.e. its component relating to the obligation to ensure the citizens' rights, and Article 1.5 establishing the principle of legality.

On what concerns the effects of this decision, the Court recalls the *erga omnes* binding, non-retrospective nature of its decisions, as provided for in Article 147.4 of the Constitution. It means that, since normative acts enjoy a presumption of constitutionality throughout their period of effectiveness, this decision is not applicable in respect of the cases settled by means of a final judgement before the date of its publication, though it shall be duly applicable in cases still pending before the courts. In what concerns final judgments, this decision may serve as grounds for a judicial review under Article 453.1.f of the Code of Criminal Procedure in the instant case as well as in cases where similar exceptions of unconstitutionality have been raised before the date of its publication in the Official Gazette of Romania, Part I.

III. Two judges formulated dissenting opinions.

Languages:

Romanian.



Russia Constitutional Court

Important decisions

Identification: RUS-1998-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.11.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 29.12.1998 / **h)**.

Keywords of the systematic thesaurus:

2.1.2.1. Sources – Categories – Unwritten rules – **Constitutional custom.**

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

3.3. General Principles – **Democracy.**

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

4.4.3. Institutions – Head of State – **Powers.**

4.4.3.2. Institutions – Head of State – Powers – **Relations with the executive bodies.**

4.6.4.1. Institutions – Executive bodies – Composition – **Appointment of members.**

Keywords of the alphabetical index:

Government, head, method of appointment / Government, head, number of candidates / Parliament, dissolution / Election, free.

Headnotes:

The constitutional provision under which the State Duma can reject three candidates for the office of Prime Minister entitles the President of the Russian Federation either to put forward the same candidate two or three times or to present a fresh candidate each time. The President's right, on the one hand, to put forward candidates, and the State Duma's right, on the other, to consent to the appointment must be exercised in the light of the constitutional stipulations on the smooth functioning of the process and the interaction of the parties involved.

Summary:

The Constitutional Court heard the case concerning the interpretation of Article 111.4 of the Constitution.

The proceedings were initiated following an application by the State Duma in relation to the interpretation of the article in question.

Under Article 111.4 of the Constitution, after the State Duma thrice rejects candidates for the office of Prime Minister, the President of the Russian Federation shall appoint the Prime Minister, dissolve the State Duma and call a new election. The State Duma was seeking to establish whether the President of the Russian Federation was entitled to re-submit for the office of Prime Minister a candidate rejected by the State Duma, and to clarify the legal consequences of its rejecting the same candidate three times.

The Constitutional Court found that, in the strictest interpretation of the provision in question, the words “thrice rejects candidates for office of Prime Minister of the Russian Federation” could cover three rejections of any candidacy for the post or three rejections of individual candidates. The text of Article 111 of the Constitution did not rule out either of these interpretations.

It is clear that this Article of the Constitution, considered in conjunction with Articles 83, 84 and 103 of the Constitution, is intended to prevent conflict between the three separate branches of state power, the legislature, executive and judiciary. The Constitution stipulates methods of resolving differences between the three branches so as not to delay the formation of the government and thus impede its functioning.

The choice of candidates presented to the State Duma for the office of Prime Minister is the prerogative of the President of the Russian Federation, who has the discretion, in the unrestricted practical exercise of that prerogative, either to put forward the same candidate two or three times or to present a fresh candidate each time.

Equally, the aim of civil peace and accord, asserted in the preamble to the Constitution, requires that the organs of state power function smoothly and interact. That is also the reason that the President of the Russian Federation and the State Duma must act in concert when exercising their powers in the procedure for appointing the Prime Minister. The procedure depends upon the two parties' seeking agreement on the candidacy, either through those forms of interaction provided for in the Constitution, or by other constitutionally acceptable means that emerge from the exercise of the powers of head of government and from parliamentary practice.

In practice, the application of Article 111 of the Constitution has included approval of the first candidate proposed by the President for the office of Prime Minister, presentation of the same candidate three times, and recourse to arbitration procedures after the rejection of two candidates. However, there is nothing to prevent the development of a constitutional tradition founded on any one such variant.

Under Article 111 of the Constitution, the mandatory consequences if the State Duma thrice rejects candidates put forward by the President of the Russian Federation for the office of Prime Minister – whatever variant has been used in the presentation of the candidates – are the appointment of the Prime Minister by the President, the dissolution of the State Duma and the calling of new elections. This procedure, under constitutional law, for resolving a dispute through the mechanism of free elections reflects the basic constitutional principles of the Russian Federation, as a democratic state founded on the rule of law.

Languages:

Russian.



Identification: RUS-2000-2-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 07.06.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.06.2000 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

- 3.1. General Principles – **Sovereignty.**
- 3.6.3. General Principles – Structure of the State – **Federal State.**
- 4.8.4. Institutions – Federalism, regionalism and local self-government – **Basic principles.**
- 4.8.6.1. Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Deliberative assembly.**
- 4.8.6.2. Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Executive.**
- 4.8.8.1. Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

Keywords of the alphabetical index:

Federation, entity / Republic, within the Federation, sovereignty / Republic, autonomous, power.

Headnotes:

According to the Federal Constitution, sovereignty rests exclusively with the country's multinational people, which is the sole source of authority, and as a consequence there can be no form of state sovereignty other than the sovereignty of the Federation. The sovereignty of the Federation excludes the possibility of two tiers of sovereignty in a single system of paramount and independent state authority, and therefore precludes the sovereignty of the constituent republics of the Federation.

Summary:

The applicant, the Head of the Republic of Altai – Chairman of the Government of Altai, asked for a ruling on the constitutionality of certain articles of the Constitution of the Republic of Altai and of the Federal Act on the general principles governing the legislative, representative and executive powers of the subjects of the Federation.

The Court found that the provisions of the Altai Constitution concerning the sovereignty of the Republic of Altai were incompatible with the Federal Constitution. Sovereignty only exists at federal level and is linked to the expression of the wishes of the multinational people of Russia, which is the sole and unique source of authority in the Federation. Sovereignty is not subject to the wishes and agreement of the republics, as members of the Federation. The Republic does not have authority to grant itself powers or sovereignty. However, this does not concern all the powers of the autonomous Republic outside the limits of the Federation's jurisdiction. The Constitutional Court also declared unconstitutional the following provisions of the Altai Constitution, concerning federal authority or the shared authority of the Federation and its subjects:

- the statement that all the natural resources in the territory of Altai are the property of the Republic of Altai;
- the prohibition on storing nuclear waste and toxic materials in the Republic of Altai;
- the dismissal of the Head of the Republic of Altai, Chairman of the Government of Altai, if he or she commits a serious premeditated offence, since such a finding must be confirmed by the Supreme Court of the Republic of Altai;

- the establishment and organisation of municipal and regional courts in accordance with an act of the Republic of Altai;
- the appointment and dismissal of ministers or heads of committees by the Head of the Republic, with the agreement of the Republic's State Assembly;
- the right to dismiss the Head of the Republic, if he is shown to have lost popular confidence in a referendum or commits a serious breach of the Federal Constitution, the Constitution of the Republic of Altai, federal legislation, legislation of the Republic of Altai or the provisions of the Federal Act on the general principles governing the legislative, representative and executive powers of the subjects of the Federation relating to the dismissal of senior officials (heads of executive authorities) of subjects of the Federation before the expiry of their term of office in the event of their dismissal by the electors, because these provisions do not lay down requirements to establish strict legal grounds for dismissal.

The Court found that the provisions of the Altai Constitution are compatible with those of the Federal Constitution concerning parents' duty to ensure that their children receive a full secondary education, and with the Federal Constitution and the Federal Act on the general principles governing the legislative, representative and executive powers of the subjects of the Federation concerning the need for parliamentary consent to the appointment of heads of local offices of federal executive bodies, subject to two conditions, namely that cases where such consent is required should be specified in federal legislation and that the bodies in question should exercise joint federal and republic responsibilities.

Languages:

Russian.

*Identification:* RUS-2006-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 16.07.2006 / **e)** 7 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.06.2006 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

4.9.8.2. Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Campaign expenses.**

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

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

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

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

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

Keywords of the alphabetical index:

Electioneering, finance, limit / Election, campaign, financing, limit / Election, campaign, finance, control.

Headnotes:

Prohibiting citizens from the independent financing of electioneering is intended to ensure equality between candidates and the protection of the rights and freedoms of others, as well as transparency of the funding of elections, which is necessary for equality between candidates and the freedom of voters to form their own opinion.

Summary:

I. The Court examined the conformity with the Constitution of certain provisions of the Federal Law “On Essential Guarantees of Electoral Rights” at the request of the State Duma of the Astrakhan region. The disputed provisions stipulate that expenditure on electioneering may come only from the corresponding electoral funds.

According to the applicant, the challenged law does not enable a citizen who is not a candidate himself or does not represent a candidate or an electoral bloc to engage in electioneering and pay the corresponding expenses himself. It is claimed that freedom of thought and speech and also the right of citizens to seek and disseminate information via any legal channel would be restricted.

II. The Court noted that free elections, which reflect the true will of the people and determine the formation of elected bodies of public authority, are

closely linked to freedom of thought and speech and the right of any person to freely seek, obtain, transmit, produce and disseminate information via any legal channel, guaranteed by the Constitution, and also to freedom of mass information. In resolving conflicts of law between freedom of thought and speech on the one hand and the right to free elections on the other hand, the federal legislator must maintain a balance between these constitutionally protected values.

Information work within the electoral process entails informing voters about the candidates and electoral blocs and deadlines and procedures for carrying out electoral actions. It also involves electioneering, which is an activity aimed at encouraging voters to vote for a given candidate. The Court concluded that a restriction on information for voters and electioneering, as established by the disputed law, serves to ensure free expression of citizens' will and publicity for elections. This restriction therefore complies with the requirements of the Constitution.

In laying down the procedure for electioneering, the disputed law provided for different legal regimes for the participants: candidates and electoral blocs are entitled to create electoral funds, spend their resources on electioneering and also freely disseminate electoral material.

Citizens who are not candidates and do not represent candidates or electoral blocs are entitled to engage in electioneering in forms and using resources that do not require financial expenditure. As for citizens' participation in the financing of electioneering, this consists in the entitlement to make voluntary contributions to electoral funds, whose limits are established by law.

The differences in conditions governing electioneering, including its financing by candidates and electoral blocs on the one hand and by citizens on the other hand, are linked, according to the legislator, to the specific characteristics of the exercise of active and passive electoral rights, as well as the aims pursued. By exercising his passive electoral right, a candidate is pursuing the aim of being elected, which implies the financial expenditure necessary to run his election campaign. Exercise of the active electoral right is geared, above all, to expression of the electorate's will, which is free from unlawful pressures, including financial pressure.

Therefore, although the challenged provision represents a restriction of the forms and methods of electioneering carried out by citizens, it is intended to ensure equality between candidates and the protection of the rights and freedoms of others, including voters.

Prohibiting citizens from financing electioneering themselves, independently of election funds, is also determined by the need to ensure the transparency of funding of elections as a condition for equality between candidates and the freedom of voters to form their own opinion.

By taking into consideration the status and real possibilities of control of the financing of elections, the challenged provision pursues an aim in line with the laws, does not violate the balance of constitutionally protected values, meets the criteria of necessity in a democratic society and complies with the Constitution.

Languages:

Russian.



Identification: RUS-2007-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 05.02.2007 / **e)** 2 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 14.02.2007 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

- 1.6.2. Constitutional Justice – Effects – **Determination of effects by the court.**
- 3.10. General Principles – **Certainty of the law.**
- 3.22. General Principles – **Prohibition of arbitrariness.**
- 4.7.2. Institutions – Judicial bodies – **Procedure.**
- 5.3.13.1.2. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings.**
- 5.3.13.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.13.18. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning.**
- 5.3.14. Fundamental Rights – Civil and political rights – **Ne bis in idem.**

Keywords of the alphabetical index:

Supervisory review, scope / Supervisory review, condition / Supervisory review, time-limit / Supervisory review, party, request / Supervisory control, reasoning / Judgment, final, revision.

Headnotes:

Unlike proceedings at first instance, in which the dispute between the parties is decided directly on the merits, and appeal and cassation proceedings, in which errors made in forming a judicial decision are rectified, supervisory review of civil cases is a procedure intended solely to remedy fundamental miscarriages of justice and represents an additional level of judicial recourse, especially within a national legal system functioning on a large scale and at a number of levels.

Given the current state of development of Russia's legal system, total elimination of supervisory review, the absence of which could not be offset through the constitutional appeal procedure, would engender a legal vacuum that might lead to mass human rights violations. The solution consists in implementing a legislative reform of the supervisory review procedure in civil matters and aligning it with international standards.

Summary:

Individual citizens, legal entities and the Cabinet of Ministers of the Republic of Tatarstan sought a decision on the constitutionality of the provisions of the Code of Civil Procedure governing the supervisory review procedure. These provisions contained no concrete time limit on the admissibility of the review of enforceable decisions, made it possible to dismiss an application for review without examining it on the merits and instituted a procedure for the preliminary consideration of review applications and the cases cited. The impugned provisions also empowered the Presidents of the Supreme Court and the Regional Courts and their deputies to agree, or not, on ruling an application for supervisory review inadmissible and to take decisions concerning the citation of cases and their referral to the review authority for examination on the merits. In addition, the challenged provisions entitled the Presidents of the Supreme Court and the Regional Courts and their deputies to submit of their own initiative to the presidents of the relevant courts requests for the review of judgments. A number of applicants challenged the constitutionality of the supervisory review procedure itself, which they deemed incompatible with the state's international commitments.

Having acknowledged that the supervisory review procedure involved “a multiplicity of review authorities, the possibility of excessively lengthy appeal proceedings” and other “departures from the principle of legal certainty”, the Court nonetheless refrained from recognising that the impugned

provisions of the Code of Civil Procedure were unconstitutional. It asked the federal parliament to improve the procedure so as to bring it into conformity with the Constitution and international standards.

Pending a decision by parliament determining the procedure for examining supervisory review applications, the Court gave a constitutional and legal interpretation of all the challenged provisions, which is binding on all ordinary courts and rules out any other interpretation in applying the law.

The Court's interpretation in particular prevents a court examining an application for review to refuse arbitrarily, without giving reasons, to cite a case and refer it to the review authority.

Again according to the Court's interpretation, the fundamental miscarriages of justice constituting grounds for review are errors in the interpretation and application of substantive and procedural law such as to have influenced the outcome of a case, which, if not rectified, make it impossible to safeguard the rights at issue and the public interest.

In addition the Court ruled that the Presidents of the Supreme Court and the Regional Courts and their deputies could not, of their own initiative and without a review application being lodged, request the review of enforceable decisions. In other words, the parties concerned must appeal. Furthermore such requests must be made in accordance with the Code of Civil Procedure during the year following the entry into force of the first-instance court's judgment.

Languages:

Russian.



Identification: RUS-2010-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 26.02.2010 / **e)** 4 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 12.03.2010 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

2.2.1.5. Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments.**

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

Keywords of the alphabetical index:

Decision, judicial / Judgment, execution, law / Civil procedure.

Headnotes:

The Federal legislator must establish mechanisms under the Code of Civil Procedure to execute the decisions of the European Court of Human Rights.

Summary:

The Court was petitioned by citizens whose applications had previously been determined by judgments of the European Court of Human Rights finding a violation of Article 6 ECHR and directing the government to pay sums of money by way of just satisfaction.

The applicants subsequently applied to the domestic courts for a review of their cases pursuant to these new developments, but their applications were dismissed on the basis of Article 392 of the Code of Civil Procedure, which does not provide this possibility.

In the applicants' view, Article 15.4 of the Constitution provides that the universally recognised principles and standards of international law and the international treaties concluded by the Russian Federation form an integral part of its legal system. Moreover, they put forward the argument that the right of citizens to petition the European Court of Human Rights goes hand in hand with Russia's obligation to execute its judgments.

The payment of money by way of just satisfaction awarded by the European Court of Human Rights does not suffice to redress the wrong resulting from the violation of the rights of those concerned. Thus, the impugned judgments should also be reviewed. However, the legislation on review of judgments concedes the possibility of dismissing applications for review.

It should be noted that the Code of Criminal Procedure and the Code of Arbitration Procedure of the Russian Federation both provide for mandatory

review of domestic judgments after the European Court of Human Rights has acted, particularly when a violation of the right to a fair trial has been found. In the absence of similar provisions in the Code of Civil Procedure, judicial protection becomes ineffective, incomplete and inequitable.

The final judgments of the European Court of Human Rights are binding on Russia. The state is obliged not only to pay the victim compensation, but also to restore the situation that obtained prior to the violation of his or her rights. Absence of provisions intended to establish, under the Code of Civil Procedure, means of requesting review after the judgment of the European Court of Human Rights constitutes a *de facto* violation of Article 15.4 of the Constitution.

The Constitutional Court, in determining the constitutional purport and spirit of Article 392.2 of the Code of Civil Procedure, recognised the right of the persons concerned to apply to the courts to have the judgments of the European Court of Human Rights executed. They could thus request a review of judgments delivered in breach of their rights. Until such time as the Code of Civil Procedure was revised, the courts were therefore required, by analogy, to apply Article 311.7 of the Code of Arbitration Procedure to civil proceedings.

The Constitutional Court nevertheless held that Article 392.2 of the Code of Civil Procedure was in line with the Constitution in so far as it did not expressly forbid a court to review its decision after censure by the European Court of Human Rights.

The Constitutional Court accordingly proposed that the Federal legislator amend the Code of Civil Procedure in order to ensure uniform and appropriate protection.

Languages:

Russian.



Identification: RUS-2011-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 14.07.2011 / **e)** 16 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 165, 29.07.2011 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.1.1. Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

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

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

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

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

Keywords of the alphabetical index:

Accused / Criminal procedure / Competent court.

Headnotes:

Where family members oppose the decision to terminate proceedings on account of the death of the suspect (the accused), the prosecuting authority must continue the proceedings and forward the file to the Court. The Court must examine the entire file on the merits.

Summary:

The Constitutional Court considered two applications relating to compliance with constitutional rights and freedoms of Articles 24.4.1 and 254.1 of the Code of Criminal Procedure. They concern the termination of proceedings on account of the decease of the accused without the express consent of the family. On 14 July 2011, the Court ruled that these articles were unconstitutional.

The first application arose from a road accident in February 2010, in Moscow, when two individuals were killed: the driver of one of the vehicles involved in a head-on collision and her passenger. Criminal proceedings were initiated against the driver (under Article 264 of the Criminal Code (breach of the Code on the driving and operating of vehicles). In August 2010, the investigating authority dropped the criminal proceedings against the person under investigation on account of her death (See Article 24.4.1 of the Code of Criminal Procedure).

Her father applied to the courts to have this decision taken by the investigating authorities annulled. He requested the reopening of the criminal proceedings and asked for the matter to be examined by the Court. He argued that this was the only way to

determine the innocence of his daughter and thus restore her reputation. The Court found that the investigating authorities were entitled by law to terminate the proceedings. The Court did not grant the application and rejected the complaint.

The second applicant was the father of a deceased police officer against whom charges had been brought. Proceedings had been initiated against the latter and his colleague for abuse of power. In January 2008, the City Court terminated the proceedings against him, on account of his death. The Court held no hearing and did not seek the opinion of family members.

The father of the deceased accused asked the Court to annul this decision as his son's guilt had not been proven and asserted his right to rehabilitation. His request was dismissed.

Both applicants claimed a violation of the right to the presumption of innocence and the right to be defended in court. They argued that the fact that it was impossible for the accused's family to appeal against the decision to terminate proceedings, taken by the investigating authorities, was unconstitutional. Moreover, the impugned regulations did not provide for any involvement by family members in the judicial proceedings or for the need to take their consent into account where authorities decided to terminate proceedings because of the accused's death. They were not entitled to request continuation of the proceedings and examination of the case by a court.

The order of the investigating authorities impacts the interests of third parties (family members of the deceased persons who were accused or suspects). Consideration has to be given, for example, to the possibility of damages. At present, the family members are unable to restore the good reputation of the deceased and are not entitled to any damages occasioned by the criminal proceedings.

The Court reiterated the principle of the presumption of innocence, the principle of equality and the principle of the guarantee of judicial protection, which apply even to the deceased.

The question is whether the family of the deceased who was accused or a suspect has the right to challenge the decision of the investigating authority to terminate proceedings on account of the death of the suspect (or the accused) and to ask for the criminal investigation to be resumed and the case to be examined by a court.

The Court referred to public international law texts, such as the Universal Declaration of Human Rights and the European Convention on Human Rights (Article 6) and its already established case-law (decisions of 24 March 1999 and 27 June 2000).

The Court found that the right to be defended in court and the principle of the presumption of innocence were fundamental rights and freedoms. The Court considered Article 21.1 of the Constitution (on the dignity of the individual), Article 23.1 of the Constitution (on everyone's right to defend his or her honour and reputation), Article 46.1-46.2 of the Constitution (on everyone's right to the guarantee of judicial protection of his or rights and freedoms and on the right of appeal to a court) and Article 49 of the Constitution (on the presumption of innocence). Based on the above Articles, it determined that the possibility to take legal action, to re-establish one's rights and to confirm one's innocence must be guaranteed to all. The examination of a case without the presence of the persons concerned limited the constitutional right to judicial protection and adversely affected the nature of justice.

Moreover, the termination of the proceedings initiated against the deceased persons puts an end to verification of their guilt. In contrast, these individuals were declared guilty without judgment by the decision taken by certain bodies. The Court held that the decision to terminate the proceedings on account of the death of the suspect (the accused) was no substitute for a judgment and could not constitute an act establishing the guilt of the accused.

The fact that the family members of a deceased person could not object to the termination of criminal proceedings excessively limited the rights of the deceased to rehabilitation, dignity and good reputation. The legislature had deprived those family members of the opportunity to defend their rights, honour and reputation, and of the opportunity to request damages in connection with the criminal proceedings that had been initiated.

These restrictions on rights were not justified, violating the guarantees set out in the Constitution. Accordingly, where the family members objected to the decision to terminate proceedings on account of the death of the suspect (the accused), the prosecuting authority must continue the proceedings and forward the file to the Court. The Court must examine the whole file on the merits.

The Court declared Articles 24.4.1 and 254.1 of the Code of Criminal Procedure, which enabled proceedings to be terminated in the event of the death of the person being prosecuted without the consent of his or her family, to be unconstitutional.

It added that parliament should specify the interested parties (other than relatives), their status and the procedural forms of their participation in the proceedings.

Parliament must also provide for the forms of preliminary and judicial proceedings in the event of the death of the suspect (the accused).

Languages:

Russian.



Identification: RUS-2012-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 05.12.2012 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 292, 19.12.2012 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality**.
 5.3.20. Fundamental Rights – Civil and political rights – **Freedom of worship**.
 5.3.28. Fundamental Rights – Civil and political rights – **Freedom of assembly**.

Keywords of the alphabetical index:

Religion, activity, freedom / Religion, public gathering, local authority, approval / Religion, public gathering, public order, disturbance, danger.

Headnotes:

Application of the Law on Public Gatherings to the organisation of religious services, processions or ceremonies is consistent with the Constitution, but only where such gatherings are likely to disturb public order.

Summary:

I. The Ombudsman applied to the Constitutional Court on behalf of representatives of the “Jehovah’s Witnesses” religious organisation, who had received sanctions for organising a public gathering without the approval of the municipal authorities.

The law in force prohibits the organisation of religious services, processions or ceremonies outside places of worship without the approval of the municipal authorities. The appellant contended that this constitutes a violation of Articles 28 and 31 of the Constitution.

II. The Court held the impugned law to be constitutional, but interpreted it in a particular way. The Court held that organisers are required to inform the authorities in cases where religious ceremonies present a potential danger to public order. It ruled that arbitrary and illegal interference by the public authorities in the exercise of freedom of worship should be eliminated.

The Court held that the legislature should change the law and draw up rules taking due account of the specific characteristics of religious ceremonies.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2015-3-004

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 11.06.2015 / **e)** Uz-1696/2013 / **f)** / **g)** *Sluzbeni glasnik Republike Srbije* (Official Gazette), no. 60/2015 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Procedural rules, application.

Headnotes:

In their application of the rules of procedure, courts must avoid both excessive formalism, which would impair the fairness of the proceedings, and excessive flexibility, which would render nugatory the procedural requirements laid down in statutes. The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a barrier preventing a person from having their case determined by the competent court.

Summary:

I. The applicant, through his authorised representative, filed an enforcement motion with the Commercial Court, based on an authentic document, against an enforcement debtor, with a view to settling a monetary claim. The applicant proposed in the motion that the Commercial Court, following conducted proceedings and presentation of evidence, should rule on the matter “and enforce as follows”.

The Commercial Court dismissed the enforcement motion in its first instance ruling as irregular, on the basis that the enforcement creditor had not specified whether the enforcement was to be conducted by the court or an enforcement officer.

The Commercial Court, in the ruling under dispute, rejected the enforcement creditor’s complaint and upheld the first-instance ruling.

The applicant submitted a constitutional appeal against the Commercial Court ruling, alleging a violation of the right to a fair trial guaranteed under Article 32.1 of the Constitution.

II. The Constitutional Court noted that there are two phases of enforcement proceedings. During the first phase, the enforcement motion is accepted and decided upon and evidence is assessed (in enforcement proceedings, the court acts on the basis of submissions and other documents; a hearing is held only when it deems it appropriate). In the second phase, enforcement is conducted, either by a court, when the court will issue a court enforcement officer with an order to begin enforcement and will schedule the place, date and time of enforcement, or by an enforcement officer, who will conduct the enforcement directly.

Article 35.6 of the Law on Enforcement and Security provides that a motion to enforce must state whether physical enforcement is to be carried out by the court or by an enforcement officer. The enforcement debtor cannot choose the manner of enforcement in areas where the Law on Enforcement and Security has envisaged exclusive jurisdiction of courts or enforcement officers. Enforcement in family relations and reinstatement of employees to work falls within the exclusive jurisdiction of the courts, while the enforcement of claims based on the provision of utility and other services (such as telephone, electric power, heating, maintenance charges and parking charges) fall within the exclusive remit of the court enforcement officer.

In this case, the motion was filed on the basis of an authentic document (an invoice for the delivery of office material), which meant that the subject matter did not fall under the exclusive enforcement jurisdiction of either courts or enforcement officers. The applicant had stated in the enforcement claim that the enforcement court was to decide the claim, and subsequently conduct the enforcement. The enforcement court stated that the manner of enforcement could not be considered as having been specified, i.e. as to whether a court or an enforcement officer should carry it out.

The Constitutional Court explained that according to the case-law of the European Court of Human Rights, courts are bound to apply the rules of procedure avoiding both excessive formalism that would impair the fairness of the proceedings and excessive flexibility such as would render nugatory the

procedural requirements laid down in statutes (see *Esim v. Turkey*, no. 59601/09, 17 September 2013).

The dismissal of an enforcement motion based on an authentic document for the enforcement of which no exclusive jurisdiction has been envisaged, either by courts or enforcement officers, in which it was indicated that the enforcement court was to rule on the motion, and then enforce the ruling, cannot be described as “excessive flexibility”.

In the Constitutional Court’s opinion, dismissal of an enforcement motion based on an authentic document, in which it has been indicated that the court is to conduct enforcement as being incomplete, with a reasoning that such motion “cannot be considered specific regarding the manner of enforcement in respect of who shall enforce the ruling, a court or enforcement officer”, represents excessive formalism on the part of the enforcement court, contravening the applicant’s right to a fair trial, protected under Article 32.1 of the Constitution, and more specifically, the right to access to court.

The Constitutional Court assessed that the detrimental consequences of the violation of this right could only be removed if the Commercial Court’s ruling were annulled and it was ordered to make a fresh decision on the complaint the applicant had filed against the first-instance ruling.

Pursuant to Article 49.2 of the Law on the Constitutional Court, the Constitutional Court also resolved to publish this decision in the Official Gazette of the Republic of Serbia, in view of its wider relevance for the protection of human rights and civil freedoms, guaranteed by the Constitution.

Cross-references:

European Court of Human Rights:

- *Esim v. Turkey*, no. 59601/09, 17.09.2013.

Languages:

English, Serbian.



Slovakia Constitutional Court

Important decisions

Identification: SVK-2009-3-002

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 04.12.2007 / **e)** PL. ÚS 12/01 / **f)** / **g)** *Zbierka zákonov c. 14/2008, Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 1/2007; www.concourt.sk / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

2.3.3. Sources – Techniques of review – **Intention of the author of the enactment under review.**

2.3.6. Sources – Techniques of review – **Historical interpretation.**

3.16. General Principles – **Proportionality.**

3.19. General Principles – **Margin of appreciation.**

4.6.3.1. Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

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

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

Keywords of the alphabetical index:

Abortion-on-demand / Abortion for health reasons / Abortion, sub-law / Child, unborn, protection / Woman, pregnant, right to privacy.

Headnotes:

Abortion on demand of a pregnant woman in the first 12 weeks of pregnancy is in conformity with the right to life (including the clause stating that human life is worthy of protection even before birth) as set in the Constitution.

A regulation (e.g. Ordinance of the Ministry of Health) itself cannot state that abortion for genetic reasons is allowed up to 24 weeks of pregnancy because this issue should be covered by a law.

Summary:

I. A group of MPs filed a claim before the Constitutional Court challenging those provisions of

the Abortion Law which allowed abortion on demand in the first 12 weeks of pregnancy. They argued that those provisions meant there was no legal protection of human life during the first 12 weeks of pregnancy. They stressed the importance of the right to life and insisted on the original intent of the legislator to protect unborn life from conception onwards. Although the right to life and the right to privacy need to be balanced, and there can be exemptions to the prohibition of abortion, this is not the case regarding abortion on demand, where a woman is not obliged to prove any threat to her human rights.

The petitioners also challenged those provisions of the regulation which allowed abortion for genetic reasons up to 24 weeks of pregnancy, although the Law allowed abortion only in the first 12 weeks of pregnancy.

II. The Constitutional Court initially stated that the Slovak Republic is a state governed by the rule of law and is ideologically neutral. The Court pointed out that its role is to review the challenged Law from the constitutional point of view, not to answer a variety of non-legal questions related to abortion. After stressing the principle of unity of the Constitution, which necessitates balancing various conflicting constitutional rights, the Court noted that the Abortion Law was also related to the right to privacy, freedom of conscience and the right to health.

The Court went on to say that the required balance of constitutional rights precludes the absolute priority of a particular constitutional right over the others. In order to find the just equilibrium in this case, Parliament must establish the legal framework which protects human life before birth on the one hand, and secures the right to privacy of the woman on the other. This matter is within the powers of Parliament; however, the Court is authorized to review whether the outcome is in line with the mutual relations of the respective rights embodied in the Constitution.

The most important challenged provision, Section 4 of the Abortion Law, reads:

“A woman's pregnancy may be terminated if she demands it in writing, if the pregnancy does not exceed 12 weeks, and if her state of health does not prevent it.”

It must be stressed that the Court reviewed solely abortion-on-demand in the first 12 weeks of pregnancy, not the Abortion Law as such or other reasons for abortion.

The right to life is a crucial human right, is binding *erga omnes* and is directly applicable. It is a right that

is applied both vertically and horizontally and the state has a positive obligation to protect it. The question is therefore whether the subject of the right to life is only an already born human being, or whether it also includes unborn life.

The first sentence of Article 15.1 of the Constitution refers to, the right to life. The second sentence reads: 'Human life is worthy of protection even before birth.' (hereinafter, the “worthy of protection clause”). The Court identified two possible contradicting interpretations of the worthy of protection clause. On the one hand, this clause is legally irrelevant, and on the other it includes the subjective right to life of the unborn. The Court rejected both these interpretations. The worthy of protection clause does not include the subjective right to life for several reasons: not only is the wording different from the right to life clause in the first sentence, but moreover Article 14 of the Constitution reads that every person is entitled to his or her rights (legal capacity) leaving no doubts that every person in Article 14 of the Constitution is only a living, born person. According to Article 15.4 of the Constitution, no infringement of the rights set out in the preceding parts of Article 15 occurs if someone is deprived of life as a result of an act which is not criminal according to the law. If the worthy of protection clause were considered a subjective right and Article 15.4 of the Constitution were applied, then the rights of a woman could not be balanced against the right to life of the unborn. This could mean not only the banning of abortion on demand, but also abortion for other reasons, which were not challenged. Balancing the right to life of the unborn and the right to life of the mother could lead to strong restrictions on abortion, and if there were an attempt to leave some reasons for abortion, then different categories of the right to life could be developed which the Court found unacceptable. It is not acceptable to develop a special kind of subjective right from the worthy of protection clause, a kind of weaker' right to life. This would also breach the principle of equality.

Nevertheless, the worthy of protection clause has some legal relevance. The Court declared that the Constitution also contains objective values. The worthy of protection clause may be considered an objective value, whereby this value is less specific than basic rights, so constitutional protection is lower. According to the Court, the legislator has a wide margin of appreciation when fulfilling the worthy of protection clause. The right to privacy also includes the possibility for a woman to make decisions about her pregnancy, at least up to a particular stage of the pregnancy. The Court had to consider whether the right to privacy and the constitutional value of unborn life were properly balanced.

The Court took into consideration related international treaties and decisions of the European Court of Human Rights, Human Rights Committee and foreign courts of constitutional type. There was also a review of foreign legal regulations on abortion. The Court concluded that all those arguments merely have supportive value.

If there was no protection of the unborn life during the first trimester, when abortion-on-demand is allowed, then there would be a contradiction with the worthy of protection clause. The Court argued that this protection should be viewed from the perspective of the whole Slovakian legal order. The unborn child is protected via the special protection of pregnant women under labour and criminal law. The Court accepts the opinion that the life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. The unborn child is also protected against his or her own mother's will by the special four-step procedure including counselling at the doctor's before the abortion. The Court also stated that the period of the first trimester is constitutionally acceptable. It is not arbitrary because, on the one hand, it is not too short for pregnant women to consider abortion and thus to fulfil the aim of the Law and, on the other, it is not too long to breach the constitutional value set in the worthy of protection clause. In any case, the legislator has a wide margin of appreciation in this respect.

With respect to the contention of the petitioners that the original intention of the legislators to protect unborn life from conception onwards must be taken into account, the Court stated that the historical method of interpretation has only a supportive role. The original intent of the MPs was not decisive, but the objective text of the Constitution was.

Following this argumentation, the Court rejected the petition to abrogate the challenged provision allowing abortion-on-demand in the first trimester.

According to Section 12 of the regulation issued by the Ministry for Health, pregnancy may be terminated up to 24 weeks for genetic reasons. The petitioners also challenged this provision, because the Law allows abortion only up to 12 weeks. The Court stated that the Law allows both abortion on demand and abortion for health reasons. The Law itself does not put a time limit on abortion for health reasons. Section 12 cannot therefore be compared to the 12 week period, which is set in the Law solely for abortion-on-demand. The only question is whether the legal norm set in Section 12 could be set only in the regulation, or whether it is *praeter legem*. The Court stated that the 24-week period cannot be considered insufficiently relevant to put in the Law

and it is also not a technical question in the expert sense which usually belongs in a regulation. On the contrary, the period is very important, because it limits the right to privacy of pregnant women balanced against the worthy of protection clause.

Therefore, according to the Court, the provision breached Article 123 of the Constitution (Competence of a ministry to issue regulations) and Article 2.2 of the Constitution (Principle of legality).

Supplementary information:

Five judges wrote dissenting opinions to the first part of the decision. In a joint dissenting opinion, three judges wrote that Article 15.1 of the Constitution implies that unborn life has extraordinary constitutional value. The challenged provision itself and the rest of the legal order do not provide protection to unborn life in the first trimester. The right to life as a core constitutional value of unborn life has a quality which is not comparable with the right to privacy of a woman.

Another judge stressed that only abortion-on-demand in the first trimester was challenged, not the Abortion Law as a whole. He noted that counselling cannot be considered as part of the protection of unborn life, because women may demand abortion notwithstanding this. He considered the challenged provision as not conforming with Article 15.1 of the Constitution, because there is no legal or administrative protection of unborn life in the first trimester.

The last judge wrote that there was no difference between the protective obligations of the legislator stemming from the right to life clause and the worthy of protection clause. Human life has equal value whether unborn or born. It is not acceptable to absolutise either the right to life or the right to privacy. According to the dissenter, unborn life in the first trimester is in a vacuum from the point of view of values and the absence of regulation. The right to privacy is exclusively preferred, which is not proportionate. Although there is no textual basis in Article 15 of the Constitution, the legislator arbitrarily distinguishes between unborn life before and after the 12th week of pregnancy. Consequently there is no protection of unborn life in the first trimester.

Languages:

Slovak.



Identification: SVK-2014-3-003

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 28.10.2014 / **e)** PL. ÚS 24/14 / **f)** / **g)** / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

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

4.9.2.1. Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility**.

4.9.2.2. Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Effects**.

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

5.3.34. Fundamental Rights – Civil and political rights – **Right to marriage**.

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

Keywords of the alphabetical index:

Marriage, same-sex couple / Couple, same-sex, marriage, right / Couple, same-sex, adoption, right / Couple, same-sex, rights / Couple, same-sex, protection / Referendum, question, limit.

Headnotes:

The irrevocability of human rights means that the standard (level) of human rights as set in the constitutional text cannot be reduced. If the subject of a referendum would lead to the broadening of human rights, such a referendum would be constitutionally acceptable. If the subject of the referendum would reduce human rights to such a degree that it would jeopardise the nature of the rule of law, such a referendum would not be constitutionally acceptable.

Summary:

I. In Slovakia, a referendum may be initiated by a petition signed by at least 350,000 voters. The questions must relate to the public interest, but the subject of the referendum must not be basic rights and freedoms.

A referendum may be used to decide on crucial issues in the public interest (Article 93.2 of the Constitution). No issues of fundamental rights, freedoms, taxes, duties or national budgetary matters may be decided by a referendum (Article 93.3 of the Constitution).

The Constitutional Court may review whether the subject (question) of the referendum conforms to the Constitution on the request of the President, who announces the referendum. In 2014, 408,000 voters asked the President to announce a referendum on the following questions:

1. Do you agree that the term 'marriage' may not be used to designate any other form of cohabitation of persons other than the union between one man and one woman?
2. Do you agree that pairs or groups of persons of the same sex may not be allowed to adopt children and subsequently to bring them up?
3. Do you agree that no other form of cohabitation of persons other than marriage should be accorded the special protection, rights and obligations which are accorded solely to marriage and spouses by the legal system as at 1 March 2014 (especially recognition, registration and documentation as a union for living by public authority, or the possibility of a child's adoption by the other spouse of the child's parent)?
4. Do you agree that schools may not require children to attend lessons in the field of sexual behaviour or euthanasia, if their parents and the children themselves do not agree with the teaching content?

The President doubted whether the first question was in the public interest, because the Constitution had recently been amended in the same sense. Moreover the question relates to the right to privacy, which the President viewed from the perspective of the European Court of Human Rights case-law.

The President questioned whether the second and third questions were admissible because they related to the right to privacy (Article 19 of the Constitution) and the rights set out in Article 41.4 of the Constitution (childcare and upbringing shall be the right of parents; children shall have the right to parental care and upbringing). The President supported his arguments with the European Court of Human Rights and European Court of Justice case-law. In his view, the third question was also imprecisely formulated.

Regarding the fourth question, the President opined that it involved a narrowing of the school curriculum, which might interfere with the essence of the right to education.

So the President asked the Court to review whether the questions were in conformity with Article 93.3 in connection with Articles 1.2, 7.5, 12.2, 19.2, 41.1, 41.4, 42.1 and Article 93.2 of the Constitution.

II. The Court stressed that this was the (very) first time it had reviewed the subject of the referendum within this particular competence. It referred to its case II. ÚS 31/97 (*Bulletin* 1997/2 [SVK-1997-2-005]; binding interpretation of the Constitution) in which the Court ruled that a request to amend the Constitution may be the subject of a referendum.

Another, possibly more problematic area is that of the legal effects of a referendum, as Parliament is the sole constitution-framing and law-making body pursuant to Article 72 of the Constitution. However, the constitutional concept of a referendum supports the existence of its legal effects. The Constitution prescribes strict conditions which have to be fulfilled in order that a specific referendum firstly may be announced (Article 95.1 of the Constitution), and secondly may be valid and effective (Article 98.1 of the Constitution).

It follows that the result of a valid referendum has a high level of legitimacy, which is also confirmed by Article 99.1 and 99.2 of the Constitution (the National Council may amend or annul the result of a referendum by passing a constitutional law, but only after a period of three years has elapsed from the date of promulgation of the result, and a referendum may be repeated on the same issues at the earliest after a period of three years elapses from the date it was held).

The substantive background of the results of a referendum therefore clearly favours the existence of legal effects of a referendum, since all proposals confirmed by a successful referendum are promulgated in the Collection of Laws by the National Council in the same manner as its laws (Article 98.2 of the Constitution). With respect to possible collisions between the legal effects of a referendum and the exclusive legislative power of Parliament, the Court concluded that Article 72 of the Constitution does not preclude passing generally-binding legal regulations with the same legal force as laws or constitutional laws through referendum.

The subject of a referendum must not be basic rights and freedoms. A wider interpretation of this norm might work against the functionality (purpose) of referenda. The Court considers as basic rights and freedoms also human rights treaties, not just the Constitution. The power to review the subject of a referendum must be differentiated from the usual, abstract, judicial review of legal norms. The idea of

prohibiting referenda about human rights is rooted in the protection of individuals and prevention of the risk of totalitarianism. Some countries protect freedoms even with the “*Ewigkeitsklausel*” (prohibition to amend certain articles of the Constitution).

In the Slovak Republic, by comparison, the inalterability of constitutional provisions guaranteeing fundamental rights and freedoms is protected primarily by Article 12.1 of the Constitution (Basic rights and freedoms are irrevocable, inalienable, imprescriptible, and infeasible.), but provisions with the same purpose are undoubtedly included also in Article 93.3 of the Constitution.

For this reason, regarding its decision-making on the proposal of the President under Article 125.b of the Constitution, the Constitutional Court inclined to the interpretation according to which Article 93.3 of the Constitution prevents referenda which if successful would entail breaching of the concept of fundamental rights and freedoms through lowering the standard deriving from international as well as national law to an extent threatening the character of the state governed by the rule of law.

On the other hand, it is not possible to reject every question which might even minimally affect one or other fundamental right or freedom. Otherwise this could lead to denial of the sense and purpose of referenda themselves, which Parliament as framer of the Constitution certainly did not mean by including Article 93.3 in the Constitution.

The Constitutional Court needs to balance these two conflicting notions in its decision-making on any specific challenged referendum question, in the sense that it should examine the consequences of potential outcomes of a successful referendum for persons and entities affected by the rules resulting from such a referendum.

As Article 12 of the Constitution guarantees the irrevocability of human rights and Article 93.3 of the Constitution has a similar purpose, the Court argued that this irrevocability means that the level of human rights as set in the constitutional text cannot be reduced. This implies that if the subject of a referendum would lead to broadening of human rights, such a referendum would be constitutionally acceptable. If the subject of the referendum would reduce human rights, such a referendum would not be constitutionally acceptable.

Question 1: The Court stated that the fact that marriage had been recently defined in the Constitution was clear evidence that the question was in the public interest. Specifically, Article 41.1 of the Constitution reads:

“Marriage is a unique union between a man and a woman. The Slovak Republic comprehensively protects and fosters marriage for its own good.”

The Court added that there is no right to same-sex marriage according to the European Court of Human Rights. A positive answer to the first question in a valid referendum would strengthen the current constitutional definition of marriage. So there would not be a reduction of the human rights standard as stipulated in the Constitution or in the European Court of Human Rights standards. So Question 1 was declared acceptable.

Question 2: The European Court of Human Rights case-law states that it is a matter for the member states to determine whether they allow one member of non-married couples (whether homosexual or heterosexual) or a person in registered partnership to adopt a child of the other partner. However if they allow this for non-married heterosexual couples, then it is discrimination to completely exclude same-sex couples from adopting. The Family Code allows adoption by spouses or by a married stepparent, so adoption is in any case based on marriage, as in the European Court of Human Rights' *Gas and Dubois* case. From this point of view, the second question would not reduce the standard of the right to privacy (Article 19) in the sense intended by Article 93.3 of the Constitution. So Question 2 was declared acceptable.

Question 3: The Court opined that (nominally) this question has no gender connotation. It excludes all non-marriage cohabitations from particular “marriage” rights. These rights relate to the right to privacy. The Court realised that the legal order accords these particular rights also to other forms of cohabitation of persons (such as unmarried couples). From this point of view, the question was ambiguous. Also it might lead to reducing the standard of the right to privacy for other already-recognised forms of cohabitation of persons. So Question 3 was declared non-acceptable, i.e. not in conformity with Article 93.3 of the Constitution in connection with Article 19.2 of the Constitution.

Question 4: The Court argued that this question might produce a result leading to an acceptable balance between the interests of children on the one hand (Article 42.1 of the Constitution, whereby every person shall have the right to education) and interests of parents on the other (Article 41.4 of the

Constitution, whereby childcare and upbringing shall be the right of parents; Article 24.2 of the Constitution on religious freedom). The particular implementation of the result might raise constitutional dispute, but this would be a matter of review of ordinary laws. So Question 4 was declared acceptable.

III. There were dissenting opinions. One judge argued that the whole methodology should have been different. Instead of the prohibition of reducing the standard of rights, just the criterion of “relating to basic rights” should have been used. From this point of view, he could accept only the fourth question. The reference criterion should have been not particular constitutional articles or Strasbourg case-law, but the constitution itself, i.e. constitutionality. He also cited the decision of Italian Constitutional Court in *Corte Costituzionale*, 45/2005, *Bulletin* 2005/1 [ITA-2005-1-001].

In his dissenting opinion another judge said that he would put more stress on normative consequences of referendum. He accepted the methodology based on prohibition of non-reduction of the standard of human rights, but he suggested that this standard should contain not just human rights but also principles of anti-discrimination, state governed by the rule of law, democracy and even the natural law approach. From this point of view, he could not allow the second question either.

Supplementary information:

The President announced the referendum in line with the decision of the Constitutional Court. It was held on 7 February 2015. Participation in the referendum amounted to 21.41 % of all voters, so it was not valid. The reason is that Article 98.1 of the Constitution stipulates that the results of the referendum shall be valid provided an absolute majority of eligible voters have participated and the issue has been decided by an absolute majority of votes.

Cross-references:

European Court of Human Rights:

- *Gas and Dubois v. France*, no. 25951/07, 15.06.2012.

Constitutional Court of Italy:

- no. 45/2005, 13.01.2005, *Bulletin* 2005/1 [ITA-2005-1-001].

Languages:

Slovak.



Identification: SVK-2015-2-002

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 10.12.2014 / **e)** PL. ÚS 10/13 / **f)** Compulsory vaccination / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

3.18. General Principles – **General interest.**

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

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

5.3.4.1. Fundamental Rights – Civil and political rights – Right to physical and psychological integrity – **Scientific and medical treatment and experiments.**

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

Keywords of the alphabetical index:

Vaccination / Treatment, medical, compulsory.

Headnotes:

The importance of the protection of public health from outbreaks of infectious diseases outweighs the importance of the protection of natural persons from interference with their physical and psychological integrity as part of the right to respect for private life. The public interest in protecting public health and lives of members of society by preventing infectious diseases from spreading through compulsory vaccination must be preferred to the right of an individual to respect for private life.

Summary:

I. The case originated in two applications challenging the constitutional conformity of certain provisions of Law no. 355/2007 Coll. on protection, promotion and development of public health (hereinafter, the “Law”) and Regulation no. 585/2008 Coll. on prevention and control of infectious diseases (hereinafter, the “Regulation”), issued by the Ministry for Health.

The applications were submitted by the regional court that had been dealing with two motions to annul the decisions delivered pursuant to the challenged provisions by an administrative body, whereby fines were imposed upon the parents who failed to comply with the requirement of compulsory vaccination with respect to their children. The regional court claimed that the challenged provisions were contrary to Article 13 of the Constitution of the Slovak Republic (hereinafter, the “Constitution”), according to which duties may be imposed only by law, or on its basis and within its limits, whereas in this case the requirement of compulsory vaccination was, in the view of the applicant, imposed by the Regulation (i.e. by statutory instrument, not by law) which introduced the vaccination schedule. The regional court also claimed that compulsory vaccination itself violates the constitutional rights to life (Article 15 of the Constitution), to protection of health (Article 40 of the Constitution) and to respect for private life (Article 16 of the Constitution).

II. The Constitutional Court found that the challenged legislation was in line with Article 13 of the Constitution, since the general requirement of compulsory vaccination had been imposed upon all natural persons by the Law, and the Ministry for Health had been entitled to issue the Regulation with the vaccination schedule by the specific provisions of the Law, which were sufficiently clear and precise. Thus the Regulation had been issued on the basis and within the limits of the Law.

The Constitutional Court went on to say that vaccination was proven to reduce or even eradicate various infectious diseases, whilst the risk of its side effects was very low, and according to the Law compulsory vaccination would not be applicable in cases where any contraindications exist. The purpose of compulsory vaccination is therefore to protect health of natural persons, and consequently it cannot contravene the right to life or the right to protection of health.

However, with regard to the right to respect for private life, there was a conflict of two colliding values: the value of the protection of public health and the value of the protection of the integrity of natural persons from any unlawful interference. Compulsory vaccination (as an involuntary medical treatment) amounts to interference with the right to respect for private life, which includes a person's physical and psychological integrity. The Constitutional Court had already found that this interference was lawful (see above, paragraph 3) and it remained to be established whether it was justified.

To answer this question the Constitutional Court applied a test of proportionality which involved three steps:

- i. the test of legitimate aim/effect of interference;
- ii. the test of necessity/subsidiarity of interference; and
- iii. the test of proportionality in its strict (narrower) sense, which included firstly the test of the possibility of satisfying both colliding value concurrently and secondly Robert Alexy's Weight Formula, according to which both the intensity of interference with one value and the level of satisfaction of the other value could be given certain weights (light, moderate or serious) and it was a matter of balancing them in order to decide which value should be satisfied at the expense of the other.

The Constitutional Court concluded that the aim of compulsory vaccination (to protect public health) was legitimate and that compulsory vaccination was necessary to achieve this aim, since there is no other effective means to reduce or eradicate infectious diseases. It was evident that both of the colliding values could not be satisfied concurrently, and for that reason the Constitutional Court had to employ the Weight Formula in order to decide which value should be satisfied. The Court concluded that the intensity of interference with the right to respect for private life was moderate or serious (vaccination could have detrimental side effects, but it would not be applied in cases of contraindications and there were legal instruments to seek damages if any side effects happened to occur), whereas the satisfaction of the principle of protection of public health had a serious weight' (if compulsory vaccination were to be abolished, there would be no other means to control infectious diseases). It followed that the principle of protection of public health must be preferred to the principle of protection of the right to respect private life.

For all these reasons the Constitutional Court dismissed both of the applications.

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:

1.3.4.6.1. Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of referendums and other instruments of direct democracy – **Admissibility** .
 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**.
 4.9.2. Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
 4.9.2.2. Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Effects**.
 5.1.4. 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-1998-1-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.03.1998 / **e)** U-I-249/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), 27/98; *Odlocbe in sklepi ustavnega sodisca* (Official Digest), VII, 1998 / **h)** *Pravna Praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 1.3.5.12. Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**
- 1.3.5.13. Constitutional Justice – Jurisdiction – The subject of review – **Administrative acts.**
- 2.1.2.2. Sources – Categories – Unwritten rules – **General principles of law.**
- 3.14. General Principles – **Nullum crimen, nulla poena sine lege.**
- 4.7.11. Institutions – Judicial bodies – **Military courts.**
- 4.7.12. Institutions – Judicial bodies – **Special courts.**
- 5.3.13.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.39.3. Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Constitutional Court, decision, pre-Constitution regulation / Seizure, asset / Right to rehabilitation and compensation.

Headnotes:

The Constitutional Court does not in general have jurisdiction to decide on the constitutionality of laws, other regulations and general acts which, at the time of the independence of Slovenia, did not become a composite part of its legal order. The Court may, however, exceptionally pass judgment in such matters if it is a penal regulation which may be used under the provisions of Article 28 of the Constitution in deciding on the rights or obligations of an individual, or for other regulations which may be used in their full extent for any other specially founded reasons for deciding on rights or obligations.

The provision of Article 28 of the Confiscation Act (ZKIK), in all cases in which a declaration of a district people's council (that a specific person is a war

criminal or national enemy and has specific assets) was not based on a court sentence, was a provision of a material criminal law nature that determined by decision of an administrative organ which persons could be proclaimed war criminals and the penalty thus imposed of seizure of assets. A declaration of a district people's council was in these cases, in terms of its content, a sentence. The Constitutional Court thus has jurisdiction to review it.

The concepts “war criminal” and “national enemy”, at the time of creation of the ZKIK, were determined from Articles 13 and 14 of the Military Courts Decree, which contained the definitions of the most serious criminal offences. So the then Article 28 ZKIK was already in conflict with the basic principles which were recognised by civilised nations because it determined that, outside a criminal proceeding, that is outside a procedure in which at least the basic guarantee of a fair trial was guaranteed, individual persons could be declared war criminals or national enemies by decision of an administrative organ. The use of such a provision would not be permissible in contemporary proceedings, since it signified a serious violation of Article 23 of the Constitution.

A person entitled may, according to the provisions of the now valid Code of Criminal Procedure, demand a renewal of the procedure in which the decision was issued, which is by its legal nature a court sentence.

Summary:

The concepts “war criminal” and “national enemy” in the text of Article 28.1 ZKIK are derived from the Decree on Military Courts (UVS), Articles 13 and 14, the constitutionality of which the Court has already examined in case no. U-I-6/93, *Bulletin* 1994/2 [SLO-1994-2-008]. In that case the Court held that all elements of the provisions of the Order which were used as bare incrimination of status and did not refer to specifically defined acts of the accused were opposed to general legal principles and to the current Constitution. The lack of specificity of these provisions also served as a basis for arbitrary decisions by the courts of the time. It is clearly possible that the post-war legislator had in mind, with the use in the ZKIK of the concepts of “war criminal” and “national enemy” and the provisions disputed in the instant case, precisely the terminology of Articles 13 and 14 UVS. Under this law, military courts pronounced judgment in criminal proceedings; seizure of property was envisaged as a secondary penalty and was pronounced together with the main punishment in the criminal proceedings in which a decision was reached on the accused's guilt.

Examination of the implementation of the ZKIK shows that a declaration according to Article 28 that the person in question was a war criminal could be based on a court sentence, and that criminal proceedings may have taken place in individual cases, although court records were not preserved; and it is equally clear that in other cases property was confiscated based on a declaration, made without court proceedings having taken place, that the accused was a war criminal. This was permitted under Article 28.1 ZKIK, which allowed district councils to proclaim persons who, during the war, were “shot, killed, died or fled” to be “war criminals” and “national enemies” – which, in the criminal terminology of the time, meant persons who had been convicted of war crimes – and to seize their property. The legislator thus gave district councils authority, in cases where no criminal proceedings or judgment occurred, to determine that a specific person was guilty of a criminal act under Article 13 or 14 UVS. Thus administrative bodies could and did find persons guilty of serious crimes, and this without even the most minimal guarantees of a fair trial.

An essential part of Article 28.1 ZKIK was the legal nature of the finding that a specific person was a war criminal or national enemy who during the time of war had been shot or killed or had died or fled. At the time of passing sentence of confiscation, the court was forbidden to enter into the question of whether an individual person had really been shot, killed, died or fled, since establishing this, under the authentic interpretation of Article 28.2 ZKIK, was within the exclusive jurisdiction of the district councils. Similarly, the courts could not enter into the question of whether an individual person had really committed any kind of criminal offence which represented a war crime under the then valid legislation, and whether this person had been convicted in a criminal proceeding in which the basic guarantees of a fair trial were assured, as already then recognised by civilised nations. The courts therefore passed sentence and carried out confiscation of property even if a criminal judgement had not been passed, solely on the basis of the declaration of the district council.

This declaration was from a formal legal standpoint undoubtedly an administrative decision and was such also from a material law standpoint in all those cases in which and in so far as the finding that an individual had committed a criminal offence (was a war criminal) was the basis of the sentence. In all other cases it was possible, by this administrative decision, to declare a person a war criminal. Undoubtedly, the terms “war criminal” and “national enemy” implied persons held to have committed some criminal offence; seizure of property was considered a secondary punishment. The court sometimes executed seizure itself, and

sometimes only passed this sentence. But in order to pass a sentence of seizure under Article 28.1 ZKIK, it was necessary to consider that it was passed on persons against whom there existed an enforceable criminal judgment, which the court did not have to hand owing to the exceptional wartime conditions. Seizure itself thus represented, under Article 28.1 ZKIK, an institution of criminal law. As the applicant claimed, the administrative decision – the declaration of the district council in all cases where it was not based on a criminal law judgment – replaced, in terms of its content, such a criminal law judgment. The district councils had explicit statutory authority for this. The statutory regime thus allowed for criminal convictions to be pronounced without the necessity of first carrying out criminal proceedings which would guarantee to the individual at least the basic principles of a fair trial, already then recognised in civilised nations. The use today of such a provision – which allows for the conviction of an individual as a war criminal or national enemy without a fair trial and even without criminal charge – would be in conflict at the very least with Article 23 of the Constitution, according to which everyone has the right to have any criminal charges laid against him decided by an independent, impartial court established according to the law.

Since the declaration was of such a nature that in terms of its content it represented a sentence, then the same legal regime must apply for it as applies for a sentence. On the basis of the appeal which the Constitutional Court explicitly addressed to the legislator in the already cited decision on UVS, by the provision of Article 559 Code of Criminal Procedure (hereinafter, “ZKP”) special appeal was introduced for disputing already final decisions. The time limit for exercising such appeals has already expired. Article 416 ZKP allows for renewing regulations annulled by constitutional judgment on the basis of which a final condemnatory judgement was passed. This legal remedy is also undoubtedly a reflection of Article 28 of the Constitution, and as such is directed above all at cases of annulled criminal provisions under which criminal offences are defined. The Constitutional Court could not, however, annul the disputed provision, as it was already invalid, and so in the same way and for the same reasons as with UVS, it decided that the provision, as anti-constitutional, may not be used in procedures before State organs in the Republic of Slovenia. The effect under Article 416 ZKP of such a decision in terms of its content is the same as that of the annulment of a still valid regulation which determined punishable behaviour. Thus, in compliance with Article 416 ZKP, persons who were proclaimed war criminals and national enemies by declaration without sentence, or their legal heirs who are legally entitled to this, must be allowed to request in a retrial a change to the final

decision (that is the declaration of a district people's council which was not based on a sentence) on the basis of this decision of the Constitutional Court.

Persons who were in this way unjustly convicted have the right to moral rehabilitation, which they can achieve in a retrial under Article 416 ZKP. Similarly they also have the right for property seized to be returned to them or their legal heirs. Property in these cases, on the basis of Article 28 ZKIK, was formally (in the legal sense) seized by decision of the district court of jurisdiction, which meant in essence enforcement of the declaration. From this point of view, this decision, against which no legal remedy is any longer available, would represent in the above-mentioned cases, despite possible annulment of the declaration, a hindrance to the restitution of property to persons unjustly convicted. However, given that both in these cases and in cases in which a sentence represented the basis for seizure the decision of the district court only represented a continuation of the sentence, it actually signified rendition of a penal sanction against the individual. So in a case in which the individual achieves annulment of the sentence which was the basis for seizure of property by decision of a district court under Article 28 ZKIK, the legal basis is also created for restitution of that property under the provisions of the Punishment Enforcement Act.

Supplementary information:

Concurring separate opinion of a constitutional judge.

Dissenting separate opinion of a constitutional judge.

Legal norms referred to:

- Articles 23, 28, 30 of the Constitution;
- Articles 367, 411, 416, 421, 559 of the Code of Criminal Procedure (ZKP);
- Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (UZITUL);
- Articles 23, 26, 40.1 of the Constitutional Court Act (ZUstS).

Cross-references:

Constitutional Court:

- no. U-I-6/93, 13.01.1994 (Dolus III, 33, Bulletin 1994/2, 159, [SLO-1994-2-008]);
- no. U-I-67/94, 21.03.1996 (Dolus V, 31, Bulletin 1996/2 [SLO-1996-2-006]);

- nos. U-I-68/97 and U-I-1/97, 22.01.1998, were joined to the case being tried because of common treatment and decision.

Languages:

Slovene, English (translation by the Court).



Identification: SLO-2000-S-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.09.2000 / **e)** U-I-214/00 / **f)** / **g)** *Uradni list RS* (Official Gazette), IX, 201 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

2.1.3.3. Sources – Categories – Case-law – **Foreign case-law.**

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

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.**

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

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

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

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

Keywords of the alphabetical index:

Advertisement, right / Person, data, dissemination, consent / Association, internal agreement.

Headnotes:

The Constitutional Court does not have jurisdiction to review constitutional provisions or provisions of constitutional acts amending the Constitution or regulating the implementation of constitutional provisions and the transition to the new constitutional regulation.

Summary:

I. The applicant challenged the Constitutional Act that amended Article 80 of the Constitution.

II. As neither the Constitution nor the laws grant the Constitutional Court jurisdiction to review the mutual consistency of constitutional provisions or the constitutionality of the provisions of a constitutional act, the Court had to decide whether it was competent to consider the petition on the merits.

The Constitutional Court recalled the criteria that must be applied when deciding on the jurisdiction to review a constitutional act. It clarified that there are two different types of constitutional acts. Firstly, a constitutional act may be used as an act amending the Constitution. The provisions of such an act change the wording of the Constitution and constitute constitutional provisions regardless of their content or nature (i.e. already according to the formal criterion). Such a constitutional act may not be reviewed by the Constitutional Court. Secondly, the constitution framers may adopt a constitutional act that does not amend the Constitution and does not contain constitutional subject matter. As the provisions of such a constitutional act in fact entail statutory subject matter, they could in principle be subject to constitutional review (according to the substantive criterion). However, if such a constitutional act is aimed at regulating the implementation of constitutional provisions and ensuring the transition to the new constitutional regulation, it must nevertheless be deemed to contain norms of a constitutional nature that cannot be reviewed by the Constitutional Court.

The Constitutional Court then explained that Point I of the challenged Constitutional Act amended the constitutional regulation of the elections to the National Assembly and thus entailed a constitutional amendment. It undoubtedly regulated constitutional subject matter and could not be subject to constitutional review. The content of Point II of the challenged Constitutional Act, on the other hand, essentially constituted statutory subject matter and could, according to the substantive criterion, be subject to review in proceedings before the Constitutional Court. However, the amended constitutional regulation of the elections to the National Assembly also required that its implementation and the transition to the amended electoral system be regulated. As such was precisely the intention of Point II of the challenged Constitutional Act, it also entailed constitutional provisions that did not fall within the jurisdiction of the Constitutional Court.

The Constitutional Court thus rejected the petition to review the constitutionality of the challenged Constitutional Act for lack of jurisdiction.

III. The decision was adopted unanimously.

Languages:

Slovenian, English (translation by the Court).

*Identification:* SLO-2009-2-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 26.03.2009 / **e)** U-I-218/07 / **f)** / **g)** *Uradni list RS* (Official Gazette), 27/09 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality**.
 5.1.4. Fundamental Rights – General questions – **Limits and restrictions**.
 5.4.17. Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions**.
 5.4.19. Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Employment, working conditions / Smoking, ban.

Headnotes:

A statutory regulation which prohibits smoking in indoor public places and indoor working places and the consumption of food and beverages in smoking areas constitutes an interference with the general right of freedom of action (Article 35 of the Constitution). However, the above-mentioned interference is not inadmissible, as it is the only way in which the constitutionally admissible aim pursued by the legislature can be effectively achieved, i.e. the protection of employed persons and all persons against the adverse effects of second-hand smoking and environmental tobacco smoke.

The characteristics of spending time and socialising in hospitality establishments cannot be regarded as

association within the meaning of Article 42.2 of the Constitution; this is not an organised and permanent community of individuals with a close connection gathering to pursue common interests, nor can it be regarded as assembly within the meaning of Article 42.1 of the Constitution. These gatherings are in general coincidental, they do not entail a group expression, and the element of internal connection between visitors in general does not exist.

Summary:

The first sentence of Article 16.1 of the Restrictions on the Use of Tobacco Products Act ("RUTPA") reads as follows:

"Smoking is prohibited in all indoor public places and indoor workplaces."

It is the case with personality rights, which are protected by Article 35 of the Constitution, as well as all human rights and fundamental freedoms, that they are not absolute and unlimited. In accordance with Article 15.3 of the Constitution, they are limited by the rights of others and in such cases as are provided by the Constitution. In the view of the Constitutional Court, the challenged statutory regulation which prohibits smoking in indoor public places and indoor workplaces, entails an interference with the general right of freedom of action (Article 35 of the Constitution). Interferences with human rights or fundamental freedoms are, in accordance with the established case-law, admissible if they are consistent with the principle of proportionality. The Constitutional Court assesses whether an interference with a human right is admissible on the basis of the so-called strict test of proportionality. The Constitutional Court must first establish (review) whether the legislature has pursued a constitutionally admissible aim.

In order to afford employed persons in all occupational groups full protection against exposure to the adverse health effects of tobacco smoke, smoking must be banned in all indoor public places and indoor workplaces. A hospitality establishment is a workplace for persons employed in the hospitality sector and protecting such employees from second-hand smoking can only be ensured by the complete prohibition of smoking in hospitality establishments. The measures laid down in the RUTPA before the implementation of the RUTPA-C, which comprised the prohibition of smoking in public places except in areas which were specially designated and separated from areas designated for non-smokers, leaving it to the owners of hospitality establishments to designate these areas for smokers as well as their size, did not achieve their objective. The RUTPA before the

implementation of the RUTPA-C did not afford employed persons in all positions of employment or workers in all occupational groups appropriate protection from tobacco smoke. In addition, employed persons in the hospitality industry, who are to a greater extent and for longer periods exposed to tobacco smoke, did not exercise their right to require that their employer ensure a smoke-free work environment, as they were not aware of the adverse effects of second-hand smoking or they were afraid to lose their jobs. Furthermore, in accordance with recent scientific evidence, the statutory provision of the RUTPA before the implementation of the RUTPA-C, which introduced the requirement of appropriate ventilation in order to prevent the mixing of smoky and non-smoky air, is no longer appropriate, as none of the accessible ventilation technologies or air purification systems can ensure protection against exposure to tobacco smoke without extensive and impractical increased ventilation. Even separate areas for smokers and non-smokers do not protect workers. What is more, there is a high concentration of carcinogens and toxins from tobacco smoke in separated areas for smokers. In view of the fact that there is no safe level of exposure to tobacco smoke, the Constitutional Court finds that the prohibition of smoking in all indoor public places and indoor workplaces is the only measure which enables the legislature's pursued aim to be achieved, i.e. the protection of workers and other persons from the adverse effects of environmental tobacco smoke.

Article 17.1.4 of the RUTPA determines that food and beverages may not be consumed in smoking areas.

The Constitutional Court finds here that in order to ensure the possibility of working in an environment where the air is not polluted and in order to prevent employed persons from being exposed to the adverse effects of environmental tobacco smoke against their will, the legislature had a constitutionally admissible aim in limiting the petitioners' right to act freely, which is protected within the framework of Article 35 of the Constitution.

The interference must also be necessary, appropriate, and proportionate in a narrower sense in order not to be excessive. In view of the fact that the petitioners' allegations only refer to smoking areas in hospitality establishments, the Constitutional Court limited the strict test of proportionality to these areas. The Constitutional Court holds that in the case of the prohibition of the consumption of food and beverages in smoking areas in hospitality establishments all three conditions are still met. In the case of smoking areas in hospitality establishments, it is assumed that employed persons have to enter them in order to carry out their work duties, including serving and cleaning up after

guests (except self-service restaurants, which nonetheless require a degree of cleaning). It follows that they are exposed to environmental tobacco smoke, regarding which it follows from the scientific evidence that there is no safe level of exposure to tobacco smoke. It is particularly dangerous in separate areas for smokers where a high concentration of carcinogens and toxins from tobacco smoke are present. If consumption of food and beverages were allowed in smoking areas in hospitality establishments, the aim that the legislature pursues would not be achieved. Thus the interference with the general right of freedom of action is not excessive; especially if it is considered that the limitation is only of a temporary nature. Smokers tend to stay in smoking rooms only for a short time and can consume food and drinks immediately after they leave these areas. The objective of the law is to protect the health of employed persons so that they are protected from second-hand smoke in situations in which they are not smoking themselves. Article 17.1.4 RUTPA, which prohibits food and beverages from being consumed in smoking areas is not inconsistent with the general right of freedom of action protected in Article 35 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 14.2, 35 and 42 of the Constitution [URS];
- Articles 21 and 25.3 of the Constitutional Court Act [ZUstS].

Cross-references:

- no. U-I-226/95, 08.07.1999, *Official Gazette RS*, no. 60/99 and the *Court's Official Annual Collection OdlUS VIII*, 174;
- no. U-I-137/93, 02.06.1994, *Official Gazette RS*, no. 42/94 and the *Court's Official Annual Collection OdlUS III*, 62;
- no. U-I-290/96, 11.06.1998, *Official Gazette RS*, no. 49/98 and the *Court's Official Annual Collection OdlUS VII*, 124;
- no. U-I-18/02, 24.10.2003, *Official Gazette RS*, no. 108/03 and the *Court's Official Annual Collection OdlUS XII*, 86.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2009-3-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 07.12.2006 / **e)** U-I-60/06-200, U-I-214/06-22, U-I-228/06-16 / **f)** / **g)** *Uradni list RS* (Official Gazette), 1/2006 / **h)** Court's Official Annual Collection OdlUS XV, 84, *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.**
- 3.12. General Principles – **Clarity and precision of legal provisions.**
- 4.7.4.1.6. Institutions – Judicial bodies – Organisation – Members – **Status.**
- 4.7.4.3.6. Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Status.**
- 5.2.1.2.2. Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

Keywords of the alphabetical index:

Judge, material status / Judge, remuneration, reduction / Judge, salary, guarantee / Judge, independence.

Headnotes:

In accordance with the principle of the independence of judges (Article 125 of the Constitution), it is appropriate that judges' salaries be regulated only by law. Certain provisions of the Judicial Service Act and the Salary System in the Public Sector Act, which determine that judges' salaries be regulated by an ordinance of the National Assembly, the collective agreement for the public sector, and a Government decree, as well as the provisions of the Ordinance on Officials' Salaries, which regulates judges' salaries as an executive regulation, were pronounced to be inconsistent with the above constitutional principle.

As no convincing reasons for the alleged disparities between the officials' salaries in the individual branches of power were demonstrated, the Ordinance on Officials' Salaries can also be found to be inconsistent with the principle of the separation of powers determined in Article 3.2 of the Constitution.

It is inconsistent with the constitutional principle of the independence of judges if the legislator only ensures judges protection against a reduction in their basic salary and if it allows additional instances of a reduction of judges' salaries to be determined by an ordinance of the National Assembly.

Statutory provisions which determine that state prosecutors' and state attorneys' salaries be regulated by an executive regulation, and the provisions of the Ordinance on Officials' Salaries which entail the implementation of such statutory authorisation are not inconsistent with the Constitution.

Statutory provisions which determine that state prosecutors' salaries be regulated by the collective agreement for the public sector are inconsistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), as state prosecutors do not participate in the process of negotiating the collective agreement. Statutory provisions which determine that state prosecutors' salaries be regulated by a decree of the Government are inconsistent with the principle of legality (Article 120.2 of the Constitution).

Summary:

The subject of review is the regulations governing the salary position of judges. The essential question in this particular case is that of the constitutional position of the judiciary and judges, and within these frameworks the question of determining the guarantees which are ensured by the Constitution in relation to the other two branches of power.

It must be underlined that the constitutional principle of the independence of judges, the bearers of which are judges, cannot be regarded as their privilege, but rather as an essential element for ensuring the protection of the rights of parties to judicial proceedings. The implementation of the principle of the independence of the judiciary is not only intended for judges, but also and in particular for those needing judicial protection of their rights. In addition, the independence of judges is a prerequisite for their impartiality in concrete judicial proceedings and therefore for the credibility of the judiciary as well as the trust of the public in its work.

Only a norm which regulates judges' salaries entirely by a statutory Act is in line with the principle of the independence of judges. Insofar as judges' salaries are determined by an ordinance, the regulation is inconsistent with the principle of the independence of judges determined in Article 125 of the Constitution. Also the legislative provisions which leave the regulation of judges' salaries to Government decrees or to the collective agreement for the public sector are inconsistent with this constitutional principle.

Determining the salaries of civil servants or officials falls within the field of discretion of the legislator, provided that the constitutional rights of individuals

are not interfered with. However, within the salary system of the highest public officials, only a few offices in the judicial branch of power are placed in the highest salary brackets. As no convincing reasons for such disparities were demonstrated, it can be concluded that the provision which determines salary brackets for individual offices in the judicial branch of power is inconsistent with Article 125 of the Constitution and with the principle of the separation of powers (Article 3 of the Constitution).

Protection against a reduction of the salary of an individual judge, if such is intended to ensure its stability and consequently the judge's independence, must be understood as protection against any interference which might cause a reduction of the judge's salary which the judge justifiably expected upon assuming office. Thus, it is not only judges' basic salaries that are protected against a reduction, but also all payments to which judges are entitled due to performing judicial office. The same applies in cases of possible payments to judges for work-related matters that do not form a fixed part of a judge's salary.

The review of the consistency of the regulation providing for supplemental payment of judges for work performance, with the principle of the independence of judges determined in Article 125 of the Constitution cannot be carried out due to the insufficiently determined and vague statutory provisions under challenge. Therefore, the contested statutory regulation is inconsistent with Article 2 of the Constitution.

The Constitution only makes explicit provision for the basic functions of state prosecutors. Their other powers are determined by the legislator, which also has to regulate the organisation and powers of state prosecutors' offices. Thus, the Constitution does not ensure the same guarantees as follow from Article 125 of the Constitution for judges. Whilst the legislator may leave more detailed regulation of the rights and obligations of prosecutors to ordinances, it must regulate the basic contents of the regulation and determine the framework and guidelines for a more detailed executive regulation. In this particular case, these guidelines were respected. Therefore, the challenged regulation is not inconsistent with Article 87 (legislative powers of the National Assembly) or Article 2 of the Constitution (the principle of legality as an integral part of a state governed by the rule of law). The same reasoning applies to the contested provisions regulating the salaries of state attorneys, which are therefore also in line with the Constitution.

The regulation whereby additional payments to state prosecutors' salaries and the criteria for the work performance supplements are regulated by the collective agreement for the public sector is inconsistent with the principles of the rule of law under Article 2 of the Constitution. State prosecutors do not participate in the process of negotiating the collective agreement, which means that their interests are not represented. This is precisely why the legislator should not leave the regulation of state prosecutors' salaries to the collective agreement.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2010-3-006

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 18.03.2010 / **e)** Rm-1/09 / **f)** / **g)** *Uradni list RS* (Official Gazette), 25/2010 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

3.1. General Principles – **Sovereignty.**

3.8.1. General Principles – Territorial principles – **Indivisibility of the territory.**

Keywords of the alphabetical index:

International agreement, constitutionality / Border, national, definition / Border, dispute, settlement.

Headnotes:

The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia is an applicable constitutional act and, as such, a permanent and inexhaustible constitutional source of Slovenian statehood.

Section II of the Basic Constitutional Charter protects the national borders and in conjunction with Article 4

of the Constitution forms the applicable and relevant constitutional determination of the territory of the Republic of Slovenia.

The part of Section II of the Basic Constitutional Charter which protects the national borders between the Republic of Slovenia and the Republic of Croatia must be interpreted within the meaning of the international law principles of *uti possidetis juris* (on land) and *uti possidetis de facto* (at sea).

In accordance with Section II of the Basic Constitutional Charter, the land border between Slovenia and Croatia is constitutionally protected where the border between the republics of the former Socialist Federative Republic of Yugoslavia was drawn, whereas the maritime border is protected along the line up to the High Sea to the point where the Republic of Slovenia *de facto* exercised its authority before its independence.

The Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia does not determine the course of the state borders between the Parties to the Agreement, but it establishes a mechanism for the peaceful settlement of the border dispute.

Summary:

The Constitutional Court adopted Opinion no. Rm-1/09-26 on 18 March 2010 in proceedings to review the constitutionality of a treaty, which were launched at the government's instigation. The Constitutional Court found that Articles 3.1.a, 4.a, 7.2 and 7.3 of the Arbitration Agreement between the Slovenian and the Croatian governments, which must be interpreted and reviewed as a whole in terms of content, are not inconsistent with Article 4 of the Constitution in conjunction with Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (hereinafter, the "BCC").

Questions arising from the coming into being and the ceasing to exist of states, and those of the state territory and state borders, fall primarily in the domain of international law. State borders by definition concern two or more states and are in general a result of their mutual agreement. However, in the case of Slovenia, the state borders are also regulated in national law, specifically in Section II of the BCC; Article 4 of the Constitution also refers to the state territory.

The Constitutional Court emphasised that the BCC, which was adopted on 25 June 1991, is a constitutional act. With its adoption, the Republic of Slovenia

established itself as a sovereign and independent state, breaking its ties definitively with the Socialist Federal Republic of Yugoslavia (hereinafter, the "SFRY"). The constitutional power of the BCC, however, was not just limited to the time of its adoption; it is a permanently applicable law and a permanent and inexhaustible constitutional foundation of the statehood of the Republic of Slovenia.

An essential element of statehood is also a territory in which the state is the highest legal and *de facto* authority. The territory of the Republic of Slovenia was defined by Section II of the BCC, which also defined its state borders. Section II of the BCC constitutionalised the state borders. However, Section II did not determine the borders in the manner that is customary in treaties, as it did not describe their course or determine them by geographic coordinates.

The Constitutional Court concluded that Section II of the BCC protected the state borders of the Republic of Slovenia and, in conjunction with Article 4 of the Constitution, formed an applicable and relevant constitutional definition of the state territory. Those drafting the Constitution intended these provisions to establish the state territory and state borders as one of the fundamental values which must be protected at the constitutional level.

When the Republic of Slovenia became independent, the land border between Slovenia and Croatia, as it existed within the former SFRY, became an internationally recognised state border, substantiated by the international law principle of *uti possidetis juris*. In accordance with Section II of the BCC, the land border between Slovenia and Croatia is constitutionally protected where the border between the republics of the former SFRY was drawn. By contrast, the maritime border between the republics within the former SFRY was not determined. However, the Republic of Slovenia exercised *de facto* authority in the Bay of Piran and in general terms. The territorial situation at sea on the date independence was gained is protected by the principle of *uti possidetis de facto*. The maritime border is thus protected along the line up to the High Sea, to the point where Slovenia in effect exercised its authority before independence. Moreover, when it became independent, Slovenia became a coastal state. As a coastal state cannot exist without an appropriate area of sea, it follows that part of the Adriatic Sea and the territory under it falls within Slovenia's state territory. The determination of which part of the sea and the pertinent maritime zones forms Slovene state territory is primarily a question for resolution in accordance with the rules and principles of international law. However, these are

only effective to the extent that states observe them when concluding border treaties or to the extent that they are a basis for the decisions of international tribunals.

The Constitutional Court ruled that the Arbitration Agreement between the Slovenian and Croatian governments did not determine the course of the borders between the Parties to the Agreement, but rather it was an agreement that established a mechanism for the peaceful resolution of border disputes.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2010-S-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 15.04.2010 / **e)** U-I-92/07 / **f)** / **g)** *Uradni list RS* (Official Gazette), 46/2010; *Odlocbe in sklepi Ustavnega sodišca* XIX, 4 / **h)** CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 3.7. General Principles – **Relations between the State and bodies of a religious or ideological nature.**
 5.3.18. Fundamental Rights – Civil and political rights – **Freedom of conscience.**
 5.3.20. Fundamental Rights – Civil and political rights – **Freedom of worship.**

Keywords of the alphabetical index:

Community, religious, registration / Conviction, religious, equality / Neutrality, state, religion.

Headnotes:

Considering the separation of the State and religious communities as well as the freedom of religion, the conditions for registration of a religious community are not a necessary measure to grant special rights only to some of the religious communities. The conditions for registration of a religious community requiring that the religious community has at least one hundred adult members and that it has been

active in Slovenia for at least ten years (or has been widely known for more than a hundred years) is inconsistent with the right of religious communities to free religious activity, read in conjunction with the freedom of association. Such an interference with the human right of religious communities to be recognised a full legal identity (which is a constituent part of the right of religious communities to free religious activity, read in conjunction with the freedom of association) does not pass the necessity part of the proportionality test.

In addition, the State may provide religious communities with the necessary financial resources for the performance of religious spiritual care in prisons and hospitals to such an extent and in such a manner which is not inconsistent with the principle of the separation of the State and religious communities. It is however constitutionally inadmissible to provide support in such a manner that priests would be employed by the State to perform religious services in penal institutions and hospitals.

Summary:

I. The applicant challenged a number of provisions of the Religious Freedom Act.

II. The Constitutional Court referred to Article 41 of the Constitution, which affords protection to theistic, atheistic, and non-theistic convictions in the sphere of ethics and morality, the internal and external characteristics of which indicate their consistency, cogency, seriousness, cohesiveness, and importance.

At a fundamental level, freedom of religion entails the right of a natural person to have a religion and freely change it (the positive aspect) and the right not to belong to one (the negative aspect). These inner convictions cannot be subject to any regulations or restrictions (i.e. *forum internum* as a special form of freedom of thought). The right to the free profession of one's religion (as a special form of freedom of expression) and the freedom to exercise one's religion (as a special form of freedom of practice) entail an external manifestation of one's inner personal decisions (i.e. *forum externum*). Freedom of religion may be manifested individually or collectively.

The principle of the separation of the State and religious communities has three core elements:

1. the religious and philosophical neutrality of the State;
2. the autonomy of religious communities in their own domain;
3. the State's equal relation to religious communities.

The aim of this principle is to ensure, through the neutral attitude of the State, true freedom of conscience and the equality of individuals and religious communities. The religious and philosophical neutrality of the State does not constitute an impediment to cooperation with religious communities. The autonomy and equality of religious communities, which are determined in the Constitution as independent principles, are the mirror images of the requirement of the neutrality of the State and the tools for ensuring the freedom of religion.

The principle of the freedom of action of religious communities exists to safeguard the independence of religious communities in their internal affairs and is at the same time an independent constituent element of the freedom of religion.

The principle of the equality of religious communities is a special expression of the general principle of equality within the scope of the relation of the State to religious communities. It should be interpreted alongside the prohibition of discrimination on the basis of personal circumstances in the exercise of any human right or fundamental freedom and in connection with the principle of equality of all before the law.

The human right to freedom of conscience is the basis of the regulation of the position of religious communities. In that respect, it takes precedence over the constitutional principles defining the position of religious communities in relation to the State. Anything, therefore, that falls within the scope of the exercise of the right to freedom of religion cannot be inconsistent with the principle of the separation of the State and religious communities.

A regulation which only permits a religious community to attain the status of "a registered religious community" if it has at least one hundred adult members who are either citizens or permanent residents of Slovenia and if it has been active or widely known in Slovenia for at least ten years is inconsistent with the right of religious communities to free religious activity, in conjunction with the freedom of association. Interference with the right of a religious community to be recognised with a full legal identity is not a necessary measure for ensuring the legislative aim, i.e. only granting special rights to some religious communities (ones which are registered.)

The State is not obliged to fund religious communities, but it can provide them with financial support, whilst at the same time respecting their equality, provided this does not run counter to the principle of the separation of the State and religious communities. An interpretation to

the effect that the State is allowed to test the acceptability of the values of the substance of such convictions and can only offer financial support to those religious communities whose substantive convictions are aligned with those of the State would be inconsistent with the requirement of neutrality guaranteed by the principle of the separation of the State and religious communities.

The requirement that a religious community must be registered if it is to receive financial support from the State is reasonable and substantively justified. Differentiating between registered and unregistered religious communities for the purpose of providing them with financial support is not inconsistent with the aspect of the principle of the equality of religious communities, which is a special expression of the general principle of equality before the law in terms of the relationship between the State and religious communities.

When funding not-for-profit activities, the State must treat all types of associations equally. However, the fact that the matter is regulated by various statutes does not substantiate the conclusion that a differentiation between these subjects is unjustified.

The right to build facilities for the profession and exercise of religion, stemming from positive religious freedom (and the principle of the freedom of action of religious communities, which is a constituent part thereof) presupposes a duty on the part of the authorities not to overlook the constitutionally protected needs of all religious communities in land use planning. The consent of the religious community in such land use planning is not required.

The taking into account by the legislator of the holocaust and its consequences as differential grounds for waiving the condition concerning the number of believers in terms of the Jewish community applying for financial support for one employee is reasonable and substantiated; it is not inconsistent with the principle of the equality of religious communities.

Points 1, 2, 3, 6, 8, 9 and 10 of the operative provisions were adopted unanimously. Points 4 and 5 of the operative provisions were adopted by five votes against four. Point 7 of the operative provisions was adopted by six votes against three.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2012-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 26.09.2012 / **e)** U-I-109/10 / **f)** / **g)** *Uradni list RS* (Official Gazette), 78/11 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

3.3. General Principles – **Democracy**.
3.9. General Principles – **Rule of law**.
5.3.1. Fundamental Rights – Civil and political rights – **Right to dignity**.

Keywords of the alphabetical index:

Democratic state, core elements / Human dignity, violation / Political sign, exposition / Value, democratic / Value system.

Headnotes:

A regulation or other act of the authorities which has symbolic significance can be found to be unconstitutional in cases where such symbol expresses values which are entirely incompatible with fundamental constitutional values, such as human dignity, freedom, democracy, and the rule of law. Naming a street after Josip Broz Tito, who is a symbol of the former totalitarian regime, is contrary to the constitutional values on which the Slovenian constitutional order is based, in particular, the principle of respect for human dignity recognised in Article 1 of the Constitution, which is at the very core of the constitutional order of the Republic of Slovenia.

Summary:

I. In 2009 the local authorities in the capital city of Slovenia, Ljubljana, named a street in the city Tito Street, after Josip Broz Tito, who was the President for life of the former communist regime, the Socialist Federal Republic of Yugoslavia. In 2010 a number of residents brought a claim to the Constitutional Court challenging the constitutionality of this act.

II. The Constitutional Court held that human dignity is at the centre of the constitutional order of the Republic of Slovenia. Its ethical and constitutional significance already proceeds from the Basic

Constitutional Charter, which not only constitutes the constitutional foundation of Slovenian statehood, but which also outlines certain principles that demonstrate the fundamental legal and constitutional quality of the new independent and sovereign state. By adopting the independence documents not only was the fundamental relationship entailing state sovereignty between the Republic of Slovenia and the Socialist Federal Republic of Yugoslavia (hereinafter, the "SFRY") severed, but there was also a complete departure from the fundamental value system of the former constitutional order. Differently than the former SFRY, the Republic of Slovenia is a state whose constitutional order proceeds from the principle of respect for human rights and fundamental freedoms. Human dignity is the fundamental value which permeates the entire legal order and therefore it also has an objective significance in the functioning of authority not only in individual proceedings but also when adopting regulations.

As the fundamental value, human dignity has a normative expression in numerous provisions of the Constitution; it is especially concretised through provisions which guarantee individual human rights and fundamental freedoms. As a special constitutional principle, the principle of respect for human dignity is directly substantiated in Article 1 of the Constitution, which determines that Slovenia is a democratic republic. The principle of democracy in its substance and significance exceeds the definition of the state order as merely a formal democracy, but substantively defines the Republic of Slovenia as a constitutional democracy, thus as a state in which the acts of authorities are legally limited by constitutional principles and human rights and fundamental freedoms. This is because individuals and their dignity are at the centre of its existence and functioning. In a constitutional democracy the individual is a subject and not an object of the functioning of the authorities, while his or her self-realisation as a human being is the fundamental purpose of the democratic order.

It can be stated that a regulation or other act of the authorities which has symbolic significance is unconstitutional in cases in which such symbol, through the power of the authority, expresses values which are entirely incompatible with fundamental constitutional values, such as human dignity, freedom, democracy, and the rule of law. The name Tito Street is inseparably connected with the symbolic significance of the name Tito. The fact that Josip Broz Tito was the President for life of the former SFRY entails that it is precisely his name that to the greatest extent symbolises the former totalitarian regime. Accordingly, naming a street after Josip Broz Tito, who is a symbol of the Yugoslav communist regime, can be objectively understood as recognition of the former non-democratic regime.

In the Republic of Slovenia, where the development of democracy and free society based on respect for human dignity began with the break up with the former system, the glorification of the communist totalitarian regime by the authorities by naming a street after the leader of that regime is unconstitutional. Naming a street after Josip Broz Tito does not simply entail preserving a name from the former system and which today would merely be a part of history. The challenged Ordinance was issued in 2009, eighteen years after Slovenia declared independence and established the constitutional order, which is based on constitutional values that are the opposite of the values of the regime before independence. Such new naming no longer has a place in the present societal and constitutional context, as it is contrary to the principle of respect for human dignity, recognised in Article 1 of the Constitution, which is at the very core of the constitutional order of the Republic of Slovenia.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2014-3-012

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.11.2013 / **e)** U-I-146/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 107/13 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

2.1.1.3. Sources – Categories – Written rules – **Law of the European Union/EU Law.**
 2.1.3.2.2. Sources – Categories – Case-law – International case-law – **Court of Justice of the European Union.**
 3.16. General Principles – **Proportionality.**
 3.26. General Principles – **Fundamental principles of the Internal Market.**
 5.2.2.1. Fundamental Rights – Equality – Criteria of distinction – **Gender.**
 5.2.2.7. Fundamental Rights – Equality – Criteria of distinction – **Age.**

Keywords of the alphabetical index:

Discrimination, justification / Dismissal on grounds of age / Employment, termination, discrimination.

Headnotes:

A measure whereby the employment contracts of civil servants are terminated due to their fulfilment of the statutory conditions for obtaining an old age pension entails discrimination on the grounds of age and sex. Discrimination on the grounds of age is admissible in this case; its objectives are to ensure sustainable public finances, establish a balanced age structure for civil servants, and prevent disputes over the ability of civil servants to perform their duties after a certain age. However, the discrimination on the grounds of sex pursues no legitimate objective.

Summary:

I. The Ombudsman for Human Rights challenged the constitutionality of a provision of the Fiscal Balance Act, to the effect that civil servants' employment contracts would be terminated upon fulfilment of the statutory conditions for obtaining an old-age pension.

II. The Constitutional Court reviewed the challenged regulation from several viewpoints, with the main emphasis on assessing whether it violated the prohibition of discrimination on the grounds of age or sex (Article 14.1 of the Constitution). The Constitutional Court noted first that the prohibition of discrimination is a universal principle of international law that is also regulated by European Union law. The Constitutional Court particularly highlighted Directive 2000/78/EC and Directive 2006/54/EC, which are implemented into the national legal order *inter alia* by the challenged provisions of the Fiscal Balance Act. The Court recalled that the primary and secondary legislation of the European Union and the case-law of the Court of Justice of the European Union must be taken into consideration when reviewing the constitutionality of national regulations which entail the implementation of European Union law. It also clarified the effects of Article 3a.3 of the Constitution, which determines the effect of European Union law in the internal legal order. The Constitutional Court therefore did not decide the case merely on the basis of national constitutional provisions. It also took into consideration European Union law and the relevant case-law of the Court of Justice of the European Union when adopting its decision.

The Constitutional Court reviewed the termination of employment contracts due to fulfilment of the conditions for obtaining an old-age pension in terms of discrimination on age grounds. This particular provision differentiates civil servants on grounds of age, as it only applies to older civil servants who have fulfilled such conditions. The Court recalled, however, that under European Union law and the case-law of the Court of Justice of the European Union such discrimination may be admissible if it pursues a legitimate objective and the means of implementation of such objective are appropriate and necessary.

The Constitutional Court was of the opinion that the main objective of the challenged measure was to ensure the sustainability of public finances; this is not *per se* a constitutionally admissible objective that could render discrimination on grounds of age admissible. However, the Court established that the regulation also aims to achieve two further objectives, namely the establishment of a balanced age structure of civil servants and the prevention of disputes over the ability of public servants to perform their duties after a certain age. These could represent constitutionally admissible objectives for differentiating civil servants on grounds of age. The Constitutional Court found the challenged measure to be appropriate and necessary in order to achieve the outlined objectives simultaneously and to the greatest extent possible. The measure is not disproportionate; those affected are entitled to the full amount of their old-age pension. Moreover, the challenged regulation did not introduce mandatory retirement; those affected are not prevented from finding new employment or continuing their professional activities elsewhere. The Constitutional Court therefore found that the regulation was not inconsistent with the prohibition of discrimination on grounds of age.

The Constitutional Court then proceeded to review the challenged measure in terms of discrimination on grounds of sex. Until 2019, when retirement conditions for men and women will be completely equal, the conditions for obtaining an old-age pension will be determined differently for men and women. Therefore, the measure of mandatory termination of employment contracts treated male and female civil servants differently, which entailed a violation of the prohibition of discrimination on grounds of sex. The Constitutional Court established that the interference with the right of female public servants to non-discriminatory treatment was already inadmissible because it was not supported by a constitutionally admissible objective. The measure was accordingly inconsistent with the prohibition of discrimination on grounds of sex. It required the legislature to remedy

the established unconstitutionality and determined the manner of the implementation of the Decision which would remain in force until this was carried out.

III. The first and second points of the operative provisions of the Decision were adopted unanimously. The third and fourth points of the operative provisions were adopted by eight votes against one. Judge Jadek Pensa voted against. The Constitutional Court adopted the fifth point of the operative provisions by six votes against three. Judges Jadek Pensa, Korpic – Horvat, and Sovdat voted against. Judges Jadek Pensa, Korpic – Horvat, and Sovdat submitted dissenting opinions.

Languages:

Slovenian, English (translation by the Court).



Spain Constitutional Court

Important decisions

Identification: ESP-2000-1-001

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 20.07.1999 / **e)** 136/1999 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 18.08.1999, 29-96 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

3.13. General Principles – **Legality.**

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

3.16. General Principles – **Proportionality.**

4.9.8. Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material.**

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

5.3.13.4. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

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

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

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

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

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

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

Keywords of the alphabetical index:

Terrorism / Election, free / Judge, challenging, procedure / Tribunal, impartial, pressure exerted by the media / Fundamental rights, deterring or discouraging their exercise / Constitutionality, domestic question, not necessary.

Headnotes:

The right to participate in public affairs and the right of access to public office (Article 23 of the Constitution) and the freedoms of expression and information (Article 20.1.a and 20.1.e of the Constitution) in no way protect the dissemination of messages or programmes which are threatening or intimidating owing to their content or the context in which they are disseminated. Such messages may be deemed to constitute the offence of collaborating with a terrorist group and punished as such, in accordance with the Criminal Code (1973, the relevant Section dating from 1989).

Any criminal-law rule imposing a minimum six year's imprisonment on an individual who has collaborated with a terrorist organisation by transmitting ideas or information from the said organisation through a lawfully established political association in the context of an election campaign is disproportionate and infringes the fundamental right to criminal sanctions based on law (Article 25.1 of the Constitution), because it impedes the free exercise of the rights to political participation and to freedom of expression (Articles 23 and 20.1 of the Constitution).

Outright rejection of a challenge to a judge does not infringe the rights to the effective protection of the courts and assistance by a lawyer, to a hearing with full guarantees and an impartial judge (Article 24 of the Constitution) if it is properly based on a finding that the challenge was wrongful and devoid of any legal basis. It therefore cannot be affirmed that such rejection materially deprives the litigant of all grounds of defence.

Pressure exerted by the media on a court adjudicating on any kind of case can infringe the right to an impartial judge (Article 24 of the Constitution), notably if such pressure originates in statements from other public authorities.

Summary:

This decision, which was given by the Plenary Assembly of the Constitutional Court, concerns the sentence passed by the Supreme Court on the leaders of the political formation Herri Batasuna (which means "The People's Left" in Basque).

The 23 members of the statutory Bureau of this political formation were found guilty of the offence of collaborating with a terrorist group, fined and sentenced to seven years' imprisonment. The offence in question was defined in Article 174bis.a of the old Criminal Code (amended in 1973, the relevant Section having been drafted under Implementing Act 3/1989) and was punishable with a prison sentence ranging from six years and one day to twelve years, plus a fine. In this particular case the appellants stood accused of having attempted to broadcast a video cassette of the ETA terrorist organisation during the election campaign for the 1996 general elections and disseminating electoral propaganda incorporating pictures and texts from the said video cassette, using electoral air time on television and radio which this political formation was granted free of charge.

The Constitutional Court afforded the appellants constitutional protection (*amparo*), considering that in this particular case application of the aforementioned provision of the Criminal Code infringed the right to criminal sanctions based on law (Article 25.1 of the Constitution). The Constitutional Court therefore quashed the judgment against the appellants.

However, the Constitutional Court rejected all the formal and procedural arguments submitted under the *amparo* appeal, namely:

- a. the fact that the appellants had been judged by the Supreme Court and were therefore unable to appeal to any higher authority against the decision given;
- b. the fact that the defendants had challenged the President of the Court on the very first day of the proceedings, arguing that one of his daughters worked in the Ministry of the Interior, which challenge the Court rejected and declared inadmissible on the grounds that it had been submitted out of time and was abusive and completely ill-founded; and
- c. the allegation that the press and other media had campaigned against them, partly because of statements made by certain members of the government, which the appellants argued had proclaimed their guilt and had amounted to a parallel trial and had influenced the Supreme Court.

The Constitutional Court affirmed that the aforementioned facts were not in violation of any fundamental rights:

- a. the loss of the right to appeal was offset by the fact that the judicial decision was to be given by the supreme criminal justice body, precisely in

order to enhance the safeguards appertaining to the parliamentarians standing trial;

- b. the declaration of inadmissibility of the challenge on the grounds that it had been submitted out of time, and was abusive and based on completely arbitrary claims, in no way deprived the defendants of their material grounds of defence; and
- c. although the statements made by certain senior officials had not helped the work of the court, their content and effects had in the end proved innocuous.

As far as the merits of the case are concerned, the Constitutional Court judgment considered the combined effect of a number of relevant fundamental rights: the right to participate in political activity, the right to the freedoms of expression and information, and the right to criminal sanctions based on law, these three rights all being linked. The grounds of the judgment might be summed up as follows:

1. The right to participate in public affairs and the right of access to public office (Article 23 of the Constitution) are based on freedom. They therefore prohibit any interference with politicians by the public authorities, particularly when the former are presenting their views and proposals to the citizens. However, interference with the citizens themselves is also prohibited, particularly when they are being called upon to decide which political proposals they consider most appropriate. Moreover, the freedoms of expression and information (Article 20.1.a and 20.1.e of the Constitution) can only be fully exercised if they are enshrined as instruments for the rights of political participation.

2. Nevertheless, none of these freedoms can be used for the dissemination of messages or programmes which are threatening or intimidating owing to their content or the context in which they are disseminated, even if they are not strictly tantamount to the offence of proffering threats or exercising coercion. In such cases, however, great caution must be exercised because the public authorities must not be allowed to restrict citizens' freedoms, particularly during elections, and steps must be taken to enable third parties to disseminate neutral media reports presenting the said messages.

3. Having conducted a detailed analysis of the tape produced by the Herri Batasuna political formation as part of the advertisement which they sent to various television channels, as well as of the video cassette which was to be shown at various public events, the Constitutional Court concluded that they did not constitute a neutral report in which the political formation had confined itself to transmitting a terrorist group's message. Instead, the Court ruled that in this

video recording Herri Batasuna was endeavouring to communicate a message based on information provided by third persons and to canvass people to vote for their formation.

4. Having conducted an in-depth examination of the messages in question (which listed the terrorist group's objectives, stated that the violence would cease as soon as these objectives were attained and explicitly called on the electorate to vote for the Herri Batasuna political formation, all against a background of images of hooded gunmen), the Constitutional Court decided that they amounted to intimidation or coercion, because it would be obvious to any ordinary voter that the purpose of the video was a blatant attempt at intimidation.

5. Consequently, the behaviour for which the leaders of the HB political formation were being tried did not amount to lawful exercise of the rights to political participation or freedom of expression. Their acts were therefore – in principle – liable to criminal penalties. However, such penalties would only be constitutional if they met the requirements of the criminal legality principle and also if their severity did not lead to an unnecessary or disproportionate sacrifice of freedom or have the effect of deterring or discouraging citizens from exercising the fundamental rights involved in the penalised acts. The Court expanded in detail upon these primordial ideas in the light of constitutional case-law and the case-law of the European Court of Human Rights.

6. Therefore, an analysis had to be conducted of the Criminal Code provision applied in the decision in question, as interpreted by the Supreme Court, because it should be remembered that this Court has sole responsibility for interpreting and applying criminal classifications: the provision in question stipulates a minimum prison sentence of six years and one day for such cases, where the leaders of a lawful political association attempt to disseminate intimidating messages during an election campaign with a view to publicising the action proposed by the ETA and the HB and canvass people for their votes. It is immaterial that this attempt failed, because the dissemination of such messages had been prohibited by a court and the offence is precisely constituted by the activity itself or the abstract danger it entails.

7. The Constitutional Court affirmed that the provision of criminal law in question was aimed at protecting values or interests important enough to justify a minimum prison sentence of 6 years: terrorism is a particularly serious offence which jeopardises such important values as life, the safety of individuals, social peace and the democratic system.

8. There can be no doubt that the penalty laid down is well-founded (even if it raises certain other problems, because they are immaterial to this case), as stressed by the Constitutional Court, for three main reasons:

- i. the judgment in question does not penalise the legitimate exercise of constitutional rights;
- ii. the acts for which the appellants were convicted were aimed at promoting a terrorist group and its methods;
- iii. the appellants do not invoke any alternative measure to the penal reaction, and the Constitutional Court obviously cannot usurp the role of imaginary legislator.

9. Notwithstanding the foregoing comments, Constitutional Court Decision no. 136/1999 considers the criminal law provision applied to the appellants disproportionate for yet different reasons:

- i. the acts penalised proved relatively innocuous in practice;
- ii. the sentence is heavy *per se* and as compared with penalties laid down for other offences and in other countries;
- iii. in this case the rule is being applied to the expression of ideas and communication of information by a lawfully established political association as part of an election campaign, which is liable to discourage the lawful exercise of the fundamental rights to political participation and to freedom of expression;
- iv. lastly, this deterrent effect is reinforced by the relative vagueness of the provision applied.

The Constitutional Court concluded that the criminal law provision on which the appellants' conviction was based, stipulating a minimum prison sentence of six years, has an obvious deterrent effect on the exercise of the freedoms of expression, communication and participation in public affairs, even though the acts penalised do not constitute a legitimate means of exercising these freedoms, which are absolutely necessary for the democratic functioning of society, and are totally indispensable in the case of political parties when canvassing citizens for votes.

Consequently, in this case the application of the said provision of the Criminal Code infringes the principle of criminal sanctions based on law in that it lays down disproportionate sentences. The rule is therefore unconstitutional solely because it does not provide for adapting the criminal penalty to the seriousness of the act of collaboration with the terrorist group. The Constitutional Court's judgment specifies that there is no need to challenge the provision for unconstitutionality since it has already been repealed under the new Criminal Code.

Supplementary information:

Four judges expressed concurring opinions, adding that the applicants' right to presumption of innocence had also been infringed. However, three other judges expressed dissenting opinions, affirming that the applicants should not have been granted constitutional protection (*amparo*) because, in their view, none of the fundamental rights of the HB leaders had been violated.

Languages:

Spanish.



Identification: ESP-2000-1-011

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 14.03.2000 / **e)** 73/2000 / **f)** Presa de Itoiz / **g)** *Boletín oficial del Estado* (Official Gazette), 90, 14.04.2000, 61-77 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 1.2.3. Constitutional Justice – Types of claim – **Referral by a court.**
- 1.4.7. Constitutional Justice – Procedure – **Documents lodged by the parties.**
- 2.1.1.4. Sources – Categories – Written rules – **International instruments.**
- 2.1.3.2.1. Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**
- 2.2.2. Sources – Hierarchy – **Hierarchy as between national sources.**
- 3.17. General Principles – **Weighing of interests.**
- 3.18. General Principles – **General interest.**
- 3.22. General Principles – **Prohibition of arbitrariness.**
- 4.5.2. Institutions – Legislative bodies – **Powers.**
- 4.5.8. Institutions – Legislative bodies – **Relations with judicial bodies.**
- 4.7.9. Institutions – Judicial bodies – **Administrative courts.**
- 5.3.13. Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
- 5.5.1. Fundamental Rights – Collective rights – **Right to the environment.**

Keywords of the alphabetical index:

Legislator, interference with justice / Validation, legislation / Law of general application / Law, interlocutory judicial review / Law, interpretation / Regulation, no subject-matter reserved *vis-à-vis* statute law / Environment, conservation / Council of Europe, statute.

Headnotes:

No law may unduly undermine the operative provisions of a final judgment. Otherwise it might breach the fundamental right to the effective protection of the courts, the principle that the courts have sole competence to exercise judicial authority and the obligation of compliance with court decisions (Articles 24.1, 117.3 and 118 of the Constitution). Parliament may make legal reforms even if, in so doing, it prevents the execution of a decision given by a court under the law formerly applicable. However, under no circumstances may it legislate in pursuit of an unlawful aim, such as impeding the administration of justice, or pass legislation that may unduly sacrifice the specific interests safeguarded by a judgment awaiting execution on the sole ground of serving the interests enshrined in the new law.

Statements made by political representatives in no way constitute guidance for interpreting the law and cannot be used to distort its substance.

Parliament breaches the prohibition on arbitrary action by public authorities (Article 9.3.7 of the Constitution) only where there is no rational explanation for a law. A law laying down generally applicable new rules on the conservation of natural areas cannot be deemed arbitrary, even where the new rules are debatable from a political or technical standpoint.

Under the Constitution, statute law may have any subject matter, and parliament may in principle pass laws on subjects which were previously governed by regulations. Transforming regulatory provisions into statutory provisions in no way prevents their judicial review, since the courts may always refer the legislation to the Constitutional Court.

Only the courts may raise questions of unconstitutionality, after hearing the parties as to the actual legal provisions whose compliance with the constitution is in doubt. Those provisions must moreover be clearly identified by the court, on consulting the parties, as must the articles of the Constitution which the court considers to be breached. Reference to any other constitutional

provision by any party to the proceedings shall not be binding on either the court or the Constitutional Court, without this affecting the powers conferred *ex officio* on the latter.

Summary:

The administrative division of the National Court (*Audiencia nacional*) raised a question of unconstitutionality concerning a number of provisions of a Law on nature conservation areas passed in 1996 by the autonomous community of Navarra. That law repealed the earlier “foral” law of Navarra on the same subject, which dated from 1987, and, *inter alia*, replaced various provisions relating to the rules governing the protective areas surrounding nature reserves.

In 1995 the National Court had cancelled a project to build a dam in the Itoiz valley on the ground that it breached various provisions of the law of Navarra on nature conservation then in force. Following an appeal on points of law this decision was upheld by the Supreme Court in a judgment given in 1997 relating to only one aspect: the area which was to be flooded on building the dam affected a number of nature reserves in the Itoiz valley, as the protective strips of land surrounding them would partly disappear under the waters of the new dam reservoir. The dam project was also partly cancelled by a final judgment prohibiting the building of the upper part of the dam.

When it was preparing to execute the final judgment the National Court received an application from the public authorities seeking recognition that the execution of the judgment was legally impossible, since the new rules of 1996 permitted the existence of nature reserves without surrounding protective areas and the implementation of building projects in the public interest – as was the case with the Itoiz dam – on the protective strips of land. The National Court then raised a question of unconstitutionality in respect of the law passed in 1996 by the autonomous community of Navarra, deeming that it impeded the execution of the judgments handed down in 1995 and 1997.

The Constitutional Court ruled that the law under consideration did not breach the Constitution.

The principle that public authorities were prohibited from taking arbitrary measures (Article 9.3.7 of the Constitution), which must be applied with extreme care where it was a matter of reviewing parliamentary decisions that were nothing other than the expression of the people’s will, could be deemed to have been breached only where there was no rational

explanation for a law. The impugned law of Navarra in no way established rules *ad casum* (for a particular case), such as to amend the earlier legislation without justification. On the contrary, it constituted generally applicable legislation amending the rules governing natural areas in Navarra in terms which were indeed debatable from the technical and political points of view but were not devoid of justification.

In those circumstances it was of little consequence that a number of politicians and members of parliament had made statements enabling the National Court to find that the sole purpose of the new law was to prevent the execution of the court decision. The law under consideration brought the 1987 legislation of the autonomous community of Navarra into line with a law passed in 1990 at national level, with the aim of giving increased protection to natural areas. It also incorporated and harmonised the provisions of a number of earlier laws. The objective substance of that law could not be distorted by statements or initiatives that came within the realm of political debate or political strategy and in no way amounted to guidance on interpreting the law under consideration.

Parliament was empowered to amend the legislation on a subject or a given part of the legal system, whether or not that legislation had been applied by the courts in connection with earlier proceedings or with cases pending. Otherwise, the legal system would be immutable, and undue restrictions would be placed on parliament's rightful freedom of action. The question whether, in making such amendments to the legislation, parliament had interfered with judicial proceedings was quite a different matter, and in that case the issue was not arbitrary action by parliament but the right to the protection of the courts.

The fundamental right to the effective protection of the courts (Article 24.1 of the Constitution) guaranteed the execution of final judgments. The mere fact that a judicial decision had become impossible to execute following an amendment of the law on which it was based did not, in itself, constitute a breach of the Constitution, since compliance with court decisions was conditional on the characteristics of each individual set of proceedings and the substance of the decision. Firstly, parliament had very broad latitude to adopt legal reforms; secondly, compliance with final judgments was of considerable importance in a state governed by the rule of law, as established by the Constitution, and was part of the common heritage shared with other European states (Articles 3 and 1.a of the 1949 Statute of the Council of Europe and case-law of the European Court of Human Rights).

Under the Constitution no law could unduly undermine the operative provisions of a final judgment (Articles 24.1, 117.3 and 118 of the Constitution). The law under consideration had a legitimate aim, which was none other than conservation of the environment (Article 45 of the Constitution). Furthermore, it did not clearly or flagrantly disrupt the balance between the interests enshrined in the law and the specific interests safeguarded by the judgment awaiting execution. First, the interests safeguarded by the judgment consisted in guaranteeing the protection of the nature reserves located in the valley to be flooded by the Itoiz dam project; those interests were duly taken into account by preserving a protective 500-metre strip of land around the reserves, as provided for in the final judgment and also in the new rules laid down by the law of 1996, under which the dam waters themselves were a means of guaranteeing the protection of the birds' nests in the area. Second, the new legislation combined conservation of the environment with other public interests, such as the implementation of a public works project intended to permit the irrigation of vast areas of agricultural land and the supply of drinking water to a number of urban areas and industrial estates.

Under the Constitution, statute law could deal with any subject matter, and the legislature could, in principle, assume responsibility for a task previously performed by the executive. It was therefore not unconstitutional that an appendix to the "foral" law of 1996 defined the protective areas surrounding the nature reserves, which had previously been governed by decree. It could not be said that the only reason for giving a higher rank to the legislation delimiting the nature reserves was to avoid its review by the administrative courts. Moreover, it should be pointed out that the courts could always verify the validity of legislation by referring a question of unconstitutionality to the Constitutional Court, as in the case under consideration.

From a judicial standpoint, the present judgment specified that it was for a court having to decide on referral of a question of unconstitutionality to consult the parties to proceedings, expressly state the articles of the Constitution with which it deemed the provisions in question to be in contradiction, and clearly define which provisions of the relevant law were concerned, so as to facilitate the parties' submissions and the production of state counsel's report. In the case under consideration the question of unconstitutionality had already been found inadmissible once (decision no. 121/1998 of the Constitutional Court, *Bulletin* 1998/2 [ESP-1998-2-012]) on account of a number of defects in satisfying these procedural requirements. The appeal court had then granted the parties a new

time-limit for filing their submissions, after specifying the relevant provisions of the law of the autonomous community of Navarra, by means of a fairly complex Series of references to various Sections of the law, and the clauses of the Constitution considered to have been breached, and had subsequently once more referred the matter to the Constitutional Court. The Constitutional Court's judgment stated that the division of the National Court could have identified the relevant provisions in a simpler manner but the question of unconstitutionality was none the less properly posed.

Although one of the parties to the proceedings had relied on other grounds of unconstitutionality, the judgment merely dealt with the aspects mentioned by the court having raised the question of unconstitutionality, as there was no call for an *ex officio* examination of those grounds (Section 39.2 of the Organic Law on the Constitutional Court).

Supplementary information:

Statute of the Council of Europe of 1949, Articles 3 and 1.a.

Cross-references:

Constitutional Court:

- nos. 61/1984, 67/1984, 15/1986, 167/1987, 92/1988 and 107/1992 (Failure to execute final judgments);
- nos. 108/1986, 99/1987 and 239/1992 (Arbitrary measures by parliament);
- no. 113/1989 (Possibility of broadening the scope of a question of unconstitutionality);
- no. 46/2000, 17.02.2000, *Bulletin* 2000/1 [ESP-2000-1-007] (Possibility of broadening the scope of a question of unconstitutionality).

The judgment takes account of Article 6.1 of the European Convention on Human Rights (Article 10.2 of the Constitution).

European Court of Human Rights:

- *National and Provincial Building Society and others v. the United Kingdom*, no. 117/1996/736/933–935, 23.10.1997, *Reports of Judgments and Decisions* 1997-VII;
- *Stran and Stratis Andreatis v. Greece*, no. 13427/87, 09.12.1994, Series A, no. 301B, *Bulletin* 1994/3 [ECH-1994-3-021];
- *Papageorgiou v. Greece*, no. 97/1996/716/913, 22.10.1997, *Reports of Judgments and Decisions* 1997-VI.

Languages:

Spanish.



Identification: ESP-2000-2-022

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 29.06.2000 / **e)** 181/2000 / **f)** Baremo de daños / **g)** *Boletín oficial del Estado* (Official Gazette), 180, 28.07.2000, 68-96 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.7.1. Institutions – Judicial bodies – **Jurisdiction.**

5.1. Fundamental Rights – **General questions.**

5.2. Fundamental Rights – **Equality.**

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

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

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

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

Keywords of the alphabetical index:

Damage, statutory scale / Accident, road / Damage, complaints, courts, access / Compensation, for non-pecuniary damage / Justice, higher value / Decision, court, discretion, range of results / Judicial authority, exclusive jurisdiction, principle / Legislative freedom, weight of legislation / Damage, individual assessment in judicial proceedings.

Headnotes:

Taken as a whole, the law establishing a binding system for assessing damage resulting from road accidents does not lack reasonable justification and is therefore not in breach of the principle prohibiting all arbitrary action by the authorities (Article 9.3.7 of the Constitution).

The statutory scale of damages applies to all damage resulting from the circulation of motor vehicles. It governs a sector which is defined objectively and

neutrally and makes no distinction between different categories of people or groups. It is therefore not in breach of the principle of equality (Article 14 of the Constitution).

In accordance with the right to life and the right to protection from physical and psychological duress (Article 15 of the Constitution), the law is bound to offer compensation which is adequate – that is, which has due regard for people's inherent dignity and, with no unwarranted exceptions, preserves the integrity of their whole being.

The higher value of justice (Article 1.1 of the Constitution) cannot be described in terms of specific definitions of what is just. It is an open-ended, multi-dimensional concept which complements other material factors, especially the principle prohibiting all arbitrary action by the authorities.

The statutory scale is limited to damage caused to persons and leaves the quantitative assessment of damage to property entirely to the discretion of the courts. This distinction is not arbitrary, since the difficulty of assessing physical and non-pecuniary damage does not apply in the case of property, which is covered by legal provisions.

The legal rules governing civil liability produce no arbitrariness in situations where civil liability in respect of personal damage results from the risk or danger inherent in the use of motor vehicles.

The law's provision for a basic level of compensation in respect of psychological, physical and non-pecuniary damage is not in breach of the Constitution. Assessments made by courts enjoying discretion had previously led to an unwelcome range of results.

The statutory definition of pecuniary damage suffered as a consequence of temporary injury resulting from an accident in which there was fault rather than risk sets an unreasonable limit on the victim's right to compensation. This part of the law is therefore arbitrary.

The statutory scale is not in breach of the principle of the exclusive jurisdiction of the courts and tribunals (Article 117.3 of the Constitution), since it in no way limits their jurisdictional powers. The Constitution places no restrictions on the freedom of the legislature to determine the extent to which any area whatsoever should be regulated.

In the proceedings in question, the rule governing compensation in respect of temporary injury fails to satisfy legitimate claims for compensation from

victims or those who have suffered prejudice. Its finality and exclusiveness preclude any individual assessment of the true extent of damage. It is therefore in breach of the right to effective judicial protection (Article 24.1 of the Constitution).

The charge of unconstitutionality may be raised by a court during proceedings to enforce a decision if application of the disputed law is seen to be necessary at that point.

The declaration that the legal provision is unconstitutional and void is partial only; it does not apply to damage arising from a significant fault established by the courts.

Summary:

In this judgment, the Constitutional Court ruled on eight charges of unconstitutionality raised by various tribunals and provincial courts of appeal (*Audiencias provinciales*) which were handling civil and criminal proceedings brought following various road accidents. In order to determine the compensation payable by the drivers found to be at fault (or, more correctly, their respective insurance companies), the courts were obliged to apply the damage assessment scale approved by a 1995 act. In contrast with previous legislation, which had provided scales for indicative purposes, the rules currently in force established an exhaustive, inflexible system for the assessment of personal damage: death, permanent injury and temporary incapacity. The only exception allowed under the law concerned damage resulting from an intentional offence, which must be compensated in full as freely assessed by the court.

The courts held that the statutory scale was in breach of various constitutional principles and provisions, such as the principle of equality with regard to the higher value of justice and the prohibition of all arbitrary action by the authorities (Articles 14.1.1 and 9.3.7 of the Constitution), the right to life and the right not to be subjected to physical or psychological duress (Article 15 of the Constitution), the right to effective judicial protection (Article 24.1 of the Constitution) and the principle that the courts have exclusive jurisdiction (Article 117.3 of the Constitution).

The Constitutional Court partially allowed the applicants' charges of unconstitutionality. It held that the statutory system was valid as a whole and also approved the validity of several of its constituent parts, including the uniform assessment of personal damage (death, permanent or temporary incapacity, loss of limb and after-effects) and even non-pecuniary damage (*pretium doloris*). However, it declared one disputed part of the system unconstitutional, namely,

that concerning the assessment of damage to property resulting from the temporary incapacity of accident victims.

Four members of the Court registered three dissenting opinions in respect of this judgment, arguing that the act was entirely constitutional.

Supplementary information:

The disputed provision appeared in various provisions of a 1968 Act on the circulation of motor vehicles (Section 1.2, its supplementary provision and several paragraphs from the appendix) which had been introduced by Act no. 30/1995 on the authorisation and supervision of private insurance.

Many constitutional cases are currently pending on different aspects of the statutory system for assessing civil liability in connection with the circulation of vehicles.

Cross-references:

Constitutional Court:

- nos. 108/1986, 65/1990, 66/1990, 142/1993, 212/1996, *Bulletin* 1996/3 [ESP-1996-3-031] and 116/1999, *Bulletin* 1999/3 [ESP-1999-3-014] (principle prohibiting all arbitrary action by the authorities);
- nos. 75/1983, 144/1988, 222/1992 and 164/1995, *Bulletin* 1995/3 [ESP-1995-3-030], (principle of equality before the law);
- nos. 53/1985 and 129/1989 (duty of the legislature to protect life as a legal interest);
- nos. 76/1982 and 110/1993 (charges of unconstitutionality are subject to criteria whose interpretation must be flexible).

Languages:

Spanish.



Identification: ESP-2000-3-031

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 15.11.2000 / **e)** 273/2000 / **f)** Retroactive waste disposal charges / **g)** *Boletín oficial del Estado* (Official Gazette), 299, 14.12.2000, 39-48 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 3.10. General Principles – **Certainty of the law.**
- 3.22. General Principles – **Prohibition of arbitrariness.**
- 4.6.6. Institutions – Executive bodies – **Relations with judicial bodies.**
- 4.10.7.1. Institutions – Public finances – Taxation – **Principles.**
- 5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
- 5.3.38.4. Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law.**

Keywords of the alphabetical index:

Retroactivity, laws and other normative acts / Regulation, retroactive effect / Water, treatment, charge / Regulation, executive, procedural rules.

Headnotes:

A retroactive tax provision may be contrary to the principle of legal certainty if it introduces changes which could not reasonably be foreseen. To determine whether it infringes the Constitution, an assessment must be made of the degree of retroactivity and the precise circumstances that arise in each case.

The public authorities have a duty to comply with the basic procedure for framing legal rules, according to the principles of legal certainty and the avoidance of arbitrary conduct.

The rules governing fiscal charges are not provisions which restrict individual rights, and so they are not subject to the prohibition of retroactivity laid down by Article 9.3 of the Constitution.

The Spanish Constitution does not recognise any principle whereby certain matters may be regulated only by regulations: any matter may be regulated by law.

Summary:

Law 5/1981 dated 4 June 1981 of the Autonomous Community of Catalonia concerning sewage disposal included a number of provisions for financing sewage disposal and treatment. It provided for an increase in the rates payable by users of the water supply networks and for a waste disposal charge for certain types of water consumption. In 1983, the Executive Council (*Generalidad*) of the Autonomous Community of Catalonia enacted several regulatory provisions

under this law, for the purpose of financing and under taking the relevant works. Some of these provisions formed the subject of appeals by businesses required to pay the above-mentioned charge and were annulled by the courts on procedural grounds, as no mandatory preliminary technical report had been produced.

On 13 July 1987, when the courts had not yet ruled on the appeals, the Parliament of Catalonia adopted Law 17/1987 on water management, which contained a number of regulations on the increase of rates and the introduction of a waste disposal charge, previously approved by the autonomous government. The Parliament also decided that these regulations would have force of law and would be applied immediately, pending the entry into force of the law. The Supreme Court then referred the 1987 Law to the Constitutional Court, arguing that it infringed the principles of legal certainty and non-retroactivity of provisions restricting individual rights, as protected by Article 9.3 of the Constitution. The Supreme Court contended that a legislative provision cannot confer a higher status and retroactive effect upon regulatory provisions of a fiscal nature, which are void as the corresponding tax assessments would otherwise themselves be void.

The Constitutional Court stated that provisions giving rise to fiscal charges (Article 31.1 of the Constitution) are not, by definition, provisions which restrict individual rights within the meaning of Article 9.3 of the Constitution. Accordingly, fiscal provisions as such are not restricted by the prohibition of retroactivity stipulated in the Constitution.

However, the judgment points out that retroactive fiscal provisions maybe contrary to other constitutional principles, in particular the principle of legal certainty. But this principle is not absolute, as that would result in what the Court calls 'freezing' or 'petrification' of the legal system. Nor is there any citizens' right to the maintenance of a particular tax law system. But the principle of legal certainty protects citizens against rule changes which cannot reasonably be foreseen, it being understood that back-dating fiscal provisions must never be contrary to the prohibition of arbitrary behaviour by the public authorities.

Determining whether a fiscal provision infringes the principle of legal certainty entails assessing, firstly, its degree of retroactivity and, secondly, the specific circumstances which arise in each case. In this instance, the Court found that the retroactivity of the law did not infringe the principle of legal certainty insofar as it was in conformity with the guarantee of certainty of the provision and the foreseeability of its application by the public authorities, the two elements of the principle susceptible of violation.

The Court also stressed that, although the second supplementary provision of Law 17/1987 does not clearly identify the specific regulatory provisions incorporated into the law, that is a defect of legislative technique which, in this particular instance, does not impair the objective aspect of legal certainty or reliability.

Nor did the Court consider that the impugned provision impaired the subjective aspect of legal certainty, i.e. the foreseeability of its effects. The Court emphasised that the requirement to pay the charge had been clearly established since Law 5/1981, having been affected neither by the court decisions annulling the regulations, nor by the fact that Law 17/1987 conferred the status of a Law on the regulations in question. The regulations had not yet been annulled insofar as the Supreme Court had not yet ruled on the appeals; their nullity was based on a procedural defect and not on any substantive infringement. Consequently, conferring a higher legal status on the retroactive provisions had no negative impact on citizens' confidence, as they had been able to adapt to the legislation in force.

The Court also stated that the principle of legal certainty and non-arbitrary behaviour by the public authorities require the latter to comply with the basic procedure for framing legal provisions. But these same constitutional principles do not oblige the public authorities to remain passive when a provision of a nature to serve the public interest is impaired by a procedural defect. In this particular instance, the legislature of the Autonomous Community of Catalonia acted to further a constitutional interest, namely the improvement of environmental water quality (Article 45 of the Constitution), which would have been seriously impaired if the necessary sewage disposal and water treatment works had not been carried out.

The Court also held that the legislative decision to confer a higher status on the retroactive provisions is irreproachable from the point of view of the system of sources. There is no principle laid down in the Spanish Constitution whereby it is mandatory for certain matters to be dealt with by regulatory, and not legislative, provisions. Under the Constitution and subject to the limits it sets, a law may have any content whatsoever.

Finally, it should be noted that the impugned legislative provision had been repealed before the Constitutional Court ruled on its constitutionality. However, this did not render the constitutional proceedings pointless, insofar as repeal of the provision does not prevent its being applied to the dispute in connection with which the question of unconstitutionality was raised, or to other similar cases that might arise.

Cross-references:

Constitutional Court:

- nos. 150/1990 of 04.10.1990 (FJ 8); 173/1996 of 31.10.1996 (FJ 3); 182/1997 of 28.10.1997 (FJ 11b), *Bulletin* 1997/3 [ESP-1997-3-022], (retroactivity of fiscal provisions);
- no. 73/2000, 14.03.2000 (FJ 15), *Bulletin* 2000/1 [ESP-2000-1-011], (absence in the Spanish Constitution of any principle making certain matters subject to regulatory provisions).

European Court of Human Rights:

- *National and Provincial Building Society and others v. the United Kingdom*, no. 117/1996/736/933–935, 23.10.1997, paragraphs 111 and 112;
- *Greek Refineries, Strain and Straitis Andreatis v. Greece*, 13427/87, 09.12.1994, paragraphs 49–50, *Bulletin* 1994/3 [ECH-1994-3-021];
- *Papageorgiou v. Greece*, 97/1996/716/913, 22.10.1997, paragraph 37.

Languages:

Spanish.

*Identification:* ESP-2000-3-032

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 16.11.2000 / **e)** 276/2000 / **f)** 50% tax surcharge / **g)** *Boletín oficial del Estado* (Official Gazette), 299, 14.12.2000, 72–88 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.10.7.1. Institutions – Public finances – Taxation – **Principles.**

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

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

Keywords of the alphabetical index:

Tax, surcharge, late payment.

Headnotes:

The 50% surcharge for late payment of taxes is an administrative sanction covered by the Constitution. As such, it must respect the principle of lawfulness of sanctions and the procedural guarantees applying to sanctions (Articles 25.1 and 24.2 of the Constitution).

Whatever the legislator calls them, only punitive measures taken by the public authorities may be termed sanctions, and regardless of whether their remunerative function is accompanied by others.

Summary:

The Administrative Disputes Chamber of the Supreme Court of Catalonia applied to the Constitutional Court for a ruling that the General Tax Law was unconstitutional, arguing that Section 61.2 of the law, as drafted under law 18/1991, was incompatible with Articles 24 and 25.1 of the Constitution, and thus with Article 9.3 of the Constitution. The contested provision introduced a 50% surcharge for non-payment within the stated time of sums due on tax returns and assessments, unless the tax-payer had previously informed the tax authorities that the payment would be late.

The referring Chamber argued that the surcharge actually constituted an administrative sanction, which was not provided for as such in law, and was not attended by the guarantees applying to the sanctions procedure.

The Constitutional Court declared the said provision unconstitutional and void. Two judges delivered concurring opinions.

This judgment was based on the assumption that only measures which are genuinely punitive, i.e. which are covered by the state's right to punish, are subject to the constitutional guarantees applying to measures which have the characteristics of a sanction. The Court accordingly started by trying to establish whether, regardless of its legal title, the contested surcharge was an administrative sanction or mere compensation for delay, as argued by the State Counsel.

For this purpose, the Court first examined the way in which the legislature regulated this surcharge. It concluded that the legal regime can be deduced from the firm intention not to treat the surcharge as a

sanction, since at no point is the surcharge termed a sanction, and no express provision is made for its application under the sanctions procedure. Moreover, it is provided that application of the surcharge excludes the application of any sanction. It nonetheless points out that tax surcharges may have the external characteristics of a sanction, since they are imposed on persons guilty, under the established legal system, of tax fraud (under Section 79 of the law, any failure to pay all or part of a tax debt before expiry of the statutory time limit constitutes a serious offence). This is, in other words, a measure which produces negative effects on the assets of the taxpayers to whom it is applied, and which involves restriction of a right; the amount of the surcharge is determined with reference to the nature of the fraudulent activities (it depends on the sum which has not been paid in time, and on the extent of the delay).

That said, as the Constitutional Court stated in its judgment, the legal name assigned to this restrictive measure, and the legislator's intention not to treat it as a sanction, are by no means sufficient to justify the conclusion that the tax surcharge is not subject to the restrictions imposed on sanctions by the Constitution. Nor, on the other hand, is it sufficient to find that the contested surcharge has the characteristics of a sanction. In fact, as the Constitutional Court pointed out, a measure of this kind constitutes a sanction only if it serves a punitive function. To determine its legal nature, the Court accordingly set out to establish whether it was in fact a punitive measure or served other functions.

It concluded that the surcharge was primarily intended as a coercive, dissuasive and incentive measure, and also served a compensatory function; in addition, however, it served a punitive function, since the difference between the amount of the surcharge and that of fiscal sanctions was a small one, and since it was a measure which restricted certain rights, and was imposed for violation of the law. The Court accordingly ruled that the contested surcharge did serve a punitive function, and was subject to the substantive and judicial guarantees provided by Articles 25.1 and 24.2 of the Constitution.

In its judgment, the Constitutional Court finally emphasised that the surcharge in question was introduced by a legal rule having force of law and was consistent with the guarantees of certainty derived from the principle of legality, enshrined in Article 25.1 of the Constitution. However, it violated Article 24.2 of the Constitution, since it was imposed directly without a prior hearing, and without the tax-payer's being able to exercise his defence rights in the proceedings. The legal provision introducing the surcharge must therefore be declared void.

Supplementary information:

Section 61.2 of the law, as drafted under Law 18/1991, provides as follows:

“Any delay in the payment of sums due on tax returns and assessments shall give rise, unless the tax-payer has previously informed the tax authorities of the delay, to payment of a single 50% tax surcharge, and shall exclude the payment of interest for delay, and any other applicable penalty. Notwithstanding the above, if payment is made within three months of expiry of the time limit for presentation of the said returns and assessments, and for settlement of the sum due, the surcharge shall be fixed at 10%.

A tax-payer who fails to pay taxes when the corresponding tax returns and assessments are presented late, and who has not expressly applied to postpone payment or pay in instalments, shall be required to pay a 100% surcharge.”

The Court thus ruled in this judgment that the sub-Section covering the 50% tax surcharge was void. However, the 10% surcharge had already been declared constitutional (Constitutional Court Judgment no. 164/1995 and Constitutional Court decisions 57/1998 of 3 March 1998 (FJ 4) and 237/1998 of 10 November 1998 (FJ 4)). As for the 100% surcharge, the Plenary Court held in Judgment no. 291/2000 of 30 November 2000 that this has the characteristics of a sanction, and annulled the surcharge imposed on the applicant by the tax authority. This same judgment also raised an internal question concerning the constitutional validity of the second paragraph of Section 61.2 of the law.

Cross-references:

Constitutional Court:

- nos. 164/1995, *Bulletin* 1995/3 [ESP-1995-3-030] and 291/2000.

European Court of Human Rights:

- *Bendenoun v. France*, 12547/86, 24.02.1994, *Bulletin* 1994/1 [ECH-1994-1-004].

Languages:

Spanish.



Identification: ESP-2007-3-002

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 28.03.2007 / **e)** 68/2007 / **f)** Urgent measures on unemployment / **g)** no. 100, 26.04.2007 / **h)**.

Keywords of the systematic thesaurus:

1.2.1.4. Constitutional Justice – Types of claim – Claim by a public body – **Organs of federated or regional authorities.**

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

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

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

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

4.6.3.1. Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

Keywords of the alphabetical index:

Legislative decree / Legislation, urgent need / Social security / Unemployment, legislation, urgent need.

Headnotes:

The government cannot approve by legislative decree the reform of social security relating to unemployment benefit and training for the unemployed, unless there is deemed to be a situation of extraordinary and urgent need (Article 86.1 of the Constitution).

The Constitutional Court acknowledges that the political judgment of the authorities responsible for governing the state has an impact on the assessment of situations deemed to be of extraordinary and urgent need; but it can also reject the definition given by those same political authorities in the event of misuse or arbitrary use, since the constitutional provision is not a meaningless text.

The breakdown of negotiations between the government and the social partners or the calling of a general strike to express opposition to a reform cannot on any account justify an extraordinary situation of urgent need, which is the requirement established by the Constitution in order for the government to enact legislative decrees.

A legislative decree enacted in a situation which cannot be deemed to be one of extraordinary and urgent need is unconstitutional and entirely void.

Derogation from a legislative decree by a law enacted by the General Assembly on the basis of the text (Article 86.3 of the Constitution) does not prevent review of its constitutionality. However, the case pending before the Court no longer has a purpose because Parliament has substantially amended the rules governing the legal institutions.

An Autonomous Community is empowered to object to a state law, not only in order to uphold its own powers in the matter, but also to objectively improve the legal system, since the law may affect the exercise of its powers (Section 32.2 of the Implementing Act on the Constitutional Court).

The appeal against the law is lodged by the government of the Autonomous Community but on no account by the lawyers who filed the application.

Summary:

I. The judgment dealt with two applications to declare Royal Legislative Decree no. 5/2002 of 24 May 2002, on urgent measures to reform the system for protection of the unemployed and improvement of employment, unconstitutional. One of the applications was filed by Junta de Andalucía and the other by more than 50 members of the Assembly. The Court allowed these applications and declared the urgent legislative decree enacted at the time by the government entirely void, because of the lack of the factual circumstances required by Article 86.1 of the Constitution, namely a situation of extraordinary and urgent need enabling the government to legislate directly by legislative decree rather than tabling a bill in Parliament.

The Royal Legislative Decree of 2002 altered the social security benefits granted to the unemployed, particularly to those who had been employed in the agricultural sector. The decree introduced measures concerning training and employment for the unemployed and altered the rights of dismissed workers, at a time when their disputes were in the preparatory stage before the Labour Court, particularly with regard to the compensation paid pending the outcome of the conciliation procedure.

II. The judgment draws attention to the Court's long line of decisions in the matter, although this had never resulted in the setting aside of a legislative decree owing to the lack of the factual circumstance of urgent need. The political authorities' definition of a situation of extraordinary and urgent need must be

explicit and must state the reasons for it. There must also be a balance between the situation of urgent need and the measures adopted.

To verify whether these conditions are met, the Court examines the statement of the reasons for the legislative decree and the defence submitted by the government during the subsequent parliamentary debate, when the Congress of Deputies ratifies or derogates from the royal legislative decree.

In this particular case, the government provided no evidence of the factual circumstances required by Article 86.1 of the Constitution. The arguments adduced on this point in the preamble to the royal legislative decree are highly theoretical and overall preclude any assessment of the realities of the situation. They were also qualified – or indeed neutralised – by the perception of reality conveyed by the government during the parliamentary debate on ratification. In any event, the government did not at any time provide evidence of any obstacles to the law being dealt with through the parliamentary legislative procedure.

During the dialogue with the trade unions and professional organisations prior to the enactment of the decree, the Ministry of Labour and Social Affairs stated its wish to end the talks before the end of summer 2002 so that the measures might come into force on 1 January 2003. This schedule could have been observed through the parliamentary process, and the breakdown of negotiations with the social partners or the calling of a general strike to protest against the reforms cannot on any account serve as evidence of the urgent need required by the Constitution.

The express derogation from Royal Legislative Decree no. 5/2002 of 24 May 2002, after it had been tabled as a bill under the procedure provided for by Article 86.3 of the Constitution, by Act no. 45/2002 of 12 December 2002, does not preclude assessing the existence of a situation of urgent need. But the objections concerning the reasons for the legislative decree no longer have a purpose, since Act no. 45/2002 substantially amended the regulations, particularly as regards matters affected by a possible finding of unconstitutionality.

The Autonomous Community of Andalusia is fully empowered to challenge the procedure for enacting the royal legislative decree before the Constitutional Court, since its powers and the impugned reasons are closely related.

The decision of the Andalusia Government Council, as the body empowered by Article 162.1.a of the Constitution to lodge the said appeal, is entirely unequivocal. The authorisation given to its law office to draw up the application is merely a formal requirement which does not in any sense affect the prior lodging of an objection by the competent body (STC 42/1985).

Cross-references:

- no. 111/1983, 02.12.1983;
- no. 29/1982, 31.05.1982;
- no. 182/1997, 20.10.1997;
- no. 137/2003, 03.07.2003.

Languages:

Spanish.



Identification: ESP-2007-3-004

a) Spain / **b)** Constitutional Court / **c)** First chamber / **d)** 16.04.2007 / **e)** 72/2007 / **f)** María Escudero Cuenca against the publishing company of the newspaper Diario 16 / **g)** no. 123, 23.05.2007 / **h)**.

Keywords of the systematic thesaurus:

- 3.17. General Principles – **Weighing of interests.**
- 5.3.21. Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.22. Fundamental Rights – Civil and political rights – **Freedom of the written press.**
- 5.3.32. Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Photograph, use without consent / Police, officer, photograph, use without consent.

Headnotes:

The publication in a newspaper of a photograph of a municipal police officer participating in a court-ordered eviction and countering the violent resistance put up by the evictees in the street does not under any circumstances violate her right to her own image (Article 18.1 of the Constitution).

The right to one's image is neither absolute nor unconditional: its content is limited by other constitutional rights such as freedom of expression or information. The general rule is that the holder of this right should be the person who decides whether to allow third parties to capture and disseminate his or her image. This therefore means reconciling the right to one's image with the freedom of expression and information of third parties.

Summary:

The Constitutional Court dismissed the application lodged by a sergeant in the Madrid municipal police who had brought a claim for damages against the publishing company of the newspaper *Diario 16*, its director and a photographer for infringement of her right to her image. The ground adduced was the publication on the front page of the newspaper in question of a photograph taken during an eviction operation. The sergeant was clearly identifiable in the foreground, pinning a person to the ground. The front page carried in large type the headline "VIOLENT EVICTION".

The judgment dismissing the application states that the constitutional dimension of the right to one's image confers on holders of that right the power to control representations of their physical appearance enabling them to be identified. This presupposes in particular the right to prevent unauthorised third parties from obtaining, reproducing or publishing their image.

However, the capture and dissemination of a person's image may be allowed when that person's behaviour or the circumstances justify the lifting of these restrictions, in such a way that the interests of others prevail. This therefore makes it necessary to reconcile the interests at stake.

In the view of the Constitutional Court, the impugned judgment of the Supreme Court achieved an appropriate reconciliation between the conflicting rights: the latter argues that the right to freely communicate and receive accurate information must take precedence over the applicant's right to her image. The conclusion was thus reached that the factual circumstances did not by any means call for anonymity.

The document reproduces the image of a sergeant who was photographed while participating in a public operation, namely a court-ordered eviction which was assisted by officers of the municipal police owing to the violent resistance put up by the evictees in the streets of the city. It is also beyond doubt that the information published by the newspaper is public and

accurate. Lastly, the photograph in question is purely secondary in relation to the information published, and under no circumstances does it show the applicant in a situation other than that of the normal performance of her duties.

Article 8.2 of Organic Law no. 1/1982 on civil protection of the right to honour, personal and family privacy and one's own image:

"In particular, the right to one's own image shall under no circumstances prevent:

- a. its capture, reproduction or publication by any means in the case of persons who exercise a public function or a high-profile or publicly prominent profession and if the image is captured at a public event or in a place open to the public;
- b. the use of caricature of those persons, in accordance with social usage;
- c. graphic information concerning an incident or public event where the image of a particular person appears purely incidentally.

The exceptions provided for in sub-paragraphs a and b shall not apply in the case of authorities or persons exercising functions which, by their nature, require the person exercising them to remain anonymous."

Languages:

Spanish.



Identification: ESP-2008-2-007

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 14.05.2008 / **e)** 59/2008 / **f)** Occasional domestic violence / **g)** *Boletín oficial del Estado* (Official Gazette), no. 135, 04.05.2008 / **h)**.

Keywords of the systematic thesaurus:

- 1.3.1.1. Constitutional Justice – Jurisdiction – Scope of review – **Extension.**
- 3.19. General Principles – **Margin of appreciation.**
- 3.20. General Principles – **Reasonableness.**
- 3.21. General Principles – **Equality.**

Keywords of the alphabetical index:

Violence, against women / Offence, criminal / Guilt, constitutional principle / Criminal law, less severe.

Headnotes:

The law which stipulates that a man who commits an occasional offence of domestic violence is liable to one of a range of alternative penalties, including a prison sentence of between six months and one year, while a woman committing similar acts of violence is liable to a prison sentence of between three months and one year, does not infringe the constitutional principles of equality under the law or those relating to culpability.

Criminal law policy is an exclusive matter for the democratic legislator, who has wide discretionary powers within the limits set out in the Constitution.

The provision in question requires analysis, not from the angle of the prohibition of discrimination on the grounds of sex, but rather from the general principle of equality.

The general principle of equality (Article 14 of the Constitution) requires different treatment of cases concerning the same facts to be objectively and reasonably justified; this should not entail consequences disproportionate to the aim pursued.

It is quite legitimate for the law to pursue the aim of protecting women from gender-based violence, *inter alia* by means of criminal-law measures. The provision in question is appropriate for this aim because it is deemed legitimate for the law to consider that aggression involves serious harm to the victim where the attacker acts in a given cultural context, viz the inequality existing within a couple's relationship, which involves serious injury to the victims.

The wording of the provision in question in no way suggests that the perpetrator of the offence is necessarily a man, since it is also possible for women to perpetrate the offence in question; this does not prevent the Constitutional Court from determining the question of unconstitutionality on the basis of the Criminal Court's interpretation of the principle.

Summary:

The judgment concerns a question of unconstitutionality raised by a Criminal Court in trying a man accused of violent acts against his wife. If the Criminal Court declared him guilty, it had to establish

its sentence on the basis of the provision introduced into the Penal Code by the Organic Law on protection against gender-based violence, which was approved in 2004. The question is based on the fact that the law stipulates severer penalties if the attacker is a man rather than a woman; this allegedly indicates a case of discrimination based on sex, given that different penalties are imposed for the same conduct.

The judgment, which was adopted, with three votes against, stated that criminal law in no way infringed the right to equality before the law. This is partly due to the fact that the principle in question must be analysed on the basis of the general equality principle set out in the first sentence of Article 14 of the Constitution, not on the subsequent prohibition of sex discrimination. The reason for this is as follows: the sex of the perpetrators and victims is not an exclusive or decisive factor in determining different criminal sanctions, given the type of conduct described in the provision considered by the court (Article 153.1 of the Penal Code), or the grounds mentioned by the legislator. These grounds are based on a major abnormality in the conduct described in Article 153.2, which is applicable to men and women in matters of attacks committed outside the context of the couple, i.e. the Article provides for prison sentences of between three months and one year.

This provision has a legitimate aim, namely to reinforce protective measures to guarantee the physical, psychological and moral integrity of women in a specific environment, that of the couple, where the legislator sets forth grounds for considering that women are sufficiently protected and combating inequality within this same environment. The distinction drawn in the provision is a reasonable one, and does not involve disproportionate consequences in the light of the limits on the penalties (minimum of six months rather than three) and their flexibility (the law provides for alternatives to imprisonment and certain factors varying the length of detention). This is even more apparent when we consider that the law protects vulnerable persons cohabiting with violent offenders.

Lastly, the provision in no way infringes the constitutional principle of guilt: it is naturally and perfectly legitimate, although it does not assume that men's conduct is more aberrant because they are men or women are more vulnerable because they are women. Nor does the provision penalise the guilty parties for violence perpetrated by other male spouses, but only for their own base acts.

The judgment sets out a number of preliminary considerations. One of them, to the effect that although male responsibility for the offence is one of

the possible interpretations of the provision, it should not be overlooked that women too can perpetrate this offence, and that the inclusion of “particularly vulnerable persons cohabiting with the perpetrator” as alternative victims broadens the definition of “victim” by ensuring that it is not confined to women. However, the Court challenges the constitutionality of the provision as interpreted by the Criminal Court which raised the question, presuming that the perpetrator is a man and the victim a woman.

The judgment recalls that, as a general rule, the framing of criminal policy is an exclusive matter for the democratic legislator. Selecting a given act for consideration as an offence and attaching a specific penalty to it is the result of a complex assessment of expediency which does not only involve the enforcement or application of the Constitution. This determines the limitations on the jurisdiction of the Court, which is not responsible for analysing the efficacy or justification of criminal provisions: it must solely assess whether the external limits imposed by the Constitution on the criminal legislator, who enjoys wide discretionary powers, have been respected.

Supplementary information:

Article 153.1 of the Penal Code (approved by Organic Law no. 10/1995 of 23 November 1995), pursuant to the wording of Article 37 of Organic Law no. 1/2004 of 28 December 2004 on comprehensive protection against gender-based violence (BOE, 29 December 2004, no. 313), reads as follows:

“Anyone inflicting on another person, by any means or procedure, any type of psychological harm or injury not defined as an offence by the present Code or striking or inflicting physical ill-treatment on another person without causing lesions, the victim being the perpetrator's wife or a person having had an affective relationship with the perpetrator, even in the absence of cohabitation.. will be punished with a prison sentence of between six months and one year.”

The judgment, which sparked a heated political debate, was the first in a long list of judicial decisions on one hundred or so cases submitted by various criminal courts relating to the Law on gender-based violence.

Languages:

Spanish.



Identification: ESP-2009-1-001

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 11.09.2008 / **e)** 103/2008 / **f)** Consulta popular en el País Vasco / **g)** no. 245, 10.10.2008 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.1. General Principles – **Sovereignty**.
 3.3.2. General Principles – Democracy – **Direct democracy**.
 4.5.6. Institutions – Legislative bodies – **Law-making procedure**.
 4.8.4.1. Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.
 4.9.2. Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.

Keywords of the alphabetical index:

Authority, abuse.

Headnotes:

A law enacted by the autonomous parliament of the Basque Country, calling upon Basque citizens to answer several questions of a plainly political nature, actually constitutes an indirect referendum infringing the Constitution because this is an area of reserved State power.

The Spanish Constitution provides for the existence of a representative democracy coupled with certain instruments of direct democracy such as a referendum. These instruments are intended to strengthen, not weaken or supplant, representative democracy.

In order to abide by the Constitution, it is imperative that institutional reform bills take the course laid down for that purpose by the Constitution itself, particularly when they involve the identity of the single, exclusive entity in which national sovereignty is vested and which is none other than the Spanish people.

Defects that vitiate legislative procedure infringe the Constitution if they substantively pervert the expression of the position obtained in the houses of parliament.

Summary:

I. In this judgment, the Constitutional Court determined an appeal on grounds of unconstitutionality lodged by the President of the Spanish Government against an act of the Basque Country's parliament with the object of questioning the citizens of that Autonomous Community about "initiating a process of negotiation to promote political harmony and normalisation".

The President of the Spanish Government stated the following grounds for his appeal:

- a. encroachment on the State's sole authority to authorise the organisation of consultations of the people by referendum;
- b. substantive unconstitutionality of recognising a new sovereign entity besides the Spanish people, without any prior constitutive decision; and
- c. procedural unconstitutionality based on contestation of the legislative procedure followed in the passage of the act.

II. In the unanimously adopted judgment detailed below, the Constitutional Court examined these three questions in succession:

Concerning the first question, the Constitutional Court began by reminding the parties that the act of parliament must be found unconstitutional if it should prove to have the object of organising a referendum. In order to ascertain the nature of this act, it was essential to determine who it was directed at, and the procedural guarantees. The consultation settled by the act constituted a referendum on an issue of a plainly political nature since it was referred to the electorate of the Basque Country and carried safeguards characteristic of electoral processes. In establishing whether it was a referendum, the legally non-binding nature of the outcome was immaterial. In the instant case, the consultation of the people had been organised with no claim to empowerment whatsoever, as it was not expressly prescribed by positive law including the autonomy statutes of Spain's Communities and the Constitution. Besides, under the Spanish constitutional system, governed solely by the general principle of representative democracy, no implicit power was prescribed in the matter. The Constitutional Court's inference from this in its judgment was therefore that the impugned act infringed Article 149.1.32 of the Constitution.

As to the second question, the Constitutional Court stated in its judgment that the identification of an institutional entity, as it happened the Basque people, purportedly vested with a "right to decide" equivalent

to that of the Spanish people, was impossible without a prior reform of the current Constitution by way of Article 168 of the Constitution. That would require the twofold participation of the *Cortes generales* (Article 66 of the Constitution) and of the entity vested with sovereignty, through a mandatory referendum of ratification (Article 168.3 of the Constitution). The Spanish people alone are vested with national sovereignty, the foundation of the Constitution and the source of all political power (Articles 1.2 and 2 of the Constitution).

The Constitutional Court concluded that the act examined concerned issues which the standing orders of the Basque parliament expressly excluded from the single reading procedure, under which no amendment could be moved. Passage of the act according to that procedure substantively perverted the process of articulating the position of the house of parliament: the procedure imposed in fact greatly limited the possibilities of participation by minorities in the formulation of the provision, and moreover was pursuant to a decision of the Basque Government, not a unanimous decision by the Bureau of the parliament.

The appeal alleging unconstitutionality was lodged on 15 July 2008. The Constitutional Court sat during August so as not to interrupt the proceedings. The full bench finally delivered its judgment on 11 September, two months after the appeal had been brought.

Supplementary information:

The act of the Basque parliament, no. 9/2008 of 27 June 2008, on the organisation and regulation of a popular consultation to ask the citizens of the Autonomous Community of the Basque Country about initiating a process of negotiation to promote political harmony and normalisation, was published in the "*Boletín Oficial del País Vasco*" on 15 July 2008.

Languages:

Spanish.



Identification: ESP-2010-2-005

a) Spain / b) Constitutional Court / c) Full Court / d) 28.06.2010 / e) 31/2010 / f) Estatuto de Cataluña / g) *Boletín oficial del Estado* (Official Gazette), 172, 16.07.2010; www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9873 / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

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

1.3.5.4. Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation.**

1.5.4.3. Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**

1.5.4.4. Constitutional Justice – Decisions – Types – **Annulment.**

2.2.2.2. Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

3.1. General Principles – **Sovereignty.**

3.6. General Principles – **Structure of the State .**

3.8. General Principles – **Territorial principles.**

4.3.1. Institutions – Languages – **Official language(s).**

4.7.5. Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

4.7.7. Institutions – Judicial bodies – **Supreme court.**

4.8.4.1. Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.7. Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**

4.8.8.1. Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

4.8.8.5.2. Institutions – Federalism, regionalism and local self-government – Distribution of powers – International relations – **Participation in international organisations or their organs.**

4.12.10. Institutions – Ombudsman – **Relations with federal or regional authorities.**

Keywords of the alphabetical index:

Region, power, political status / Authority, territorial, autonomous, status, powers / Autonomy, statute, procedure and reform correct / Community, autonomous.

Headnotes:

The power of reform of the Statutes of Autonomy is submitted to the Constitution, which is at the heart of the right to self-government of the regions of Spain.

From a constitutional perspective, there is only one Nation (the Spanish nation). Otherwise, it is legitimate to vindicate the historical rights of the territorial minorities of Spain.

The Spanish Ombudsman (*Defensor del Pueblo*) is an institution established by the Constitution for the protection of fundamental rights and public liberties. Any suppression of this guarantee is in contravention of the Constitution.

The Constitutional Court has a monopoly over the rejection of the laws that are contrary to the constitutional provisions. The Statutes of Autonomy cannot establish mechanisms of control that ignore that monopoly.

In contrast with the federal State, in the Spanish “Autonomic State” there is only one Judiciary. In the “Autonomic State” the plurality of powers finds a limit in the unity of the Judiciary.

It is not the proper role of the Statutes of Autonomy to give a general definition of the concepts and terminology deployed in the Constitution. The Statutes of Autonomy are, however, the appropriate legislation in which to set out the provisions on the institutional relations of the Autonomous Communities, the State and other public bodies.

Participation of the Autonomous Communities in the financial instruments of solidarity among regions cannot be subjected to conditions unilaterally imposed by an Autonomous Community.

The State legislature must participate in the reform of a Statute of Autonomy because it is a law that pertains to the actual organisation of the State.

Summary:

I. Ninety nine deputies (members of the lower chamber of the Spanish Parliament) belonging to the Popular Party of Spain (centre-right) brought an action of unconstitutionality against the reform of the Statute of Autonomy for Catalonia approved by the Organic Law 6/2006 of 19 July 2006. In formal terms, this was a reform of the Statute of Autonomy (originally approved in 1979). However, Organic Law 6/2006 contained a completely new Statute of Autonomy. The deputies raised concerns over a

number of provisions, including the basis of the autonomy, the regulation of official languages, the incorporation of a bill of rights (the original Statute of Autonomy lacked such content), the Judiciary in Catalonia, the competences of Catalonia, as well as the financial system for Catalonia and local powers in the region.

The Constitutional Court upheld most of the provisions, but declared some of them unconstitutional and imposed an interpretation on others. It also denied juridical value to certain declarations of the preamble. There were five dissenting opinions.

II. In its judgment as to the constitutionality of the new Statute of Autonomy of Catalonia, the Constitutional Court stated that Statutes of Autonomy can include content that contributes towards the performance of the constitutional function assigned to them as well as content envisaged expressly in the Constitution. These are the institutional basic rules that incorporate the basic regulation of competence of every Autonomous Community. They may not exceed the qualitative limits that separate the scope of the constituent power and the constituted powers. Although the preamble lacks normative value, it has a level of juridical value as a template for the interpretation of statutory rules. The terms "nation" and "national reality" used in the preamble of the new Statute of Autonomy of Catalonia do not have juridical interpretative effectiveness.

The Constitutional Court also defined in its judgment the scope of other terms used in the preliminary title, such as "people of Catalonia" (which is in line with the concept of democratic principle), "citizenship" of Catalonia (with reference to the subjective realm of the projection of self-government), or "historical rights" (which should not to be confused with the rights of the historical territories, which are Alava, Guipúzcoa, Navarra and Vizcaya).

The definition of Catalan as "Catalonia's own language" in the new Statute of Autonomy must not be allowed to jeopardise the balance in the constitutional system of co-official languages. Neither does it justify the statutory imposition of the preferential use of Catalan at the expense of Spanish, which is also an official language in this Autonomous Community. The new Statute of Autonomy for Catalonia includes a provision requiring knowledge of Catalan. This was restricted by the Constitutional Court to the specific fields of education and the Civil Service. The right to linguistic choice between co-official languages established in various statutory provisions in order to guarantee citizens' linguistic rights imposes certain duties on public authorities. The concrete definition of these duties must be

assumed by the territorial power against which the rights can be exercised. The existence of a system of co-official languages in certain regions does not mean that it must be immediately implemented in state constitutional or judicial bodies. On the duty of linguistic readiness of companies, in their relations with consumers and users, the Constitutional Court accepted a projection of linguistic rights in the relations between companies and consumers. Finally, the Court stated that the constitutionality of the characterisation of Catalan as the language of education should not deprive the Spanish language of the same status.

The rights recognised by the new Statute of Autonomy of Catalonia are not fundamental rights. According to the Constitutional Court in its judgment, they are not subjective rights but mandates for action aimed at autonomous public authorities. For example, the proclamation in the new Statute of Autonomy of the right of those in the last stages of life to live with dignity does not imply recognition of euthanasia but the manifestation of the right to a dignified life, the legal status of which depends on policy development made by the regional legislature. Moreover, the assertion in the Statute about secularism in public education means that public teaching is not institutionally assigned to religious denominations.

The new Statute attributes binding effect to the opinions of the Council of Statutory Guarantees regarding bills and motions which develop statutory rights. The Constitutional Court stated in its judgment that this provision represents a decrease of political participation rights and a meddling in the Constitutional Court's exclusive jurisdiction over the power to reject laws. On the other hand, the exclusivity of the supervisory role of administrative activity attributed to the *Sindic de Greuges* (the Catalan Ombudsman), implies a divestment of the *Defensor del Pueblo* (Spanish Ombudsman), an institution established by the Constitution itself as a guarantee of fundamental rights.

The establishment of a list of powers for local government in the new Statute of Autonomy does not limit the power of State legislature to approve the basic legal order of local governments. The creation of the territorial figure of the *Vegueria* (a new local intermediate entity created by the Statute of Autonomy), does not deprive the province of its constitutional role as territorial division of the State. Rather, it should be perceived as an augmentation of legally guaranteed self-government. The Constitutional Court drew a distinction in the judgment between the regulation of the *Vegueria* as the name given to the province in Catalonia or as a new local authority.

The Constitutional Court emphasised that one of the defining characteristics of the Spanish “Autonomic State”, by contrast with the federal State, is that its functional and organic diversity does not extend to the Judiciary. The Autonomic State came about as a result of its establishment in the unique Constitution of 1978 and is also limited by the existence of a unique jurisdiction. In the field of normative concretion, the unity of jurisdiction and Judiciary is equivalent to the unity of the constituent will in terms of abstraction.

The territorial structure of the State does not affect the Judiciary as a power of the State but does allow for the decentralisation of judicial services. The judgment declared certain of the provisions relating to the judiciary in Catalonia to be unconstitutional, such as those relating to the creation of the Council of Justice as a decentralised body of the General Council of the Judiciary. The constitutionality of the provisions for the Supreme Regional Court, the Public Prosecutor Office or the “administration of the auxiliary services of Judiciary” was upheld, although they were qualified in scope.

Having examined the powers conferred by the new Statute of Autonomy on the *Generalitat* of Catalonia, the Constitutional Court proceeded with the correct interpretation of the concepts used by the constituent power. The Statute of Autonomy cannot provide a general definition of constitutional terms such as “basic regulation” of a matter, competence attributed by the Constitution to the State or “legislation”, as a competence of the Central State, but it can define the scope of the powers included in the competences assumed by the Autonomous Community. Most of the new statutory provisions conferring specific powers on the *Generalitat* of Catalonia were upheld. However, the provisions about regional powers over saving banks and mutual insurance companies not integrated in the social security system that include a general definition of the constitutional notion “basic regulation” were declared null and void.

The Statute of Autonomy is the appropriate legislation to set out the fundamental principles of the relationship between the Autonomous Community and the State and other public bodies, such as the European Union. The State must assume responsibility for establishing the specific conditions that allow for the participation of the *Generalitat* of Catalonia in the institutions, agencies and decision-making of the State concerning the regional powers. This participation must preserve the rights of the State powers and respect the freedom of the State regulatory agencies.

The State has the power to regulate its own taxes, the general framework of the tax system and to define the financial powers both of autonomous communities and the state. The autonomic financing provision of the Statute of Autonomy cannot limit the capacity of institutions and multilateral agencies, neither can it impede or impair the full exercise of State powers. The transfer rates of certain taxes and the provisions about State investment in Catalonia within the Statute are not binding on Parliament.

The requirement in the new Statute of Autonomy for other Autonomous Communities to make a “similar tax effort”, as a condition for Catalonia's contribution to levelling mechanisms was pronounced unconstitutional. Striving towards solidarity could not be detrimental to the most prosperous Autonomous Communities beyond that which was needed for the promotion of the disadvantaged Communities.

The provisions on the local Treasury and the financial supervision of local government were upheld. The power of the regional Parliament to perform complete regulation of local taxes was, however, declared unconstitutional.

Statutes of Autonomy can establish their own process of reform. The role played by the *Cortes Generales* (State Parliament) in this process will vary according to the power and institutions affected by the reform. The new Statute of Autonomy gives the State Parliament the power to call a referendum, the final necessary act to accomplish legislative will. Where the President of an Autonomous Community calls a referendum for the ratification of a new Statute of Autonomy, he does so in his capacity of ordinary representative of the State within the territory of the Autonomous Community.

Languages:

Spanish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2008-3-007

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 05.09.2008 / **e)** 1C155/2008 / **f)** Amaudruz and Others v. Geneva cantonal government (*Conseil d'État*) / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 134 I 322 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.2.2.2. Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

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

3.13. General Principles – **Legality.**

4.6.3.2. Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

Keywords of the alphabetical index:

Legislative delegation / Smoking, ban, legal basis / Public place, ban on smoking / Public health, protection.

Headnotes:

Separation of powers; Article 5.1 of the Federal Constitution (rule of law), Article 36.1 of the Federal Constitution (limitations of fundamental rights require a legal basis) and Article 164.1 of the Federal Constitution (requirement of a legal basis in statute law).

Regulations issued by the Geneva cantonal government prohibiting smoking in public places.

The cantonal constitution's provisions on the ban on smoking in public places are not directly applicable (recital 2.5). The challenged regulations cannot have their basis in these provisions, which are insufficiently precise and contain no delegation in favour of the executive (recital 2.6), or in the clause on states of emergency (recital 2.7).

Summary:

I. A popular initiative entitled "Passive smoking and health" called for the introduction, in the Constitution of the Canton of Geneva, of a new Article 178B under the title "Protection of public hygiene and health; passive smoking". The Geneva Grand Council (cantonal parliament) validated the initiative with a minor amendment. The Federal Court confirmed this validation on appeal. The initiative was approved by a popular vote held on 24 February 2008.

On 3 March 2008 the Geneva *Conseil d'État* (cantonal government) adopted implementing regulations on the ban on smoking in public places. Lodging public-law appeals, two citizens asked the Federal Court to annul the entire regulations. Arguing that the cantonal government was not authorised to issue regulations that had no legal basis in statute law, the appellants claimed there had been a breach of the principle of separation of powers and of the rule of law.

II. The Federal Court allowed the appeals and annulled the challenged regulations.

The rule of law is not an individual constitutional right but a constitutional principle whose violation cannot be alleged separately, but solely in relation with a violation, *inter alia*, of the principle of separation of powers. All the cantonal constitutions, including that of the Canton of Geneva, uphold the latter principle, at least by implication. This principle guarantees compliance with the powers conferred by the cantonal constitution. The executive is accordingly not authorised to issue legal rules, save under a delegation validly conferred on it by the constitution and parliament.

In the case under consideration the challenged regulations were of the nature of a substitute decree, since parliament had not yet passed the law implementing the new constitutional provisions prohibiting smoking in public places. It was clear from the drafting work and the terms of the constitution that the constitutional provisions were not directly applicable but must be the subject of implementing legislation.

The challenged regulations could not be regarded as an autonomous decree based directly on the constitutional provisions. The latter contained none of the essential points delimiting a framework for the regulatory activity. In particular the constitutional provisions did not specify, even in broad terms, the points to be covered by implementing regulations (the definition of public places, powers of supervision, the sanctions incurred by consumers and business

operators). The provisional nature of the regulations made no difference. There was no state of emergency justifying reliance, even for a limited duration, on the general policing clause.

Since they were devoid of any basis in law or the constitution, the challenged regulations had to be annulled on the ground of a breach of the separation of powers.

Languages:

French.



Identification: SUI-2011-1-001

a) Switzerland / **b)** Federal Court / **c)** Criminal Chamber / **d)** 26.08.2010 / **e)** 6B599/2010 / **f)** Rappaz v. Department of Security, Social Affairs and Integration, Valais Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 IV 97 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 1.3.1. Constitutional Justice – Jurisdiction – **Scope of review.**
- 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 – **Detainees.**
- 5.2. Fundamental Rights – **Equality.**
- 5.3.3. Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**
- 5.3.5.1. Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**
- 5.3.21. Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Force-feeding / General police clause / Prisoner, state of health / Hunger strike / Sentence, execution / Sentence, interruption.

Headnotes:

Article 92 of the Swiss Penal Code and Article 36.1 of the Federal Constitution; interruption of enforcement of sentences and measures; general police clause.

The Federal Court's power of review in the case of an appeal against a decision not to interrupt the enforcement of a sentence or measure (recital 4).

Interpretation of Article 92 of the Penal Code; concept of "good cause" (recital 5.1); limits of the discretionary powers of the authority responsible for executing sentences and measures (recital 5.2). Problem of a prisoner on prolonged hunger strike; under certain conditions, the authority responsible for executing sentences may order a given prisoner to be force-fed; in such cases, by virtue of the subsidiarity of the interruption, the authority responsible for executing sentences cannot interrupt the execution of the sentence or measure imposed on a hunger striker unless there is reason to believe that the risk to the person's health could be obviated, in due course, by force-feeding him or her (recital 6).

Summary:

On 20 March 2010 Bernard Rappaz began serving a prison sentence of almost five years and eight months. As soon as he was imprisoned he went on hunger strike, but ended it on 7 May, having secured an initial interruption of his sentence. On 21 May 2010 he was imprisoned again and again stopped eating. On 10 June he was transferred to Geneva University Hospital in order to continue to serve his sentence under medical supervision.

On 21 June 2010 he once again requested the interruption of his sentence because of medical problems caused by his hunger strike. This request was rejected by the Head of the Department of Security, Social Affairs and Integration of Valais Canton on 23 June 2010. Bernard Rappaz lodged an appeal against this decision, which was rejected by the competent authority on 8 July 2010. On 12 July the Head of the above Department transferred the prisoner to the Hôpital de l'Île in Bern, leaving it to this establishment to place him in a Section compatible both with his state of health and with the security measures required for the execution of a prison sentence.

Bernard Rappaz appealed to the Federal Court against the 8 July 2010 judgment, requesting the interruption of his sentence until the application for pardon which he had submitted to the Valais Cantonal Parliament had been adjudicated, or at least

until his state of health was such that he could return to prison. He adduced a violation of Article 92 of the Swiss Penal Code. The appeal was rejected by the Federal Tribunal.

By order of 15 July 2010, the investigating judge refused to order the interruption of the sentence, but invited the Head of the above Department to take any necessary measures compatible with the Constitution to protect the applicant's life and health while the two concurrent proceedings were in progress. Subsequently, the Head of the Department ordered the sentence to be executed in the form of house arrest until the appeal had been decided. The applicant discontinued his hunger strike.

Under the terms of Article 92 of the Swiss Penal Code the execution of sentences and measures may be interrupted if there is a "good cause" for doing so. The authority responsible for executing sentences has discretionary powers deriving from the optional wording of the provision. When an appeal is lodged with the Federal Court against a refusal to interrupt the execution of a sentence, the Court must freely verify whether the Cantonal authority has used a legally valid conception of "good causes" which could justify application of Article 92 of the Swiss Penal Code, but must also respect the extensive leeway available to the authority responsible for executing sentences once the existence of a "good cause" has been noted.

Article 92 of the Swiss Penal Code implicitly posits the principle of uninterrupted execution of all prison sentences. This principle is based on the fact that the sentence cannot achieve its goals unless it is served in a continuous manner. Accepting a "good cause", on the one hand, and interrupting the sentence on the basis of such a cause, on the other, must remain the exception. The enforcement of the sentence can only be interrupted if the convicted person is unable, for a specific period of time, to withstand the execution of his or her sentence for very serious health reasons. Therefore, the only relevant causes, from the case-law angle, are potential medical risks to the convicted person arising from continued execution of the sentence. Nevertheless, the relevant and/or irrelevant medical reasons cannot be exhaustively listed. Moreover, the origin of the medical risk adduced in support of a request for interruption is a matter of indifference, as the possibility of a serious medical problem is sufficient on its own to justify interrupting the execution of the sentence.

The medical reasons taken on board are invariably deemed sufficiently serious for applying Article 92 of the Penal Code where the continued execution of the sentence would violate the prohibition of cruel, inhuman

or degrading punishments as set out in Article 10.3 of the Federal Constitution, Article 3 ECHR, Article 7 UN Covenant II and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment concluded in New York on 10 December 1984. The seriousness of the reasons taken on board must not be appraised abstractly but in accordance with the convicted person's actual condition and the support provided by the medical services in terms of healthcare available inside the prison system. Appraising the seriousness of the medical reasons is an isolated decision which does not, in general, facilitate any relevant comparison in terms of equality of treatment. In the instant case, therefore, the deterioration of the prisoner's state of health caused by his hunger strike constituted a "good cause" for considering whether the execution of the sentence should be interrupted.

In order to justify such an interruption, the prisoner's state of health must be incompatible with any mode of execution of the sentence or with any possible adaptation of the latter, e.g. using a prison sickbay or a hospital. Article 92 of the Penal Code therefore only applies on a subsidiary basis where the various modes of detention are insufficient. The subsidiarity requirement is flexible and must be qualified by public security criteria.

Furthermore, in connection with restrictions on public liberties, the principle of proportionality means that the measure envisaged must be likely to produce the expected public-interest results, which cannot be achieved by any less stringent measure; moreover, it precludes any restriction which goes beyond the aim pursued.

The public interest in the uninterrupted execution of sentences has a variety of aspects. First of all, regard must be had to the need to protect society, to respect for the effectiveness of sentences with a view to general and specific prevention, to the safeguarding of the credibility of the prison system, and lastly, to the principle of equality in penal terms. On the other hand, the prisoner's private interest in obtaining an interruption lies in the prevention of risks to which he or she, because of his or her state of health, would be exposed by the continued execution of the sentence.

"Protest fasts", or hunger strikes, represent a traditional health problem facing prison medicine, but this problem affects a limited number of prisoners. The aim of medical provision is to put an end to the fast before any risk of medical complications, though without exerting active pressure on the prisoner. If the medical provision fails to secure the discontinuation of the hunger strike, the prisoner's state of health will inexorably reach a critical point at which irreversible, serious lesions will

appear, with far-reaching effects. The principle of force-feeding hunger strikers at an advanced stage in their fast has not been deemed contrary to the European Convention on Human Rights, but it comprises degrading aspects which, in some situations, may infringe the prohibition set out in Article 3 ECHR. It is incumbent on national legislation to settle the conflict between the individual's right to physical integrity and the positive obligation to protect the life and health of prisoners. If it is accepted in domestic law and implemented in a manner respecting human dignity, force-feeding is compatible with the Convention. Recommendation no. R (98) 7 of the Committee of Ministers of the Council of Europe concerning the ethical and organisational aspects of healthcare in prison (8 April 1998) does not contain any clear, unequivocal recommendations for member States, but does not prohibit force-feeding either. A brief comparison of medico-legal legislation in a number of Council of Europe member States shows that where force-feeding is concerned, some western European countries lay the emphasis on individual freedom by requiring physicians and the authorities to respect the principle of the explicit consent of any hunger striker who is capable of discernment. However, opinions diverge on the position to be adopted once hunger strikers face a serious, imminent risk to their health, or indeed life.

In Switzerland, this issue is not governed at federal level and therefore comes under cantonal jurisdiction, but doctrine is very strongly in favour of standardising the regulations at federal level. The Swiss Academy of Medical Sciences did issue medico-ethical directives on the practice of medicine on prisoners on 28 November 2002, but there is nothing in these directives to prevent the cantonal authorities from ordering the applicant to be force-fed or to exempt requisitioned physicians from conducting such force-feeding, where the legal conditions for such a measure are fulfilled.

Force-feeding a prisoner on hunger strike can be seen as a restriction on freedom of expression and also as a restriction on the person's individual freedom. The option of imposing medical treatment on a patient is only possible under a formal law. Such freedoms can only be restricted under the conditions set out in Article 36 of the Federal Constitution, which states that any restriction on a fundamental right must have a legal basis and that significant restrictions must be based on a law, but that this does not apply in cases of serious and immediate danger where no other course of action is possible; moreover, any restriction on a fundamental right must be justified in the public interest or for the protection of the fundamental rights of others; and lastly, any restrictions on fundamental rights must be proportionate to the aim pursued.

However, it is possible to restrict a fundamental right without a legal basis in order to obviate a serious and immediate danger to a major public interest, if there is found to be an urgent need for intervention. The general police clause allows individuals' fundamental rights to be restricted, for example by imposing medical treatment on them. In the instant case, the authority was able to order the force-feeding of a prisoner on hunger strike on the direct basis of the general police clause, as this restriction on the right of expression and personal freedom served to protect, in a proportionate manner, a major public interest from serious violation which could not have been obviated otherwise. A major public interest necessitates uninterrupted execution of criminal sentences. On the other hand, the State's duty to preserve prisoners' lives based on Article 2 ECHR requires it to do its utmost to prevent them from committing suicide, and to assist them in the event of attempted suicide. The same applies where prisoners refuse food.

In conclusion, when the authority gave its decision, there was nothing to prevent it from ruling that the risk of serious harm to the applicant's health could be obviated, if necessary, by force-feeding, a measure which is compatible with continued execution of the sentence. Accordingly, it did not breach federal law by refusing the request for an interruption of execution.

Languages:

French.



Identification: SUI-2013-1-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 12.10.2012 / **e)** 2C828/2011 / **f)** X v. Migration Service and Department of Justice and Security of the Canton of Thurgau / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 139 I 16 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.1.1. Sources – Categories – Written rules – National rules – **Constitution.**

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

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

2.2.2.1. Sources – Hierarchy – Hierarchy as between national sources – **Hierarchy emerging from the Constitution.**

3.16. General Principles – **Proportionality.**

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

4.9.2.2. Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Effects.**

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

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

Keywords of the alphabetical index:

Conviction, criminal / Foreigner, asylum, residence permit / Foreigner, deportation / Foreigner, undesirable / Popular initiative.

Headnotes:

Article 8 ECHR; Article 5 (principles governing the activities of the law-based state), Article 190 (applicable law) and Article 121.3 to 121.6 (version of 28 November 2010 [“Deportation Initiative”]) in conjunction with Article 197.8 of the Federal Constitution of the Swiss Confederation of 18 April 1999; Articles 62.b, 63.1.a, 63.1.b and 63.2 of the Aliens Act of 16 December 2005 (revocation of permits); direct application of new provisions of constitutional law which come into conflict with existing laws and public international law.

Review of the criteria laid down in the case-law of the European Court of Human Rights and the Federal Court in order to assess the proportionality of measures to terminate the residence of foreign nationals guilty of criminally reprehensible behaviour (recitals 2 and 3). Following an interpretation that takes due account of “practical concordance” and in the absence of a sufficiently precise wording, Article 121.3 and 121.6 of the Constitution introduced into the Federal Constitution by the “Deportation Initiative” of 28 November 2010 are not directly applicable and require transposition into legislation; they do not take precedence over the fundamental rights or safeguards of the ECHR. Account should be taken of the value judgments expressed by the drafters of the constitution insofar as this neither contradicts higher law nor conflicts with the discretion conferred by the ECHR on Contracting States in implementation of their policy for controlling immigration (recitals 4 and 5).

Summary:

I. X (born in 1987) is from Macedonia. He came to Switzerland in November 1994 under family reunification arrangements. He subsequently obtained a settlement permit. After compulsory schooling, he trained as a painter. In June 2000, he was given a suspended 18-month custodial sentence for a serious offence against the Narcotics Act. The criminal court found that he had participated in drug trafficking involving one kilo of heroin. The Migration Service of the Canton of Thurgau revoked his settlement permit in March 2011 and deported him from Switzerland. The appeals against these measures at cantonal level were unsuccessful.

The Federal Court allowed X's public law appeal and set aside the judgment of the Administrative Court of Thurgau.

II. Under the Aliens Act (Articles 62 and 63 LEtr), a settlement permit may be revoked when a foreign national has been sentenced to a long-term custodial sentence (i.e., more than one year) or when he or she seriously violates or endangers public security and order in Switzerland or another country or poses a threat to Switzerland's internal or external security. The grounds for revocation also apply where the foreign national has resided legally in Switzerland for a continuous period of over 15 years. The measure must also respect the principle of proportionality.

In this connection, under the case-law of the Swiss Federal Court and the European Court of Human Rights, the criteria to be taken into account include the seriousness of the offence, the culpability of the person concerned, the time which has elapsed since the offence was committed, whether he or she was of full age at the time of the offence, whether it was an offence involving violence, the person's conduct, state of health and degree of integration, how long he or she has been in the country, and the disadvantages facing the person concerned and his or her family. Great reserve must be exercised in the matter of the revocation of the residence permit of a foreign national who has been in Switzerland for a long time. Withdrawal cannot be ruled out in the case of repeated or serious offences, even where the foreign national was born in Switzerland and has always lived there. Under the case-law of the European Court of Human Rights, in the case of narcotics offences, the public interest in termination of residence rights generally takes precedence if the person has no particular personal or family ties in the country of residence. If the person is unmarried and has no children, the public interest in his or her removal takes precedence in principle if the sentence is more than three years or if there are additional offences.

In light of the case-law of the European Court of Human Rights and its interpretation of Article 8 ECHR, the Federal Court held that revoking X's settlement permit should be considered disproportionate. The appellant received a suspended 18-month custodial sentence for a serious offence against the Narcotics Act. He smuggled drugs and participated in trafficking although he was not in financial need and was not a drug addict. It should, however, be taken into consideration, by way of mitigating circumstances, that he has been living in Switzerland since the age of 7, received all his schooling there and served an apprenticeship as a painter there. The appellant was aged 19 at the time of the offence. He was convicted three and a half years after the events and has committed no other crimes. Despite his active role, the appellant was not the main offender and participated naively in the smuggling and trafficking because of his youthful irresponsibility. The fact that he neither requested nor received any significant financial benefits for his participation, despite the considerable value of the heroin, is an illustration of this.

The appellant was co-operative and confessed during the criminal investigation. In July 2010, he began to work in a facade building company. In the beginning of 2011, he founded a painting company with his father and brother, and would like to take over the company. At the end of July 2011 he became engaged to a compatriot born in Switzerland who holds a settlement permit. During the 16 or so years he has been in Switzerland, he has integrated into Swiss society – apart from his one offence. He no longer has any family in Macedonia, as nearly all his relatives live in Switzerland. Although he is familiar with his country of birth, having spent holidays there, he does not speak Macedonian and only has a sketchy knowledge of Albanian; however, he speaks German fluently. Under these circumstances, revoking the permit is contrary to Article 8.2 ECHR. If the appellant failed to take full advantage of the opportunity given to him, a future revocation following a further weighing of interests is not out of the question.

Article 121.3, 121.4, 121.5 and 121.6 of the Constitution introduced by popular initiative is clear on this point. That is, foreign nationals are stripped of their residence permit, regardless of their status, and of all their residence rights in Switzerland if they have been convicted by a final judgment, *inter alia* for drug trafficking. The persons concerned must be deported from the country by the authorities responsible and banned from entering Switzerland for a period ranging from 5 to 15 years. In the case of re-offenders, the ban on entry is for 20 years. According to some legal writers, loss of residence permit and

deportation in the aforementioned circumstances are mandatory. There is no question of considering the proportionality of the punishment in individual cases. The government and parliament take the same view.

If parliament has not assigned priority to a particular rule, it is generally assumed that rules are equivalent for the purposes of interpretation. An interpretation of Article 121.3, 121.4, 121.5 and 121.6 of the Constitution, which disregards the overall constitutional law context and focuses solely on the wishes of the initiators of the referendum is inadmissible. One exception is if the rule in question is given unequivocal priority over the other constitutional rules in question. The fact that the new constitutional rule constitutes *lex posterior* is insufficient.

Constitutional rules may be sufficiently precise and be enforced as soon as they come into force without any need for implementing legislation. To determine whether this is the case, the text in question must relate to the specific constitutional features that exist in the matter.

Article 121.3 of the Constitution mentions various situations, some of which refer to provisions of the Criminal Code (rape and robbery) and some of which are worded in a very broad and non-technical way (trafficking in drugs, burglary), have no clear outlines and according to the text of the article itself, need to be defined in more detail by the legislature (Article 121.4 of the Constitution). Under the transitional provisions of the Constitution, this must be done within five years of adopting the initiative by the people and the cantons (Article 197.8 of the Constitution).

In accordance with the principle of legality, direct applicability is only possible if the statement of legal fact and the legal consequences are worded precisely enough for individuals to be able to adapt their behaviour accordingly. Article 121.3, 121.4, 121.5 and 121.6 of the Constitution are not worded clearly enough for them to be directly applicable. This is especially the case because their direct applicability would contradict not only with other constitutional and international rules, but also with key principles of the Swiss constitutional order as the rule of law and respect for fundamental rights.

The implementation of the Deportation Initiative raises serious problems of constitutional and international law. The reason is that automatic deportation, which would be the case if Article 121.3, 121.4, 121.5 and 121.6 of the Constitution were considered in isolation, would rule out an assessment in each individual case of the proportionality of the decision to revoke residence rights, as required under

international law. It would be incompatible with various constitutional and treaty provisions. For this reason, the text of the Constitution clearly stands in a problematic relationship with the fundamental values of Switzerland's constitutional and international law. The constitutional provision does not distinguish between minor and serious offences because mandatory deportation is based on the type of offence and not on the quantum of the sentence. It rules out any weighing of interests and assessment based on the circumstances of the particular case, as required under the ECHR and the Agreement between the Swiss Confederation and the EU on free movement of persons.

Article 121.3 of the Constitution is a provision that gives the legislature a margin of implementation. Its relationship with other constitutional provisions and principles needs to be clarified. This cannot be done presently by the Federal Court owing to the separation of powers. The responsibility falls to the legislature (Article 121.4 of the Constitution). When conflicting laws cannot be resolved through interpretation, the Federal Court is obliged to apply both federal laws and international law (Article 190 of the Constitution). Political authorities must strike the necessary balance between the constitutional values at issue through legislation.

Even if Article 121.3.a of the Constitution were directly applicable to the instant case and one were to leave out of consideration how it fits into the Constitution as a whole, the outcome of the proceedings would be the same. When international law conflicts with a subsequent law, the position adopted by the courts is that, in principle, international law takes precedence, except where the legislature has deliberately accepted a conflict with international law. The courts have rejected this exception where there is a conflict with the human rights conventions. In its most recent decisions on the subject, the Federal Court has upheld the primacy of international law. If there is a conflict of rules between federal law and international law, Switzerland's international undertakings take precedence, even in the case of agreements not concerned with fundamental rights. This also applies to subsequent federal laws that come into force after the rule of international law. The *lex posterior* rule does not apply in the relationship between international and national law. Switzerland cannot rely on its national law to justify non-compliance with a treaty. Consequently, a federal law that conflicts with international law is generally inapplicable.

The instant case raises the issue of the relationship between international law and a subsequent constitutional provision. In accordance with

Article 121.4 of the Constitution, an amendment to the Constitution must not violate binding international law. Similarly, popular initiatives violating binding international law are null and void (Article 139.3 of the Constitution). It follows *a contrario* that constitutional amendments that do not comply with other rules of international law remain possible. It is unclear how such cases should be dealt with. Some legal writers think that a directly applicable subsequent constitutional provision takes precedence over an earlier treaty; others disagree.

The European Convention on Human Rights is a treaty and must be interpreted in accordance with the rules of the Vienna Convention. Article 8 ECHR guarantees everyone's right to respect for their private and family life. Under the case-law of the European Court of Human Rights and in the practice of states, Article 8 ECHR is violated when the person in question has sufficiently strong personal or family ties in the country of residence lastingly affected by the decision to refuse or terminate residence. Under Article 8.2 ECHR, the case-law of the European Court of Human Rights requires the person's private interest in staying in the country to be balanced against the public interest in removing him or her or refusing him or her entry for one of the purposes specified elsewhere. According to the criteria adopted by the European Court of Human Rights, the public interest must outweigh the private interest in the particular case based on an overall assessment, in the sense that the measure must be necessary.

That is not true of the instant case. In ratifying the European Convention on Human Rights and accepting the right of individual application, Switzerland adopted not only the substantive guarantees of the Convention but also its implementing mechanisms. Switzerland also undertook, with reference to the case-law of the European Court of Human Rights, to take the necessary measures to avoid similar violations of the European Convention on Human Rights in future, if necessary by amending national law. The Federal Court must adopt the same approach when considering Article 121.3 of the Constitution. It must continue to implement the guidelines deriving from the case-law of the European Court of Human Rights. In the balancing of interests required by the case-law of the European Court of Human Rights, it must take into account of the legislature's opinion, provided this does not lead to a conflict with higher law or with the discretion which the European Court of Human Rights allows Contracting States in implementing their policies on migration or foreign nationals. In this context, the required balancing of interests cannot, however, be reduced schematically to certain offences provided for in constitutional law, which are defined with varying degrees of precision, without taking

account of the quantum of the sentence and other aspects proving the violation of private and family life linked to termination of the residence permit.

Languages:

German.



Identification: SUI-2014-1-001

a) Switzerland / **b)** Federal Court / **c)** First Chamber of Public Law / **d)** 26.02.2014 / **e)** 1B369/2013 / **f)** A. v. Geneva Canton prosecution department / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 140 I 125 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality.**

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

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

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

Keywords of the alphabetical index:

Detainee, treatment, poor conditions / Detention pending trial, conditions / Prison, treatment.

Headnotes:

Article 7 of the Federal Constitution (securing human dignity) and Article 10.3 of the Federal Constitution (prohibiting torture and any other cruel, inhuman or degrading treatment or punishment); Article 3 ECHR; Article 3.1 of the Swiss Code of Criminal Procedure (dignity of persons involved in procedure) and Article 235 of the Swiss Code of Criminal Procedure (restricting the freedom of persons detained on charges only to the extent required by the aim of detention and by preservation of order and security in the prison). Conditions of detention in the Champ-Dollon prison (Geneva Canton).

Treaty, constitutional and federal and cantonal legislative requirements in respect of conditions of detention (recitals 3.1 and 3.2); case-law of the Federal Court and the European Court of Human Rights (recitals 3.3 and 3.4); prevailing judicial opinion (recital 3.5).

Description of the conditions of detention in the prison which for some years has been in a serious and chronic state of prison overcrowding. Partial admission of the appeal and recognition of the unlawful detention conditions of the applicant during 157 consecutive days (recital 3.6).

Summary:

A. was placed in custody – pending trial then on grounds of security – in the Champ-Dollon prison on suspicion of having participated in large-scale cocaine trafficking. By a judgment of 2 October 2013, the Geneva Canton criminal court imposed a six year custodial penalty on him. This judgment was appealed; the case is currently pending before the court of appeal.

In connection with an application by the prosecution to extend his detention pending trial, A. complained of the conditions of his detention, relying on Article 3 ECHR. The court responsible for coercive measures (hereinafter, “Tmc”) ordered the extension of the detention pending trial and opened a procedure to verify the existence of irregularities that would constitute a violation of the European Convention of Human Rights, of federal law or of cantonal law.

The Tmc subsequently found that the conditions of detention for 199 days, particularly in a cell with less than 4 m² of floor space per inmate, that is 3.83 m², were not in accordance with the European Prison Rules. The cantonal appeals authority dismissed the claim of the remand prisoner and upheld that of the prosecution, set aside the decision of the Tmc and ruled that the conditions of detention complied with the legal requirements.

Acting through the channel of appeal from a criminal judgment, A. asked the Federal Court principally to set aside the judgment and ascertain the unlawfulness of the conditions of detention, and in the alternative to refer the case back to the cantonal authority for a new ruling on the lawfulness of the detention. The prosecution reached the conclusion that the application should be dismissed. The Federal Court partially admitted the application, set aside the impugned cantonal judgment and found that the conditions of detention pending trial had been unlawful for 157 days.

At the treaty level, Article 3 ECHR stipulates that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. At the constitutional level, Article 7 of the Federal Constitution requires that human dignity be respected and protected, and Article 10.3 of the Constitution prohibits torture and any other cruel, inhuman or degrading treatment or punishment. The Geneva Canton Constitution embodies these fundamental rights in Articles 18 and 14.

Where detention is concerned, Switzerland has ratified the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which sets up a Committee competent to examine the treatment of detainees during inspections and to draw up a report with recommendations.

At the legislative level, Article 3.1 of the Swiss Code of Criminal Procedure restates the principle of human dignity. Articles 234.1 and 235 of the code provide for detention pending trial in facilities set aside for that use for brief deprivations of liberty, as restrictions on the freedom of persons facing charges are permitted only to the extent required by the purpose of the detention and by the preservation of order and security in the facility, and compliance with the general principle of proportionality, the detention regime being settled by the cantons.

In Geneva Canton a regulation provides in particular that each cell should allow decent and healthy living, detainees being entitled to have regular showers, one hour per day of exercise, and one visiting hour per week. On the other hand, this regulation contains no particulars as to the cell's design, appointments and dimensions or the floor space inside it from which each occupant should benefit.

The Committee of Ministers of the Council of Europe adopted Recommendation Rec (2006) 2 on the European Prison Rules (EPR), prescribing detailed conditions of detention in keeping with human dignity. These rules were further elaborated in a Comment issued by the CPT, particularly minimum standards of floor space estimated at 4 m² per inmate in a dormitory and 6 m² in a single cell, with the number of hours spent outdoors to be taken into account. Although these are simple directives, a prison detention code (*soft law*) is spoken of, and the Federal Court has long had regard to it in the fulfilment of fundamental rights. It has nevertheless conceded that conditions of detention pending trial may be more restrictive where risks of absconding, collusion or reoffending are high or security is imperilled, provided that the term of detention is short. In excess of about three months, the demands of the

detention regime are higher. Finally, the Court has insisted on the overall assessment of all material conditions of detention.

With regard to the present case, the National Commission on prevention of torture made a three day visit to the Champ-Dollon prison and delivered a detailed report early in 2013. This indicates that the approximately 200% occupancy has represented serious and chronic overcrowding for several years. According to a report by the prison governor, the appellant, most significantly, spent 27 nights in a 12 m² cell with three inmates and 199 nights, 157 of them consecutive, in a 23 m² cell occupied by six detainees, leaving an individual net space of 4 and 3.83 m² respectively, and this was for 23 out of 24 hours. Although it is a difficult condition for three to be accommodated in a single cell, it does not constitute degrading treatment affronting human dignity. Conversely, the fact of one cell having six occupants with 3.83 m² of individual floor space, further restricted by furniture, may constitute a violation of Article 3 ECHR if it covers a long period and is compounded by other poor conditions of detention. A length of time verging on three consecutive months seems the limit beyond which the above-mentioned conditions can no longer be countenanced, and the very limited time (one hour of exercise) which the appellant was permitted to spend outside his cell further aggravated the situation. In the final analysis, the combined effect of these factors rendered the mode of detention incompatible with the inevitable degree of suffering inherent in deprivation of liberty, and the distress or ordeal to which it subjected the appellant was akin to degrading treatment contrary to respect for human dignity and privacy. Consequently the cantonal court infringed the law by holding that the appellant's detention complied with the legal, constitutional and treaty requirements regarding conditions of detention.

In addition, sharing a cell with smokers did not impair human dignity if it was of limited duration and no direct health damage was ascertained for the remand prisoner, a non-smoker, and sleeping on a mattress laid on the floor with no bedstead did not constitute inhuman treatment.

Languages:

French.



Identification: SUI-2014-3-007

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 01.10.2014 / **e)** 1C518/2013 / **f)** Geneva Socialist Party and others v. Council of State of Geneva Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 140 I 381 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.13. General Principles – **Legality.**
 3.16. General Principles – **Proportionality.**
 3.18. General Principles – **General interest.**
 4.11.2. Institutions – Armed forces, police forces and secret services – **Police forces.**
 5.3.32. Fundamental Rights – Civil and political rights – **Right to private life.**
 5.3.32.1. Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

Keywords of the alphabetical index:

Agent, undercover / Judicial enquiry, prior / Police officer, undercover / Police, law on the police / Surveillance, secret, measure.

Headnotes:

Article 13.1 of the Federal Constitution (protection of the private sphere); Article 8 ECHR; Geneva Canton Police Act; preventive observation, secret preventive investigations and undercover enquiry; protection of the private sphere.

Description of preventive observation, secret preventive investigations and undercover enquiry within the meaning of the Geneva Canton Police Act.

These three measures constitute a breach of the protection of the private sphere, albeit with an adequate legal basis. However, they do not comply with the principle of proportionality in the strict sense as they fail to provide for subsequent disclosure to the person under observation (grounds, method and duration), carrying a right of appeal; this right to information after the event may nevertheless be qualified by exceptions. As with preventive observation, an authorisation must furthermore be requested of the prosecution department or of a court for secret preventive investigations where these last more than one month; in case of undercover enquiry, a court's permission is necessary when the measure is put into operation.

Summary:

The Parliament of Geneva Canton enacted a law amending the Police Act (LPol), promulgated by the government at the end of the time allowed for referendum. Entitled “Prior measures”, this amendment distinguishes three measures:

1. Preventive observation (Article 21A LPol) is a surveillance measure which occurs before the commission of an offence i.e. before criminal proceedings are instituted, in order to stop offences from being committed. It applies to a given person or thing and extends over a fairly long period, or at least must have been planned for a certain duration. It is conceivable only in places freely accessible to the public, and audio or video recordings of it can be made. By contrast with secret preventive investigations and undercover enquiry, there is no provision for direct contact between the observer and the targeted person. Beyond 30 days, authorisation is needed from the duty prosecutor.

2. Secret preventive investigations (Article 21B LPol) are defined as a milder form of secret investigation, less invasive and in principle far more selective. These are to enable police detectives, not acting under assumed names but without making themselves known in their official capacity to the persons with whom they come into contact, to establish where relevant that offences were about to be committed. Article 21B LPol thus constitutes the legal basis which the police currently lack for carrying out targeted operations to discover the commission of crimes or offences. It is therefore concerned with aiding arrests “in the act”. Drug trafficking is especially where such an investigative measure may be deployed. As with secret observation, there must be strong indications that an offence may be committed. Additional considerations include the actual or probable failure of other investigative methods.

3. Undercover enquiry, provided for in Article 22 LPol, presupposes the intervention of an “undercover agent” who has a false identity. The police are able to carry out undercover enquiry operations prior to the commission of an offence. The conditions for a secret measure of this kind are, firstly, probable commission of a serious or specific offence and, secondly, actual or probable failure of other investigative methods (subsidiarity clause).

The Geneva Socialist Party, the Geneva “Greens” Party and some private individuals filed a public law appeal and asked that Articles 21A.2, 21B and 22 LPol be set aside. The Federal Court allowed the appeal.

Under Article 13.1 of the Constitution, echoing Article 8 ECHR, everyone is entitled to respect for his private and family life, home, correspondence and the relations which it establishes through the post and telecommunications. Paragraph 2 of this provision stipulates that everyone is entitled to be protected against wrongful use of data concerning him. Article 13 of the Constitution protects the private sphere in a broad sense, taking in protection of personal data. These refer to the identity, the social relations and the intimate acts of every natural person, honour and reputation and especially all information relating to a person which is not accessible to the public, in particular information on the files of civil, criminal or administrative procedures, which would damage his social standing. In the field of data protection, the right to self-determination in respect of personal information, enshrined in the Constitution, guarantees that the individual in principle retains control of data concerning him, irrespective of the actual degree of sensitiveness of the information in question.

Articles 21B and 22 LPol were found to constitute infringements of the protection of the private sphere since they involved the secret intervention of the police in areas covered by the private sphere, in particular social relations, communication with others and self-determination. The same applied to audio or video recording of data on the public street, their storage and processing as provided by Article 21A.2 LPol. Pursuant to Article 36 of the Constitution, any restriction of a fundamental right must have a legal foundation, be justified by a public interest, and proportionate to the aim sought.

The applicants did not dispute the existence of a public interest. Regarding the principle of compliance with the law, the requirement of weight of legislation was not absolute since the legislator could not be ordered to refrain completely from resorting to general concepts involving a necessary degree of interpretation, and it did not presuppose that a catalogue of offences be itemised. Moreover, the fact that preventive investigations were reserved in this instance for crimes and offences and not plain misdemeanours already constituted a limitation on police activity. The case-law furthermore acknowledged that to a certain extent the imprecision of the statutes could be offset by procedural guarantees. The infringement of the private sphere caused by the impugned provisions thus had an adequate legal basis.

The principle of proportionality required that a restrictive measure be calculated to achieve the expected results and that these are unattainable by a less incisive measure; in addition, it forbade any

limitation exceeding the aim sought and required that this be reasonably related to the jeopardised public or private interests. As regards the right to keep order, which governs state activity in the framework of the monopoly on legitimate violence, the principle of proportionality, also embedded in Article 5.2 of the Constitution, was of special importance.

From this standpoint, preventive observation was calculated to achieve the expected result, that is keeping public order and preventing offences, and had a subsidiarity clause. As the interference with fundamental rights was slight, and it was a short-term measure, the fact that the secret preventive observation was conducted without authorisation for 30 days was not contrary to the principle of proportionality. As to compliance with the principle of proportionality in the strict sense, that is a reasonable relationship between the aim sought and the jeopardised private interests, a balance had to be struck between the right to the private sphere and the need to provide for preventive observation in order to protect society. A means of providing a guarantee to guard against possible abuse and to be able to supervise the work of the police was to inform the person concerned after the event of the surveillance undergone by him or her and enable him or her to appeal. This right to information after the event could nevertheless embody exceptions to preserve the effectiveness and confidentiality of the measures taken. The interference with the private sphere brought about by Article 21A.2 LPol infringed the principle of proportionality in the strict sense, as it failed to provide for subsequent disclosure to the person under observation, and this provision should be set aside.

Regarding secret preventive investigations, these were calculated to achieve the expected result and carried a subsidiarity clause. As to compliance with the principle of proportionality in the strict sense, keeping public order and preventing offences could justify an encroachment on the private sphere. In order to prevent encroachments on the private sphere from remaining secret as to duration, it was necessary to provide for authorisation by the prosecution department or by a court where the secret preventive investigations lasted more than 30 days. Such prior authorisation was intended to verify, in the specific case, the public interest pursued together with the proportionality of the requested measure. Besides, for the same reasons as were stated for preventive observation, provision should be made for disclosure after the event of the grounds, the method and the duration of the investigations conducted on the person concerned. This right to information after the event could nevertheless embody exceptions in order to safeguard the

effectiveness and confidentiality of the measures taken. The interference with the private sphere caused by Article 21B LPol was not in accordance with the principle of proportionality and so it was appropriate to set aside this provision.

Finally, with regard to undercover enquiry, it was capable of achieving the expected result, namely preservation of public order and prevention of offences. Recourse was had to undercover enquiry only "if other measures of information-seeking or enquiry have not succeeded, would have no prospect of succeeding, or would be unduly difficult". Undercover enquiry was moreover conditioned by "the gravity or specificity of the offence". The rule of expediency was thus expressed in the Act. As to proportionality in the strict sense, keeping public order and preventing offences could justify this encroachment on the private sphere. The authorisation of an independent judge was nevertheless required if particulars were to be fabricated or altered to create a false identity. Subjection to a judge's authorisation was a way of making Article 22 LPol conform to the Constitution, a solution found in several other cantonal acts on the police. Moreover, the Geneva legislator must provide for disclosure after the event of the grounds, method and duration of the undercover enquiry, coupled with a right of appeal. Article 22 LPol did not afford an adequate guarantee against abuses and must therefore be set aside.

Languages:

French.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2000-1-002

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 19.04.2000 / e) U.br.195/99 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 36/2000 / h) CODICES (Macedonian).

Keywords of the systematic thesaurus:

1.3.5.10. Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by the executive.**

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

3.13. General Principles – **Legality.**

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

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

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

Keywords of the alphabetical index:

Religion, encouragement by the state / School, introduction of religious activity / School, primary / School, secondary.

Headnotes:

The freedom of religion includes the right of individuals to determine freely and independently their religious affiliation as well as their acceptance or non-acceptance of a certain religion or atheism. It means, for example, that everyone is free to decide whether to profess or not to profess a certain religion and whether to participate or not to participate in religious ceremonies.

The state can neither require nor order the carrying out of religious activities of any kind anywhere.

Summary:

The Helsinki Committee for Human Rights lodged a petition challenging the act of the Ministry of Education introducing a religious blessing at the beginning of the school year in elementary and secondary schools. The petitioner argued that the act was not in conformity with Article 19 of the Constitution and certain provisions of the Law on Elementary Education and the Law on Secondary Education.

The challenged act required elementary and secondary school principals to call pupils, teachers and other school employees together at the beginning of the school year and to invite parish priests to bless all for the happy commencement and successfulness of the new school year. According to the act, in areas where more than one religious conviction existed, religious leaders of each conviction concerned should pronounce such a blessing.

Although the act did not fulfil the criteria of a regulation, the Court found that its contents undoubtedly amounted to generally binding legal provisions that had been passed by a state body. Thus, the act introduced religious activity within elementary and secondary schools as a regulated and perpetual legal relation, which would continue to be valid and enforceable, irrespective of the fact that it referred only to the commencement day of the school year – 1 September 1999.

Article 16.1 of the Constitution guarantees the freedom of conviction, conscience, opinion and public expression of opinions. As a specific kind of freedom of conviction and conscience, the freedom of religious confession and its free and public expression, whether individual or collective, are guaranteed by Article 19.1 and 19.2 of the Constitution. According to Article 19.3 of the Constitution, the Macedonian Orthodox Church and other religious communities and groups are separate from the state and equal before the law.

Furthermore, the Law on Elementary Education (Article 13.1) bans political and religious ceremonies and activities in elementary schools and the Law on Secondary Education (Article 7.1) bans such activities within secondary schools.

In reaching its decision, the Court observed two crucial facts: first, the act introduced religious activities in elementary and secondary schools and second, it is enforced by the legal order of the state. Therefore, the basis for judging the constitutionality and legality of the challenged act was the principle of the separation of the state from religious communities and groups and the extent of the state's neutrality, as crucial factors in the realisation of the freedom of religion.

Bearing this in mind, it can be concluded that the state cannot interfere in religious matters, whether to incite religious affiliation or to prevent the expression of a religious conviction. It cannot impose religious activities or ceremonies as socially desirable activities. Without delineating possible means of regulating the relations between the state and religious communities and groups, or more generally, between the state and the freedom of religion, one principle is nevertheless incontrovertible: the state can neither require nor order the carrying out of religious activities of any kind anywhere.

Furthermore, bearing in mind the above-mentioned statutory provisions, the Court found that the act was contrary to the provisions of the Law on Elementary Education and the Law on Secondary Education, as it introduced religious activities or ceremonies within elementary and secondary schools.

Languages:

Macedonian.

*Identification: MKD-2001-3-008*

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.09.2001 / **e)** U.br. 10/2001 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 78/2001 / **h)** CODICES (Macedonian).

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.**
- 4.6.9. Institutions – Executive bodies – **The civil service.**
- 5.2.1.2.1. Fundamental Rights – Equality – Scope of application – Employment – **In private law.**
- 5.2.1.2.2. Fundamental Rights – Equality – Scope of application – Employment – **In public law.**
- 5.2.1.3. Fundamental Rights – Equality – Scope of application – **Social security.**
- 5.4.3. Fundamental Rights – Economic, social and cultural rights – **Right to work.**

Keywords of the alphabetical index:

Civil servant, dismissal / Dismissal, different criteria / Employee, discrimination / Employment, termination / Labour law.

Headnotes:

The right to work is one of the fundamental human rights guaranteed by the Constitution, which cannot be specified or altered according to specific circumstances. Since the Constitution does not make any distinction between employees in the economic and non-economic sectors, the legislature is obliged to put individuals in an equal legal position with respect to rights, duties and responsibilities deriving from labour relations, the creation and termination of employment, social security and retirement.

The state is obliged to respect the constitutional obligation to treat the beneficiaries of these rights equally and to create such conditions where equal rights would refer to all persons being in same position.

Redundancies for public sector employees only, the lack of objective criteria and terms for its enforcement, as well as difference in the quality of rights of this category of employees violates the constitutional principles of equality, the rule of law and legal certainty.

Summary:

Judging upon a petition lodged by several individuals and legal entities, the Court repealed the statute amending the Law on labour relations. Under the disputed Law, the attainment of rights, duties and responsibilities of an employee and employer and the creation and termination of employment can be regulated by other laws besides the Law on labour relations.

The core issue of the petition was the introduction of a new method of redundancy, which was reserved for one category of employees only – those in the public sector.

The Law at issue introduced “redundancy due to office requirements” as a specific way of employment termination. It also provided for more accurate regulation of issues related to employment termination in this way.

The employment terminates by dismissal due to office requirements if:

1. state and local self-government units and bodies of the city of Skopje, public undertakings and institutions, funds and other organisations and institutions set up and owned by the state or set up by virtue of law would cease working or would be dissolved;
2. these institutions are undergoing internal reorganisation;
3. there is a loss of competencies or the scope of work has narrowed; and
4. there have been other organisational changes that bring about redundancy.

The Law has also defined the rights to which the newly redundant employee is entitled to:

4. the right to a retirement pension, if certain criteria are met; and
5. the payment of redundancy money under certain circumstances.

While judging the constitutionality of the disputed Law, the Court took into consideration the fundamental values of the constitutional order and provisions, which refer to individuals' equality, the right to work and the rights and positions of employees. It also examined the values inherent in social security and social insurance legislation.

Article 8 of the Constitution specifies the fundamental values of the constitutional order. Amongst these are: human rights and freedoms acknowledged in international law and established by the Constitution, the rule of law, humanism, social justice and solidarity.

Article 9 of the Constitution safeguards the equality of persons in respect to their rights and freedoms, as well as before the Constitution and laws.

Article 32 of the Constitution *inter alia* sets out that each person is entitled to work and material safety in time of temporary unemployment, provided that employees' rights are attained and their position is regulated by law and collective agreements.

Labour relations are determined by a contract established between the employee and employer stipulating some things to be done and rights and duties deriving there from to be enforced. The employee sets up the employment on voluntarily basis, under a method and terms stated by law and collective agreement. The Law on labour relations and collective agreements regulate the terms and processes of employment termination, including the

forms and ways of employees' rights to protection in such cases. The Law prescribes several ways of employment termination: upon agreement, after the expiration of the period of employment, by virtue of law, or by dismissal due to economic, technological, structural or similar changes.

The Law, which was subject matter of Court examination in this case introduced an additional way of employment termination referring to public sector employees only: dismissal due to office requirements. Besides, it set out specific rights, different from those to which employees are entitled to in case of employment termination described above.

In the Court's opinion, the Constitution proclaims the right to work and material safety in case of temporary unemployment, provided that employees' rights are regulated by law and collective agreements. Social protection and social security of persons, which are defined as common constitutional principles, are based on state social character, provided that the legislature regulates the rights and their scope. That means that the Constitution does not determine the attainment and scope of labour and social insurance rights, but it forces the legislature to regulate it. However, laws dealing with labour and social insurance issues must determine such principles, which would equally refer to all, i.e. employees or the unemployed.

After analysing the Law at issue, the Constitutional Court concluded that its provisions prescribed a specific way of employment termination in cases where the state was in the position of employer. Although it authorised the state to decide on possible rights to which the employee dismissed was entitled, it was obliged to ensure an effective protective mechanism regarding employees' legal safety.

In coming to its decision, the Court looked at several issues. As regards rights, duties and responsibilities deriving from employment, including its creation and termination, the legislature is bound to safeguard the equal legal position of persons.

Labour relations are a unique category of contractual relations between the employee and employer referring to all employees equally, regardless of their activities or sphere of work. The right to work is a universal one, and does not depend on the sector in which it is enforced. The Court judged that the principle of equality is also jeopardised as regards the quality of rights relating to employees, who have been made redundant due to office requirements. In the Court's opinion, the law at issue put the employees in the public sector in an advantageous position.

Since the Law in question did not establish terms and criteria to which the employer would be bound when dismissing employees due to office's requirements, the Court found that employees' legal safety was jeopardised as well. On the other hand, it also restricted the possibility for protection of employees, whose employment had ceased on these grounds. The lack of objective criteria, whereby the termination of employment would depend on an employer's will, was held by the Court to breach the fundamental principle of the rule of law. Due to the reasons stated, the Court ascertained the alleged unconstitutionality of the Law amending the Law on labour relations.

Languages:

Macedonian.



Identification: MKD-2005-3-010

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 21.12.2005 / **e)** U.br.161/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 3/2006, 12.01.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

1.6.3. Constitutional Justice – Effects – **Effect erga omnes.**
 3.9. General Principles – **Rule of law.**
 3.10. General Principles – **Certainty of the law.**
 5.4.2. Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

Education, secondary, final examination, legal basis / Law, reference to invalid provision.

Headnotes:

It runs against the principle of the rule of law to seek to establish the validity of a Rulebook which has undoubtedly ceased to be valid and which no longer forms part of the legal order of the state.

Summary:

A citizen petitioned the Court to bring proceedings to assess the constitutionality of Article 6 of the Law on Changing and Supplementing the Law on Secondary Education. Article 6 of this Law changes Article 115 of the Law on Secondary Education to read as follows:

“Students who complete their gymnasium education, art education, and three and four year vocational education in the 2005/2006 school year shall take the final examination under the provisions of the Rulebook pertaining to the contents and organisation of the final examination in secondary education.”

The Court found that the 1994 Rulebook was superseded within the legal order of the Republic of Macedonia by the Law on Secondary Education, immediately as this Law came into force. Moreover, the Rulebook has also ceased to be valid with regard to the manner of taking examinations and evaluating the students' results in the final examinations in secondary vocational education which was repealed by the Constitutional Court by its Decision U.br.31/2005 of 15 June 2005, *Bulletin* 2005/2 [MKD-2005-2-005].

Article 6 of the Law on Changing and Supplementing the Law on Secondary Education established the validity of the Rulebook as regards the contents and organisation of the final examination in secondary education. As this Rulebook has undoubtedly ceased to be valid and no longer forms part of the legal order of the state, the Court held that Article 6 is not in accordance with the Constitution on the grounds of legal certainty as an element of the principle of the rule of law.

Languages:

Macedonian, English.

*Identification:* MKD-2005-S-001

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 21.12.2005 / **e)** U.br.195/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 3/2006, 12.01.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

1.3.4.2. Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

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

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

Keywords of the alphabetical index:

Constitutional Court, competence.

Headnotes:

The Constitutional Court's powers are determined solely by the Constitution and the legislator may not, therefore, introduce new competences allowing the Constitutional Court to decide upon the constitutionality and legality of people's initiative as a form of direct democracy.

Summary:

I. The Constitutional Court initiated proceedings *ex officio* in order to assess the constitutionality of the provisions of Article 67.3 and 67.4 of the Law on Referendum and Other Forms of Direct Democracy of Citizens (“Official Gazette of the Republic of Macedonia”, no. 81/2005).

Article 67.3 allows the Speaker of the Assembly, upon receipt of a proposal for a civil initiative, to ask the Constitutional Court to assess, within fifteen days, the compatibility of the civil initiative with the Constitution and law. Under Article 67.3 and 67.4 the person proposing the civil initiative is to be informed, if the Speaker of the Assembly receives written notification from the Constitutional Court within fifteen days.

The Constitutional Court took as its starting premise the constitutional principle of the separation of state powers. Under this principle, the Assembly is the legislative and representative body of the citizens, ensuring parliamentarism; the President of the Republic of Macedonia represents the Republic; the Government is the holder of the executive power, and the Constitution establishes an autonomous judiciary with the Supreme Court as the highest court. Under Article 108 of the Constitution, the Constitutional Court is a body of the Republic protecting constitutionality and legality.

The competences of these institutions are defined by and originate from the Constitution, and the Constitutional Court's powers are defined in detail by the Constitution. Its structure and functions are stipulated directly in the Constitution.

Specifically, under the Constitution, modes of work and procedures before the Constitutional Court are to be regulated by an act of the Court. Such issues are accordingly regulated by the Book of Procedures of the Constitutional Court of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 70/1992).

The Court noted that when drafting the Constitution, the Assembly outlined the powers of the Constitutional Court in a clear and precise fashion, thus creating a constitutional guarantee for exemption from any form of interference into and regulation of the competences of the Constitutional Court by holders of authority. As a result, the Constitutional Court's powers may only be altered by the Constitution.

II. In view of the above, the Court found that the stipulation of the types of obligations, actions and competences of the Constitutional Court by laws or other regulations adopted by the bodies of the Republic could not be construed as being constitutionally based. It therefore found Article 67.3 and 67.4 of the Law on Referendum and Other Forms of Direct Democracy of Citizens to be out of line with the Constitution, as through these provisions, the legislator has assumed authority in the absence of grounds from the Constitution and has defined new obligations and competences for the Court. In so doing, the legislator has regulated a constitutional matter which may not be the subject of regulation beyond the Constitution itself.

The Court found the challenged provisions to be particularly at odds with Article 8.1.3, which refers to the rule of law as a fundamental value of the national constitutional order, as well as with Article 51, which stipulates that in the Republic of Macedonia laws must be in accordance with the Constitution and all other regulations with the Constitution and law and that everyone is obliged to respect the Constitution and laws. The provisions were also at variance with Article 108, which provides that the Constitutional Court is a body of the Republic protecting constitutionality and legality, and with Article 110 which defines the competences of the Constitutional Court and does not contain those prescribed by Article 67.3 and 67.4. The Court therefore repealed this article.

Languages:

Macedonian.



Identification: MKD-2006-1-001

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.04.2006 / **e)** U.br.191/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 52/2006, 20.04.2006 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.21. General Principles – **Equality.**
 4.5.11. Institutions – Legislative bodies – **Status of members of legislative bodies.**
 5.2.1.3. Fundamental Rights – Equality – Scope of application – **Social security.**
 5.2.2. Fundamental Rights – Equality – **Criteria of distinction.**
 5.3.38.3. Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Social law.**
 5.4.16. Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

Keywords of the alphabetical index:

Parliament, member, old-age pension scheme, equality / Pension, old-age, parliament, member, equality.

Headnotes:

The legislator introduced unequal treatment into the provisions of a law by providing more favourable conditions for members of parliament, because they are in the same social position as other holders of public functions.

The principle of the prohibition of the retroactive effect of laws reinforces the legal safety of citizens and prevents the weakening of the rule of law.

Summary:

A number of individuals, political parties and others requested the Court to examine the constitutionality

of Articles 1, 31.1.7, 40-45, 47 and 48 of the Law on members of parliament (“Official Gazette of the Republic of Macedonia”, no. 84/2005).

The Court held that the challenged provision in Article 31.1.7 of the Law (reimbursement of costs for the attendance of parliamentary sessions and of the Working Body of Parliament, and per diem for official trips inside the country) neither corresponded to the principle that each employee is entitled to an appropriate wage in accordance with his or her contribution to the work, nor to the principle of equality among the holders of public office.

In order to obtain an overview of the extent to which Articles 40-45, 47 and 48 of Law deviates from the general rules, the Court took into account the provisions of the Pension and Disability Insurance Law, the Electoral Law and the Rules of Procedure of the Assembly.

On the basis of constitutional, legal and procedural provisions, the Court concluded that the aforementioned articles were not in line with the generally established principles of the pension and disability insurance system.

The Court therefore held that the challenged provisions of the Law, taken on their own, are not contrary to the constitutional principles of equality and the rule of law merely because the legislator had defined different, more favourable conditions for early retirement schemes for this category of insurees. However, according to the Court, these conditions must be based on justifiable grounds, be in line with the general principles governing rights in this area, and should only apply if there is a reason to exclude the interested persons from the group of insurees to which they belong, so as not to infringe Article 1 of the Constitution (democratic and social state), which may indirectly affect other constitutional principles such as those of equality, the rule of law and social justice.

However, the explanation provided by the draft law does not put forward justifiable reasons. Therefore, in the absence of such reasons, the question arises whether or not the legal position of members of parliament, which ensues from the Constitution (i.e. the manner of acquiring the mandate, the legal nature and the length of the mandate, the representative character of the function, the detailed rights, duties and responsibility of the member of parliament, the publicity of the work, the limited mandate, the impossibility for the member of parliament to pursue another profession, duty or profitable activity, etc.), may be the reason for the extent of the deviation from the principle of equality of rights in the area of pension schemes and disability insurance made by the legislator.

According to the Court, the mere status of a member of parliament in the legal system of the state is not reason enough to justify the extent of the deviation made by the legislator from the general principles in this area.

On the contrary, with the determination of a very low minimum period of insurance and age for the acquisition of a more favourable old age pension scheme for the members of parliament – as compared to the ones established under the general law for all citizens – the right to an early retirement scheme not only on the ground of efforts made and years of age, but also on the ground of the terms of office of a member of parliament (of at least 2 years); the amount of the old age pension on more favourable grounds than the existing ones, the Court found that the rights were not even close to those from which the legislator deviated envisaging special conditions for retirement for a certain category of employees.

After considering the entire legal regulations, the Court held that, by providing more favourable conditions for only a certain group of holders who are in the same social position as other holders of public functions, the legislator has created unequal treatment to the detriment of those who are not included in this law.

The right to equality is one of the fundamental legal principles of the Constitution. It provides that all citizens have the right to be treated equally by the law and that state authorities protect citizens against any form of discrimination in the enjoyment of their rights. For this reason, the legislator must treat them equally and, according to the Court, this right is nothing more than the acquisition of rights under privileged conditions and refers only to members of parliament and not to all holders of public office who are in the same social position or to all citizens, without justified grounds for doing so. In this way, the legislator puts citizens on an unequal footing, which is contrary to Article 9 of the Constitution.

The Court also held that Articles 47 and 48 of the Law contain the right to early, disability and family retirement schemes as high as 80% of the average salary of the member of parliament in the last three months of work, including: the members of parliament who have completed at least half of the term of office in parliament, counting from the beginning of the mandate, as well as the members of parliament who have exercised the right to remuneration upon their request in the Parliament of the Republic of Macedonia beginning from the first pluralist composition of the Parliament of the independent and sovereign Republic of Macedonia.

Under Article 52.4 of the Constitution, the prohibition of retroactive effect of laws is a principle that reinforces the legal safety of citizens and prevents the weakening of the rule of law. Consequently, the deviation from this principle can only be allowed under the Constitution if it is in favour of the exercise of the freedoms and rights of citizens. The law had a retroactive effect that was more favourable, but only for a certain category of citizens, namely the members of parliament as holders of public office on the ground of their status. The Court therefore held that this was not in line with the principles of prohibition of retroactive effect of laws and the rule of law.

Languages:

Macedonian, English.



Identification: MKD-2009-1-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 15.04.2009 / **e)** U.br.202/2008 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 53/2009, 15.04.2009 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.1. General Principles – **Sovereignty**.
 3.7. General Principles – **Relations between the State and bodies of a religious or ideological nature**.
 5.2.2.6. Fundamental Rights – Equality – Criteria of distinction – **Religion**.
 5.3.18. Fundamental Rights – Civil and political rights – **Freedom of conscience**.
 5.4.2. Fundamental Rights – Economic, social and cultural rights – **Right to education**.

Keywords of the alphabetical index:

Education, religious.

Headnotes:

Freedom of confession by its nature implies that everyone is free, without interference, to determine his or her religious belief, to accept whether or not to accept a certain religion or to embrace another, or not

to accept any religion at all. It also implies the freedom to profess one's religion and to decide whether or not to take part in religious sermons etc. Under the principle of secularism, the state must maintain its neutrality and must not interfere in religious matters (and therefore religious communities and groups), or promote a particular religion or religion in general. Nor should it obstruct the expression of religion, impose religious conformism or request implementation of religious activities as socially desirable conduct.

Issues over religious education (religious instruction, religious teaching) should be left to be the subject of decision and sphere of concern of religious communities and groups, within the frameworks of the freedoms to establish religious schools for these purposes. Any form of religious education that exceeds the academic and neutral character of the teaching, which is otherwise the characteristic of the public, state education and involves the state in the organisation of such religious teaching, violates the principle of secularism.

Summary:

The Liberal Democratic Party of the Republic of Macedonia asked the Court to review the constitutionality of Article 26 of the Law on Primary Education ("Official Gazette of the Republic of Macedonia", no. 103/2008) which introduced the possibility of religious education in elementary school as an elective subject.

The petitioner claimed that the disputed provision was contrary to Article 19 and Amendment VII of the Constitution, which determined the secular character of the state, and as a result religious education was only permissible on a voluntary basis and outside state (public) schools.

The Court took account of the provisions of Articles 9, 16.1, 19.1.2, 20, 44, 45 and Amendment VII of the Constitution, as well as relevant provisions of the Law on Primary Education and the Law on the Legal Position of a Church, Religious Community and Group ("Official Gazette of the Republic of Macedonia, no. 113/2007). It observed that:

- the citizens of the Republic of Macedonia are equal in their freedoms and rights;
- the free expression of religious confession is guaranteed to everyone;
- religious communities and groups are separate from the state and equal before the law;
- they are free to establish religious schools and other social and charitable institutions;

- the right to belong to a certain religion also implies the right not to belong to any religion and not to profess its teaching;
- there is no state religion that would be privileged and no privileges of any religion on any ground are recognised;
- citizens enjoy freedom of association to exercise their convictions on the basis of programmes and actions that are not directed, *inter alia*, at religious hatred and intolerance.

The Court went on to observe that Article 19 and Amendment VII of the Constitution promote the freedom of confession, but at the same time establish the principle of separation of the state and the religious communities, that is, the principle of secularity. Freedom of confession by its nature implies that everyone is free, without interference, to determine his or her religious belief, to accept whether or not to accept a certain religion or to embrace another, or not to accept any religion at all. It also implies the freedom to profess one's religion and to decide whether or not to take part in religious sermons etc. Under the principle of secularism, the state must maintain its neutrality and must not interfere in religious matters (and therefore religious communities and groups), or promote a particular religion or religion in general. Nor should it obstruct the expression of religion, impose religious conformism or request implementation of religious activities as socially desirable conduct.

Issues over religious education (religious instruction, religious teaching) should be left to be the subject of decision and sphere of concern of religious communities and groups, within the frameworks of the freedoms to establish religious schools for these purposes. Any form of religious education which exceeds the academic and neutral character of the teaching, which is otherwise the characteristic of the public, state education and involves the state in the organisation of such religious teaching, violates the principle of secularism.

The Court found that Article 26 of the Law provides an opportunity to introduce a subject in primary education in which certain a religion is studied, allowing an introduction, in the form of religious teaching, religious lessons or religious instruction, into the rules by which members of a certain religious confession should abide. The Court took into account the fact that the manner of implementation of the contested provision coincides with this conclusion in all respects. Such form of religious education deriving as a possibility from the law, exceeds the academic and neutral character of teaching, which is otherwise the characteristic of public state education and involves the state in the organisation of such religious

teaching, *vis-à-vis* the noted principle of separation of the state and the church, and in this context the freedom of the religious communities to establish religious schools. Hence, the Court found that the contested provision of the Law is in contravention of Article 19 and Amendment VII of the Constitution.

Languages:

Macedonian.



Identification: MKD-2015-1-001

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 11.02.2015 / **e)** U.br.93/2014 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 31/2015, 03.03.2015 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

- 4.9.9.3. Institutions – Elections and instruments of direct democracy – Voting procedures – **Voting.**
- 4.9.9.4. Institutions – Elections and instruments of direct democracy – Voting procedures – **Identity checks on voters.**
- 5.2.1.4. Fundamental Rights – Equality – Scope of application – **Elections.**
- 5.3.1. Fundamental Rights – Civil and political rights – **Right to dignity.**
- 5.3.41.3. Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting.**
- 5.3.41.4. Fundamental Rights – Civil and political rights – Electoral rights – **Secret ballot.**

Keywords of the alphabetical index:

Election, voting, secrecy / Election, electoral ink, marking / Election, electoral process, confidentiality.

Headnotes:

The practice of marking voters' hands with visible ink to signify they had voted is unconstitutional, violating the principles of equality, secrecy of voting as well as their dignity, reputation and privacy.

Summary:

I. In this case, the applicant requested the Constitutional Court to consider the constitutionality of provisions of the Electoral Code (hereinafter, the "EC") concerning the use of election ink to visibly mark the voters' thumb to identify they voted. The applicant argued that the challenged provisions not only violate the principle of equality and the right to vote but also unlawfully distinguishes between voters and non-voters. The applicant also pointed out that the practice gives political parties inadmissible and unconstitutional opportunity to control whether their members had acted according to the party line, which further violate their right to vote.

The applicant underscored that the right to vote should be exercised in secrecy. Confidential voting is not only an integral part of free and fair elections but it also manifests the freedom of belief, conscience, thought and public expression guaranteed by the Constitution. Hence, the applicant believes that marking voters with visible ink directly contradicts the principle of secrecy of voting, an internationally recognised right under Article 21.3 of the Universal Declaration of Human Rights and Article 25.b of the International Covenant on Civil and Political Rights.

II. The Court noted that the contested EC provisions fail to maintain voters' confidentiality and guarantee their anonymity, because the marking on the voters' thumb is visible to others, who can identify whether his or her fellow citizen has exercised his or her right to vote or not, which violates the principle of secrecy of voting. This right is recognised also by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which are part of the internal legal order as that they have been ratified (Article 118 of the Constitution). According to the acts, general principles of the European constitutional heritage (basis of any genuinely democratic society) determine the right to vote in terms of the possibility of casting a vote in general, direct, equal, free and secret elections held at regular intervals. The presumption of a democratic state must favour inclusion, because the universal right to vote in such society becomes a "basic principle".

Furthermore, according to the Court, the visible marking of the voter's thumb violates Article 22.2 of the Constitution, specifically the passive dimension of the secrecy of the voting right. That is, it violates the secrecy of the right of the citizen to decide to participate in or abstain from elections, a right which is guaranteed by the Constitution. The Court emphasised that freedom of choice includes protection against various types and forms of

pressures that citizens confronted, whether they voted or not. Hence, the visible marking of voters, in contrast to citizens without markings because they chose not to vote, is not in accordance with the Constitution and its basic principles.

Also, the Court found that the visible marking violates the voter's dignity and reputation and his or her privacy, which is contrary to Article 25 of the Constitution. The Court pointed out that civil liberties are freedoms and rights granted to citizens, which are confirmed and guaranteed by the Constitution. Essential to civil liberties and rights is the respect for the physical and legal integrity of the personality and the individual and upholding his or her honour and dignity.

Based on the aforementioned considerations, the Court repealed contested parts of Article 108.2, 108.6 and 108-a.9 of the EC and ruled them as unconstitutional.

Languages:

Macedonian, English (translation by the Court).



Turkey

Constitutional Court

Important decisions

Identification: TUR-2008-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 03.01.2008 / **e)** E.2005/151, K.2008/37 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 29.03.2008, 26831 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.2.3. Constitutional Justice – Types of claim – **Referral by a court.**

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

3.21. General Principles – **Equality.**

4.5. Institutions – **Legislative bodies.**

5.2.2.12. Fundamental Rights – Equality – Criteria of distinction – **Civil status.**

Keywords of the alphabetical index:

Criminal proceedings, sentencing / Victim, crime, family member / Violence, domestic, prevention / Penalty, increased for attack against family member.

Headnotes:

The legislator may enact different criminal sanctions, depending on whether somebody has committed the crime of laceration against a close relative or against somebody else. The state is obliged to prevent domestic violence. The application of the principle of equality before the law in criminal law does not require that all criminals be punished in the same way. Different rules against individuals having different status may be introduced in order to prevent domestic violence in society.

Summary:

I. Several courts asked the Constitutional Court to assess the compliance with the Constitution of Article 86.3 (as amended by Law no. 5328) of the Turkish Penal Code, 5237.

Article 86.2 of the Turkish Penal Code introduced some provisions on deliberate laceration. If the result of deliberate laceration is slight and it can be

removed with simple medical intervention, the perpetrator shall be sentenced to imprisonment for between four months and one year, and shall be fined at the instigation of the injured party.

Article 86.3.a provides that where deliberate laceration has been committed against ancestors, descendants, spouses or siblings, the sanction to be applied shall be increased by half, regardless of whether the injured party has lodged a complaint.

II. The applicant courts asserted that the offence of laceration against relatives results in direct prosecution, irrespective of whether the injured party has complained. Offences of laceration against others will be prosecuted upon complaint by the injured party.

In its judgment the Constitutional Court referred to Articles 2, 5, 10, 12, 17, 38 and 41 of the Constitution.

National and international statistics demonstrate that offences stemming from domestic violence and their results are common problems within all societies. It is notable that countries take criminal, legal and administrative measures in order to prevent these kinds of offences, in line with their social values, traditions and individual tendencies. In some countries, domestic violence is prosecuted directly, without the need for the injured party to lodge a complaint. In others, the criminal investigation is commenced upon complaint from the injured party.

In recent years, extensive legal and administrative measures have been taken in order to prevent domestic violence and to penalise criminals effectively in Turkey. Within this context, a provision has been introduced, whereby domestic violence will be prosecuted without seeking any complaint if the deliberate laceration could be treated with simple medical intervention.

The legislator may draw a distinction between offences that are directly prosecutable by the public prosecutor and those where a complaint by the injured party is required. This will depend upon the gravity of the offence and its significance from the perspective of public order, privacy of private life and other factors. Thus, the legislator may introduce a prosecution principle, whereby suspects are to be prosecuted directly, in order to reduce domestic violence and to prevent “cover-ups” of offences committed within the family, whose members are responsible to treat each other with kindness.

The application of the equality principle before the law in criminal law does not mean that all criminals who have committed the same offence will be subject to

the same punishment, without taking account of their differing characteristics. Equality before the law is the principle under which each individual is subject to the same laws, with no individual or group having special legal privileges. The equality principle envisaged by the Constitution is legal, as opposed to absolute, equality. Provided that those of the same legal status are subject to the same rules and those of differing legal status to different rules, the equality principle enshrined in the Constitution is not violated. Different regulations for those who have the same status contravene the equality principle.

Differences in the conditions of the injured party or perpetrator may require the application of different rules. The fact that there are different rules to follow for the individuals mentioned in the provision under dispute (i.e. ancestors, descendants, spouses or siblings), detaching them from another individuals, does not constitute a contradiction of the equality principle.

On the other hand, it is clear that improvement of the moral and material assets of family members is only possible within a peaceful and confident environment. In order to ensure this environment, domestic violence should be prevented.

Analysis shows that the legislator, by using its discretionary powers, expressed a preference for the protection of close family members by comparison with other individuals. The provision in dispute covers families consisting of physically and psychologically healthy individuals. It was not found to be contrary to Article 41 of the Constitution.

The state must protect individuals who are the cornerstones of the family and society from all threats, violence and danger. The provision in point is a reflection of the state's obligations in this regard, as indicated in Article 17 of the Constitution.

For those reasons, the article was found to be compatible with the Constitution. Justices Kiliç, Akyalçın, Özgüldür and Kaleli expressed dissenting opinions, however.

The provision stipulates an increase by half of the term of imprisonment and the level of fine. The Constitutional Court noted that an examination of past and present Turkish criminal legislation demonstrates two parts to the legislative approach towards family members and close relatives as suspect and injured party. The fact that one is a family member or close relative can be a mitigating factor in terms of the applicable sanction, while in other cases, it makes matters worse. It is up to the legislator to determine which actions shall be deemed crimes and which

sanctions shall be applied to them, provided that this is in conformity with the general principles of the Constitution and those of the criminal law. The legislator has discretionary power to prevent domestic violence, by increasing terms of imprisonment and levels of fines by half, if the offence has been committed against family members and close relatives, as stipulated in the provision. For those reasons, it is not contrary to the Constitution, and the petition was rejected.

Languages:

Turkish.



Identification: TUR-2008-2-004

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 29.01.2008 / **e)** E.2002/1 (SPL), K.2008/1 / **f)** Dissolution of a Political Party / **g)** *Resmi Gazete* (Official Gazette), 01.07.2008, 26923 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.8.1. General Principles – Territorial principles – **Indivisibility of the territory.**

4.5.10.4. Institutions – Legislative bodies – Political parties – **Prohibition.**

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

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

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

5.3.45. Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Political party, programme / Political party, dissolution / Minority, language.

Headnotes:

The fact that a political party refers to the “Kurdish problem”, proposes some solutions to it, and advocates more autonomy for local governments on the basis of principles of pluralism and participation in the statute and programme of a political party does

not make that political party unconstitutional. Such a proposition should not, therefore, be regarded as justification for the dissolution of a political party.

Summary:

I. The Chief Public Prosecutor at the Court of Cassation launched a court action seeking the dissolution of the Rights and Freedoms Party (*Hak ve Özgürlükler Partisi HAK-PAR*) under various provisions of the Law on Political Parties and of the Constitution.

Article 3 of the party's statute described one of the party's aims as the restructuring of Turkey in its administrative, political, social and economic aspects in a decentralised model according to the universal democratic legal norms and pluralist political system of the EU and the world. It went on to promise that the party would solve the Kurdish problem by social consensus based on equality of rights.

In its Party Programme, the Rights and Freedoms Party suggested that this problem might be resolved if Turkish governments put forward the same arguments for Kurds living in Turkey as they demand for minority groups living in countries such as Cyprus, Bulgaria, Greece and Kosovo. It also stated, "Regulation of local governments will depend on the universal principles of participation and pluralism. Local governments will be provided with an autonomous structure."

The Chief Public Prosecutor claimed that the statute and programme of the Party described the "Kurdish problem" as "the main problem of Turkey". He pointed out that such an approach, drawing a distinction between Turks and Kurds and accepting the existence of a separate Kurdish nation, entailed the rejection of the concept of nationhood, which depends on conscience of citizenship. As a result, the statute and programme of the party were in conflict with Articles 78 and 101 of the Law on Political Parties, which protect the "indivisible integrity of the state with its nation and territory". The Chief Prosecutor also contended that the statute and programme of the party contravened Article 81.a-b of the Law on Political Parties. This provision prevents political parties from asserting that there are minorities based upon national, religious and linguistic differences. He also pointed out that the Section of the party programme dealing with the restructuring of the state aimed to create administrative regions and sovereign autonomous regions. This ran counter to the concept of the unity of the state and contravened Articles 78.b and 80 of the Law on Political Parties. The Chief Public Prosecutor accordingly asked the Constitutional Court to dissolve the Party.

II. The Constitutional Court observed that Article 69.5 of the Constitution allowed the dissolution of a political party where it can be proved that the party's statute and programme violate the provisions of Article 68.4 of the Constitution. The Court stated that the statute and the programme of the Rights and Freedoms Party aim to establish a decentralised government model. The party advocates the solution of the Kurdish problem, which it considers one of the fundamental problems of Turkey, on the basis of equality of rights. The Court reiterated that political parties are indispensable elements of democratic political life. They are free to determine policies and to suggest different solutions to society's social, economic and political problems. They can only be banned if their policies and activities pose a clear and present danger to the democratic regime. The Rights and Freedoms Party was only established a short time ago, and there is no evidence of its having committed unconstitutional acts since its establishment. It is therefore safe to say that the party does not pose a serious threat to the democratic regime. The aims mentioned above should be considered within the scope of freedom of expression. The Chief Prosecutor's request for the dissolution of the party was therefore rejected. Vice President Osman Alifeyyaz Paksüt and Justices Ahmet Akyalçin, Mehmet Erten, A. Necmi Özler, Serdar Özgüldür and Sevket Apalak delivered dissenting opinions.

Languages:

Turkish.



Identification: TUR-2013-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 20.09.2012 / **e)** E.2012/65, K.2012/128 / **f)** Abstract Review of Article 25 of the Basic Law on National Education (Law no. 1739) as amended by Law no. 6287 / **g)** *Resmi Gazete* (Official Gazette), 18.04.2013, 28622 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Education, religious / Secularism, principle.

Headnotes:

Provision of courses on “The Quran” and “The Life of The Prophet” on an elective basis at public elementary and high schools is not contrary to the principle of secularism.

Summary:

I. The parliamentary group of the main opposition party (Republican People's Party) asked the Constitutional Court, *inter alia*, to assess the constitutionality of the third sentence of Article 25 of the Basic Law on National Education (Law no. 1739) as amended by Law no. 6287. The third sentence of Article 25 reads as follows:

“The Quran and the Life of the Prophet are among the elective courses which shall be taught in elementary and high schools”

The applicant party argued that the teaching of the Quran and the Life of the Prophet in public elementary and high schools as elective courses is contrary to the principle of secularism since it establishes a connection between Islam and the state. The party contended that providing some courses related to the Islam but not other religions is not compatible with the impartiality of the state towards all religions and beliefs. They also argued that, although the courses are elective, choosing or not choosing those courses could be considered as manifestation of one's belief and therefore the existence of those courses is contrary to the freedom of religion.

II. The Constitutional Court observed that the aim of the contested provision was to provide an opportunity for students who want to learn their religion. The courses are not compulsory for any student and nobody will be forced to choose them. The Court also emphasised that the principle of secularism requires state impartiality towards all religions and beliefs. In a pluralist democratic society, a secular state should be the guarantor of a plurality of beliefs and believers. The Court also noted that the establishment of private schools for religious education was prohibited in Turkey and religious education is possible only under state observation. Under those conditions, the Court held that provision of such courses at public schools is a positive obligation of the state and does not conflict with the constitution. As a result, the Court rejected the claims of the applicant party. Judges Mrs Fulya Kantarciolu, and Mr Mehmet Erten put forward dissenting opinions.

Languages:

Turkish.

*Identification:* TUR-2014-3-004

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 25.06.2014 / **e)** 2014/256 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 05.07.2014, 29051 / **h)** CODICES (English, Turkish).

Keywords of the systematic thesaurus:

3.13. General Principles – **Legality**.
 3.16. General Principles – **Proportionality**.
 3.17. General Principles – **Weighing of interests**.
 5.2.2.6. Fundamental Rights – Equality – Criteria of distinction – **Religion**.
 5.3.18. Fundamental Rights – Civil and political rights – **Freedom of conscience**.

Keywords of the alphabetical index:

Religion, headscarf, symbol, discrimination / Limitation of right, justification / Limitation of right, public order.

Headnotes:

Restrictions imposed on a lawyer wearing a headscarf because of her religious belief constituted a violation of her freedom of religion and conscience and put her in a disadvantageous position vis-à-vis those lawyers who do not wear a headscarf.

Summary:

I. The applicant is a lawyer registered at the Ankara Bar. Subsequent to the decision of the Supreme Administrative Court (*Danistay*) to suspend the enforcement of the word “bareheaded” in the Code of Conducts which was adopted by the Turkish Bar Associations in 1971, the applicant began attending hearings, wearing a headscarf.

At a hearing dated 11 December 2013, the judge adjourned the case to another day on the ground that lawyers could not attend hearing by wearing headscarves in accordance with the Bangalore

Principles of Judicial Conduct, the Code of Conduct of the Council of Bars and Law Societies of Europe, the decisions of the European Court of Human Rights and the Constitutional Court to the effect that the headscarf was a strong religious and political symbol contrary to secularism. The judge instructed the applicant's client to appoint another lawyer until the next hearing.

The applicant claimed that since there existed no rule prohibiting her from following hearings while wearing a headscarf, the impugned interim decision to the contrary was in breach of, *inter alia*, her freedom of religion and conscience in Article 24 of the Constitution and the prohibition of discrimination in Article 10 of the Constitution. The applicant argued that she was wearing a headscarf because of her religious belief and that it was discriminatory as other lawyers who did not wear headscarves could attend hearings whereas she could not if wearing a headscarf.

II. The Constitutional Court underlined that it may be decided by adherents of a religion whether a conduct was a requirement of a particular religion or belief. Additionally, the opinions of the relevant religious authorities may also be taken into account.

In this regard, the Constitutional Court considered that wearing a headscarf fell under the scope of Article 24 of the Constitution, and that State actions which put restrictions on where to use the right to wear a headscarf as an expression of religious belief and how to do this constituted an interference with an individual's right to manifest of her or his religion.

The Court then examined the compliance of the intervention with "the principle of limitation by a law" or "the principle of lawfulness" which has a more restrictive meaning in Turkish Law than the concept of the European Court of Human Rights of "being prescribed by law".

In the light of the decision of the Supreme Administrative Court, the Constitutional Court however found that there was not any accessible, foreseeable and precise provision of law which restricted the applicant's freedom of religion and belief that would prevent arbitrary behaviour of the State institutions. In the mentioned decision, the Supreme Administrative Court decided that the word "bareheaded" in the Code of Conduct had no basis in the superior legal norm, namely the Law on Lawyers, and exceeded the purpose of this law. The Supreme Administrative Court had further noted that Article 49 of the Law on Lawyers did not grant the Union of Bar Associations the power to place restrictions on wearing a headscarf.

The Constitutional Court concluded that there was no legal basis of interference with the applicant's freedom of religion, and that there was no need to examine compliance with the principles of pursuing a legitimate aim and being necessary in a democratic society as the interference failed to meet the principle of lawfulness. The Court accordingly found, with a majority vote, a violation of the applicant's freedom of religion and belief under Article 24 of the Constitution.

In the first place, the Constitutional Court considered that the complaint of discrimination constituted an important aspect of the individual application and that the case should be also examined from the standpoint of principle of equality or the prohibition of discrimination under Article 10 of the Constitution.

The Court underlined that even though all female lawyers were required to be bareheaded at the hearings, this negatively affected the applicant, who used a headscarf as a form of abiding by the exigencies of her religious belief. Therefore, pressing social needs to ban the applicant from hearings solely because of her headscarf should be demonstrated. Such an intervention must pursue the aims of "protecting the rights and freedom of others" and "maintaining public order".

The Constitutional Court noted that separate concrete facts could not be put forward in the interim decision concerning how the applicant's headscarf prevented others enjoying their rights and freedoms, and that it was not established what measures were taken before restricting a fundamental right or freedom. It was accordingly concluded that it was not proportionate to prohibit the applicant from attending a hearing while wearing a headscarf.

Having regard to the foregoing, the Constitutional Court found that the applicant was put in a disadvantageous position vis-à-vis those who did not wear a headscarf, and that Article 10 of the Constitution in conjunction with Article 24 of the Constitution was breached.

Second, the Constitutional Court decided to send the file to the relevant court in order to remedy the violation and its consequences. Given that it would constitute just satisfaction, the applicant's request for non-pecuniary compensation was not awarded.

Languages:

Turkish, English (non-official translation by the Court).



Identification: TUR-2015-3-003

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 14.01.2015 / **e)** 2015/12 / **f)** / **g)** *Resmî Gazete* (Official Gazette), 22.05.2015, 29263 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

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

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

5.3.13.3.1. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law.**

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

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

Keywords of the alphabetical index:

Judiciary, independence / Impartiality, institutional.

Headnotes:

The “criminal judicature of peace” was established as a new judicial institution “to take decisions which need to be taken by the judge in the investigation phase”. This new institution aims to serve the public interest by ensuring that investigation phase decisions are taken by judges specialised in taking such decisions and, therefore, it does not contradict the principle of the rule of law. The impersonal and predetermined allocation of cases to judges (principle of natural judge) prohibits the creation of judicial authorities or appointment of judges with competence to try conflicts or crimes that took place before their creation. The criminal judicatures of peace are not created or appointed for trying a specific case, person or group. They have jurisdiction over all conflicts and crimes which fall within their scope and, therefore, no aspect of these institutions is contrary to the guarantees of a legal judicial process.

Summary:

I. Eskisehir 1st Criminal Judicature of Peace applied to the Constitutional Court claiming that the legal provision establishing a new judicial organ, the “criminal judicature of peace” (authorised to take decisions which need to be taken by a judge in the investigation phase), leaves the outcome of the investigations conducted in Turkey to the initiative of the political power and that this situation breaches the principle of the rule of law, the right to legal remedies, personal security and freedom, and the principles of judicial independence and natural judge.

The applicant organ also claimed that, as any objection made to the decisions given by any of the criminal judicatures of peace in limited numbers are finally concluded by an authority within the same system, this would render the objection process ineffective, which is in breach of the principle of the rule of law, the principle of natural judge, personal freedom and security and the right to a fair trial.

II. Rendering its judgment on 14 January 2015, the Constitutional Court emphasised that it falls into the discretionary power of legislator to determine the establishment, structure, functions and powers and operation and trial procedures of the courts as per Article 142 of the Constitution. Taking into account the legislative intent of the provision and its objective content, the Constitutional Court established that the criminal judicatures of peace have been established with a view to enabling these judges to specialise in taking decisions required to be taken at the investigation stage by a judge.

The Constitutional Court noted that in practice, dealing with cases is regarded as the main task while the decisions required to be taken at the investigation stage are regarded as a subsidiary task and that there have been significant right violations as the actions required to be carried out at the investigation stage could not be adequately addressed. The Court also indicated that the practice whereby the same judges, who have previously issued their opinions on the imputed offence and the suspect, sit on the court which deals with the merits of the case, has been criticised by the European Court of Human Rights.

Accordingly, the Court observed that the task of “taking decisions required to be rendered by the judge at the investigation stage”, which was previously performed by the Criminal Courts of Peace and has now been assigned to the criminal judicatures of peace, and that the establishment of the latter organs, which are entrusted with only the task of giving decisions required to be taken by the judge at the investigation stage with a view to

enabling such specialised judges to deal with only these decisions, has pursued the aim of serving the public interest. Therefore, the establishment of criminal judicatures of peace does not constitute any contradiction of the principle of the state based on the rule of law (hereinafter, “the state of law”).

The Court emphasised that the impersonal and predetermined allocation of cases to judges (principle of natural judge) prevents the establishment of a judicial authority and appointment of a judge after an offence is committed or a dispute occurs. However, the guarantee of the natural judge should not be understood in the manner that newly established courts or judges recently appointed to the existing courts can under no circumstances participate in proceedings concerning offences previously committed. It does not contradict the principle of the natural judge in cases where a newly-established court or a judge newly appointed to an existing court tries conflicts or crimes that took place before their creation or appointment, provided that such courts or judges are not created or appointed for trying a specific case, person or group. To hold the contrary would result in a failure to establish new courts. The Court concluded that the provision is not, in any aspect, in breach of the guarantee of the natural judge by taking into account the facts that the contested provision does not aim to determine the place of jurisdiction where the relevant case would be handled after committing of a certain offence and that it has been applied in respect of all conflicts which fall into its scope following its entry into force.

Considering that such judges are appointed by the High Council of Judges and Prosecutors (the HCJP) and have the legal guarantee of judges enshrined in the Constitution as all other judges, the Court indicated that there is no ground which would lead to the conclusion that these judges’ offices are considered to have a different status to those of other judges in respect of independence and that guarantees for their independence have been undermined. The Court indicated that it cannot be asserted that these criminal judicatures of peace suffer from a lack of objective impartiality *vis-a-vis* the regulations ensuring independency and included in the Constitution and law provisions to which criminal judicatures of peace are subject and the guarantees ensuring independence and impartiality of judges to take office therein. The Court also specified that the allegation of subjective independence, which is completely associated with the personal conduct of the judge, may only be asserted in the cases being dealt with on the basis of concrete, objective and plausible evidence, and that the matter of subjective impartiality, which is discussed in the relevant procedural law, falls outside the scope of

constitutional review. Consequently, the Court rejected the request for annulment of the provision relying on the above-mentioned grounds.

Other contested provisions set out that, where there is more than one criminal judicature of peace in a given district, the objections to a decision given by the criminal judicature of peace shall be reviewed by the judge’s office with the consecutive number. Objections to any decision given by the judge’s office of the last number shall be reviewed by criminal judicatures of peace no. 1. Where there is only one criminal judicature of peace office in regions where there is no assize court, objections shall be reviewed by the criminal judicature of peace located in the district of jurisdiction of the relevant assize court. Where there is only one criminal judicature of peace in regions where there is an assize court, objections shall be reviewed by the criminal judicature of peace in the region where the closest assize court is located.

In the application, it was maintained that as any objection made to the decisions given by any of the criminal judicatures of peace in limited numbers are finally concluded by an authority within the same system, this would render the objection process ineffective, which is in breach of the principle of the state of law, the principle of the natural judge, personal freedom and security and the right to a fair trial.

The Constitutional Court noted that the right to legal remedies and the right to a fair trial are among the most efficient guarantees which would ensure proper enjoyment and protection of fundamental rights and freedoms and that the right to legal remedies falls within the scope of the right to a fair trial.

Emphasising the requirement that the appeal courts are entitled to amend the decision being reviewed when necessary with a view to ensuring efficient implementation of the right to legal remedies guaranteed under Article 36 of the Constitution, the Court ascertained that the criminal judicatures of peace are entitled to review the contested decision and give decision as to the merits of the case and it has therefore concluded that the legal remedy provided is an efficient one.

The Court indicated that there is no constitutional norm which requires review of the objections to the decisions rendered by the criminal judicature of peace’s offices by another court of higher jurisdiction and noted that the authority reviewing the contested decision must not be necessarily an authority of higher jurisdiction provided that an effective review is ensured.

On the other hand, the Court indicated that conclusion of the objections to a court's decision by the court with the consecutive number in the same place is an established practice in both criminal and civil justice law.

The Court finally noted that the method in which an objection to the decisions given by the criminal judicatures of peace considered to become specialised in the security measures as they are entrusted independently with this duty is raised before and concluded by another criminal judicature of peace, which has specialised in the same issue aims to serve the public interest. The Constitutional Court accordingly held that this provision is not unconstitutional.

Languages:

Turkish.



Identification: TUR-2015-3-004

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 27.05.2015 / **e)** 2015/51 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.06.2015, 29382 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality.**

5.1.4.2. Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**

5.2.2.6. Fundamental Rights – Equality – Criteria of distinction – **Religion.**

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

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

Keywords of the alphabetical index:

Marriage and family, protection / Marriage, right, limitation criteria / Religion, neutrality of the state.

Headnotes:

Imprisonment of those who marry by arranging a religious ceremony without executing an official civil marriage, and of those who conduct a religious marriage ceremony without seeing the certificate of civil marriage, is a violation of the freedom of conscience and the right to family life. Under Article 13 of the Constitution, the right to demand respect for private and family life and the freedom of religion and conscience may be restricted only by law and to the extent that it is necessary in a democratic society. In addition, these restrictions must not be contrary to the letter and spirit of the Constitution, the requirements of the democratic order of the society, the secular republic, and the principle of proportionality.

Summary:

I. Pasinler District Chief Public Prosecutor Office filed a public case against the defendant alleging that he committed the crime of getting married with a religious ceremony without obtaining a civil marriage, which is an offence under Article 230.5 of the Turkish Penal Code (hereinafter, "TCK") and against another defendant alleging that he committed the crime of conducting a religious wedding ceremony without a civil marriage as per Article 230.6 TCK.

During the hearing of the case on 24 January 2014, the court of first instance considered the challenged provisions, namely Article 230.5 and 230.6 TCK, to be contrary to the Constitution and referred the case file to the Constitutional Court for constitutionality review.

The contested provisions of law criminalise the acts of marrying by arranging a religious ceremony without executing official marriage transactions and of conducting such a religious ceremony. The applicant court of first instance argued that marrying by arranging a religious ceremony and conducting such a ceremony are issues of private life and of the freedom of religion and conscience. Living together without an official marriage contract does not constitute a crime under the Turkish legal system. The applicant court claimed, under these conditions, that imposing an imprisonment sanction on marriage by arranging a religious ceremony and conducting such a ceremony is contrary to the right to respect to private life and family life under Article 20 of the Constitution, freedom of religion and conscience under Article 24 of the Constitution, the principle of equality before law under Article 10 of the Constitution and the right to protect and improve one's material and spiritual entity under Article 17 of the Constitution.

II. The Constitutional Court decided that the application should be examined from the standpoint of the right to demand respect for private and family life under Article 20 of the Constitution and the freedom of religion and conscience guaranteed under Article 24 of the Constitution. The application was found to be irrelevant to Articles 5 and 17 of the Constitution. Furthermore, given that Article 13 of the Constitution includes the criteria to be observed in limiting fundamental rights and freedoms, it was also decided to carry out an assessment under this Article.

First, the Constitutional Court emphasised that “the right to demand respect for private and family life” aims to protect the secrecy of private and family life and to prevent it from being exposed publicly. In other words, it protects the individual’s right to demand all issues and events in his or her private life to be known to only himself or herself or those he or she wishes to reveal and disclose. Furthermore, it aims to prevent public authorities from interfering in any individual’s private life; i.e. it guarantees the individual’s right to control and live his or her personal and family life according to his or her own sense and understanding. In this context, the Constitutional Court noted that Article 20 of the Constitution protects private life and family life against the State, society and other people, subject to the exceptions under Constitution.

Second, the Constitutional Court assessed the freedom of religion and conscience guaranteed under Article 24 of the Constitution and noted that this freedom is “one of the foundations of a democratic society” and a fundamental right that goes “to make up the identity of people and their conception of life”. The Court also noted that, in a similar manner to the right to demand respect for private and family life, the freedom of religion and conscience constitutes, in principle, a space that cannot be interfered with by the State and others.

On the other hand, the Constitutional Court noted that the right guaranteed under Articles 20 and 24 of the Constitution is not absolute, by stating that certain limitations may be introduced to this right. However, the Court emphasised that such limitations must be in accordance with Article 13 of the Constitution, i.e. they shall not impair the essence of the right, and shall not be contradictory to the requirements of the democratic order of the society and the principal of proportionality.

The Constitutional Court noted that, under the principle of proportionality, there must be a requirement of the democratic order of the society in order to interfere in the right to demand respect for private and family life and the freedom of religion and conscience,

and there must not be any other means available to protect the rights of spouses arising from the establishment of conjugal community other than the said limitation.

The Court noted that the legal order allows for legal arrangements for the protection of people’s rights arising from the establishment of conjugal community, that the relevant provisions of the Turkish Civil Code require the spouses to have their official marriage transactions completed in order to claim their rights arising from matrimony, that they would be deprived of certain rights if they do not have official marriage transactions, that this deprivation of rights constitutes a civil sanction for those who do not execute official marriage transactions and this sanction is adequate to ensure that people execute these transactions, and, therefore, there is no need to impose penal sanctions on the acts of marrying by arranging a religious ceremony or conducting a religious marriage ceremony in accordance with people’s religious beliefs.

Consequently, the Constitutional Court concluded that the measures were not necessary in a democratic society; in particular, the contested provisions of law are not necessary for the protection of family order, which is the purpose of the limitation introduced with those provisions. The Court also concluded that, under these circumstances, given that marrying by arranging a religious ceremony or conducting a religious marriage ceremony falls into the scope of the right to demand respect for private and family life and the freedom of religion and conscience, criminalising such acts and introducing a penal sanction against these acts constitute a disproportionate interference to the said rights and thereby contradict the principle of proportionality. The Constitutional Court ruled for annulment of the contested legal provisions.

III. Out of seventeen justices, four delivered two dissenting opinions. The three dissenting judges disagreed on the grounds that one of the reform laws protected under Article 174.4 of the Constitution prescribes “the principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official adopted with Turkish Civil Code no. 743 of 17 February 1926, and the provisions of Article 110 of the Code. They also argued that “freedom of religion and conscience” cannot be given precedence against this reform law as Article 174.4 of the Constitution must be interpreted together with the principles stated in the Preamble and Articles 2, 4, final paragraph of 24 and 41 of the Constitution.

The other dissenting judge reasoned that this regulation imposes a sanction in the nature of

“coercive detention” for the said crime, which is different from effective repentance and extenuating circumstances. The purpose of this regulation is not to punish someone for conducting a religious ritual, but to ensure that a religious ceremony is conducted after the official proceedings of civil marriage. This regulation aims to prevent possible losses of rights of women and children, which may arise when the religious marriage remains ineffective due to deferral of the official civil marriage.

Languages:

Turkish.



Identification: TUR-2015-3-005

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 04.06.2015 / **e)** 2014/12151 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 01.07.2015, 29403 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criticism / Freedom of the media / Political expression, freedom.

Headnotes:

Freedom of expression and the freedom of political discussion is “the basic principle of all democratic systems”. The public authorities must tolerate the severest criticism directed towards them by virtue of the public power vested in them. Even if the execution of a sanction is postponed, the risk of a new investigation has a deterrent effect (“chilling effect”) on the journalist to express their opinions or press activities.

Summary:

I. In the incident giving rise to the present application, which was concluded by the Constitutional Court in its plenary sitting on 4 June 2015, the applicant is a columnist in a nationwide daily newspaper called “*Cumhuriyet*” (the Republic). The applicant penned an article entitled “Painted Stairs” in the issue of the newspaper dated 4 July 2013 on the protests of painting the stairs which started in Istanbul and spread nationwide. In the article, the applicant criticised the politicians and deputies in a strong language. Making reference to the red colour of chairs in parliament, he or she implied that deputies get angry and attack colours. A criminal case was filed against the applicant on account of said article with the allegation of “insulting public officers who were working as a committee”. The Criminal Court of First Instance sentenced the applicant for the thoughts which he or she expressed in his or her article and subsequently decided to suspend the pronouncement of the judgment. The applicant argued that his or her punishment for the thoughts he or she expressed in the article constituted a violation of his freedom of expression and freedom of the press.

II. The Constitutional Court noted that Articles 26.1 and 28.1 of the Constitution guarantee freedom of expression; and that the freedom of expression applicable for both real and legal persons includes all forms of expression such as political, artistic, academic or commercial opinions and convictions.

The Constitutional Court observed that, in the present application, the interference in the applicant’s freedom of expression was a part of measures aiming at the “protection of the reputation or rights of others”. The Court recalled that its duty is to make an assessment concerning whether a fair balance was struck in a democratic society between the applicant’s freedom of expression and the protection of the reputation or rights of others.

Recalling that before the publishing of said article in the newspaper, a series of social protests publicly known as the “Gezi demonstrations” took place in June 2013, the Court indicated that the acts of painting staircases, also called the “rainbow protest”, started in various places of Turkey for the alleged purpose of increasing awareness of protecting the environment; and that on the date of the incidents, some of the municipalities did not permit the act of painting staircases and repainted the staircases in their original colours.

In the Court's opinion, the article which was at the centre of the application was penned as a part of the on-going discussions in the press and media organs and political spheres at the time of the incidents. The applicant's expressions that led to his or her conviction criticise waggishly the reactions by some municipal officials and politicians against the protest of painting the cities' staircases initiated by individuals to draw attention in their way to the environmental problems subsequent to the incidents known as "Gezi demonstrations", which occupied the public agenda for quite a long period of time. Making a reference to news appearing in the media stating that colours of the General Assembly Hall of the Turkish Grand National Assembly, especially the red colour of the seats, have a negative impact on the mood of the parliamentarians, the applicant had made the criticism that a colourful environment was not welcomed by the politicians.

The Constitutional Court emphasised that freedom of expression mainly guarantees the freedom of criticism and, therefore, the severe expressions used in the course of disclosure or dissemination of the opinions must be deemed natural; and that on the other hand, it must be taken into account that the freedom of political discussion is "the basic principle of all democratic systems".

Noting that the public authorities must tolerate the severest criticism directed towards them by virtue of the public power vested in them, the Constitutional Court has recalled that a sound democracy requires the supervision of a body exercising public power not only through judicial authorities, but also by non-governmental organisations, media and press or other actors of the political sphere, such as political parties. Likewise, tolerable limits of criticism towards politicians are wider than those of other individuals. Unlike other individuals, a politician intentionally makes each of his or her statements and actions open to the public, as well as other politicians' scrutiny. That is why they must have a wider tolerance to criticism. Therefore, political expression must not be restricted unless there are compelling reasons.

In the Court's opinion, although the probationary measure was applied in respect of the applicant upon the pronouncement of the suspension of judgment, the applicant, who is a writer, would always face a risk of the execution of his or her sentences during this probation period. The anxiety regarding being subject to sanctions has a disruptive effect on people and, although the person concerned is likely to complete his or her period of probation without a new conviction, there is always a risk for the person under the effect of such anxiety to refrain from expressing his or her opinions or performing press activities.

Consequently, the Court held that the interference in the applicant's freedom of expression and the freedom of the press for the purpose of the "protection of the reputation or rights of others" was not necessary in a democratic society. The Court accordingly held that the applicant's freedom of expression and freedom of the press guaranteed under Articles 26 and 28 of the Constitution had been violated.

Languages:

Turkish.



Identification: TUR-2016-1-001

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 13.07.2015 / **e)** 2015/68 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24.07.2015, 29424 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.17. General Principles – **Weighing of interests.**
 3.25. General Principles – **Market economy.**
 5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
 5.4.2. Fundamental Rights – Economic, social and cultural rights – **Right to education.**
 5.4.4. Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

Keywords of the alphabetical index:

Freedom of enterprise, restriction / Limitation of right, justification.

Headnotes:

Excluding private tuition schools from the scope of "private teaching institutions" and ordering the closure of existing private training centres is not in line with Article 42 of the Constitution entitled "right and duty of education and learning", Article 48 entitled "Freedom of labour and contract" and Article 13 entitled "restriction of fundamental rights and freedoms".

Summary:

I. In this case, the applicant challenged the constitutionality of Article 2.1.b of the Law on the Private Teaching Institution no. 5580 (hereinafter, the “Law”) and Provisional Article 5.1, which provided that private tuition schools (“*dershane*”) shall be excluded from the scope of “private teaching institutions” included in the Law and that the existing private tuition schools shall cease performing their activities after 1 September 2015. In the petition submitted to the Court, it was briefly argued that the contested provisions were introduced due to a pressing social need, but that abolition of the private tutoring centres, which encompass the right to education and learning, the freedom of enterprise, and the right to freedom of labour, is disproportionate and infringes upon the very essence of these rights. It was also maintained that the State is obliged to strike a fair balance between the public interest expected from the restriction and individual rights and freedoms. It was therefore contended that these provisions are contrary to Articles 2, 5, 13, 17, 35, 42, 48 and 49 of the Constitution, which concern, respectively the rule of law as a principle of the State, permissible restriction of fundamental rights, the rights to life and prohibition against sanctions contrary to human dignity, the right to property, the right to education, the right to freedom of labour, and the right and duty to work.

II. Rendering its judgment on 13 July 2015, the Constitutional Court examined the provisions in dispute under Article 42 of the Constitution concerning the “right and duty of education and learning”, Article 48 on “freedom of labour and contract” and Article 13 on “restriction of fundamental rights and freedoms”.

The Constitutional Court considered in its assessment, with regard to the right to education and learning, that in democratic countries the legislator has broad discretion over the determination of education policies and its choice of institutional alternatives to implement these policies. The position of institutions offering preparatory education for exams in education policy as well as the law to which these institutions shall be subject and the power to determine its limits also fall within the scope of the legislator’s discretion.

Whereas the power to determine fundamental policies and implement them is vested with the legislator, the legislator’s power in respect thereof is limited by the Constitution, and the regulations to be introduced should not violate constitutional principles and fundamental rights and freedoms. In this sense, fundamental rights and freedoms form the constitutional boundaries of democratic political powers. The

right to education and learning in Article 42 of the Constitution is capable of enabling a person to retain and improve his or her material and spiritual self, along with other rights.

The duty of the State, which is responsible for the supervision and inspection of education in accordance with the same Article, is to enable everyone to enjoy the right to education and learning in the best possible way. Regulation of the activities of private enterprises offering services in the field of education is required under the State’s obligation to enable the proper functioning of education. While the State has no absolute obligation to establish institutions where out-of-school education can be received, it should refrain from arrangements causing total elimination of services offered by the private sector in this field within the framework of legislation, unless this is necessary. In other words, no arrangement which abolishes education and learning rights of persons and which eliminates the freedom of enterprise, in such a way as to render their exercise impossible or restrict them disproportionately, can be introduced.

As a matter of fact, out-of-school education provides an environment where individuals are able to act freely and where they can improve their material and spiritual self in accordance with their preferences. The State should not interfere in this field, unless it is necessary in a democratic society. However, it is evident that the legislator has discretionary power in making arrangements in the field of out-of-school education, as Article 42 of the Constitution stipulates that education shall be conducted under the supervision and inspection of the State. This power of the State enables the legislator to introduce arrangements in matters such as the name, structure, and sphere of activity of the mentioned institutions and the rules they are to obey.

Seeking closure of private tuition schools, which meet a need created by the system of education and exams, and which have been granted with a legal status by the State, through a complete ban of these institutions by means of the challenged legal provisions, instead of taking measures to prevent the drawbacks related to such institutions, eliminates the possibility for persons to receive educational support from out-of-school private institutions within the scope of preparation for exams. Accordingly, it violates the right to education and learning.

The Constitutional Court, making an assessment within the scope of the freedom of enterprise guaranteed under Article 48 of the Constitution, considered that this freedom safeguards the right to economic enterprise of every real and legal person

freely in the field of his or her choice. As expressed in the legislative intent of the Article, this freedom “has been regulated as an economic and social right with a view to providing the individual personally with his or her economic peace and prosperity”. Again as provided therein, “Article 48 has both provided a guarantee for free enterprise, and has indicated in its second paragraph the restrictions that might be introduced”. Accordingly, the State can impose restrictions on the freedom of private enterprise in cases of public interest and as required by the national economy, and for social purposes.

When it is considered that private tuition schools are enterprises which operate in the field of education, it is obvious that State supervision and inspection of them should be stricter. In this regard, it is possible for the administration to impose sanctions on businesses acting contrary to the laws and to cancel their work permits when the relevant legal conditions are satisfied. However, a complete ban or shutdown of a private enterprise continuing its operation within the statutory framework for reasons unrelated to free market conditions depending on supply and demand – hence, on the free will of the individual – without a pressing social need with respect to the democratic social order, leaves the freedom of private enterprise unprotected.

Without introducing an arrangement of the specified nature and putting forward a compelling reason in respect of the order of a democratic society, and without resorting to less restrictive means which could accomplish the purpose of the restriction as well, the indiscriminate closure of private training centres is a restriction on the freedom of enterprise, which is disproportionate and not necessary in a democratic society.

Consequently, the Court held that the provisions, which exclude private tuition schools from the definition of “private educational institutions”, and which order the current tuition schools that fail to convert to ordinary private schools to cease their activities after 1 September 2015, are contrary to Articles 13, 42 and 48 of the Constitution. The Court accordingly decided to annul these provisions.

Languages:

Turkish.



Identification: TUR-2016-1-002

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 08.10.2015 / **e)** 2015/85 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24.11.2015, 29542 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.16. General Principles – **Proportionality.**

4.5.3.1. Institutions – Legislative bodies – Composition – **Election of members.**

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

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

5.3.41. Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Election, ineligibility / Political rights, loss / Election, right to be elected, restriction.

Headnotes:

Restrictions on political rights of citizens cannot be contrary to the principle of proportionality, such as the right to elect and to be elected and the right to engage in political activity.

Summary:

I. In the application lodged with the Court, five provisions of the Turkish Criminal Code were challenged as contrary to the Constitution. First, it was argued briefly that, although the constitutional provisions on eligibility to be a parliamentarian prescribe that persons who have been sentenced to imprisonment for one year or above, except for negligence offences, shall not be elected as a parliamentarian, the contested provision sets forth that persons may be deprived of “their capacity to be elected” even when they are sentenced to imprisonment for a term of less than one year. It was therefore contended that this provision is in breach of the Constitution.

The second challenged provision prescribes that a person may be deprived of his or her capacity to elect, to be elected, and his or her other political rights as legal consequences of a sentence of imprisonment imposed on him or her due to intentionally committing an offence. The provision was claimed to be unconstitutional as it contradicts with the basic constitutional principles on political rights.

The third provision in dispute provides that a person may be deprived of enjoying his or her other political rights as legal consequences of being sentenced to imprisonment due to an intentional offence. The provision is claimed to be unconstitutional as it prescribes that a person may be deprived of enjoying his or her other political rights as legal consequences of being sentenced to imprisonment due to an intentional offence; however it is not clearly specified which rights they are and, thereby, leads to ambiguity.

The fourth provision challenged as unconstitutional provides that a person may not use his or her rights set out in Article 53 of the Law until the imprisonment sentence imposed on him or her is fully executed. The unconstitutionality was claimed to arise due to the provision prescribing that a person may not use his or her right to elect and to be elected until execution of the imprisonment sentence imposed on him or her is fully completed, even during the period he or she is conditionally released and therefore is not in a penitentiary institution, which constitutes a contradiction of the explicit provision of Article 76.2 of the Constitution.

The fifth, and final, provision challenged in the application provides that persons who are sentenced to short-term imprisonment due to an offence they have intentionally committed, and pronouncement of whose imprisonment sentence is suspended, cannot be deprived of the right to vote or to be elected under Article 53.1 of the Law. Although Article 76.2 of the Constitution sets out that those who have been convicted for theft cannot be elected as a parliamentarian regardless of the type, duration and suspension of the sentence imposed, Article 53 of the Law shall not be applicable to the persons whose short-term imprisonment sentence is suspended and, thereby, those whose short-term imprisonment sentence imposed for the offence of theft is suspended may obtain the right to be elected as a parliamentarian in spite of the arrangement set out in Article 76 of the Constitution. Accordingly, it was maintained that this provision is in breach of the Constitution.

II. Regarding the first provision, the Constitutional Court emphasised that being sentenced to imprisonment for a term of less than one year, except for the offences cited under Article 76 of the Constitution (i.e. "dishonourable" offences such as embezzlement, theft and bribery, as well as terrorism and disclosure of state secrets), is not prescribed as one of the reasons to be disqualified from being elected as a parliamentarian. It therefore annulled the provision containing the said phrase insofar as it contains the phrase "capacity to be elected..." in

Article 53.1.b of the Law by finding it contrary to Article 76 of the Constitution as it sets forth that persons may be deprived of "their capacity to be elected" even when they are sentenced to imprisonment for a term of less than one year due to an intentional offence.

Regarding the second provision, in the Constitutional Court's view, democratic society calls for a system where citizens enjoy their right to elect to the greatest extent possible as a means of determining the national will. The State shall not interfere with the right to elect unless it is necessary for the democratic order of society. Although this right may be restricted for legitimate aims, such restriction shall not be imposed in a manner which would eliminate the citizens' right to elect or render it dysfunctional.

A person who has the right to elect enjoys this right by casting a vote. Accordingly, it is evident that the right to elect cannot be dissociated from the right to vote, which may be defined as putting it into practice. Article 67 of the Constitution prescribes that convicts in penitentiary institutions, except for those convicted of negligence offences, cannot vote. As the said provision regulates that only those who are held in the penitentiary institutions for committing an intentional offence cannot vote, there is no constitutional provision which prevents convicts who are not held in the penitentiary institutions from casting votes.

When the provision in dispute is examined, it is observed that it prescribes that, regardless of whether they are held in the penitentiary institutions or not, those who are sentenced to imprisonment due to an intentional offence shall be deprived of their right to elect. The restriction imposed by this provision on the right to elect goes beyond the boundaries of "the right to vote", which is clearly defined in the Constitution as a manifestation of the right to elect. It restricts the right to elect categorically in cases of being sentenced to imprisonment due to an intentional offence without taking into account whether the convict is in a penitentiary institution or not. Consequently, the Constitutional Court annulled the provision containing the phrase in dispute insofar as it contains the phrase "right to elect and..." set out in sub-paragraph b of the same paragraph by finding it contrary to Articles 13 and 67 of the Constitution as the said provision of the Law constitutes a disproportionate restriction, which is not necessary in a democratic social order.

Regarding the third provision, in the Constitutional Court's opinion, political rights are fundamental rights that are related to the establishment and functioning of the State. These rights constitute the basis of

democracy as they provide individuals with the ability to act directly to have an influence on the basic rules and structures of the society.

The Court observed that the restriction imposed on the contested provision covers all political rights cited from Articles 66 to 74 of the Constitution (which includes the right to participate in political activities, to form political parties, etc.) except for the rights to elect and to be elected. Although one may accept that a criminal can be denied of certain rights which especially require the existence of trust, as stated in the legislative intent of the Law, depriving the individual of all political rights enshrined in the Constitution cannot be considered necessary for the aims pursued by the said provision. Consequently, the Constitutional Court decided to annul the provision insofar as it relates to the phrase in dispute by finding it contrary to the principle of proportionality.

As regards the fourth provision, in the Constitutional Court's view, the provision in dispute, which prescribes that a person may not use his or her right to elect until the imprisonment sentence imposed due to an intentional offence is fully executed, contradicts the explicit provision of the Constitution by restricting the right to elect for a period which exceeds the actual execution period elapsing in the penitentiary institutions. It is therefore in breach of the Constitution in this respect.

On the other hand, although Article 76.2 of the Constitution does not prescribe the status of "being sentenced to imprisonment for a period of less than one year" as one of the reasons for being disqualified from becoming a parliamentarian, the provision in dispute provides that those sentenced to imprisonment for less than one year due to an intentional offence may be deprived of the right to be elected. Therefore, this provision contradicts the Constitution.

Consequently, the Constitutional Court decided to annul the provision in dispute insofar as it relates to the phrase "the capacity to elect and to be elected..." included in Article 53.1.b of the Law by finding it contrary to Articles 67 and 76 of the Constitution, concerning the right to vote and eligibility for election as a deputy respectively.

Regarding the fifth challenged provision, in the Constitutional Court's opinion, persons whose short-term imprisonment sentence is suspended shall not be deprived of the right to be elected by virtue of the provision in dispute. In this context, the provision has broadened the explicit and detailed arrangements set out in Article 76 of the Constitution on the eligibility to become a parliamentarian with regard to suspended short-term imprisonment sentences. However, the

intent of the drafters of the provision set out in Article 76 of the Constitution is to ensure that those who exercise legislative power bear certain qualifications. In this context, the eligibility criteria for being elected as a parliamentarian may be changed only through a constitutional amendment. Therefore, the contested provision, which may be regarded as an amendment to the provisions concerning eligibility for election as a parliamentarian enshrined in the Constitution, is unconstitutional insofar as it relates to the phrase "...the capacity of being elected..." mentioned in the second paragraph. Consequently, the Constitutional Court decided to annul the provision in dispute insofar as it relates to the phrase "...the capacity of being elected..." cited in subparagraph b of the first paragraph for being contrary to Article 76 of the Constitution.

Languages:

Turkish.



Identification: TUR-2016-1-003

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 08.12.2015 / **e)** 2014/87 / **f)** K.2015/112 / **g)** *Resmi Gazete* (Official Gazette), 28.01.2016, 29263 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.10. General Principles – **Certainty of the law.**
 5.1.4. Fundamental Rights – General questions – **Limits and restrictions.**
 5.3.32.1. Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

Keywords of the alphabetical index:

Personal data, collection / Personal data, processing / Private life, right.

Headnotes:

Legal provisions regulating broadcasting on the internet and crimes committed through internet broadcasting, which empowered the Telecommunications Communication Presidency to compel production of

communications data from content, hosting and access providers without this power being subject to any legal restriction or obstacle constitute a breach of “the confidentiality of private life” and of the criteria for lawful restriction of rights, particularly the criteria of foreseeability and certainty.

Summary:

I. According to some of the provisions of Law no. 5651 “Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting”, content, hosting and access providers are obliged to deliver any information requested by the Telecommunications Communication Presidency (hereinafter, the “TIB”) in the manner required by the TIB and to take measures requested by the TIB.

In the petition lodged with the Constitutional Court, it was argued that the challenged provisions have been introduced in order to enable the TIB to obtain communication data of all internet users without being subject to any legal restriction or obstacle; and that any arrangement which would restrict access of the TIB to personal information to be delivered by the content, hosting and access providers to the TIB when requested is not prescribed in these provisions. It was also argued that although the provisions in dispute hold the content, hosting and access providers liable to take measures requested by the TIB, it is not clearly set out what these measures are and therefore they are ambiguous in nature. For the abovementioned reasons, it was contended that these provisions are in breach of Articles 2, 13, 20, 36 and 40 of the Constitution: these guarantee, respectively, the state based on the rule of law; that restrictions of fundamental rights must be by law, necessary in a democratic society and proportionate, and must not infringe their essence; the right to private and family life; the right of access to justice and to a fair trial; and the right to legal remedies for rights infringements.

II. Rendering its judgment on the action for annulment, the Constitutional Court examined the provisions in dispute under Article 2 of the Constitution, in which the principle of the state based on the rule of law is prescribed, and under Article 20 of the same, which is entitled “the confidentiality of private life”.

In the Constitutional Court’s view, it is inevitable that the TIB needs certain information and documents, including personal data, in order to regulate publications and broadcasts on the internet and to combat offences committed by means of such publications and broadcasts and in order to perform the duties assigned to it. However, the scope of the

information to be requested by the TIB from content, hosting and access providers with a view to performing its duties set out in the Law no. 5651 and framework of the liabilities which the TIB may impose are not set out in the challenged provisions. In this context, the scope of the TIB’s power to demand information from content, hosting and access providers is not restricted by means of ensuring guarantees necessary for the protection of personal data. In addition, liabilities whose scope cannot be ascertained are imposed on content, hosting and access providers for ensuring that they take the requested measures.

In Article 4.3 of the Law, which is requested to be annulled, a general definition is given by means of stating “within the scope of the performance of the duties assigned to the Presidency by this Law and other Laws”. However, this general definition is not set out in Articles 5.5 and 6.1.d of the Law, which are requested to be annulled. In this context, the challenged provisions do not clearly set out under which conditions and for which grounds the information requested by the TIB shall be delivered to the Presidency by content, hosting and access providers, or how long the information provided shall be stored by the TIB, as well as the content of the information requested and measures to be notified to content, hosting and access providers. Therefore, the provisions are not definite and foreseeable.

The provisions in dispute permit access to individuals’ personal data without their explicit consent and the processing and delivery of such information to the TIB in spite of the guarantees introduced in Article 20 of the Constitution for the protection of private life. Article 20.3 of the Constitution provides as follows: “personal data can be processed only in cases envisaged by law or with the person’s explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law”. The precise nature of “cases envisaged by law” for the protection of personal data in the above-cited Article of the Constitution is not clearly defined in Law no. 5651. The challenged provisions provide that all kinds of personal data, information and documents pertaining to individuals shall be unconditionally submitted to the TIB without being subject to adequate restriction in terms of subject-matter, aim and scope in spite of the guarantee prescribed in the Constitution. In this way, individuals are left unprotected against the State’s administrative authorities. Therefore, as these provisions are not definite and foreseeable, they impose a disproportionate restriction on the right to request the protection of personal data and are in breach of Article 20 of the Constitution.

Consequently, the Constitutional Court found the provisions, which set out the internet content, hosting and access providers' liability to deliver the information requested by the TIB to the TIB and to take measures notified by the TIB, in breach of Articles 2, 13 and 20 of the Constitution and decided to annul these provisions.

Languages:

Turkish.



Identification: TUR-2016-1-004

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 25.02.2016 / **e)** 2015/1856 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.03.2016, 29649 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.22. General Principles – **Prohibition of arbitrariness.**
 5.3.5.1. Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**
 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:

Liberty, personal, right.

Headnotes:

Detention of journalists, without the existence of “strong evidence” of having committed an offence, constitutes a violation of the right to personal liberty and security as well as the rights to freedom of expression and free press.

Summary:

I. Some trucks, alleged to have been weapon-laden, were stopped and searched at Hatay and Adana provinces in January 2014. The incidents related to the stopping and search of these trucks and the contents and destination of their freight were

discussed by the public and a newspaper named *Aydinlik*, in its issue on 21 January 2014, published a news article alleging that these trucks were carrying weapons and ammunition and a photograph related to such allegations. Approximately sixteen months after such publication, Can Dündar, one of the applicants, published in the daily newspaper *Cumhuriyet's* issue of 29 May 2015 photographs and information related to the weapons and ammunitions alleged to have been found on the trucks. Another news article on the same incident was prepared by Erdem Gül, the other applicant, and published in the same newspaper on 12 June 2015.

After the publication of the news by Can Dündar, the Chief Public Prosecutor's Office made a press statement on 29 May 2015 and announced that a prosecution had been initiated on the charges of “providing documents regarding the security of the state, political and military espionage, unlawfully making confidential information public and making propaganda of a terrorist organisation”. Approximately six months after such announcement, the applicants were invited by phone on 26 November 2015 to give their statements and they were detained on charges of “deliberate support for the organisational objectives of an armed terrorist organisation without being a member and providing for espionage purposes the information that was meant to be kept confidential for the sake of the state's security or its domestic or international political interests and disclosing such information”. The applicants objected to the said decision on their detention. However, their objections were dismissed. Upon the rejection of their objections, the applicants lodged an individual application to the Constitutional Court.

The applicants claimed that they were deprived of their liberty in an unlawful way, that there is no justification for their detention, that the only grounds for the decision on their detention is the news that they published and that no evidence except for the news articles were adduced against them. Accordingly, they alleged that their right to personal liberty and security, and rights to freedom of expression and free press, have been violated.

II. In this context, the Constitutional Court stated that the individual application relates to the allegations as to the applicants' detention violates freedom of expression and press and that the applicants exhausted legal remedies by objecting to the decision on their detention.

Firstly, the Constitutional Court stated that its review on the merits of the allegations declared admissible is limited to the “lawfulness of detention” and “the effects of detention measure on the freedom of

expression and press”, independently of the investigation and prosecution of the applicants and possible outcomes of their trial. The Court emphasised that this review is not on the merits of the applicants’ case on trial before the relevant court of instance and, therefore, does not include whether publication of the news articles at the centre of the application constitutes a crime or not.

The constitutionality review as to whether the right to personal liberty and security has been violated or not must be carried out, in the first place, with regard to the existence of “strong evidence of having committed an offence”, which is cited among the essential conditions of a detention measure in the third paragraph of Article 19 of the Constitution. Considering that the subject of the individual application is a detention measure and that there is an on-going trial procedure concerning the applicants, such review shall be carried out limited to whether the concrete facts indicating the strong suspicion of crime were adduced in the grounds of the decision on detention. The Court also deemed it necessary to examine whether the detention measure is “necessary” within the context of the principle of proportionality, which is one of the criteria for the restriction of rights under Article 13 of the Constitution.

The aim of the guarantees laid down in Article 19 of the Constitution is to prevent the arbitrary deprivation of individuals’ liberty. The Constitution and the Law stipulates that an individual can only be detained on the ground that there exists strong evidence of their having committed a crime and other detention requirements. Nevertheless the court did not show any concrete evidence as indication of strong suspicion of the applicants having committed the alleged crimes except the publication of the relevant news articles in the reasoning of the detention decision. A measure as severe as detention which does not meet the criteria of lawfulness cannot be considered proportionate and necessary in a democratic society. The detention measure was implemented approximately six months after the beginning of the investigation concerning the said news and without considering the fact that similar news items were published approximately sixteen months earlier in another newspaper. The circumstances of the case and the grounds of the decision on detention do not explain which “pressing social need” leads to such detention measure interfering with the applicants’ right to liberty and security. Consequently, the Constitutional Court ruled, by majority, that the applicant’s right to personal liberty and security guaranteed under Article 19 of the Constitution had been violated as conditions of “strong evidence” and “being necessary”

required for detention measure were not reasoned in the relevant decision.

Considering the questions addressed to the applicants by the Chief Public Prosecutor’s Office and grounds of the decision on their detention, there are no facts – except for publishing news in the newspaper – which may constitute a basis for the charges against them. In this context, the detention measure implemented against the applicants, irrespective of the content of the news, constitutes an interference with the freedom of expression and press.

However, not every interference with fundamental rights and freedoms leads to a violation of the relevant right or freedom on its own. In order to determine whether an interference violates the freedom of expression and press, it must also be tested whether such interference meets the criteria of being prescribed by law, having a legitimate aim, being necessary in a democratic society, and being proportionate.

Under Articles 26.2 and 28.5 of the Constitution, freedom of expression and press may be restricted for the purposes of “national security”, “preventing crime”, “punishing offenders”, “withholding information duly classified as a state secret”, and “preventing disclosure of state secret information”. Considering the grounds in the justification of the decision on detention and the characteristics of the crimes charged against the applicants, it is seen that the aim pursued with detention of the applicants is compatible with the aforementioned purposes of restriction cited under the Constitution.

The fact that the interference has a legal basis and a legitimate aim is not sufficient alone to justify that the interference does not cause a violation. The facts of the case must also be reviewed with respect to “being necessary in a democratic society” and “being proportionate”. The Constitutional Court shall carry out such review on the basis of detention process and the grounds of decision on detention.

Taking into account the assessments of the right to personal liberty and security and considering that the only fact adduced as a basis for the charged crimes was the publication of the relevant news articles, a measure as severe as detention which does not meet the criteria of lawfulness cannot be considered proportionate and necessary in a democratic society. The detention measure was implemented approximately six months after the beginning of the investigation on the said news and without considering the fact that similar news were published approximately sixteen months earlier in another

newspaper. The circumstances of the case and the grounds of the decision on detention do not explain which “pressing social need” leads to such detention measure interfering with the applicants’ freedom of expression and why it is necessary in a democratic society for the protection of national security.

Moreover, it is evident that implementing a detention measure without adducing concrete facts other than the published news and grounding the necessity of such measure might lead to a chilling effect both on the applicants and the press in general.

Consequently, the Constitutional Court ruled by majority that the applicants’ freedom of expression and press had been violated in conjunction with their right to personal liberty and security.

Languages:

Turkish.



Ukraine Constitutional Court

Important decisions

Identification: UKR-1999-2-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 24.06.1999 / **e)** 6-rp/1999 / **f)** Constitutionality of Articles 19 and 42 of the Ukrainian Law on the 1999 State Budget (case on the funding of courts) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 28/99 / **h)**.

Keywords of the systematic thesaurus:

3.4. General Principles – **Separation of powers.**
 4.5.8. Institutions – Legislative bodies – **Relations with judicial bodies.**
 4.6.2. Institutions – Executive bodies – **Powers.**
 4.6.6. Institutions – Executive bodies – **Relations with judicial bodies.**
 4.7.4.6. Institutions – Judicial bodies – Organisation – **Budget.**
 4.10.2. Institutions – Public finances – **Budget.**
 5.3.13.14. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

Keywords of the alphabetical index:

Court, independence, financial / Justice, administration, non-interference / Expenditure, not provided for by law / Judiciary, budget, necessary amount.

Headnotes:

The aim of the functional separation of public authorities into legislative, executive and judicial branches is the delimitation of responsibilities between the different organs of the public authorities and the prohibition of the appropriation of full state powers by any one of these authorities.

In Ukraine, justice is dispensed exclusively by the courts. The Constitution embodies the principles of the independence of judges as the organs of the judicial authority and of non-interference in the administration of justice.

The special arrangements for the funding of the courts represent one of the constitutional guarantees for the independence of judges. This guarantee mechanism is represented by the State's duty to ensure the proper financial and material conditions for the functioning of the courts and the judges by making provision in the national budget for the expenditure pertaining to the maintenance of the courts. The centralised procedure for the funding of the judicial organs by means of the national budget to a level which guarantees the necessary economic conditions for the full and independent administration of justice and the financing of the needs of the courts (expenditure for trials, running costs, maintenance and repairs, security, logistics, postal expenses etc) is designed to ensure the freedom of the courts from any outside influence. This procedure is aimed at ensuring judicial activity on the basis of the principles and provisions of the Constitution.

The absence of established criteria for the financing of the courts by the central government cannot serve as a justification for the legislative or executive authorities to define the relevant figures arbitrarily, since the necessary amounts in the national budget for the upkeep of the courts cannot be reduced to a level which fails to comply with the constitutional provisions regarding the funding of the judicial system. The budgetary appropriations for the maintenance of the judiciary are directly protected by the Constitution and cannot be reduced by the organs of the legislative or executive authorities below the level which ensures the complete and independent administration of justice in accordance with the law.

The Constitution defines the mechanism for securing the funding of the judicial authorities, to be used by the parliament (*Verkhovna Rada*), which is responsible for approving the national budget, amending it and monitoring its execution. The execution of the budget comes within the sphere of competence of the Cabinet of Ministers.

Summary:

Article 19 of the Ukraine Law on the 1999 State Budget establishes the list of items of expenditure in the national and the local budgets for 1999, on the statutory basis of the economic distribution of costs: the emoluments for staff of the budgetary institutions; supplementary remuneration etc. The financing of the requisite expenses by the national and local budgets is effected primarily by the treasury paymasters of the appropriate budgetary resources.

The law does not protect the circle of subjects of the budgetary relations (the budgetary institutions themselves), but the objects of these relations (items of budgetary expenditure according to the economic distribution of costs). Since the subjects of these relations are the budgetary institutions, the list of statutory items of expenditure is limited to the remuneration of staff in general, including those of the judicial organs and the judges, as members of the staff of the budgetary institutions.

By authorising the Cabinet of Ministers, under certain conditions and at the proposal of the Finance Ministry, to limit the expenditure ordered by the treasury paymasters while taking account of the paramount importance of financing in full the expenditure provided for by law, the parliament (*Verkhovna Rada*) enabled the Cabinet of Ministers to reduce the funds made available for the maintenance of the courts in the same manner as non-statutory expenditure.

The restriction in the funds available to the judicial authorities fails to guarantee the necessary conditions for the full and independent administration of justice and the functioning of the courts. Moreover, the restriction undermines the confidence of citizens in the public authorities and impairs the promotion and protection of human rights and freedoms.

Furthermore, the independence of the judicial power is recognised under international law.

The provisions of the contested legislation which relate to expenditure provided for under the Law (Article 19 of the Law on the 1999 State Budget) are in conformity with the Constitution.

The provisions of Article 42 of the disputed Law in which the Cabinet of Ministers is authorised to restrict the expenses in the national budget earmarked for the judicial authorities, without taking into account the guarantees for their payment incorporated in the provisions of the Constitution, are thus unconstitutional.

Item 3 of the resolution part of the decision reads:

“According to Article 70 of the Law on the Constitutional Court to place on the Cabinet of the obligation within a month period to bring into conformity with the Decision of the Constitutional Court the Decree of the Cabinet of Ministers on limitation of expenses of the 1999 State Budget as of 22 March 1999 no. 432.”

Supplementary information:

Legal norms to which the Court referred:

- Articles 6, 85, 116, 124, 126, 129 and 130 of the Constitution;
- Articles 19 and 42 of the Law on the 1999 State Budget;
- Articles 1 and 3 of the Law on the status of judges;
- Article 6.1 ECHR;
- 1 and 7 of the Basic Principles on the Independence of the Judiciary (UN General Assembly Resolutions nos. 40/32 and 40/146 of 29 November and 13 December 1985);
- Principle I.2.b of Recommendation no. R(94)12 of the Committee of Ministers of the Council of Europe to member states on the independence, efficiency and role of judges (adopted on 13 October 1994);
- Item 27 of the Programme of Action adopted by the Second World Conference on Human Rights on 25 June 1993.

Languages:

Ukrainian, French (translation by the Court).

*Identification:* UKR-2000-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.10.1999 / **e)** 9-rp/1999 / **f)** Official interpretation of Article 80.3 of the Constitution (parliamentary immunity) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 44/99 / **h)**.

Keywords of the systematic thesaurus:

- 3.13. General Principles – **Legality.**
 3.14. General Principles – **Nullum crimen, nulla poena sine lege.**
 3.21. General Principles – **Equality.**
 4.5.11. Institutions – Legislative bodies – **Status of members of legislative bodies.**
 5.3.5. Fundamental Rights – Civil and political rights – **Individual liberty.**

Keywords of the alphabetical index:

Liability, criminal.

Headnotes:

Criminal responsibility starts from the moment of conviction. The process of bringing someone to criminal responsibility as a phase of criminal prosecution commences when a person is charged with a criminal offence. The consent of the Parliament (*Verkhovna Rada*) has to be obtained prior to charging a deputy with a crime in accordance with the Code of Criminal Procedure. Parliamentary immunity covers the people's deputy from the time of his or her formal election subject to confirmation by the appropriate election committee until the termination of his or her mandate. Where a person is charged a criminal offence and/or is arrested prior to his or her formal election as a people's deputy, criminal proceedings can be continued subject to the consent of the parliament regarding prosecution and/or detention.

Summary:

The Ministry of Internal Affairs requested an official interpretation of Article 80.3 of the Constitution. Article 80.3 stipulates that people's deputies cannot be brought to criminal responsibility, detained or arrested without the consent of the Parliament (*Verkhovna Rada*). The constitutional request also raised the following issues: the moment when criminal responsibility and bringing a person to criminal responsibility begins; the need to cancel such preventive measures as detention prior to a person's election as a people's deputy; and the need to apply to the parliament for its consent when bringing a person to criminal responsibility and carrying out his or her arrest as prescribed by law.

Criminal responsibility is a type of legal liability and a special element of the mechanism of state legal regulation of persons accused of a criminal offence. The concept of criminal responsibility has not been legally determined, and, therefore, is interpreted differently in the theory of criminal law and the law of criminal procedure.

In accordance with Article 62.1 of the Constitution a person is presumed innocent until his or her guilt has been proved through legal procedure and established by a court verdict. In accordance with Article 3 of the Criminal Code, criminal responsibility applies only to a person who is guilty of committing a crime, i.e. a person who intentionally or negligently committed a socially dangerous act. No person can be found guilty of a criminal offence and punished other than on the basis of a court sentence and according to law. These provisions give reasons to consider criminal responsibility as a specific legal institution, within the framework of which the state responds to a committed crime.

The mere fact of instituting criminal proceedings against an individual, of arresting or detaining them or putting them on trial cannot be defined as criminal responsibility. A person is only criminally responsible pursuant to a reasoned court decision.

The status of people's deputy is determined by the Constitution and laws. An important constitutional guarantee is parliamentary immunity, which has the purpose of ensuring that the people's deputy carries out his or her functions efficiently and without any hindrance. The immunity is not a privilege; rather, it has a public and legal nature.

In accordance with the provisions of Article 80.2 of the Constitution, people's deputies are not legally responsible for the results of voting or for statements in parliament and its agencies except for an slander. This means that a people's deputy cannot be held legally responsible for the aforementioned acts even upon termination of his or her mandate.

Parliamentary immunity also provides specific procedures for bringing to criminal responsibility or arresting people's deputies. They may not be brought to criminal responsibility or arrested without the consent of the parliament (Article 80.3 of the Constitution).

Parliamentary immunity covers people's deputies from the time of their formal election in accordance with the election results certified by the appropriate election committee through to termination of their mandate in accordance with procedures prescribed by law. If a person was elected a people's deputy after having been accused of a criminal offence or arrested in connection with a criminal offence, further criminal proceedings against such deputy may continue if the parliament gives its consent. This approach ensures the principle of equality of all people's deputies in the context of parliamentary immunity.

Languages:

Ukrainian.



Identification: UKR-2000-1-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.03.2000 / **e)** 3-rp/2000 / **f)** Constitutionality of the Law on proclamation of an all-Ukrainian referendum on people's initiative / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.4.6.1. Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of referendums and other instruments of direct democracy – **Admissibility** .
 1.3.5.6. Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State**.
 3.1. General Principles – **Sovereignty**.
 3.3.1. General Principles – Democracy – **Representative democracy**.
 3.3.2. General Principles – Democracy – **Direct democracy**.
 4.4.3.1. Institutions – Head of State – Powers – **Relations with legislative bodies**.
 4.9.2. Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
 4.9.7. Institutions – Elections and instruments of direct democracy – **Preliminary procedures**.

Keywords of the alphabetical index:

Referendum / Popular initiative.

Headnotes:

The expression of a no-confidence vote in the Parliament (*Verkhovna Rada*) and the adoption of a new Constitution are unconstitutional by way of an all-Ukrainian referendum.

Where any other issues set forth in the Decree are approved by an all-Ukrainian referendum on the people's initiative, they shall be mandatory for consideration by the appropriate bodies of state power in accordance with the procedures prescribed by the Constitution and laws.

Summary:

The people's deputies lodged a claim to the Constitutional Court to examine the constitutionality of the Decree of the President proclaiming an all-Ukrainian referendum at the people's initiative. They emphasised that the Decree differs from what is provided in Article 13 of the Law on all-Ukrainian and local referendums. The institution of an all-Ukrainian referendum at the request of citizens is an essentially new type of referendum. Its organisation and the

procedures for its conduct are not regulated by the aforementioned Law, and this disables the holding of such a referendum. The all-Ukrainian referendum at the people's initiative cannot directly introduce changes to the Constitution since the Constitution does not provide for consultative referendums. Issues which in accordance with the Decree are to be included in bulletins do not comply with requirements for the holding of referendums since some of them cover two or more independent issues, and this may affect the free expression of the will of citizens by voting.

The all-Ukrainian referendum is one of the forms of expression of the people's will (Article 69 of the Constitution), which may be called by the Parliament (*Verkhovna Rada*) or the President according to their powers established by the Constitution. In particular, the parliament calls an all-Ukrainian referendum on issues regarding the territory of Ukraine (Articles 73 and 85.2 of the Constitution). The President calls an all-Ukrainian referendum on changing the Constitution in accordance with Article 156 of the Constitution. A referendum shall not be permitted regarding draft laws on issues of taxes, the budget and amnesty (Article 74 of the Constitution).

The Constitution also provides that an all-Ukrainian referendum may be held at the people's initiative, proclaimed by the President, at the request of at least three million Ukrainian citizens who are eligible to vote and provided that signatures in support of the referendum have been collected in at least two thirds of oblasts (regions) and that there are at least one hundred signatures per oblast (Article 72.2 of the Constitution). At the same time, the Constitution does not provide for a no-confidence vote in an all-Ukrainian referendum, including that proclaimed at the people's initiative, in the parliament or any other constitutional governmental bodies as a possible reason for early termination of their authorities. This is why the issue of a no-confidence vote in the parliament would be a violation of the constitutional principle whereby bodies of state power exercise their authorities according to the Constitution and the principles of a state ruled by law.

In accordance with the Constitution, the bearer of sovereignty and the only source of power in Ukraine is the people. People exercise power directly and through the bodies of state power and local self-government. The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and may not be usurped by the state, its bodies or its officials (Article 5 of the Constitution).

The issue of the adoption of a new Constitution is put to an all-Ukrainian referendum without obtaining the people's will on the necessity to adopt a new Constitution. It brings into doubt the very existence of the current Constitution, which may lead to weakening the fundamental principles of the constitutional order and the rights and liberties of people and citizens.

Confirming the exclusive right of the people to determine and change the constitutional order, the Constitution has established a clear procedure for introducing changes to the Constitution. Changes to the Constitution are the competence of the parliament and this competence is exercised within the limits and in accordance with the procedures prescribed by Section XIII of the Constitution. The Constitution, while introducing changes to it, balances the actions of the President, the people's deputies and the parliament for the realisation of the people's will.

Languages:

Ukrainian.



Identification: UKR-2000-1-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 19.04.2000 / **e)** 6-rp/2000 / **f)** Official interpretation of Article 58 of the Constitution and Articles 6 and 81 of the Criminal Code (retroactivity of criminal law) / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.13. General Principles – **Legality.**
 5.3.38.1. Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

Keywords of the alphabetical index:

Retroactivity, laws and other normative acts / Criminal law.

Headnotes:

Only criminal laws which mitigate or annul criminal responsibility can be retroactive.

The Criminal Code (Articles 81.4, 82.4, 83.3, 84.4, 86.2 and 86-1) establishes criminal responsibility for theft of public or collective property on a large or essentially large scale, which is determined with consideration of the minimum wage as established by law effective at the time of discontinuation or termination of the crime. Alteration of the minimum wage does not entail an alternation of the qualification of crimes laid down by the aforementioned articles.

Consequently, the provisions of Article 6.2 of the Criminal Code related to retroactivity do not cover all these cases, and criminal cases should not be revised unless the law stipulates otherwise.

Summary:

The people's deputies submitted a petition to the Constitutional Court for an official interpretation of the provisions of Article 58 of the Constitution and Articles 6 and 81 of the Criminal Code regarding the fact that courts of common jurisdiction erratically ignore application of the principle of non-retroactivity of laws and other normative acts when they mitigate personal criminal responsibility in cases where the minimum wage is altered. This affects qualification of the act of theft of public or collective property on a large or essentially large scale (Articles 81.4, 82.4, 83.3, 84.4, 86.2 and 86-1 of the Criminal Code).

In accordance with Article 58.1 of the Constitution, laws and other normative and legal acts are not retroactive. The principle of the inadmissibility of the retroactivity of laws and other normative acts established by the Constitution is compliant with international legal acts, in particular, with Article 15 of the International Covenant on Civil and Political Rights and Article 7 ECHR.

The essence of the retroactivity of laws and other normative acts lies in the fact that their provisions apply to legal relations which existed prior to the coming into force of the above laws. However, their enforcement is impossible in some areas of law, especially criminal law.

In accordance with Article 58.2 of the Constitution, no one can be held criminally responsible for deeds which at the time they were committed did not constitute an offence. According to this constitutional provision, an action can only be made an offence by law and not by any other kind of normative act. This conclusion is supported by the provisions of Article 92.22 of the Constitution stipulating that only laws determine "the basis of civil legal responsibility; deeds which are criminal, administrative or disciplinary offences and responsibility for committing them."

The principle of the supremacy of law is acknowledged and in force in Ukraine. The Constitution has supreme legal force. Laws and other normative acts are adopted in accordance with the Constitution and must be compliant with it (Article 8 of the Constitution).

In accordance with the provisions of Article 6.1 of the Penal Code, criminality and providing adequate punishment for an offence are determined by the law in force at the time the offence was committed. Part two of the aforementioned article stipulates that a law which eliminates reasons for punishment or softens the punishment shall be retroactive. These provisions of the Code correspond to the provisions of Article 58 of the Constitution. Retroactivity of criminal law means applying the law to persons who carried out acts prior to the validity of the law. Comparing the provisions of Articles 8, 58, 92 of the Constitution and of Article 152.1 of Section XV "Transitional Provisions" of the Constitution with Article 6 of the Code leads to the conclusion that only the criminal laws determine deeds as crimes and establish responsibility for their commitment. Retroactivity is provided for by criminal laws in cases when they cancel or soften responsibility of a person.

An enactment of the parliament on procedures to put into effect and enforce the Law on the introduction of amendments to the Criminal Code, the Criminal Procedure Code of the Ukrainian Soviet Socialist Republic and the Administrative Offence Code of the Ukrainian Soviet Socialist Republic dated 7 July 1992 no. 2548-XII established that the punishment for theft must be established with consideration of the value of the *corpus delicti* on the basis of the amount of the minimum wage prescribed by law in force at the time of discontinuation or termination of the crime (paragraph 4).

Therefore, lawmakers determined that altering the amount of the minimum wage does not affect the qualification of crimes committed prior to altering the minimal wage by appropriate laws.

The Constitution established that deeds which are considered crimes and responsibility for committing them are determined only by laws (Article 22.92.1 of the Constitution) rather than by sub-legal acts.

Criminal law may contain references to provisions of other normative legal acts. Unless these provisions are changed in future, the general content of a criminal law will not be changed. The opposite interpretation would mean that criminal law could be altered by sub-legal acts, in particular resolutions of the parliament, decrees of the President and acts of

the Cabinet of Ministers, which would conflict with the requirements of Article 92.22 of the Constitution.

Articles 81.4, 82.4, 83.3, 84.4, 86.2 and 86-1 of the Criminal Code, which, in accordance with paragraphs two and three of the note to Article 81 of the Code, determine that the criteria of large scale or essentially large scale theft of public and collective property are blanket, and the above mentioned peculiarities of correlation of common and specific contents of a blanket provision do not apply to them.

Altering the minimum wage by appropriate normative and legal acts does not entail changes in the provisions, the contents of which are specified with application of such amount. This law, in this instance Articles 81.4, 82.4, 83.3, 84.4, 86.2 and 86-1 of the Criminal Code, cannot be deemed new, and the provisions of Article 58.1 of the Constitution and Article 6.2 of the Code are inapplicable to this law.

Languages:

Ukrainian.



Identification: UKR-2000-3-013

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.07.2000 / **e)** 2-v/2000 / **f)** Compliance of the draft Law on Amendments to the Constitution Following Results of All-Ukrainian Referendum of 16 April 2000, submitted by people's deputies, with requirements of Articles 157 and 158 of the Constitution (case of amendments to Articles 157 and 158 of the Constitution on the initiative of the people's deputies) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 28/2000 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.1.1. Sources – Categories – Written rules – National rules – **Constitution.**
 2.3.8. Sources – Techniques of review – **Systematic interpretation.**
 3.1. General Principles – **Sovereignty.**
 3.4. General Principles – **Separation of powers.**
 3.6.1. General Principles – Structure of the State – **Unitary State.**
 3.9. General Principles – **Rule of law.**
 3.13. General Principles – **Legality.**

4.1.2. Institutions – Constituent assembly or equivalent body – **Limitations on powers.**

4.5.1. Institutions – Legislative bodies – **Structure.**

4.5.3. Institutions – Legislative bodies – **Composition.**

4.5.11. Institutions – Legislative bodies – **Status of members of legislative bodies.**

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

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

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

Keywords of the alphabetical index:

Immunity, parliamentary / Constitution, revision / Parliament, membership / Referendum, constitutional, implementation of results.

Headnotes:

The draft Law on Amendments to the Constitution Following the Results of the All-Ukrainian Referendum of 16 April 2000 (“the draft Law”), submitted to the Court by the Parliament, was in compliance with the Constitution to the extent to which it modified Articles 90 and 106.1.8 of the Constitution in a manner identical to that proposed by the draft Law submitted by the President, giving the President the authority to dissolve the Parliament if it failed to form a permanently acting majority within one month, in case no. 1-v/2000 (*Bulletin* 2000/3 [UKR-2000-3-011]).

The proposed changes to Article 80.3 of the Constitution, dealing with parliamentary immunity, were unconstitutional, as they ran contrary to the principles of the independence of the judiciary and the separation of prosecution and justice.

Further amendments proposed in the draft Law, concerning the introduction of a bicameral parliament, were too imprecise to allow the Court to analyse comprehensively their compliance with Article 157 of the Constitution, under which the Constitution cannot be amended in such a way as to restrict the human rights and civil freedoms or destroy the independence or territorial integrity of the Ukraine. The case was dismissed to the extent to which the proposed amendments to the Constitution were directly or indirectly related to the introduction of a bicameral parliament.

Summary:

Parliament applied to the Court for a declaration on the compatibility of the requirements of Articles 157 and 158 of the Constitution with the draft Law, which was submitted to Parliament by the people's deputies in accordance with the procedure laid down by Article 154 of the Constitution.

In accordance with Article 85.1.1 of the Constitution, the powers of Parliament include the introduction of amendments to the Constitution within the limits and in accordance with the procedure provided by Chapter XIII of the Constitution. The requirements applicable to such amendments are laid down, in particular, in Articles 157 and 158 of the Constitution. Thus, in accordance with Article 157.1 of the Constitution, it is forbidden to introduce any amendments to the Constitution envisaging the cancellation or restriction of human and civil rights, or aimed at destroying the independence or territorial integrity of the Ukraine. Furthermore, in accordance with Article 158 of the Constitution, it shall be forbidden to submit to Parliament a legislative draft for the introduction of amendments to the Constitution if the draft was already discussed by Parliament within the preceding term of office and was rejected. In addition, Parliament is forbidden to change a given provision of the Constitution twice within the same term of office. The draft Law was put for the first time before the current Parliament. Therefore, it met the requirements of Article 158 of the Constitution.

The Court based its conclusion on the compliance of the draft Law with the requirements of Article 157 of the Constitution on the following arguments:

The draft law submitted to the Court proposes to use the following wording in Article 75:

“The Parliament of the Ukraine shall be the sole legislative authority of the Ukraine. It shall comprise two chambers: the Parliament and Senate of the Ukraine”.

Analysis of the modern constitutional practice of foreign states shows that the creation of a two-chambered parliament in a unitary state is a matter of practicality. The parliamentary structure itself (monocameral or bicameral) does not have any impact on the substance and scope of human and civil rights and freedoms. However, they can be affected by the manner in which the chambers are formed, their procedures, and the allocation of powers between the chambers.

In the draft Law proposed by the people's deputies, the question of the allocation of powers between two

chambers of the Parliament of the Ukraine, i.e., Parliament and the Senate, is not dealt with sufficiently, as it fails to take into account the Constitution is a single, integral act, and, therefore, introduction of any amendments into it requires a systematic approach. This is especially true for amendments dealing with the introduction of a bicameral parliament, which are rather wide-ranging. The draft Law refers only to amendments to Articles 5, 76, 79, 80, 84, 85, 88, 93, 94, 96, 97, 106, 107, 109, 113, 114, 115, 116, 122, 126, 128, 131 and 150 of the Constitution and supplementing Articles 82.1, 84.1, 101.1-101.16 of the Constitution, whereas the introduction of a bicameral parliament in a proposed draft version will require amendments or adjustments to a number of other Articles, in particular, Articles 9, 20, 55, 72, 101, 104, 148, 151, 154, 155, 156, 158 and 159 of the Constitution.

The very absence of complex, systematic amendments to the Constitution connected with the introduction of a bicameral parliament in the draft proposed by the people's deputies makes impossible a comprehensive analysis of the compliance of the proposed amendments to the Constitution with Article 157 of the Constitution.

Furthermore, as follows from the list of constitutional provisions mentioned above, amendments to the Constitution related to the introduction of a bicameral parliament concern not only Chapters II, IV, V, VI, VII, VIII, IX, X, XI, XII, XIV and XV of the Constitution, but Chapters I, III and XIII of the Constitution as well. The procedures for submitting a draft law introducing amendments into these Chapters is different from the procedures of submitting a draft law introducing amendments into other Chapters of the Constitution (Article 156 of the Constitution).

In such circumstances, the Court cannot provide a comprehensive conclusion regarding compliance of the draft Law with requirements of Articles 157 and 158 of the Constitution and considers that the case be dismissed to the extent to which the proposed amendments to the Constitution are directly or indirectly related to the introduction of a bicameral parliament.

The amendments to Article 80.3 of the Constitution proposed in this draft law contravene the principle of independence of the judiciary (Article 126 of the Constitution), and, in particular to the principle of legality (Article 129 of the Constitution). Moreover, the fact that the Supreme Court has given its consent to the detention, arrest or bringing to trial of a member of Parliament could lead to prejudice during the consideration of the subsequent case by the courts of first instance and of appeal.

These amendments are also inconsistent with Article 8 of the Constitution and with Article 6 ECHR, under which, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Nor are they in accordance with a number of decisions of the European Court of Human Rights regarding the necessity of consistently upholding the compliance with the principle of the separation of prosecution and justice.

Furthermore, parliamentary immunity is not exclusively a personal right of a people's deputy. It is also aimed at ensuring the normal functioning of the Parliament. Therefore, in those countries where parliamentary immunity exists, the power to lift that immunity falls within the powers of the parliamentary chamber. In its determination of whether to prosecute, detain or arrest a people's deputy, Parliament will not only have legal considerations, but also political considerations related to the normal functioning of the Parliament.

The draft version of Article 80.3 proposed by people's deputies also fails to comply with decision adopted by the All-Ukrainian Referendum of 16 April 2000, in so far as it retains the scope of parliamentary immunity provided for by this Article (which is to be deleted from the text of the Constitution in accordance with the results of the referendum), and provides for the transfer to another subject of the power to consent to the lifting of parliamentary immunity.

Thus, the amendments to Article 80.3 of the Constitution provide for the limitation of human and civil rights and freedoms and, therefore, contravene Article 157 of the Constitution.

The amendments to Article 90 of the Constitution proposed by people's deputies coincide with the amendments to the same Article provided by the draft Law submitted to Parliament by the President. The Court has already issued its conclusion regarding compliance of this draft with the requirements of Articles 157 and 158 of the Constitution, in which it stated that amendments to Article 90 of the Constitution do not extinguish or restrict civil rights and freedoms. Also, they are not aimed at destroying the independence or territorial integrity of the Ukraine.

Finally, the draft Law before the Court proposes to supplement Article 106.1.8 of the Constitution by the following words: "as well as in other cases provided by the Constitution". This amendment completely coincides with the amendment to the same clause provided by the draft Law on Amendments to the Constitution of the Ukraine following the results of the

All-Ukrainian Referendum on the People's Initiative, submitted to Parliament by the President. Thus, the same conclusion shall be adopted with respect to the additional provisions to Article 106.1.8 of the Constitution proposed by people's deputies.

Languages:

Ukrainian.



Identification: UKR-2004-3-017

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 02.11.2004 / **e)** 15-rp/2004 / **f)** Conformity with the Constitution of Article 69 of the Criminal Code (concerning more lenient punishments handed down by court) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 45/2004 / **h)**.

Keywords of the systematic thesaurus:

3.9. General Principles – **Rule of law.**
 3.16. General Principles – **Proportionality.**
 4.7.1. Institutions – Judicial bodies – **Jurisdiction.**
 4.7.2. Institutions – Judicial bodies – **Procedure.**
 5.2. Fundamental Rights – **Equality.**
 5.3.13.1.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**
 5.3.16. Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

Keywords of the alphabetical index:

Justice, principle, fundamental / Justice, implementation / Punishment, criminal offence, proportionality / Offence, criminal, minor / Offence, exemption from punishment, grounds / Punishment, mitigation.

Headnotes:

By not providing for the possibility of mitigating punishment for minor offences, even though it does refer to special circumstances that mitigate the penalty and considerably lower the degree of an offence for felonies and serious and medium crimes, Article 69 of the Criminal Code is inconsistent with the fundamental principle of justice of the state ruled by

law as persons committing less serious crimes are disadvantaged compared to those committing more serious offences.

Punishment must correspond to the degree of social hazard of a crime, its circumstances and personal circumstances of the offender, that is, it should be fair. The law cannot put persons committing lesser crimes in a more disadvantageous position than those committing more serious crimes. If courts are not able to apply a more lenient punishment then they are not able to implement the principle of justice by way of sentence mitigation.

Summary:

According to Article 8.2 of the Constitution, Ukraine recognises and applies the principle of the rule of law. All the elements of this principle are consistent with the justice ideology and the idea of law largely reflected in the Constitution.

Justice is crucial in determining the role of law as a regulator of social relations and a general human measure of law. The notion of justice implies that the offence and punishment should correspond.

A direct application of the constitutional principles of respect for humanity, justice and legitimacy is provided in the Criminal Code regulations. They allow an offender who committed a minor offence for the first time to be exempt from criminal responsibility in case of true repentance (Article 45); reconciliation between the offender and the victim and payment of damages by the offender of the loss or damage incurred (Article 46); admission to bail (Article 47) or change of circumstances (Article 48). A person may be exempt from punishment if, by the time of the trial, no ground exists for considering him or her a social hazard (Article 74.4).

Exemption from punishment based on Articles 47 and 48 of the Code and in accordance with Article 74.4 applies to minor or medium offences. This illustrates the application of the legal equality principle in differentiating criminal responsibility.

Article 65 of the Code establishes general sentencing principles. Based on these, the Court will sentence:

1. according to the available penalties as defined in the provisions of the Special Part of the Code;
2. in accordance with the provisions of the General Part of the Code; and
3. taking into consideration the gravity of the offence, the personal circumstances of the offender and mitigating and aggravating factors

(Article 65.1); Article 69 of the Code defines the grounds for mitigating the punishment under relevant articles of the Special Part thereof (Article 65.3).

General sentencing principles apply to all offences regardless of their gravity.

Applying to a minor crime other regulations that provide legal grounds and establish procedures of exemption from criminal responsibility and punishment (Articles 44, 45, 46, 47, 48 and 74 of the Code) may not be an obstacle for the court to customise punishment, for example by using more lenient punishments than those established by law.

However, Article 69 does not provide for this kind of custom-made punishment for minor offences, even though it does allow special circumstances that mitigate the penalty and considerably lower the degree of an offence for felonies and serious and medium crimes. Therefore, the provisions of the article are inconsistent with the fundamental principle of justice in a state ruled by law since persons committing less serious crimes are disadvantaged compared to those committing more serious offences.

Article 69 of the Code violates the fundamental principle of justice, i.e. the rule of law, because it makes it impossible to provide either an equal application of punishment which is lower than that provided by the relevant articles of the Special Part or the application of an alternative, more lenient punishment not specified in the article, to minor crimes where the degree of social hazard is much less serious than that of felonies, serious crimes and medium offences.

The restriction of the defendant's constitutional rights must be governed by the proportionality principle. The provisions of Article 69 are incommensurate with said purposes.

Article 65 of the Code implements the principle established by Article 61.2 of the Constitution that all legal responsibility is case-dependent. The General Part of the Code describes in detail the punishment system, exemption from criminal responsibility, exemption from and service of a sentence and the use of a more lenient sentence. Punishment must correspond to the degree of the social hazard of a crime, its circumstances and personal circumstances of the offender, that is, it should be fair. This is reflected in Article 65.1.3 of the Code under which the sentence must take into account the gravity of offence as well as the circumstances of the offender and mitigating and aggravating factors.

Constitutional provisions concerning the person, his or her rights and freedoms as well as Articles 65.2, 66, 223.2, 324.1.5 and 334.1 of the Ukrainian Code of Criminal Procedure that stipulate the aggravating or mitigating factors to be identified and taken into account, reflect the humanistic context of the Constitution and the criminal and procedural legislation and also an increased sentencing consistency for all crimes regardless of their gravity.

When deciding a sentence under Articles 65.2 and 69.1 and the relevant provisions of the Special Part of the Code, the courts cannot implement the provisions of Article 61.2 of the Constitution and the articles of the Criminal Code. Article 61.9 therefore restricts the application of the constitutional principles of legal equality and customised sentencing. Without being able to deliver more lenient sentences for minor crimes, the justice and punishment consistency principles are violated.

Articles 367.1.5 and 398.1.3 of the Code of Criminal Procedure stipulate the possibility of setting aside or changing a judgement or a court ruling if it is inconsistent with the gravity of the offence and circumstances of the offender for cases heard in courts of appeal or cassation. A punishment is considered inconsistent with the gravity of offence or circumstances of the offender if such punishment, although it may not exceed the limits under a relevant Code article, is by its type or severity (either too lenient or excessively severe) clearly unfair (Article 372). Article 373.1.1 of the Code of Criminal Procedure stipulates that the court of appeal may change the judgment to a more lenient one if the severity of punishment is found to be inconsistent with the gravity of offence or circumstances of the offender.

Substantial violation of the criminal procedure legislation includes all cases of infringement of the Code of Criminal Procedure which have or may have prevented the court from considering in a comprehensive manner a case and delivering a verdict or ruling that is legal, based on evidence and fair (Article 370.1).

The lack of legal opportunity for a custom-made or more lenient punishment therefore results in the court being unable to take account of the gravity of the offence, the magnitude of the damage incurred, the type of guilt or motive, the legal status of the defendant and other critical circumstances when deciding on minor offences. This violates the principle of a fair, case-dependent and commensurate punishment.

Item 3 of the resolution part of the Decision reads:

“For the parliament (*Verkhovna Rada*) to bring the provision of Article 69 of the Criminal Code in conformity with the decision of the Constitutional Court.”

Judges V.D. Vozniuk and V.I. Ivashchenko submitted their dissenting opinions.

Cross-references:

Constitutional Court:

- Articles 3, 8, 21, 28, 55, 61 and 129 of the Constitution;
- Articles 6, 14, 22, 28, 45 through 48, 50, 65, 66, 69 and 74 of the Criminal Code;
- Articles 223, 324, 334, 367, 370, 372 and 398 of the Code of Criminal Procedure;
- Article 10 of the Universal Declaration of Human Rights;
- Article 14 of the International Covenant on Civil and Political Rights;
- Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;
- Clauses 2.1, 2.2 and 2.3 of the UN General Assembly Resolution no. 45/110 of 14.12.1990 “The Standard Minimum Rules for Non-Custodial Measures” (the Tokyo Rules);
- Decision no. 3-rp/2003 as of 30.01.2003 on the conformity with the Constitution of the provisions of Articles 120.3, 234.6 and 236.3 of the Code of Criminal Procedure (concerning examination by court of specific rulings by the investigator and prosecutor), [UKR-2003-1-003].

Languages:

Ukrainian.



Identification: UKR-2014-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.03.2014 / **e)** 3-rp/2014 / **f)** Concerning Constitution (constitutionality) of the Resolution of the *Verkhovna Rada* of the Autonomous Republic of Crimea “On Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol” / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

- 3.1. General Principles – **Sovereignty.**
- 3.6.1. General Principles – Structure of the State – **Unitary State.**
- 3.8.1. General Principles – Territorial principles – **Indivisibility of the territory.**
- 4.8.4.1. Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**
- 5.5.4. Fundamental Rights – Collective rights – **Right to self-determination.**

Keywords of the alphabetical index:

Autonomy, secession, unilateral / Declaration of independence.

Headnotes:

Ukraine is a sovereign and independent state. Its sovereignty extends throughout the entire territory. The territory of Ukraine within its present border is indivisible and inviolable. The protection of the sovereignty and territorial indivisibility of Ukraine are the most important functions of the State and a matter of concern for all the Ukrainian people (Articles 1, 2 and 17.1 of the Constitution).

Summary:

I. The Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea by its Resolution “On the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol”, no. 1727-6/14 dated 11 March 2014 (hereinafter, the “Resolution”) approved the Declaration of Independence of Crimea and the City of Sevastopol (hereinafter, the “Declaration”). Members of the *Verkhovna Rada* of Crimea and Sevastopol city council adopted the Declaration, which stipulated that following the result of the all-Crimean referendum on 16 March 2014:

1. A decision will be adopted whether the Autonomous Republic of the Crimea and the city of Sevastopol will join the Russian Federation, and Crimea will be proclaimed to be an independent and sovereign state with a republican form of government.
2. Crimea will be a democratic, secular and multinational state and obliged to maintain peace and inter-ethnic and inter-confessional consent within its territory.
3. Crimea as an independent and sovereign state will propose to join the Russian Federation as a new constituent entity, on the basis of an appropriate interstate treaty.

II. Deciding on the constitutionality of the Resolution, the Constitutional Court proceeds from the following.

Ukraine is a sovereign and independent state. Its sovereignty extends throughout the entire territory. The territory of Ukraine within its present border is indivisible and inviolable. The protection of the sovereignty and territorial indivisibility of Ukraine are the most important functions of the State and a matter of concern for all the Ukrainian people (Articles 1, 2 and 17.1 of the Constitution).

The Constitutional Court referred to its Decision no. 1-rp/2003 dated 16 January 2003 in the case of the Constitution of Crimea, in which the Court had stated that state sovereignty, nationality and other features of the state are not inherent to Crimea as an administrative-territorial unit of Ukraine. Borders of Crimea with other administrative and territorial units of Ukraine are not state borders though the term “state territory” (territory of Ukraine) and “territory of the respective administrative-territorial unit”, in particular Crimea, referred to in Article 7 of the Constitution of Crimea are interrelated, yet their content differ. The Constitution of Ukraine stipulates that the sovereignty of Ukraine extends throughout its entire territory (Article 2 of the Constitution); it is a constitutional stipulation of the territorial rule of Ukraine.

Under Article 133 of the Fundamental Law of Ukraine, Crimea and Sevastopol are parts of Ukraine, but maintain separate administrative-territorial structures. The city of Sevastopol is not a part of Crimea. It has a special status, which is determined by law.

According to Article 134 of the Constitution of Ukraine, Crimea is an inseparable constituent part of Ukraine and decides on issues ascribed to its competence within the limits of authority determined by the Constitution. Envisaged in Articles 137 and 138 of the Fundamental Law of Ukraine, the list of issues determined by the authorities of Crimea and issues over which it exercises regulatory control, makes it impossible to resolve issues related to its territorial structure, constitutional order and state sovereignty.

In view of the above, the Constitutional Court of Ukraine concluded that approval by the Resolution of the *Verkhovna Rada* of Crimea of the Declaration adopted by the deputies of the *Verkhovna Rada* of Crimea and the Sevastopol City Council, does not belong to the authorities of the *Verkhovna Rada* of Crimea. This contradicts Article 2, 8, 132, 134, 135.2, 137 and 138 of the Constitution. Therefore, having adopted the Resolution, the *Verkhovna Rada* exceeded the limits of authorities prescribed by the Constitution, thus violating Article 19.2 of the Fundamental Law.

In accordance with generally recognised principles and norms of international law, people possess the right to self-determination. This should not be interpreted as authorising or encouraging any actions that violate or undermine (fully or partially) territorial integrity or political unity of sovereign and independent states that support the principle of equality and self-determination. Therefore, governments shall represent the interests of all the people on its territory without any distinctions (Charter of the United Nations, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations dated 24 October 1970, the Final Act of the Conference on Security and Co-operation in Europe of 1975).

The Constitutional Court stressed that the right to self-determination in Crimea and Sevastopol was implemented by citizens as an integral part of the entire Ukrainian people during a national referendum on 1 December 1991. Taking into account the results of this referendum, the *Verkhovna Rada* on behalf of Ukrainian citizens of all nationalities on 28 June 1996 adopted the Constitution, which proclaimed that Ukraine is a sovereign and independent state (Article 1 of the Constitution) and enshrined the principle of the territorial integrity (Article 2 of the Constitution).

The Constitution does not provide for a right of a separate part of the citizens of Ukraine (including national minorities) on the unilateral self-determination, which would change the territory of Ukraine as a united state. The issue of changing the borders should be decided on the all-Ukrainian referendum, designated by the *Verkhovna Rada* according to Articles 73, 85.1.2 of the Fundamental Law.

Thus, the Constitutional Court ruled that by adopting this Resolution, the *Verkhovna Rada* of Crimea violated the provisions of Articles 73 and 85.1.2 of the Constitution.

III. Judges of the Constitutional Court O.Serheichuk and O.Tupytskyi submitted their dissenting opinion.

Supplementary information:

Charter of the United Nations, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), the Final Act of the Conference on Security and Co-operation in Europe (1975).

Languages:

Ukrainian.



United Kingdom

Supreme Court / House of Lords / Privy Council

Important decisions

Identification: GBR-2001-1-003

a) United Kingdom / **b)** Privy Council / **c)** / **d)** 05.12.2000 / **e)** / **f)** Brown v. Stott / **g)** / **h)** [2001] 2 *Weekly Law Reports*, 817; [2001] 2 *All England Law Reports*, 97; CODICES (English).

Keywords of the systematic thesaurus:

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

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

3.16. General Principles – **Proportionality.**

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

3.19. General Principles – **Margin of appreciation.**

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

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

5.3.13.23.1. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

Keywords of the alphabetical index:

Devolution / *Ex facto oritur jus* / Right, implied / Road safety, offence / Road traffic, offence.

Headnotes:

A provision requiring a person keeping a motor vehicle to give the police the identity of the person driving it when a suspected road traffic offence was committed is not incompatible with Article 6 ECHR, the right to a fair trial. Whilst it may, *prima facie*, infringe a person's privilege against self-incrimination, such privilege is not absolute and the infringement was both necessary and proportionate in the circumstances.

Summary:

I. A woman was suspected of shoplifting at a store. The police believed she had been drinking alcohol and asked her how she came to the store. She said she travelled by her car. She was taken to a police station, charged with theft, and obliged, under provisions in the Road Traffic Act 1988 (hereinafter, the "Act") to tell the police who was driving her car when she travelled to the store. She admitted she was the driver. She was then found to be over the alcohol limit for driving and was charged with an offence under the Act. She raised a "devolution issue", under Section 6 of the Scotland Act 1998, as to whether the prosecution's reliance on her compulsory admission of driving the car was compatible with Article 6.1 ECHR. The High Court of Justiciary in Scotland allowed her appeal and declared the prosecution could not rely on such evidence. The Scottish law officers appealed to the Privy Council.

Section 172 of the Act requires the person keeping a vehicle to provide police with the identity of the driver of that vehicle where the driver is alleged to be guilty of a specified driving offence. The defendant claimed this provision infringed her privilege against self-incrimination.

II. The Judicial Committee of the Privy Council recalled that Articles 10 and 11.1 of the Universal Declaration of Human Rights (1948) and Article 6 ECHR grant a right to a fair trial but contain no express guarantee of a privilege against self-incrimination. The right is implied.

The European Court and Commission of Human Rights have interpreted Article 6 ECHR broadly by reading into it a variety of other rights to which the accused person is entitled in the criminal context. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. They include the right to silence and the right against self-incrimination with which this case is concerned. As these other rights are not set out in absolute terms in the article they are open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the European Convention on Human Rights could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently avoided by the Court

throughout its history. The case-law shows that the Court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. *Ex facto oritur ius*. The Court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lönnroth v. Sweden* at paragraph 69 of the Judgment (*Special Bulletin – Leading cases ECHR* [ECH-1982-S-002]); *Sheffield and Horsham v. the United Kingdom* at paragraph 52 of the judgment.

The high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it effectively, for the public benefit, cannot be doubted. One way democratic governments have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers. Under some legal systems (e.g. Spain, Belgium and France) the registered owner of a vehicle is assumed to be the driver guilty of minor traffic offences unless he shows that some other person was driving at the relevant time.

The jurisprudence of the European Court tells us that the questions that should be addressed when issues are raised about an alleged incompatibility with a right under Article 6 ECHR are the following:

1. Is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute?
2. If it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest?
3. If so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?

The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual. There being a clear public interest in enforcement of road traffic legislation the crucial question in the present case is whether the challenged provisions represents a disproportionate response, or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial.

In determining this question it is recalled that the European Convention on Human Rights places the primary duty on domestic courts to secure and protect rights. The function of the European Court of Human Rights is essential but supervisory. In that capacity it accords to domestic courts a margin of appreciation, which recognises that national institutions are in principle better placed than an international court to evaluate local needs and conditions. That principle is logically not applicable to domestic courts. On the other hand, national courts may accord to the decisions of national legislatures some deference where the context justifies it.

In the Privy Council's view, the challenged provision was not a disproportionate response to the serious problem of misuse of motor vehicles, nor would the defendant's admission undermine her right to a fair trial. The provision puts only a single, simple question, the answer to which cannot, by itself, incriminate a defendant since driving a car in itself is not an offence. The defendant was also required to submit to a breath test to discover her alcohol limit. It was not argued that such a procedure violated her right to a fair trial, and it is difficult to distinguish it from the challenged provision. The possession and use of a motor vehicle carries with it responsibilities including the submission to the regulatory regime in place. For all these reasons, the challenged provision was found to be compatible with Article 6 ECHR and the lower courts declaration was quashed.

Cross-references:

European Court of Human Rights:

- *Sporrong and Lönnroth v. Sweden*, nos. 7151/75 and 7152/75, 23.09.1982; 5 *European Human Rights Reports* 35, *Special Bulletin Leading cases ECHR* [ECH-1982-S-002];
- *Sheffield and Horsham v. the United Kingdom*, no. 31-32/1997/815-816/1018-1019, 30.07.1998; 27 *European Human Rights Reports* 163.

Languages:

English.



Identification: GBR-2001-1-004

a) United Kingdom / b) House of Lords / c) / d) 19.12.2000 / e) / f) R. v. Secretary of State for the Home Department, ex parte Adan; R. v. Secretary of State for the Home Department, ex parte Aitseguer / g) / h) [2001] 2 *Weekly Law Reports*, 143; [2001] 1 *All England Law Reports*, 593; CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3. Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949.**

2.1.1.4.5. Sources – Categories – Written rules – International instruments – **Geneva Convention on the Status of Refugees of 1951.**

3.13. General Principles – **Legality.**

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

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

5.3.45. Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Asylum, seeker / Surrogacy, principle / Interpretation, principle / Refugee, political / Refugee, Geneva Convention / Roma / State, duty to protect.

Headnotes:

In determining whether a person is in danger of persecution for the purposes of the Geneva Convention relating to the Status of Refugees, the responsible government minister must interpret the Convention according to its one true international meaning. The United Kingdom government and courts had determined that the true meaning included persecution by non-state agencies. Thus, when considering whether to send an asylum seeker to a third country, if that third country held a different interpretation, limiting the relevant persecution to only that by state authorities, the minister should not allow the asylum seeker to be sent there. It was not open to the minister to say his act was lawful if the third country had a different but reasonable interpretation of the Convention.

Summary:

I. Two asylum seekers, one Somali and one Algerian, arrived in the United Kingdom from “third countries”. The Somali came via Germany and claimed she was

a member of a minority clan persecuted by majority clans. The Algerian came via France and claimed he was at risk from a political faction in Algeria and that the Algerian authorities were unable to protect him.

Section 2.2.c.a of the Asylum and Immigration Act 1996 (the Act) allowed the Secretary of State to send an asylum seeker to a third country provided he certified that in his opinion the government of that country would not send him to another country “otherwise than in accordance with” the Geneva Convention relating to the Status of Refugees (the Convention). The Convention prohibited contracting states from returning a refugee to territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Article 1.A.2.b of the Convention defined a refugee as a person who, owing to a well-founded fear of being persecuted for those reasons, was outside the country of his nationality and unable or, owing to such fear, unwilling to avail himself of the protection of that country.

The government of the United Kingdom accepted that Article 1.A.2 of the Convention extended to persecution by non-state agents, but the German and French authorities interpreted the Convention as applying only to persecution by the state. The Secretary of State accepted that, if the Somali asylum seeker were returned to Germany, the authorities would probably send her back to Somalia because the governmental authority in that country had collapsed and there was therefore no state to persecute her. He also accepted the French authorities would probably return the Algerian asylum seeker to his country on the ground that the Algerian state neither tolerated nor encouraged the feared persecution. He nevertheless issued certificates under the Act providing for the return of the asylum seekers to Germany and France. They challenged certificates in judicial review proceedings. The Somali's application was dismissed, but the Algerian's was allowed. On appeal to the Court of Appeal the Secretary of State contended he had complied with the Act if he considered the approach of the third country was an interpretation of the Convention reasonably open to that country. The Court of Appeal held the Secretary of State had to be satisfied that the practice in the third country was consistent with the one true and international interpretation of the Convention, namely that the Convention extended to persons who feared persecution by non-state agents. It allowed the Somali's appeal and dismissed the Secretary of State's appeal in the other case. The Secretary of State appealed to the House of Lords, arguing that the Act was to be interpreted as if it referred to the Convention “as legitimately interpreted

by the third country concerned”, and challenging the Court of Appeal's conclusion that the Convention had only one true meaning.



II. The House of Lords held that Section 2.2.c of the Act referred to the meaning of the Convention as properly interpreted, not as “legitimately interpreted by the third country concerned”. The contrary conclusion would involve interpolation of words into the Act, not interpretation, and there was no warrant for implying such words. It followed that the inquiry had to be into the meaning of the Convention, approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It was therefore necessary to determine the one true autonomous and international meaning of Article 1.A.2. That meaning was that the protection of the Convention extended to those who were subject to persecution by factions within the state if the state in question was unable to afford protection against such factions. In that respect, there was no material distinction between a country where there was no government and one in which the government was unable to afford the necessary protection to citizens.

Just as the courts must seek to give a “Community” meaning to words in the EC Treaty (e.g. “worker”) so the Secretary of State and the courts must (in the absence of a ruling by the International Court of Justice or uniform state practice) arrive at their interpretation on the basis of the Geneva Convention as a whole read in the light of relevant rules of international law, including the Vienna Convention on the Law of Treaties. The Secretary of State and the courts of the United Kingdom have to decide the meaning of this phrase. They cannot adopt a list of permissible, legitimate, possible, or reasonable meanings and accept that any one of those when applied would be in compliance with the Geneva Convention. The phrase “otherwise than in accordance with the Convention” does not mean “otherwise than in accordance with the relevant state’s possible reasonable, permissible or legitimate view of what the Convention means”.

The Secretary of State had wrongly proceeded on the twin assumptions that there was a band of permissible meanings of the Convention provisions and that the practice adopted in Germany and France fell within that permissible range. His appeals were dismissed.

Languages:

English.

Identification: GBR-2001-1-005

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 09.05.2001 / **e)** [2001] UKHL 23 / **f)** R. v. Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury and others / **g)** [2001] *United Kingdom House of Lords*, 23 / **h)** [2001] 2 *Weekly Law Reports*, 1389; [2001] 2 *All England Law Reports*, 929 [2001]; CODICES (English).

Keywords of the systematic thesaurus:

3.3. General Principles – **Democracy**.
 3.9. General Principles – **Rule of law**.
 3.13. General Principles – **Legality**.
 3.18. General Principles – **General interest**.
 4.6.2. Institutions – Executive bodies – **Powers**.
 5.3.1. Fundamental Rights – Civil and political rights – **Right to dignity**.
 5.3.13.3. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
 5.3.13.14. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.
 5.3.13.15. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.
 5.3.39.3. Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

Keywords of the alphabetical index:

Land-use plan.

Headnotes:

Even though the Secretary of State is not an independent and impartial tribunal, it is not incompatible with Article 6.1 ECHR for him to determine certain administrative matters that involved individual rights, so long as his decisions are open to judicial review to ensure they are taken rationally, in accordance with a fair procedure and within the powers conferred by parliament.

Summary:

I. A number of companies and agencies had disputes regarding applications for planning permission. The Secretary of State “called in” the applications under his statutory powers, thereby having the ultimate decision

making power. Following an Application for Judicial Review, the High Court found that the Secretary of State's acts were in breach of the Human Rights Act 1998 as they were incompatible with Article 6.1 ECHR. The Court found the Secretary of State was not an impartial tribunal because of his dual role in formulating policy and taking decisions. The Court therefore made a declaration of incompatibility under its powers in Section 4 of the Human Rights Act. The Secretary of State appealed to the House of Lords.

II. The House of Lords allowed the appeals and reversed the decision of the High Court. Their Lordships found that planning decisions did affect civil rights even if they are of an administrative law rather than strictly civil law nature. As he is responsible for laying down planning policy, the Secretary of State cannot be an independent and impartial tribunal of planning disputes. However, determining planning policy was a different function from the judicial function, the former should generally be left to elected politicians. In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. So long as these decisions are subject to judicial review in so far as they affect the rights of individuals, the process can be compatible with the concept of the rule of law and the rights protected by Article 6.1 ECHR.

There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights are not capable of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (e.g., concerning the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.

All democratic societies recognise that while there are certain basic rights which attach to the ownership of property, they are heavily qualified by considerations of the public interest. This is reflected in Article 1 Protocol 1 ECHR. Under the first paragraph, property may be taken by the state, on payment of compensation, if the public interest requires. Under

the second paragraph, the use of property may be restricted without compensation on similar grounds. The question of what the public interest requires for the purpose of Article 1 Protocol 1 ECHR can be determined according to the democratic principle – by elected local or central bodies or by ministers accountable to them. There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals.

Another relevant principle must also exist in a democratic society: the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in Article 1 Protocol 1 ECHR, which states that a taking of property must be “subject to the conditions provided for by law”. The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by parliament.

Article 6.1 ECHR confers the right to an independent and impartial tribunal to decide whether a policy decision by an administrator such as the Secretary of State was lawful but not to a tribunal which could substitute its own view of what the public interest required. The requirements are thus met by the right to judicially review a decision.

There is nothing in the case-law of the European Court or Commission of Human Rights, which the Court must consider pursuant to Section 2 of the Human Rights Act, that suggests the United Kingdom provisions for judicial review are inadequate to satisfy Article 6.1 ECHR in the circumstances of this type of case.

Languages:

English.



Identification: GBR-2001-1-007

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 23.05.2001 / **e)** [2001] UKHL 26 / **f)** R. v. Secretary of State for the Home Department, ex parte Daly / **g)** [2001] *United Kingdom House of Lords*, 26 / **h)** [2001] 2 *Weekly Law Reports*, 1622; [2001] 3 *All England Law Reports*, 433 [2001]; CODICES (English).

Keywords of the systematic thesaurus:

2.2.1.5. Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments.**

3.16. General Principles – **Proportionality.**

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

3.20. General Principles – **Reasonableness.**

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

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

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

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

Keywords of the alphabetical index:

Common Law, rights / Legal professional privilege / Unconstitutionality, declaration, non-compatibility with the ECHR / Prison, rules.

Headnotes:

Prison rules required searches of prison cells and the examination of otherwise legally privileged material by prison staff, in the absence of the prisoner. This blanket policy requirement in the rules infringed a prisoner's common law right to legal professional privilege and right to respect for correspondence under Article 8 ECHR.

Summary:

I. The Home Secretary introduced a new policy (the policy) governing the searching of prisoners' cells. The rules specified that prison staff must not allow a prisoner to be present during a search of her/his cell. Staff could normally read legal correspondence only if the Governor had reasonable cause to suspect their contents endangered security or were of a criminal nature, and the prisoner involved should be given the opportunity to be present and informed that his correspondence is to be read.

Mr Daly was a long term prisoner. He challenged the lawfulness of the policy. He argued that a blanket policy requiring the absence of prisoners when their legally privileged correspondence is examined infringes, to an unnecessary and impermissible extent, basic common law and the European Convention on Human Rights, and that the general terms of the statute under which the rules were made did not, either expressly or impliedly, authorise such infringement.

II. The House of Lords held that any custodial order inevitably curtails the prisoner's enjoyment of rights enjoyed by other citizens. But the order does not wholly deprive the prisoner of all rights. Some rights, perhaps in a qualified form, survive the making of the order. Three important related but free standing rights concerning appropriate legal protection survive: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser. Such rights may be curtailed in laws only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment (see e.g. *ex p Leech*). The decision in *Leech* was approved by the House of Lords in *ex p Simms*, which added that the more substantial the interference with fundamental rights, the more the court would require justification before it could be satisfied the interference was reasonable.

The challenged policy infringes Mr Daly's common law right to legal professional privilege. It is necessary to ask whether, to the extent that it infringes a prisoner's common law right, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime. Mr Daly's challenge is directed to the blanket nature of the policy, applicable to all prisoners of whatever category in all closed prisons, irrespective of a prisoner's conduct and of any emergency. A policy in its present blanket form is not justified by the reasons given. Any prisoner whose conduct demonstrates he is likely to intimidate or disrupt a search of his cell may be excluded even while his privileged correspondence is examined to ensure the efficacy of the search. But no justification is shown for routinely excluding all prisoners, whether disruptive or not, while that part of the search is conducted.

The same result is achieved by reliance on Article 8.1 ECHR which gives Mr Daly a right to respect for his correspondence. Interference with that right by a public authority may be permitted if it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others. The policy interferes with Mr Daly's exercise of his right under Article 8.1 ECHR to an extent much greater than necessity requires. In this instance, therefore, the common law and the convention yield the same result.

The Court went on to say that this may not always be the case. In cases where European Convention on Human Rights apply courts should review the disputed act adopting the proportionality approach. This may differ from the conventional grounds of judicial review in at least three ways. First, the doctrine of proportionality

may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *ex p Smith* is not necessarily appropriate to the protection of human rights. In *Smith* the Court of Appeal reluctantly rejected a challenge under Article 8 ECHR on a ban on homosexuals in the military.

The European Court of Human Rights said that:

“the threshold at which the ... Court ... could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration ... of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under Article 8 ECHR” (*Smith and Grady v. United Kingdom*).

Thus, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. It is important that cases involving the European Convention on Human Rights are analysed in this way.

The Court allowed Mr Daly's appeal from the Court of Appeal's decision to refuse his application for judicial review of the Home Secretary's rules. The Court declared the rules unlawful and void.

Cross-references:

- *R v. Secretary of State for the Home Department, ex p Leech* (no. 2) [1994] *Queens Bench*, 198; [1993] 3 *Weekly Law Reports*, 1125; [1993] 4 *All England Law Reports*, 539;
- *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 *Appeals Cases*, 115; 3 *Weekly Law Reports*, 328; [1999] 3 *All England Law Reports*, 400;
- *R v. Ministry of Defence, ex p Smith* [1996] *Queens Bench* 517; [1996] 2 *Weekly Law Reports*, 305; [1996] 1 *All England Law Reports*, 257;
- *Smith and Grady v. United Kingdom*, 27/09/1999; (1999) 29 *European Human Rights Reports*, 493.

Languages:

English.



Identification: GBR-2005-3-001

a) United Kingdom / b) House of Lords / c) / d) 16.12.2004 / e) / f) *A v. Secretary of State for the Home Department* / g) [2004] UKHL 56 / h) [2005] 2 *Appeals Cases* 68; [2005] 2 *Weekly Law Reports* 87; [2005] 3 *All England Reports* 169.

Keywords of the systematic thesaurus:

3.19. General Principles – **Margin of appreciation**.
 4.7.12. Institutions – Judicial bodies – **Special courts**.
 5.1.1.3. Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.1.5. Fundamental Rights – General questions – **Emergency situations**.
 5.2.2.4. Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
 5.3.5.1. Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Detention, without trial / Derogation, European Court of Human Rights / State, duty to protect / Terrorism, fight.

Headnotes:

I. It was unlawful for the Secretary of State, under national terrorist legislation, to discriminate between nationals and non-nationals in determining which suspected terrorists should be detained without charge. Further, national legislation, promulgated after a derogation from the European Convention on Human Rights, was nonetheless found to be disproportionate in the way in which it infringed Article 5 ECHR as it did not rationally address the threat that international terrorism poses to the United Kingdom.

Summary:

In response to the threat of international terrorism, the United Kingdom Government concluded that there was a public emergency threatening the life of the nation within the meaning of Article 15 ECHR and thus derogated from the Convention in 2001 from the right to personal liberty guaranteed by Article 5.1 ECHR.

Under Section 23 of the Anti-terrorism, Crime and Security Act 2001, non-nationals could be detained if the Home Secretary believed that their presence in the United Kingdom was a risk to national security and he suspected that they were terrorists who, for the time being, could not be deported to their home countries or third party countries because of fears for their safety (their deportation would amount to a violation of Article 3 ECHR) or other practical considerations.

The nine claimants had been detained under the 2001 Act without charge or trial and appealed to the Special Immigration Appeals Commission. The commission concluded that as there was an public emergency as defined in Article 15 ECHR and that the Government's derogation was consequently lawful as it was limited to what was strictly required by the exigencies of the situation. However, the commission quashed the 2001 Derogation Order and granted a declaration that Section 23 of the 2001 Act was incompatible with Articles 5 and 14 ECHR in so far as it permitted the detention of suspected terrorists in a way which discriminated against them on the ground of nationality, since there were no provisions under the 2001 Act for the detention of British suspected terrorists.

The claimants advanced three claims. First, the derogation from the provisions of the Convention was not permissible because there was no 'public emergency threatening the life of the nation'. Secondly, the derogation was not proportionate because the legislative objective could have been achieved by means which did not, or did not so severely, restrict the fundamental right to personal freedom. Thirdly, Section 23 was discriminatory in providing for the detention of suspected international terrorists who were not United Kingdom nationals but not for the detention of suspected international terrorists who were United Kingdom nationals.

II. The majority of the Lords held, having regard to the jurisprudence of the European Court of Human Rights, that it was not necessary for government to identify a specific threat of an immediate terrorist attack but merely had to show that there was a risk of such an attack at some unspecified time. This assessment is pre-eminently of a political character and should not lightly be interfered with by the courts.

However, although the response necessary to protect national security was a matter of political judgment for the executive and Parliament, where Convention rights were in issue national courts were required to afford them effective protection by adopting an intensive review of whether such a right had been infringed, and the courts were not precluded by any doctrine of deference from examining the proportionality of a measure taken to restrict such a right.

The right to personal liberty was among the most fundamental rights protected and the restrictions imposed by Section 23 of the 2001 Act called for close scrutiny. The Lords held that Section 23 did not rationally address the threat to security, was a disproportionate response, and was not strictly required by the exigencies of the situation for the following reasons.

First, it discriminated between non-nationals and United Kingdom nationals who were considered to present qualitatively the same threat. This was particularly relevant as there had been no derogation from the Article 14 ECHR prohibition on discrimination. Further, since the purpose of Section 23 was to protect the United Kingdom from the risk of a terrorist attack presented by both groups, and since only the non-national suspects were detained, the measure unjustifiably discriminated against them on grounds of their nationality or immigration status. Secondly, it permitted non-national suspects to leave the United Kingdom when they could operate just as effectively abroad. Thirdly, it did not address the threat from United Kingdom nationals. Fourthly, it was capable of applying to individuals who did not pose that threat.

Languages:

English.

*Identification:* GBR-2008-1-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 12.03.2008 / **e)** [2008] UKHL 15, [2008] 2 W.L.R. 781 / **f)** Regina (Animal Defenders International) v. Secretary of State for Culture, Media & Sport / **g)** [2008] UKHL 15 / **h)** [2008] 2 *Weekly Law Reports* 781; CODICES (English).

Keywords of the systematic thesaurus:

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

3.3. General Principles – **Democracy.**

3.19. General Principles – **Margin of appreciation.**

4.5.2. Institutions – Legislative bodies – **Powers.**

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

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

Keywords of the alphabetical index:

Media, advertising, political, prohibition / Animal rights / Pressing social need, advertising, prohibition.

Headnotes:

The imposition of a ban on television advertising on a non-profit-making company whose aims were: to lawfully suppress animal cruelty; alleviate animal suffering; and conserve and protect their environment under Sections 319 and 321 of the Communications Act 2003 (the 2003 Act) did not amount to an infringement of Article 10 ECHR. The ban was justified as it was necessary within a democratic society.

Summary:

I. The claimant was a campaigning organisation which wished to influence public and parliamentary opinion through a wide-ranging advertising campaign, including television advertising, in 2005. The campaign's focus was the use of primates by humans and the threat this posed to their survival in the wild. On 5 April 2005 the Broadcast Advertising Clearing Centre, an informal monitoring body refused to specify that the advert was suitable for transmission. It made its decision on the ground that the advert breached the bar on political advertising set out in Section 321 of the 2003 Act. It confirmed its decision on 6 May 2005. The claimant issued judicial review proceedings against the defendant, who it was accepted was the proper defendant given his overarching responsibility for broadcasting media. Within the judicial review proceedings the claimant sought a declaration that Section 321 of the 2003 Act was incompatible with Article 10 ECHR. The judicial review action failed. Permission was given to appeal directly to the House of Lords under Section 12 of the Administration of Justice Act 1969.

II. Their Lordships noted that there was considerable common ground between the parties. It was accepted that: Sections 319 and 321 of the 2003 Act interfered with the claimant's Article 10 ECHR right; the restriction was one prescribed by law and served a legitimate aim i.e., to protect the democratic rights of other members of society; and that in respect of whether or not the restriction on the Article 10 ECHR right was necessary it was for the defendant to demonstrate that there was a pressing social need for it and that the threshold test was a high one with the margin of appreciation correspondingly small.

The claimant in its submissions relied on the Strasbourg court's decision in *VgT Verein gegen Tierfabriken v. Switzerland* [2001] 34 European Human Rights Reports 159. The facts underlying that decision were noted as being remarkably similar to the immediate case. The Strasbourg Court could have held that a ban imposed on political television advertising did amount to an infringement of Article 10 ECHR in that the ban was not necessary in a democratic society.

The defendant based his submissions on the Strasbourg court's decision in *Murphy v. Ireland* [2003] *European Human Rights Reports* 212. In that decision, the Strasbourg Court accepted that insofar as restrictions on advertising concerning morality and religion was concerned, States enjoyed a wider margin of appreciation than they did in respect of political matters. Furthermore, the defendant relied on Ouseley J's reasoning at first instance in the present case, which was to the effect that there was no sensible distinction to be drawn between a political party and a single issue pressure group, which had discernible political ends and that the distinction drawn by the Strasbourg Court in *VgT* and *Murphy* was unworkable.

The Lords dismissed the appeal. Lord Bingham, who gave the lead judgment, with whom Baroness Hale, Lord Carswell and Lord Neuberger agreed and with whom Lord Scott agreed in part, set out the following fundamental principles. First, freedom of expression and thought are essential features of a healthy democratic society. The fundamental rationale of the democratic process is that opposed, competing views, beliefs and policies should be subject to open scrutiny, with genuine choice between the alternative views coming after that open scrutiny and debate. It was the duty of broadcasters to ensure that such views were presented impartially, without favour or bias to any particular position. The playing field in an open society should be, as far as possible, a level one. That is not achieved, nor is proper debate achieved, if well-endowed interests which are not political parties are able to use their resources to give

an enhanced prominence to their views. He put it this way (at paragraph 28): 'The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of repetition, the public has been conditioned to accept them.'

Lord Bingham went on to state that it was not apparent that the full strength of the argument had been put to the Strasbourg Court in *VgT*. It was a matter for Parliament to decide whether there was a real danger from such adverts, because it was reasonable to expect democratically elected representatives to be peculiarly sensitive to what was needed to safeguard democracy; that it had chosen a blanket prohibition despite advice that it might infringe Article 10 ECHR; legislation could not be framed so as to deal with particular cases; fourthly, as a general rule had to be drawn, it was for Parliament to draw it. He went on to hold that, insofar as television and radio advertising was concerned, there was a pressing social need for a blanket ban on such advertising due to the immediate impact that such advertising had.

Languages:

English.



Identification: GBR-2010-1-001

a) United Kingdom / **b)** Supreme Court / **c)** / **d)** 24.02.2010 / **e)** [2010] UKSC 9, [2010] 2 W.L.R. 572 / **f)** Norris v. Government of the United States of America (no. 2) / **g)** [2009] UKHL 1 / **h)** UKSC 9 [2010] 2 *Weekly Law Reports* 579; CODICES (English).

Keywords of the systematic thesaurus:

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

2.1.3.1. Sources – Categories – Case-law – **Domestic case-law.**

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

3.16. General Principles – **Proportionality.**

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

3.18. General Principles – **General interest.**

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

Keywords of the alphabetical index:

Extradition, effect on family life / Family life, extradition, interference / Crime prevention, public interest, proportionality.

Headnotes:

There is a compelling public interest in extradition as a means to facilitate the prevention of crime and disorder. It is a likelihood inherent to the extradition process that there will be an interference with the rights protected under Article 8 ECHR. In order to render the interference disproportionate its consequences to the individual concerned would have to be exceptionally serious. In assessing whether such consequences were exceptionally serious a court could take account of the following:

1. relative gravity of the offence;
2. the effect extradition would have on the individual's family.

Summary:

I. Norris was the former Chief Executive Officer of an international company. He had retired on grounds of ill-health. His wife also suffered ill-health. The US authorities sought his extradition on grounds that his former company had engaged in unlawful price-fixing and obstruction of justice. Norris successfully resisted extradition on the first, price-fixing, ground. Extradition was granted however on the second ground both at first instance on appeal to the Divisional Court. Norris appealed to the Supreme Court of the United Kingdom. His appeal raised issues concerning the proper approach to be taken by a court weighing extradition against an individual's right to respect for private and family life under Article 8 ECHR.

II. The Supreme Court rejected the appeal holding that in the present case the offence of obstructing justice was of significant gravity and the effect of extradition on Norris' family was not so excessive as to render it disproportionate to the public interest of preventing crime and disorder.

Lord Phillips PSC, with whom all the members of the Court agreed, gave the leading judgment.

The central thrust of the appellant's (Norris) argument before the Supreme Court was that the correct approach to take, when assessing the balance to be struck between the public interest in extradition and the Article 8 ECHR right, was to balance the public interest in extraditing the particular accused against the damage which would be done to his and his family's private or family life. This would require the Court to assess the damage that would be done to the proper functioning of the extradition system, if extradition was refused in the individual case. It would require an assessment of whether that damage was so great as to outweigh the damage that would be done to the accused and his family's life. The test under Article 8.2 ECHR was whether the specific accused's extradition was necessary in a democratic society.

In his judgment, Lord Phillips first noted that there was a distinction between, on the one hand, extradition cases, and on the other hand deportation cases. The two were not synonymous and were not to be treated as equivalent. There was, as he put it, a public interest of a different order in respect of extradition than existed in respect of deportation.

Lord Phillips accepted that there could be no absolute rule that any interference with Article 8 ECHR rights was proportionate as a consequence of extradition. Extradition was part of the process for ensuring, in the context of international reciprocity, that those reasonably suspected of crime were prosecuted. It was a matter of critical importance to the prevention of crime and disorder that those reasonably suspected of a crime are prosecuted and, if found guilty, duly sentenced. In light of this any interference with Article 8 ECHR rights would have to be extremely serious if it were to outweigh the general public interest in the prevention of crime and disorder. Only if some quite exceptionally compelling feature, or combination of features arose would extradition amount to a disproportionate interference with the Article 8 ECHR right: see *Lauder v. United Kingdom* (2008) 25 *European Human Rights Reports* CD 67 at 73. In assessing this question, it was the interference with the Article 8 ECHR right which had to be exceptionally serious, not the nature of the circumstances.

Lord Phillips went on to state that the importance of giving effect to extradition arrangements will always be a significant factor in assessing the balance to be struck. It would not usually be the case however that the nature of the offence would have a bearing on the extradition decision. If, however, the offence is at the lower end of the scale of gravity, that fact could form one of a combination of features, which could render an extradition decision to be a disproportionate

interference with the Article 8 ECHR right. Furthermore, when considering the effect of an interference with the Article 8 ECHR right, the Court had to consider the question not just from the extraditee's perspective. It had to consider the effect on the family unit as a whole; each family member had to be considered as a victim: see *Beoku-Betts v. Secretary of State for the Home Department* [2009] AC 115.

Languages:

English.



United States of America

Supreme Court

Important decisions

Identification: USA-1803-S-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 24.02.1803 / **e)** 5 US 137 / **f)** Marbury v. Madison / **g)** 1 Cranch (5 U.S.) 137 (1803) / **h)**.

Keywords of the systematic thesaurus:

1.3.1. Constitutional Justice – Jurisdiction – **Scope of review.**

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

2.2.2.2. Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

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

4.7.1. Institutions – Judicial bodies – **Jurisdiction.**

Keywords of the alphabetical index:

Judicial review, principle / *Mandamus*, remedy.

Headnotes:

The United States Government is one in which the various departments, including the legislature, exercise limited powers.

The judicial branch, like other departments of government, is bound by the written Constitution.

The Constitution is a superior, paramount law, unchangeable by ordinary means.

When a legislative act is in conflict with the Constitution, it is void and a court is obliged not to apply it in concrete cases before the Court.

Summary:

Shortly before the end of his term of office as President of the United States, John Adams appointed William Marbury to be a federal judge (specifically, a Justice of the Peace in the District of Columbia). In doing so, President Adams signed a

commission document following approval of Marbury's appointment by the U.S. Congress. However, James Madison, the Secretary of State in the new administration of President Thomas Jefferson, refused to deliver the commission to Marbury.

Marbury invoked the original jurisdiction of the U.S. Supreme Court, pursuant to Article III of the U.S. Constitution. The second clause of Section 2 of that article states in its first sentence that: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction." Marbury asked the Court to issue a writ of *mandamus* to Madison, a remedy authorized by the U.S. Congress in Section 13 of the Judiciary Act of 1789, ordering him to deliver the commission. A writ of *mandamus* is a judicial order addressed to a public official, compelling that official to perform an act required by law.

The Court determined that Marbury was entitled to receive his commission and that Madison had wrongfully withheld it from him. However, the Court was then required to address the question of the remedy. Here, although the Judiciary Act of 1789 provided for the *mandamus* remedy, the Court determined that it could not apply the legislative act without first assessing its conformity to the Constitution – in this case, the grant of original jurisdiction in Article III. The Court took this step, even though neither the Constitution nor legislation expressly conferred such power of review upon the judiciary, after addressing certain principles which it stated are "deemed fundamental". Among these principles is recognition of the limited powers of the U.S. Government, including the legislature, whose powers are defined and limited in a written Constitution. In this regard, the Court addressed the hierarchy of laws, stating that "the Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it". The Court concluded that the first of these propositions was correct, and that therefore a legislative act that conflicts with the Constitution is void and cannot receive judicial application.

The Court concluded that the grant of original jurisdiction in Article III was a limited grant that did not include the *mandamus* remedy. Therefore, the 1789 legislative provision authorising such remedy was void and not available to the Court. As a result, although Madison's act was deemed wrongful, the Court lacked a remedy to provide Marbury with relief against it.

Supplementary information:

Marbury v. Madison was the U.S. Supreme Court's first articulation and application of the principle of judicial review. Under this principle, the Court asserted the judiciary's role in exercising constitutional control over legislative and other governmental acts. It is therefore one of the fundamental judicial opinions in U.S. constitutional history, not only because the Supreme Court is the highest Court in the federal judicial hierarchy, but also because the decision established the legitimacy of the exercise of judicial review by lower courts as well. Prior to the decision, certain lower federal courts and state courts had declined to apply legislative acts that they considered inconsistent with the federal or state constitutions. Thus, it can be said that *Marbury v. Madison* spurred the development of the diffuse system of constitutional control in the United States, where courts throughout the judicial system are authorized to exercise judicial review.

Languages:

English.

*Identification:* USA-1819-S-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 06.03.1819 / **e)** 17 U.S. 316 / **f)** McCulloch v. Maryland / **g)** 4 *Wheaton* (17 U.S.) 316 (1819) / **h)**.

Keywords of the systematic thesaurus:

3.6.3. General Principles – Structure of the State – **Federal State.**

4.5.2. Institutions – Legislative bodies – **Powers.**

4.8.7. Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**

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

4.10.7.1. Institutions – Public finances – Taxation – **Principles.**

Keywords of the alphabetical index:

Supremacy, federal / Taxation, power / Powers, implied.

Headnotes:

The federal legislature possesses the power to take actions, not in themselves among the legislature's enumerated powers, which are necessary and proper for the implementation of powers that are expressly set forth in the Constitution.

The sovereignty of the states in the federal structure does not extend to taxation of agencies of the federal government.

Summary:

In 1791, the U.S. Congress approved the formation of a corporation: the First Bank of the United States. In 1811, Congress voted not to renew the Bank's charter, in large part because of concerns that the U.S. Constitution did not grant the federal legislature such authority. However, five years later, Congress changed its position and granted a charter to the Second Bank of the United States. The Bank was a for-profit entity, with most of its stock held by private persons.

The legislatures of several states, strongly opposed to the Bank's formation as a competitor to state-chartered banks, enacted laws that imposed taxes on its activities. One of these states, Maryland, in 1818 imposed certain taxes on all banks operating within the state that were not chartered by the state legislature.

A branch of the Bank located in Maryland, led by its cashier James McCulloch, refused to pay the taxes to the state. Maryland sued the Bank and obtained a state court judgment, which was affirmed by the Maryland Court of Appeals. McCulloch sought U.S. Supreme Court review, which the Court granted.

The case presented two specific issues to the Supreme Court: whether Congress possessed the power to incorporate the Bank, and if so, whether the Bank as a federal entity could be subject to taxation by a state. In an opinion authored by Chief Justice John Marshall, the Court ruled in the affirmative on the first question and against such an assertion of state power on the second.

As to the first question, the powers of the Congress are enumerated in Article I-8 of the Constitution. The power to grant corporate charters is not among those listed. The Court, however, while acknowledging this and the principle that the federal government is one of enumerated powers, nevertheless ruled that the act of chartering a corporation lay within the scope of certain powers that are expressly set forth in Article I-8 of the Constitution including the power to

lay and collect taxes, to pay the public debts, and to borrow money. The key to this conclusion, according to the Court, lay in the “necessary and proper” clause of Article I-8 of the Constitution which after listing the powers of Congress expressly grants to the Congress the power to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” Therefore, the congressional power was implied as a means of implementing those which were enumerated: “A power without the means to use it,” the Court stated, “is a nullity”.

In regard to the power of a state to tax the Bank, the Court invoked the Supremacy Clause of Article VI of the Constitution, which states that the Constitution, and federal laws made pursuant to it, “shall be the supreme law of the land.” Therefore, the power of the states to tax, while certainly important to those units of the federal system, is subordinate to and controlled by the U.S. Constitution. Having determined that the Bank was an agency of the federal government, the Court observed that a state’s capacity to tax federal agencies would give it the power to destroy those institutions, thereby defeating the purposes of government created under the Constitution. In sum, the Court ruled, a state cannot tax those subjects over which its sovereignty does not extend.

Supplementary information:

The Supreme Court’s broad construction of the “necessary and proper” clause was a cornerstone for the vast expansion of federal power in the twentieth century in the United States, particularly during and after the “New Deal” policies of the 1930s.

Languages:

English.



Identification: USA-1990-R-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 17.04.1990 / **e)** 88-1213 / **f)** Employment Division, Department of Human Resources of Oregon v. Smith / **g)** 494 *United States Reports* 872, 1990; 110 *Supreme Court Reporter* 1595, 1990; 108 *Lawyer’s Edition Second* 876 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.2. Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**
 2.3. Sources – **Techniques of review.**
 3.3. General Principles – **Democracy.**
 3.7. General Principles – **Relations between the State and bodies of a religious or ideological nature.**
 3.17. General Principles – **Weighing of interests.**
 3.18. General Principles – **General interest.**
 5.2.2.6. Fundamental Rights – Equality – Criteria of distinction – **Religion.**
 5.3.18. Fundamental Rights – Civil and political rights – **Freedom of conscience.**
 5.3.26. Fundamental Rights – Civil and political rights – **National service.**
 5.4.15. Fundamental Rights – Economic, social and cultural rights – **Right to unemployment benefits.**

Keywords of the alphabetical index:

Law, generally applicable / Law, religion-neutral / Drug-taking, purpose, sacramental / Approach, categorical / Burden, incidental.

Headnotes:

Free exercise of religion, guaranteed under the First Amendment to the U.S. Constitution, includes the right to believe whatever religious doctrine one desires, and to declare publicly that belief.

Under the Free Exercise Clause, the state may not compel affirmation of religious belief, punish practice or expression of religious doctrine it believes to be false, impose special requirements or restrictions on the basis of religious views or status, or lend its power to one side or another in controversies over religious authority or dogma.

Rights under the Free Exercise Clause do not relieve an individual of the obligation to comply with a neutral law of general applicability, even though that law might proscribe or require conduct that is contrary to his or her religious practice, as long as the law does not violate other constitutional protections.

A balancing test requiring the state to demonstrate a compelling governmental interest is inappropriate to evaluate a claim for a religious exemption from a generally applicable religion-neutral law that incidentally burdens a particular religious practice.

Legislatures may make non-discriminatory religious practice exemptions to their generally applicable religion neutral laws, but such exemptions are not constitutionally required.

A balancing test requiring a compelling governmental interest is impermissible when it is claimed that the regulated conduct is "central" to an individual's religion, since the judicial function should not extend to examination of religious doctrine.

Summary:

A private drug rehabilitation organisation in the State of Oregon dismissed two employees, Alfred Smith and Galen Black, because they ingested peyote, a hallucinogenic drug, for sacramental purposes during a ceremony of the Native American Church. Oregon law prohibits the intentional possession of peyote unless a medical practitioner has approved its use for therapeutic reasons. The employees, both members of the Native American Church, filed applications for unemployment compensation from the State of Oregon. Their applications were denied under a state law which disqualifies employees who have been dismissed for work-related "misconduct". The former employees challenged the state's application of the "misconduct" prohibition to conduct which is a religious practice. The Supreme Court of the State of Oregon ruled that the prohibition was invalid under the Free Exercise Clause of the First Amendment to the U.S. Constitution, which proscribes any law which prohibits the free exercise of religion, and which is applicable to the states by means of incorporation into the Fourteenth Amendment to the U.S. Constitution.

In a 6-3 vote, the United States Supreme Court reversed the Oregon Supreme Court's decision. The Court employed a categorical approach to the question presented, articulating a rule that the Free Exercise Clause cannot be violated by a generally applicable, religion-neutral law that has only an indirect (or incidental) effect on a particular religious practice and which implicates only the Free Exercise Clause and not any other constitutional guarantees. The Court distinguished the Oregon law from legislation which targets religious exercise by, for example, prohibiting the performance of an act only when it is engaged in as a matter of religious practice. In contrast, according to the Court, the Oregon law in question was not specifically targeted at religious practice and applied equally to those who engaged in acts for non-religious reasons. According to the majority opinion, the only cases in which the Court has invalidated such a religion-neutral, generally applicable law which incidentally burdens religious practice have been when those laws have implicated not only the Free Exercise Clause but other constitutional protections as well.

In adopting a categorical approach, the Court rejected the former employees' assertion that the Court should apply a balancing test which would require the state to justify any substantial burden on religiously motivated conduct by showing that it advances a compelling governmental interest. The Court applied such a balancing approach in three cases, starting with its 1963 decision in *Sherbert v. Verner*, to invalidate states' unemployment compensation eligibility rules that conditioned the availability of benefits upon the willingness of applicants to work under conditions forbidden by their religions. Rejecting a balancing approach in the instant case, the Court observed that it had never used the Sherbert methodology to invalidate a generally applicable religious-neutral criminal law regulating a particular type of conduct. Instead, in the Sherbert line of cases, the states had made individualised case-by-case decisions which focused directly on examination of religious claims.

The Court stated that when generally applicable legislation is at issue, the judiciary must leave the balancing of interests to the legislature. In this regard, the Court noted that it would be constitutionally permissible for legislatures to make non-discriminatory exemptions to drug enforcement laws for sacramental peyote use, and identified state legislatures which had in fact done so. To extend a presumption of invalidity to generally applicable legislative acts, on the other hand, would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind, including compulsory military service, the payment of taxes, and health and safety regulations. While acknowledging that leaving the balancing of interests up to the political process will place minority religious practices at a relative disadvantage, the Court observed that this is an unavoidable consequence of democratic government which is preferable to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the importance of all religious beliefs.

The former employees also asserted that the Court should require the application of the compelling governmental interest balancing test because the conduct prohibited by Oregon was "central" to their religion. The Court rejected this approach as well, stating that the judicial function should not extend to assessments of the place of a particular belief in a religion or the plausibility of a particular religious claim.

In two separate opinions, several Justices articulated their disagreement with the Court's approach. Justice O'Connor, joined by three other Justices, wrote that

the categorical approach was a dramatic departure, incompatible with the constitutional commitment to religious liberty, from well-settled First Amendment jurisprudence. She would have applied the balancing test sought by the former employees, but concurred in the Court's result because she concluded that the Oregon law did advance a compelling state interest. The other three Justices (Justices Blackmun, Brennan, and Marshall), in a dissenting opinion authored by Justice Blackmun, disagreed both with the Court's categorical approach and with the result. On one matter, meanwhile, the nine Justice were in agreement: that as a general principle, the courts should refrain from examining whether, as a matter of religious doctrine, a particular practice is "central" to that religion.

Supplementary information:

Despite certain changes in other aspects of its religious freedom jurisprudence in the 1990's, the Supreme Court continues in Free Exercise Clause cases to adhere to the central determination in *Employment Division v. Smith*: to employ the categorical approach when a generally applicable legislative act imposes an incidental burden on religious practice.

Cross-references:

The Court's approach differed from that in the case of:

- *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

Languages:

English.



Identification: USA-1998-2-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.1997 / **e)** 95-2074 / **f)** City of Bourne v. Flores / **g)** 117 *Supreme Court Reporter* 2157, 1997 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

3.6.3. General Principles – Structure of the State – **Federal State.**

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

3.16. General Principles – **Proportionality.**

4.5.2. Institutions – Legislative bodies – **Powers.**

4.5.8. Institutions – Legislative bodies – **Relations with judicial bodies.**

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

4.6.6. Institutions – Executive bodies – **Relations with judicial bodies.**

4.8.8.1. Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

5.2.2.6. Fundamental Rights – Equality – Criteria of distinction – **Religion.**

Keywords of the alphabetical index:

Constitution, violation, substantial / Disproportionate means / Religion, right to practise, burden.

Headnotes:

The enforcement power of the U.S. Congress under the Fourteenth Amendment to the U.S. Constitution extends only to legislation which advances enforcement of constitutional provisions. The Fourteenth Amendment does not give Congress the power to determine what constitutes a substantive constitutional violation.

Congressional legislation enacted pursuant to the Fourteenth Amendment must be proportionate; it must show a congruence between the means used and the ends to be achieved, and its appropriateness must be evaluated in light of the evil presented.

Summary:

City officials of Bourne, Texas, denied a church's application for a building permit to enlarge its building. The denial was based on a city ordinance which sought to foster historic preservation by regulating building activities within a designated district. The church appealed to the federal courts, challenging the denial on the grounds of a federal statute, the Religious Freedom Restoration Act of 1993 (hereinafter, "RFRA"). RFRA prohibited public authorities from "substantially burdening" a person's exercise of religious rights guaranteed under the First Amendment to the U.S. Constitution, even if the burden results from imposition of a rule of general applicability, unless the government can demonstrate that the burden furthers a compelling governmental interest and is the least restrictive means of furthering

that interest. RFRA was enacted in response to the U.S. Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, in which the Court imposed a less stringent test than the "compelling governmental interest" standard on a generally applicable state law which burdened a religious practice.

The U.S. District Court ruled that RFRA was not enforceable because Congress had exceeded the scope of its powers. The Court of Appeals reversed the lower court's ruling, finding RFRA to be constitutional. The U.S. Supreme Court in a 6-3 decision reversed the decision of the Court of Appeals, holding that RFRA was not a proper exercise of Congress' power because it violated principles necessary to maintain the separation of powers and the federal-state balance.

The issue in the case was the scope of Congress' enforcement power under the Fourteenth Amendment to the U.S. Constitution. Section One of the Amendment prohibits the states (and therefore local governments) from making or enforcing any law which deprives persons of life, liberty, or property without due process of law or which denies to persons within their jurisdiction the equal protection of the laws. Section Five of the Amendment states that "the Congress shall have power to enforce, by appropriate legislation" the Amendment's provisions. In finding unconstitutional RFRA's articulation of the standard for deciding religious exercise cases, the Supreme Court ruled that Congress had overstepped the line which separates appropriate enforcement legislation from an impermissible determination of what constitutes a substantive constitutional violation. Only the judiciary, the Court ruled, has authority under the separation of powers to make the latter determination. The Congress is limited to enactment of legislation establishing remedies for violations of constitutional rights.

In response to the claim that RFRA was an appropriate exercise of Congress' enforcement power, the Supreme Court imposed a proportionality requirement and concluded that the means employed were disproportionate to the object of the legislation. Stating that the legislative record lacked evidence to show that modern laws of general applicability had been enacted because of religious bigotry, the Court compared RFRA to the record of constitutional violations which Congress encountered when it passed the Voting Rights Act of 1965. In contrast to the voting rights question, the Court determined that the scope of RFRA, which was potentially applicable to a host of generally applicable laws, far exceeded the possibility that many of those laws would have a significant likelihood of being unconstitutional. When

considered in light of the extremely heavy standard which it imposed on state governments to justify the burdening of religious exercise, RFRA's scope was found to be so out of proportion to its object that the Court concluded that it was an impermissible attempt to effect a substantive change in constitutional protections, proscribing conduct by states that the Fourteenth Amendment itself does not prohibit.

The three dissenting justices differed with the Court's decision because the key holding in the 1990 *Smith* case was made without briefing by the parties to that case, or oral argument. Therefore, they maintained, the Supreme Court should permit briefing and argument on the merits of *Smith*, since it formed the basis for the Court's decision in the instant case. While two of the dissenters – Justices Breyer and Souter – withheld judgment on the soundness of *Smith*, Justice O'Connor in her dissenting opinion also stated her view that that case was decided incorrectly.

Cross-references:

Supreme Court:

- *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

Languages:

English.



Identification: USA-2003-1-001

a) United States of America / b) Supreme Court / c) / d) 07.04.2003 / e) 01-1289 / f) State Farm Mutual Automobile Insurance Company v. Campbell / g) 123 *Supreme Court Reporter* 1513 (2003) / h).

Keywords of the systematic thesaurus:

- 3.14. General Principles – **Nullum crimen, nulla poena sine lege.**
- 3.16. General Principles – **Proportionality.**
- 3.20. General Principles – **Reasonableness.**
- 3.22. General Principles – **Prohibition of arbitrariness.**

4.8.6.3. Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Courts.**

4.8.8.2.1. Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae*.**

5.2. Fundamental Rights – **Equality.**

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

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

Keywords of the alphabetical index:

Damages, punitive, amount / Due process / Insurance, company / Civil procedure / Damages, punitive, deterrence / Damages, punitive, retribution.

Headnotes:

The individual States possess discretion over the imposition of punitive damages in civil proceedings; however, the Federal Constitution places limitations on the amount of such awards, prohibiting imposition of grossly excessive or arbitrary punishments.

Courts reviewing punitive damages awards must insure that the measure of punishment is reasonable and proportionate to the amount of harm to the plaintiff and the amount of general damages recovered.

In reviewing punitive damages awards, courts must consider the degree of reprehensibility of the defendant's misconduct, the disparity between the actual or potential harm sustained by the plaintiff and the punitive damages award, and the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Summary:

In a civil proceeding in the State of Utah, the state court trial jury awarded 2.6 million U.S. dollars in compensatory damages and 145 million U.S. dollars in punitive damages to a husband and wife who had initiated a lawsuit against their automobile insurance company. The jury had earlier found the insurance company guilty of bad faith, fraud, and intentional infliction of emotional distress in connection with its handling of litigation against the husband and wife arising out of an automobile accident.

Compensatory damages and punitive damages serve different purposes. Whereas compensatory damages are intended to provide a plaintiff with relief from the

tangible loss resulting from the defendant's wrongful conduct, punitive damages serve the broader public policy goals of deterrence and retribution.

While the individual States possess discretion over the imposition of punitive damages, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution places limitations on the amount of such awards, prohibiting imposition of grossly excessive or arbitrary punishments. Section One of the Fourteenth Amendment, in relevant part, prohibits the States from depriving any person of property "without due process of law". In its case-law, the U.S. Supreme Court has explained that these constitutional limitations protect elementary notions of fairness that dictate that a person receive fair notice not only of the conduct that will subject him or her to punishment, but also of the severity of the potential penalty. In addition, punitive damages serve the same purposes as criminal penalties, but defendants in civil proceedings do not receive the protections applicable in criminal proceedings.

In light of these concerns, the Supreme Court in *BMW of North America, Inc. v. Gore* (1996) set forth three guidelines for courts reviewing punitive damages awards to consider:

1. the degree of reprehensibility of the defendant's misconduct;
2. the disparity between the actual or potential harm sustained by the plaintiff and the punitive damages award; and
3. the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

In a later case, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), the Court required appellate courts to conduct *de novo* (anew, without deference) review of trial courts' application of these guidelines.

In the instant case, the trial court reduced the jury award significantly, to one million U.S. dollars in compensatory damages and 25 million U.S. dollars in punitive damages. The Utah Supreme Court, applying the U.S. Supreme Court's three guidelines, reversed the trial court and reinstated the jury award.

On review of the Utah Supreme Court's decision, the U.S. Supreme Court ruled that it was error for the Utah Supreme Court to reinstate the punitive damages award. In finding the insurance company's conduct to be reprehensible, the Utah Supreme Court relied heavily on evidence that the insurer's unlawful acts were based on a company policy implemented on a widespread basis throughout the United States. However, the U.S. Supreme Court ruled that

evidence of out-of-State conduct can not be used to punish a defendant for acts that were lawful in other jurisdictions. In addition, the Court stated, punitive damages could not be used to deter and punish conduct that was not related to the harm suffered by the plaintiffs. Applying its second guideline, the Court stated that it would not impose “rigid benchmarks” as to the permissible ratio of punitive damages to compensatory damages; however, courts must insure that the measure of punishment is reasonable and proportionate to the amount of harm to the plaintiff and the amount of general damages recovered. In the instant case, the Court recognized a presumption against an award with a 145-to-1 ratio. In regard to the third guideline, the Court concluded that the most relevant civil sanction available under Utah law would have been a 10,000 U.S. dollar fine for an act of fraud, and that such an amount is tiny compared to the punitive damages award. Therefore, the punitive damages award amounted to criminal sanctions, but without the protections to a defendant afforded in a criminal proceeding, and therefore could not be sustained.

In sum, the U.S. Supreme Court found the punitive damages award to be unreasonable and disproportionate, amounting to an arbitrary deprivation of the defendant's property. The Court therefore reversed the Utah Supreme Court's judgment and remanded the case back to the Utah courts for proper calculation of the amount of punitive damages.

Cross-references:

Supreme Court:

- *BMW of North America, Inc. v. Gore*, 517 *United States Reporter* 559, 116 *Supreme Court Reporter* 1589, 134 *Lawyer's Edition Second* 809 (1996);
- *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 *United States Reporter* 424, 121 *Supreme Court Reporter* 1678, 149 *Lawyer's Edition Second* 674 (2001).

Languages:

English.



Identification: USA-2006-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 29.06.2006 / **e)** 05-184 / **f)** Hamdan v. Rumsfeld / **g)** 126 *Supreme Court Reporter* 2749 (2006) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3. Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949.**

2.1.3.1. Sources – Categories – Case-law – **Domestic case-law.**

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

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

4.7.1. Institutions – Judicial bodies – **Jurisdiction.**

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

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

Keywords of the alphabetical index:

Conspiracy / Terrorism, suspect, detention, length / Geneva Convention (1949) / Guantanamo, detainee.

Headnotes:

In establishing special institutions for trial of non-citizens detained during armed conflict and charged with violations of laws of war, the acts of the executive branch lack authority unless given sufficiently explicit legislative authorisation or are otherwise justified under the constitution or case-law on the law of war.

International treaty standards are applicable and relevant to the determination of whether bodies for trial of certain individuals are lawful in respect to their structure and composition.

Summary:

In November 2001, the petitioner Salim Ahmed Hamdan, a Yemeni national, was captured by militia forces and turned over to the U.S. military during hostilities in Afghanistan. Since June 2002, he has been detained at the U.S. naval base at Guantanamo Bay, Cuba. In 2003, the President of the United States determined that Hamdan was eligible for trial by a military commission established pursuant to a 13 November 2001 presidential military order governing the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”.

In July 2004, the military commission proceedings commenced and Mr Hamdan was charged with conspiracy to commit a number of offenses, including: attacking civilians; murder by an unprivileged belligerent; and terrorism.

Meanwhile, in April 2004, Hamdan's counsel had filed a petition in U.S. District Court for a writ of *habeas corpus* (a judicial order to review the legality of an individual's detention). The petition alleged that the military commission lacked authority to try him. In November 2004, the U.S. District Court for the District of Columbia granted Hamdan's petition and placed a stay on the military commission proceedings against him. In July 2005, the U.S. Court of Appeals for the District of Columbia reversed the lower court's decision.

In November 2005, the U.S. Supreme Court accepted review of the Court of Appeals decision, in order to decide:

1. whether the military commission had authority to conduct proceedings against Hamdan; and
2. whether in these proceedings Hamdan was entitled to rely on the 1949 Geneva Conventions governing treatment of certain persons during times of armed conflict.

II. On 29 June 2006, the Supreme Court reversed the decision of the Court of Appeals, ruling that the President lacked authority to establish the system of military commissions set forth in his 13 November 2001 order. The Court addressed a number of issues and decided them by interpreting and applying the U.S. common law of war, U.S. statutes, and Common Article 3 of the Geneva Conventions. The Court initially rejected the government's procedural defenses. It ruled that the 2005 Detainee Treatment Act, by which the U.S. Congress stripped the courts of jurisdiction to consider *habeas corpus* petitions filed by Guantanamo Bay detainees, was not applicable because Hamdan's petition had been filed prior to the Act's effective date. It also rejected the government's contention that a civilian court should abstain from intervening in an ongoing military proceeding.

On the substantive questions, the Court determined that the U.S. Congress had not made explicit legislative authorisation for the President's system of military commissions. It concluded this after examining three acts of the U.S. Congress: the Uniform Code of Military Justice; the 18 September 2001 Resolution entitled the "Authorisation for Use of Military Force"; and the 2005 Detainee Treatment Act. The Court then examined judicial practice and

precedent to determine whether, under its 1942 decision in *Ex parte Quirin*, the President's establishment of military commissions was justified under the "Constitution and laws", including the law of war. The Court concluded that it was not, in large part because the crime of conspiracy is not a recognised offense under the law of war. Finally, the Court held that the military commission was not authorised to proceed against Hamdan because its structure and composition, as well as certain of its procedural rules (such as preclusion of the accused and his counsel from certain evidence used in the proceeding, and the use of certain types of evidence not normally admissible in criminal trials and court-martial proceedings) were not consistent with standards for courts-martial in the Uniform Code of Military Justice and the minimum requirements in Common Article 3 of the Geneva Conventions. In regard to Common Article 3, the Court did not accept the government's arguments that the Geneva Conventions are not judicially enforceable and that Hamdan was outside the scope of their protections.

Although the Court's opinion was based on its interpretation and application of legislative acts, judge-made law, and a treaty, the overall tenor of this decision, particularly when read in conjunction with the concurring and dissenting opinions, reflects consideration of fundamental questions associated with the allocation, balance, and separation of powers in the U.S. governmental structure. These include the extent to which the Constitution requires the President, when invoking the powers of Commander-in-Chief, to act upon explicit authorisation of the legislative branch, and the amount of judicial deference to be granted executive branch determinations that certain acts are necessary to exercise those powers effectively. The decision also highlights important questions about the allocation of authority between the executive and judiciary for interpretation of treaty provisions.

The Court's judgment was adopted by a 5-3 vote among the Justices. Chief Justice Roberts did not participate in the case because he was one of the two judges who had voted to uphold the military commissions in the Court of Appeals decision. Justice Kennedy, while he was among the five-Justice majority, wrote a separate concurring opinion and declined to join the Court's opinion on the questions of the conspiracy charge and the commission's procedures. Justice Breyer also wrote a concurring opinion. Justices Scalia, Thomas, and Alito authored separate dissenting opinions. Justice Scalia's opinion focused on the Court's determinations regarding the applicability of the Detainee Treatment Act and the abstention doctrine. The opinions of Justices Thomas and Alito were devoted primarily to the Court's rulings on the substantive questions.

Supplementary information:

This case received, and continues to receive, great attention among the public and within the U.S. government. Its aftermath includes the intense debate in the U.S. Congress in August and September 2006, over legislation sought by the executive branch (and adopted by the Congress in late September) to establish military commissions on a basis that will meet both the war power concerns of the executive branch and the standards set forth in the Court's *Hamdan* decision.

Cross-references:

- *Ex parte Quirin*, 317 U.S. 1 (1942).

Languages:

English.

*Identification:* USA-2014-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 14.01.2014 / **e)** 11-965 / **f)** Daimler AG v. Bauman / **g)** 134 *Supreme Court Reporter* 746 (2014) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10. General Principles – **Certainty of the law.**
 4.7.1. Institutions – Judicial bodies – **Jurisdiction.**
 5.3.13.1.2. Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings.**

Keywords of the alphabetical index:

Due process / Jurisdiction, personal.

Headnotes:

Constitutional due process permits a court to exercise personal jurisdiction over a defendant located outside the forum if the defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

When the cause of action is unrelated to a foreign defendant's activity in the forum, only a limited set of affiliations with the forum will render a defendant amenable to jurisdiction there; it is not sufficient in itself that the defendant engages in a substantial, continuous, and systematic course of business in the forum.

Unless a defendant's activity in the forum makes a defendant answerable with respect to those particular acts, constitutional due process permits the exercise of jurisdiction over the defendant only if the defendant's affiliations with the forum are so constant and pervasive as to render the defendant essentially "at home" in the forum, and the paradigm bases indicating that a corporation is at home in the forum are the place of incorporation and its principal place of business.

Summary:

I. Plaintiffs, 22 residents of Argentina, filed suit in 2004 in federal court in the State of California, naming DaimlerChrysler Aktiengesellschaft (hereinafter, "Daimler") as the defendant. Daimler, a German corporation, was Daimler AG's predecessor in interest. The suit alleged that an Argentinian subsidiary of Daimler's, Mercedes-Benz Argentina (hereinafter, "MB Argentina"), had collaborated with security forces during Argentina's 1976-1983 "Dirty War" to kidnap, detain, torture, and kill certain MB Argentina workers including the plaintiffs or persons closely related to the plaintiffs. It did not claim that any of MB Argentina's alleged collaborative acts with Argentinian authorities took place in California or anywhere else in the United States.

Daimler moved to dismiss the suit for absence of personal jurisdiction. In response, the plaintiffs maintained that the court's jurisdiction over Daimler could be founded on the California contacts of Mercedes-Benz USA, (hereinafter, "MBUSA"), an indirect subsidiary of Daimler's incorporated in the State of Delaware with its principal place of business in the State of New Jersey. MBUSA had multiple facilities in California and made sales there. According to the plaintiffs, MBUSA served as Daimler's agent for jurisdictional purposes, and MBUSA's California contacts should be imputed to Daimler.

The U.S. District Court granted Daimler's motion to dismiss. It concluded that MBUSA had not acted as Daimler's agent and therefore declined to attribute MBUSA's California contacts to Daimler on an agency theory.

The federal Court of Appeals for the Ninth Circuit

reversed the District Court's decision. The Court of Appeals ruled that an agency relationship existed between MBUSA and Daimler, and that MBUSA's contacts with California could therefore be imputed to Daimler, providing a basis for jurisdiction over Daimler.

II. The U.S. Supreme Court agreed to review the decision of the Court of Appeals in order to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, Daimler would be amenable to suit in California. The Fourteenth Amendment states in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law." The Supreme Court reversed the Court of Appeals decision.

Under the Court's case-law, beginning with *International Shoe Company v. Washington* (1945), the Due Process Clause permits a court to exercise personal jurisdiction over a foreign defendant (from another State in the United States, or from outside the United States) if the defendant has certain minimum contacts with the State such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Cases involving foreign corporate defendants are classified into assertions of "specific" (or "conduct-linked") jurisdiction or "general" (or "all-purpose") jurisdiction. Specific jurisdiction entails circumstances where a foreign corporation's activity in the forum gives rise to the particular cause of action. General jurisdiction, on the other hand, encompasses situations where a corporation's operations within a forum are so substantial and of such a nature as to justify suit against it on causes of action entirely unrelated to those operations. The instant case addressed the exercise of general jurisdiction.

In *Goodyear Dunlop Tires Operations, S. A. v. Brown* (2011), the Supreme Court addressed the question of a court's general jurisdiction over foreign subsidiaries of a U.S. parent corporation. The Court ruled that the subsidiaries' distribution of some of their products in the forum was not in itself sufficient to warrant the exercise of general jurisdiction over them. Instead, according to the Court, only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction there: when its affiliations with the forum are so constant and pervasive as to render the defendant essentially "at home" in the forum.

In the instant case, the Court determined that Daimler was not "at home" in California, even if MBUSA's California contacts were imputed to it, and therefore could not be sued there for MB Argentina's alleged

acts in Argentina. The Court explained that while other indicators in support of general jurisdiction might be found in a particular, exceptional case, the paradigm bases of general jurisdiction over a corporation are the place of incorporation and its principal place of business. The plaintiffs, however, were proposing that the Court look beyond these paradigm bases and approve the exercise of general jurisdiction in every State in which a corporation engages in substantial, continuous, and systematic activities. This approach, while applicable in specific jurisdiction, is not appropriate for general jurisdiction on causes of action unrelated to those activities.

Daimler and MBUSA were not incorporated in California and did not have their principal places of business there. If MBUSA's California activities were sufficient to allow adjudication of this Argentina-rooted case in California, this same global reach might subject foreign corporations to general jurisdiction wherever they have an affiliate that does sizable business within a forum. Such "exorbitant" exercises of general jurisdiction would scarcely permit foreign defendants to structure their activities with some "minimum assurance as to where that conduct will and will not render them liable to suit."

As to the general proposition of the Court of Appeals that an agency relationship might be sufficient to impute a subsidiary's contacts in a forum to a foreign corporate parent, the Supreme Court said that it was not necessary to rule on this question.

III. The Court's judgment was unanimous. However, Justice Sotomayor wrote a separate opinion, concurring in the judgment but differing with the Court's reasoning.

Cross-references:

- *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. , 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011);
- *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

Languages:

English.



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* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

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¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.

⁵² Including the body responsible for revising or amending the Constitution.

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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

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⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

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⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

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⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

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⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹¹ For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

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⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

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¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Including all questions of non-discrimination.

¹⁰⁹ Taxes and other duties towards the state.

¹¹⁰ "One person, one vote".

¹¹¹ According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

¹¹² For example, discrimination between married and single persons.

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¹¹³ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹⁴ Detention by police.

¹¹⁵ Including questions related to the granting of passports or other travel documents.

¹¹⁶ May include questions of expulsion and extradition.

¹¹⁷ Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

¹¹⁸ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁹ This keyword covers the right of appeal to a court.

¹²⁰ Including the right to be present at hearing.

¹²¹ Including challenging of a judge.

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¹²² Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²³ This keyword also includes the right to freely communicate information.

¹²⁴ Militia, conscientious objection, etc.

¹²⁵ Aspects of the use of names are included either here or under "Right to private life".

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¹²⁶ Including compensation issues.

¹²⁷ This keyword also covers "Freedom of work".

¹²⁸ This should also cover the term freedom of enterprise.

¹²⁹ Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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