

THE BULLETIN

The Constitutional Court of Lithuania, holding the Presidency of the Conference of European Constitutional Courts, asked the Venice Commission to produce a working document on the topic chosen by the Conference for its Congress in June 2008, the "Problems of Legislative Omission in Constitutional Jurisprudence". In co-operation with the Conference, the Commission publishes this working document together with the General Report of the 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 Conference with a country specific presentation of the case-law of constitutional courts and equivalent bodies, following the usual design and layout of the Commission's Bulletin on Constitutional Case-Law.

Legislative omissions occur in every country and happen when Parliament, which had the duty to legislate, fails to ensure that the relevant and necessary acts are passed and are complete, thereby leaving a legal gap, lacunae or vacuum in the legal system. In some countries, legal gaps and how to overcome them are dealt with by the Constitution or an equivalent text, whereas in other countries the Constitution is silent on this matter. All countries deal in one way or another with the issue of legal gaps. In some, the Constitution act provides that the Constitutional Court or equivalent body has the power to investigate and assess the constitutionality of legislative gaps and may even provide for a special procedure for such a situation, whereas others do not allow the Court to have such a role and the legal gap is dealt with in a different manner. In countries that allow the Constitutional Court or equivalent body to intervene, it is however made clear that the Court cannot fill in the legal gap by creating a new act, but often the gap is filled by interpretation of existing acts, in conformity with the Constitution. The problems of legislative omissions in constitutional jurisprudence were the topic of a questionnaire prepared by the Conference of European Constitutional Courts, the answers to which can be found on the web-site of the Conference, www.lrkt.lt/Conference_R.html.

This special issue contains not only judgments which have already appeared in regular editions of the Bulletin on Constitutional Case-Law (classified using identification numbers of the form 1, 2, 3), some of which have been reedited by the Constitutional Courts' liaison officers for this publication, but also those which have not yet been published in the Bulletin but were considered to be relevant by the liaison officers. These additional judgments are indicated by the letter "M" as part of their identification number. The Venice Commission is grateful to the liaison officers for their contributions.

The present special Bulletin continues the Commission's tradition to publish special Bulletins on the topics of the congresses of the European Conference, in particular the special Bulletin on freedom of religion and beliefs, requested by the Constitutional Tribunal of Poland for the 11th Conference of European Constitutional Courts in Warsaw on 16-20 May 1999, the special Bulletin the relations between constitutional courts and other national courts, including the interference in this area of the action of the European courts, requested by the Belgian Court of Arbitration for the 12th Conference on 13-16 May 2002 and the special Bulletin on the criteria for the limitation of human rights, requested by the Supreme Court of Cyprus for the 13th Conference on 15-19 May 2005. The Conference has acknowledged the excellent co-operation with the Venice Commission in a resolution adopted by its Circle of Presidents on 5 June 2008 (www.venice.coe.int/site/main/news/CECC.pdf)

This special issue will also be incorporated into the Commission's CODICES database, which is a database of constitutional case-law containing all the regular issues and special editions of the Bulletin on Constitutional Case-Law, full texts of decisions, constitutions and laws on the constitutional courts, comprising about 5 700 précis and 7 100 full texts.

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Established in 1990, the Commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage.

Initially conceived as a tool for emergency constitutional engineering, the commission has become an internationally recognised independent legal think-tank.

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Strasbourg, December 2008

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INTRODUCTION

In September 2006, at the Circle of Presidents of the Conference of European Constitutional Courts, which took place in Vilnius, only a few votes determined the choice of topic for the XIVth Congress – “Problems of Legislative Omission in Constitutional Jurisprudence”. Such voting, not only demonstrates the deliberate choice of a demanding challenge – the analysis of an over-complicated issue, most often raised only by legislative theoreticians, of the constitutionality of legal gaps, but also shows that the jurisprudence of Constitutional Courts of the Continent has accumulated sufficient practice of assessment of legislative omission, which may be dealt with in the forum of all European Constitutional Courts. On the other hand, the slim majority of votes in the voting shows that the practice of research of legislative omission has been an incidental problem rather than a common activity. Conscious of this situation, it was no accident that the authors of the questionnaire paid some attention to the problem of legal gaps in scientific doctrine.

The Constitution – the supreme law of a country – means limitation of the state power. The latter’s decisions should comply with the requirements established in the Constitution. Constitutional control institutions normally investigate whether the established limits have been violated. However, the basics of the constitutional legal order may also be violated by failure to execute constitutional requirements, or by failure to regulate matters that need regulating according to the Constitution. Therefore, the control of not-done or badly done actions is no less important as a guarantee to the consistency of the legal system grounded by the Constitution. The purpose of the Constitutional Courts is to guarantee the constitutionality of the legal system. This function is exercised through control of the constitutionality of laws and other legal acts, and the implementation of other powers entrusted to the Constitutional Courts. Thus, the results of actions of state institutions are investigated. Where legislative omission is under investigation, an institution in charge of the constitutional control function will disclose legal gaps conflicting with the Constitution. This is another important aspect of guaranteeing constitutionality.

The main report and national reports forming the basis for the main report should be viewed as a whole. The main report was prepared on the basis of reports of Constitutional Courts or analogous institutions of Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Georgia, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Macedonia, Moldova,

Montenegro, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovenia, Spain, Switzerland, Turkey, and Ukraine. We thank all authors of the reports (irrespective of whether legislative omission is investigated in the practice of that country or not, or the importance of such investigations to the guarantee of constitutionality). But for them, no investigations, generalisations and conclusions would be possible.

The main report keeps to the topics established in the questionnaire, whilst endeavouring to generalise the material of the national reports, highlighting the peculiarities of the practice of specific Constitutional Courts on the issue concerned. The authors of the main report did not set out to report personal views on the investigation into constitutionality of legislative omission (such methods are possible too), although the generality of the data also collected during this investigation may provide one detail or another, which would not have happened had the main report been prepared by other authors.

Legal science, texts of legal acts and legal practice can be perceived as three levels of researching the problem, which are disclosed in the national reports and the main report in one way or the other. The research of all three is significant. They are all concurrent, complementary and they facilitate the understanding of each other. Authors of constitutional texts, constitutional justices and other subjects of law-making cannot be left uninfluenced by the concept of legal gaps formulated in legal science. A number of factors influence the quality of legal acts, but the position of the author himself is always essential. The practice of Constitutional Courts in the investigation and assessment of legislative omission is a significant part of the national legal reality, giving a definitive shape to law as a phenomenon. The main report therefore found room for the scientific doctrine of legislative omission and the consolidation of possibilities of its investigation in legal acts, as well as for judicial establishment of legislative omission, the peculiarities of its assessment and the consequences of such decisions.

The diversity of legal terminology, giving different names to the same subjects, or only partially coincidental concepts pose difficulties for all comparative work. These were also encountered in the preparation of the main report.

The investigation of legislative omission is one of the possible investigations the Constitutional Court can undertake. In circumstances where the Constitution or a law directly sets out the entitlement of the Constitutional Court to investigate legislative omission, the court is only faced with the task of proper implementation of authorisations of this kind.

In absence of direct provision, it has to be decided whether the Constitutional Court can initiate the investigation of the constitutionality of legal gaps. Various responses are possible. This does not mean that some of them are right and the others are wrong. The constitutional system itself, the competence of the Constitutional Court, the predominant scientific doctrines in the country and other factors may determine the approach of the Constitutional Court to the potential of investigation of legal gaps. Finally, although it may have been ascertained that the court possesses competence to investigate and assess legislative omission, problems will always arise over methods of control, its extent, the statement of the decision and its implementation. Again, various responses are possible. The Constitutional Court uses more than one legal instrument. The investigation of legislative omission is only one of them. The value of such control is evidenced by the extent to which it facilitates the guarantee of constitutional imperatives in the legal system.

Comparative research always highlights what is common, and what is specific to and characteristic of a single constitutional system. Sometimes unique elements characteristic of practice of a certain Constitutional Court become points of reference for other Constitutional Courts. The results are generally given by the application of a considered *modus operandi*, taking into account the possibilities of the constitutional system in question, rather than mechanical transposition. Finally, it is also useful to reconsider the problem and the arguments raised and comparisons made, even if the primary position taken does not change.

The authors of the main report realise that the work done is far from being the finite study. It is only the preparation of the starting point for further discussions and investigations. One should consider in the same manner the classifications given by the authors to individual tendencies of constitutional jurisprudence, which reflect only the main phenomena. This work is only a stage of understanding of a certain legal problem. If it encourages the viewing in a new light of problems of constitutionality of legal gaps which had previously been poorly studied, remarking upon new aspects, tendencies or consistent patterns, the authors of the main report will believe that they have achieved their goal.

Once again we thank all Constitutional Courts for the delivery of their national reports. They deserve credit for all the joint work, while the responsibility for mistakes falls on the authors of the main report.

1. PROBLEMATICS OF LEGAL GAPS IN SCIENTIFIC LEGAL DOCTRINE

1.1. The concept of the legal gap

1.1.1. Legal gap, its definitions. The overall majority of national reports by the participants of the Conference of European Constitutional Courts – Constitutional Courts and similar institutions (hereinafter referred to by the general name of Constitutional Courts¹) note that the problems of legal gaps are analysed in the country's scientific doctrine, the impact whereof is perceived in the constitutional jurisprudence in one way or another.

It should be noted here that some Constitutional Courts in their national reports did not focus in essence (or focused especially laconically) on the scientific doctrine relating to legal gaps. Some Constitutional Courts (Germany²) emphasised that their reports did not focus on methodological interpretation of law and the problems related thereto; therefore they virtually focused only on the valid legal regulation and jurisprudence rather than the scientific doctrine related to legal gaps, *inter alia* legislative omission. Other Constitutional Courts (Belgium, Czech Republic) emphasised that their national scientific doctrine focuses especially laconically on the problems of legal gaps, *inter alia* legislative omissions – the scientific doctrine related to legal gaps is also presented very briefly in their reports. The third group of Constitutional Courts (Albania) accentuated that problems of legal gaps in their jurisprudence appeared recently, so there is no scientific doctrine on these problems. The fourth group of Constitutional Courts (Romania) noted that the problems of legal gaps are presented episodically in the analysis of other problems, such as juridical technique of law-making, etc., rather than being examined within national scientific doctrine. The fifth group of Constitutional Courts (Denmark, Ireland, Luxemburg, Norway) emphasised that the phenomenon of legislative omission does not appear

¹ According to the Statute, the participants of the Conference of European Courts are constitutional courts and similar institutions exercising constitutional jurisdiction. The constitutional control functions performed by them allow for reference by a general name of constitutional courts in the main report. With reference to a specific constitutional court, a short name of the state is used hereinafter.

² The German Constitutional Court did not analyse its scientific doctrine in connection with legal gaps, nevertheless, more than one constitutional court (Estonia, Latvia, Portugal, and Spain) noted that their scientific doctrine is based on the German tradition.

in their legal systems, therefore they focused neither on the scientific doctrine related with legal gaps, *inter alia* legislative omission, nor, naturally, legal regulation and jurisprudence. The sixth group of Constitutional Courts (France) emphasised that such a juridical category as legal gaps is prohibited in their positive law, thus, in scientific doctrine it is regarded as an “object of legal philosophy rather than of legal theory”. The French national report takes the stance that in practice under the law courts may not identify legal gaps, since these would interfere with the consideration of cases at law, while the judges themselves ought to be prosecuted for refusal to administer justice. In other words, when faced with an allegedly new and as yet non-existent principle designed to fill a gap in a provision enacted by a subject of law-making, the courts act as if this principle has always existed (France). Such an approach dictated by legal reality negates the possibility of a legal gap as a phenomenon, let alone the possibility for state institutions, *inter alia* the courts, to discuss the problems this poses.

The vast majority of Constitutional Courts noted in their national reports that the problem of legal gaps is an object of analysis of scientific doctrine. National scientific doctrines acknowledge that legal gaps (lat. *Lacuna legis*) may exist in the legal system and that diverse definitions of legal gaps are possible. It should be noted that although the law very diverse relations, life always provides even more diversity; it is impossible to create rules of conduct covering all possible diversities of human behaviour in all circumstances of life. Consequently, sooner or later, it will become apparent that the law does not regulate a specific relation, although it should do so – this in itself is a legal gap (Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Portugal, Russia, Slovenia, Spain, Ukraine). It should be noted that such a definition of a legal gap, as crystallised in scientific doctrine, is particularly abstract.

Those definitions of legal gaps which are geared towards the interaction between state institutions, their authorisations and obligations have a particular significance in the practice of Constitutional Courts (within the sphere of the constitutional control functions with which they are entrusted). Particular emphasis is placed on those obligations consolidated in the constitution, the improper execution whereof presumes the appearance of legal gaps. For instance, the Spanish national report notes that the problem of legal gaps in their national scientific doctrine is part of a more general problem of interaction between the legislator (other subjects of law-making) and the courts. National reports note that, according to the constitution, law-making institutions are obliged to

enact legal regulations that concretise and give more detail to what is consolidated in the constitution, whilst the improper execution of such obligations may presuppose the coming into existence of the type of regulation that might be acknowledged as contravening the Constitution (Italy, Poland, Portugal, and Spain). Some Constitutional Courts took the view that a legal gap is a type of legal regulation that should have been established but has not been established by the legislator (a subject of law-making, in an improper execution of its obligations (Bulgaria, Hungary, Poland, Russia, Turkey, Ukraine). This is a precise definition of a legal gap connected with the duty of institutions carrying out constitutional control to determine improper execution on the part of law-making institutions, extending even to possible acknowledgement of constitutional breaches.

Also of relevance to the constitutional control executed by Constitutional Courts are those definitions of legal gaps which tend to highlight them as shortcomings of the legal system that hamper courts in the administration of justice. For instance, a legal gap exists when valid norms enacted by law-making institutions do not contain any provisions enabling a court to decide a case in essence (Azerbaijan, Hungary). More than one Constitutional Court (Belarus, Spain) noted that judicial practice finds relevance in that scientific doctrine of legal gaps which accentuates the empowerment of state institutions to resolve problems caused by legal gaps. In this context it may be noted that national reports also emphasise that legal gaps may be eliminated not only by ordinary law-making institutions, but also by courts themselves in the course of law-making. The fact remains that such options for courts exist in the private law sphere (Lithuania, Turkey), although they are also possible in public law (Switzerland).

It should be stressed here that reports from those Constitutional Courts whose state legal systems contain legal gaps as a phenomenon of reality (Estonia, Hungary, Lithuania, Montenegro), parenthetically, noted that national scientific doctrine, following H. Kelsen's tradition,³ expressed opinions (which are not dominant ones) that a legal phenomenon such as legal gaps does not exist (H. Kelsen uses the phrase “the so-called legal gaps”), as the positive legal system is all-regulating. In other words, there are no legal gaps in the legal system, since the absence of a legal norm does not imply that public relations are not regulated by an all-regulating underlying legal norm. Such approach is grounded on the principle that whatever is not prohibited is allowed by law. Under this approach, law created by law-

³ Kelsen H. *Pure Theory of Law*. Vilnius: Eugrimas, 2002, pp. 207-210.

making subjects is always sufficient, it is always thorough and complete, and if, in comparison to the underlying legal norm, new and more specific legal provisions are required, they may be created by state institutions, including courts (Hungary). It should be noted that the French court practice in essence follows the same approach with the exception that courts do not make law: the so-called jurisprudence law is only, as noted, the statement of existing legal principles.

1.1.2. Causes of appearance of legal gaps and factors determining them. As the vast majority of Constitutional Courts noted in their national reports that the problems of legal gaps are an object of analysis of scientific doctrine, they presented the causes of legal gaps or the factors determining them as disclosed by scientific doctrine. These causes and factors may be divided into two large groups, i.e. objective and subjective factors and causes (such ranking is provided in the national reports of Belarus, Bulgaria and Russia):

1. objective factors: dynamics of life, law-making (which is some way behind changing public relations), differences in life experience, etc. These factors were indicated by the majority of Constitutional Courts – Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Georgia, Latvia, Macedonia, Montenegro, Russia, Serbia, Slovenia, Switzerland, Ukraine, etc.
2. subjective factors, which depend on action or inaction by law-making subjects. It should be noted that such factors may be imperfect legislation (law-making), insufficient modelling and prediction when drafting legislation, inactivity by the legislator (other law-making subjects), and absence of knowledge about the real situation. In other words, these are mistakes by the legislator (other law-making subjects) which may be caused by his incorrect perception that:
 - a. certain relations ought not to be regulated;
 - b. law may be concretised through its application;
 - c. incorrect transfer of competence on the resolution of an issue to a law applying institution;
 - d. issuing of a superfluous norm;
 - e. resolution of an issue in an inappropriate manner;
 - f. enacting radically contradicting legal norms of equal power;
 - g. enacting unclear legal norms (Armenia, Bulgaria, Hungary, Italy, Lithuania, Portugal, Russia, Spain).

As mentioned, Constitutional Courts in their practice attach particular importance, in relation to constitutional control functions, to those definitions of legal gaps that place emphasis on interaction between state institutions, their authorisations and obligations, especially those obligations consolidated in the Constitution. Improper execution of these obligations presupposes the appearance of legal gaps. National reports also note the thesis put forward in scientific doctrine (primarily, constitutional) that subjective causes of legal gaps are precisely improper execution of the duties of law-making subjects to enact legal regulations concretising those consolidated by the Constitution and/or giving more detail to them. In this context it is particularly important to note from national reports (Italy, Lithuania, Poland), that an issue arises, in the analysis of legal gaps caused by the actions or inaction of law-making subjects, as to whether a constitutional control institution may state that such action or inaction has brought about a violation of the Constitution. The conclusion was reached that a legal gap may only be said to have violated the Constitution when it was caused by the action of a law-making subject, (i.e. improper execution of obligations consolidated in the Constitution to enact legal regulation concretising that consolidated in the Constitution and/or giving more detail to it (Italy, Lithuania). Legal gaps caused by inaction may only be criticised by institutions of constitutional control, and advice as to amendments may be given to the subject of law-making (Italy, Lithuania). However, the scientific doctrine of Portugal maintains that legislative omission caused by inaction may be stated as a certain legal act contravening the Constitution.

The national reports also note that legal gaps (they are referred to as non-incidentals) may be caused by deliberate actions of law-making subjects – these occur when the legislator, though aware of factual relations, purposefully does not regulate them for political, economic or other reasons (Azerbaijan, Lithuania, Turkey). In this context it should also be noted that such purposeful failure of the law-making subject to regulate relations may be referred to by the constitutional control institution as improper execution of obligations named in the Constitution to enact legal regulation concretising that consolidated in the Constitution and/or giving more detail thereto: occasionally, a non-incidentals gap may even be acknowledged as contravening the Constitution. As a matter of fact, it is also maintained that non-incidentals gaps cannot exist. For example, it is contended that one should not confuse gaps in laws (other legal acts) with circumstances where the legislator (or another law-making subject) refrains from enacting a norm and lets it be understood that the key to the resolution of the problem lies in ethics as opposed to the law (or

another legal act). This is the so-called “qualified silence” of law (Lithuania, Russia, and Switzerland). National reports from Georgia and Latvia note that “legal silence” may be regarded as a legal gap.

The national reports also note that once constitutional control institutions have acknowledged a legal norm of a law or of a sub-statutory legal act as being unconstitutional, they effectively create a certain legal gap (Armenia, Lithuania). This is another cause of legal gaps.

1.1.3. Types of legal gaps. It was noted that the dominant scientific doctrines in various European countries acknowledge the existence of legal gaps and the existence of diverse definitions of legal gaps. Such diversity of definitions should be related to a varying concept of legal gaps. The varying approach to the legal gap also determined the affluence of their classification criteria. National reports provide the following classifications of legal gaps formulated in scientific doctrine:

I. Gaps in law of supreme juridical power (*jus supremum*) – gaps in the Constitution and gaps in ordinary law.

Not all of the Constitutional Courts referred to this classification. They noted that national scientific doctrines generally recognise the possibility of legal gaps in the legal system and that they were a minority. One explanation could be the fact that the constitutional control institutions of several states (Albania, Armenia, Hungary, Lithuania) in their practice treat the Constitution as law without gaps, but the scientific doctrine while analysing legal reality did not get to the point of “finding” gaps in the Constitution – on the contrary, it is noted (following H. Kelsen’s tradition) that the Constitution is law without gaps (Lithuania).

On the other hand, for instance, the national report of Portugal directly notes that gaps in the Constitution may and indeed do exist. Other Constitutional Courts (Austria, Estonia) were careful to note that in theory, interpretation of the Constitution may be especially extensive, when the Constitution is treated as law without gaps; however, their scientific doctrine is more likely to tolerate the approach that the Constitution may contain gaps. The third group of Constitutional Courts (Belarus, Russia) expressed a double position. Opinions are to be found in their national scientific doctrine that the constitution, as a normative legal act may have gaps as well as opinions to the effect that, as the supreme legal order containing principles, it may not have any gaps.

II. Primary and secondary (or respectively, direct and indirect, or respectively real and apparent) legal gaps (Armenia, Austria, Azerbaijan, Bulgaria, Estonia, Georgia, Hungary, Latvia, Lithuania, Montenegro, Portugal, Russia, Slovenia, Switzerland, Turkey, Ukraine).

Primary legal gaps occur when, due to imperfect legislation, incomprehension of a problem or other reasons, certain factually existing public relations are not the subject of legal regulation; in other words, such legal gaps arise usually when there is no law (or any other legal act) to regulate particular public relations.

Secondary legal gaps occur when public relations have been regulated by legal norms, but changes in lifestyles and new situations arise that are neither provided for nor discussed in a law (or another legal act). In such cases, it would be more accurate to speak of a gap in a law (or another legal act), rather than that of law.

It is expedient to remember in this context that the Portuguese national report presents this classification as gaps in law and gaps in laws, rather than simply mentioning primary and secondary gaps.

1. Gaps in law. They occur when certain factually existing public relations generally are not an object of legal regulation.
2. Gaps in laws (or other legal acts). These gaps are also referred to as gaps of legal regulation, since they exist when certain legal regulation does not exist. They may be:
 - a. real gaps, when a legal norm cannot be applied, since a law (or another legal act) has no other legal norm presuming the application of the former legal norm (for example, a legal norm establishing the expiry of a legal act cannot be applied, since no other legal norm is established in the law establishing the method of counting the period until the expiry);
 - b. collision gaps, when two legal norms conflict with each other and thus neither can be applied.

3. Teleological gaps, when legal gaps become evident in the application of a legal norm or norms and when attempts are made to clarify them. They are as follows:
 - a. obvious gaps, when there is no legal norm that may be applied in the settlement of a case;
 - b. latent or hidden gaps, when there is a general norm, which appears to be of application in a lawsuit, but it subsequently appears that a special or even an exceptional legal norm is required.

III. Obvious and hidden (or respectively explicit and implicit) legal gaps (Estonia, Latvia, Turkey).

Obvious legal gaps are ones that can immediately identified by a law applying institution, i.e. without deeper clarification of legal provisions.

Hidden legal gaps are those that can only be identified by a law applying institution upon disclosing the meaning of legal provisions.

IV. Full and partial legal gaps (Hungary, Russia).

Full legal gaps are when the legal regulation does not provide for legal options permitting a court to decide a case at law.

Partial legal gaps occur when the legal regulation provides for legal provisions allowing a court to decide a case, but their content is not clear.

V. Axiological legal gaps and those that appear due to shortcomings of juridical technique (Azerbaijan, Bosnia and Herzegovina, Hungary, Russia).

Axiological legal gaps occur when a law (or any other legal act) regulates certain relations in a morally unacceptable way.

Legal gaps appearing due to shortcomings of juridical technique occur when a law (or any other legal act) regulates certain relations vaguely and indefinitely.

VI. The national reports from Hungary and Lithuania also noted that legal gaps can be divided as follows:

1. gaps appearing due to insufficiently exhaustive legal regulation; these are cases where a law (or any other legal act) does not regulate a specific relation;

2. gaps appearing due to inconsistency of legal norms; these are cases where a law (or any other legal act) establishes conflicting rules;
3. gaps appearing due to insufficient legal definition; these are the cases where there is insufficient clarity in regulation by law (or any other legal act).

We should note here that the Estonian national report stresses that legal uncertainty is not regarded as a legal gap in their scientific doctrine.

VII. Depending on the way legal gaps are eliminated from laws (or any other legal acts) they are divided (see Hungarian national report) into:

1. legal gaps that are to be amended, where elimination requires the amendment of a legal regulation established by a law (any other legal act);
2. applicable legal gaps; where elimination is related to the application of a law (or any other legal act), i.e. when an applicable legal norm ought to be established in the valid legal regulation.

In turn, applicable legal gaps are distributed into:

- a. logical legal gaps, when a court may establish an applicable legal norm following pure logic;
- b. alternative legal gaps, when a law (or any other legal act) establishes more than one applicable legal norm, but gives no indication which legal norm ought to be chosen in a concrete cases decided by a court – this should be done by the court itself; and
- c. 'judgment' legal gaps, when on the grounds of moral judgment a court improves a law (or any other legal act).

VIII. Theoretical and practical legal gaps (Hungary).

Theoretical legal gaps are logical differences between a legal norm and a legal case available in each lawsuit. As a rule, it is impossible to create such a legal norm, which could be applied to all legal cases, or to apply a general legal norm to a special legal case by general logical measures only.

Practical legal gaps occur when, in a court's judgment the "bridge extended" over a theoretical legal gap "collapses". These legal gaps are rare, but should be regarded as a particularly serious disturbance of legal practice.

IX. Justifiable and non-justifiable legal gaps (Russia).

Justifiable legal gaps are when the subject of law-making did not regulate public relations, which should be regulated, but this was because he was unaware of and could not have been aware of these public relations.

Non-justifiable legal gaps are when a subject of law-making did not regulate public relations, which should be regulated, despite being aware of the mentioned public relations.

X. Hidden and technical legal gaps (Portugal).

Hidden legal gaps are when a valid general legal norm, which is meant to regulate public relations of a certain area, cannot in fact be applied to special or even exceptional cases.

Technical legal gaps appear when a law (or other legal act) provides for a goal, but neither process nor an institution was created to the achieve this goal.

XI. Incidental and non-incident legal gaps (Azerbaijan, Georgia, Latvia, Lithuania, Russia, Turkey).

Incidental legal gaps appear when the legislator does not regulate certain factual relations, since he is unaware of their existence.

Non-incident legal gaps occur when the legislator, is aware of the existence of factual relations, but deliberately does not deal with them for political, economic or other reasons.

According to some reports, there can be lacunas, which are not accidental. Accordingly, legislative lacunas (or within other legal acts) should not be confounded with those cases when the legislator (or another norm producing subject) avoids to adopt a norm letting it being understood that the issue is not resolved in legislation (or another legal act) but in moral norms, for example. This would be called a "qualified silence" of the law (Lithuania, Russia and Switzerland). (The reports from Georgia and Latvia indicate that "legal silence" can be considered a gap in law.)

Most Constitutional Courts only used the term legal gaps in their national reports. On the other hand, some of the reports (Armenia, Lithuania, Russia) commented that some of the scientific works use a further legal term – legal vacuum. The difference between the terms is usually summarised as follows: a legal gap is conceived as the absence of a legal norm directly regulating the relation of the dispute – even though that relation belongs to the area of legal regulation – which may be eliminated both through legislation and by application of analogy, while a legal vacuum is a situation where the law does not cover a certain area of public relations in general, i.e. neither law, nor legislation exists at all, and the vacuum may only be eliminated by way of enactment of legislation. Opinions were also presented (Lithuania, Russia) that the term legal vacuum is unnecessary – it was referred to as redundant. It was stated that a legal vacuum is purely and simply a primary legal gap, i.e. an absolute vacuum. A secondary gap is a relative legal vacuum, i.e. a situation where the law regulates relations, but not sufficiently. In both cases the court can and must fill the legal gap by way of interpreting the law, by deciding the case on the grounds of general principles of law (justice, equality of rights, reasonableness, good faith, etc.), and by applying analogy.

In the assessment of differences of terminology used in national reports and referring to legal gaps (indeed, the national reports provide very diverse, frequently even intertwined, classifications of legal gaps), it should be noted that an especially rich spectrum of synonyms of the term legal gap was presented by Portugal. The following terms are used in their legal theory: 1) *Lacuna legis* (as an authentic name of a legal gap), 2) areas unregulated by the law, 3) uncertainties of law and, needless to say, 4) legislative omission, while in constitutional law there are *Lacuna legis* and legislative omission. It is worth a brief separate discussion (with the exception of legislative omission, which is dealt with in the other chapter of this report):

1. *Lacuna legis*.

Portugal emphasised the borrowing of the term *Lacuna legis* from the scientific doctrine of Germany with the meaning of "imperfection, which contravenes the plan contrived in the law-making system". Although the national report from Germany did not pay any more attention to scientific doctrine, national reports from other countries often note that their scientific doctrines are built on the German tradition (Estonia, Latvia, Portugal, Spain)). The classifications of these legal gaps (*Lacuna legis*) are especially diverse and are presented in the common classification of legal gaps of all Constitutional Courts (see classifications of legal gaps presented in this section above).

The national report of Portugal also notes that the following constitutional gaps may exist:

- autonomous constitutional gaps occur when a deficiency of the legal order is found in the constitutional complex, but this deficiency may be eliminated by way of applying the purposes of constitutional regulation and the constitutional regulation plan;
- heteronymic constitutional gaps occur when the Constitution directly sets out the constitutional requirements to establish legal regulation, but it is not established. These are constitutionally significant legislative omissions (see Chapter 1.2. “Legislative omission”).

2. Areas unregulated by law.

Certain public relations should not be regulated by the law; sometimes, certain areas of public life are left for “political decisions”. Those areas unregulated by law appear to form the so-called “qualified silence” of law (Lithuania, Russia, and Switzerland).

3. Uncertainties of law.

In the scientific doctrine of Portugal such uncertainties are viewed as incapable of creating preconditions for the appearance of constitutional legislative omissions. It is stated that constitutional provisions as such are often deliberately left without definition; it is left to the discretion of law-making subjects. This is of particular relevance to the social and economic life of the state, when the Constitution only defines more or less specific objectives and goals of the state, leaving more detailed regulation of the social and economic area to ordinary law-making institutions. Moreover, self-contained uncertainty of notions used in the Constitution (for example, real equality, public sector efficiency, etc.) is the direct cause of uncertainty of constitutional regulation.

The national reports contain very different terminology and diverse references to legal gaps. This is why they give very different, and frequently intertwining, classifications of legal gaps. As the Spanish report rightly states, there are well-established approaches and agreements in legal scientific doctrine over different references to legal gaps (for example, “gap”, “omission”, “deficient regulation”). Only those concepts of legal gaps over which the Constitutional Courts exercise their functions and which they pronounce to be inconsistent or even in breach of the Constitution are of profound significance to Constitutional Courts.

1.1.4. Positive and negative consequences of legal gaps, and the elimination of legal gaps. It should be noted that virtually all the Constitutional Courts pointed in their national reports to a predominant attitude in their legal scientific doctrine that all legal gaps in legal practice cause legal problems of some description, which require resolution. (Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Italy, Latvia, Lithuania, Macedonia, Montenegro, Poland, Portugal, Russia, Serbia, Slovenia, Spain, Switzerland, Turkey, Ukraine). The national report of Spain commented that in the scientific doctrine legal gaps are treated as an anomaly of the legal system: this position reflects opinions about the legal gaps of all Constitutional Courts.

Some courts highlighted the negative consequences to the legal system that may flow from legal gaps. Russia identified the following possibilities:

1. the development of public relations is stopped;
2. implementation of rights and liberties of the individual is adversely affected;
3. the order present in society is destabilised;
4. efficiency and applicability of valid legal provisions are compromised.

The Constitutional Courts in their national reports identified the following ways of dealing with the problem of legal gaps, i.e. eliminating them or creating presumptions for elimination:

- the law-making subject who has enacted legal regulations containing legal gaps amends them on his own;
- legal regulations containing legal gaps are amended by the institutions which interpret and apply them through the interpretation of legal provisions and, thus, by filling the legal gaps;
- constitutional control institutions acknowledge a legal regulation containing legal gaps as being in breach of the constitution, and oblige the law-making subject to amend it;
- constitutional control institutions do not necessarily acknowledge that a legal regulation containing legal gaps contravenes the constitution, but by criticising it, they indirectly advise the law-making subject as to how to amend it. Where this is the case, such

“consultation” is available to courts as well as to law-making subjects. Courts should take heed of the advice that is available from the Constitutional Court in the settlement of cases.

Of course, only the first two methods are ways of eliminating legal gaps. The other two are methods creating preconditions for elimination of legal gaps. Moreover, the first method of elimination of legal gaps was scarcely analyzed in national reports – after all, it is universally acknowledged that the law-making subject may enact, amend, and improve legal regulation. The fact that the law-making subject, having enacted legal regulation containing legal gaps, may amend this legal regulation on his own is briefly noted in nearly all national reports. For instance, the national report of Hungary notes directly that law-making subjects may eliminate legal gaps of all types.

The second method is the amendment of legal regulations containing legal gaps by an institution, (primarily, courts), which interprets and applies those regulations whilst interpreting legal provisions and thus filling legal gaps. There is broader discussion of this method in the national reports, and a note that it raises considerably more discussions in scientific doctrine. Opinions are voiced that the role of courts in the elimination of legal gaps is a very modest one, and that courts need to exercise great care when eliminating legal gaps. Most national reports, in their analysis of the potential of courts to eliminate legal gaps drew a distinction between the elimination of primary (or direct or real) legal gaps and the elimination of secondary (or indirect or apparent) legal gaps. Indeed, the majority of national reports used this classification of legal gaps.

The opinion was expressed that not only the legislator and other law-making subjects, but also the courts, can amend primary (or direct or real) legal gaps when they interpret and apply law. The majority of Constitutional Courts supported this opinion (Austria, Belarus, Bulgaria, Estonia, Hungary, Lithuania, Portugal, Russia, Switzerland, Turkey, and Ukraine). It was even noted that courts, in deciding civil cases, are obliged to fill such gaps (Switzerland).

It was noted that secondary legal gaps (or indirect or apparent ones, or those contained in law), should primarily be eliminated by the legislator (another subject of law-making). The court’s role in the elimination of these legal gaps is very limited. For example, the national report of Austria notes that this is the task of the legislator (another subject of law-making); the national report of Switzerland notes that indirect legal gaps may only be eliminated by courts when constitutional rights of the individual need to be

protected; the national report of Hungary emphasises that the court can only eliminate secondary legal gaps when these legal gaps are partial. However, the national reports also acknowledge that without disputing the powers of the legislator (or another law-making subject) to eliminate secondary legal gaps (or indirect or apparent legal gaps, or those of legal regulation) by way of enacting or supplementing a valid law (or another legal act), one should also acknowledge the second way of elimination of legal gaps – the application of a court precedent (Hungary, Lithuania). The conclusion was reached that denial of the right of a court to eliminate legal gaps would also negate an option to apply analogy. This option is crucial in the settlement of civil cases. Without it, a court that came across a legal gap would not be able to resolve the case, since the elimination of legal gaps is the prerogative of the legislator (another subject of law-making) rather than a court (Lithuania).

Constitutional courts attach significance to those ways of dealing with problems of legal gaps which are in some way connected to the execution of the functions of constitutional control institutions, i.e. what Constitutional Courts may perform and perform on their own while eliminating and/or creating preconditions for the elimination of legal gaps. These ways of dealing with the problem of legal gaps are those described above, with the exception of the first one, where the law-making subject, having enacted legal regulation containing legal gaps, makes his own amendments to legal regulation. Thus, Constitutional Courts may apply the following ways of dealing with the problems of legal gaps:

1. amending legal regulations containing legal gaps by interpreting them and thus filling the legal gaps. It should be noted that when investigating whether a disputed law (or another legal gap) contravenes the constitution, the Constitutional Courts interpret both the Constitution and that law (or another legal act). Thus, while interpreting both the Constitution and ordinary legal regulation, the Constitutional Court may fill:
 - a. gaps in the Constitution (as a matter of fact, few courts noted in their national reports that their scientific doctrine maintains that Constitutional Courts may fill gaps in the Constitution. The same courts emphasised that the scientific doctrine acknowledged in those states proposes that in general gaps in the Constitution may exist (Austria, Belarus, Estonia, Portugal, and Russia));

- b. gaps of ordinary legal regulation (Austria, Hungary, Lithuania, Poland, Portugal, Spain);
2. obliging law-making subjects to amend legal regulations containing legal gaps which it has acknowledged as being in breach of the Constitution (Italy, Lithuania, Poland, Portugal), i.e. to presume the elimination of gaps of ordinary legal regulation by other institutions;
 3. where it has not found a legal regulation containing legal gaps to be in breach of the constitution:
 - a. criticising this legal regulation and advising the law-making subject on how to amend it (Italy, Lithuania);
 - b. pointing out that, when they decide cases, courts are to take account of such interpretations of the Constitutional Court (Lithuania).

Thus, Constitutional Courts create preconditions for elimination of gaps of ordinary legal regulation by other institutions.

The national report of Hungary states that within their scientific doctrine, the possibility is afforded to courts to apply the following means in the elimination of legal gaps:

1. analogy, where the case was resolved in a way analogous to a similar case, in which that legal norm was applied and which must be applied now;
2. broad interpretation, when the legal norm which was applied in a similar case is interpreted in an extensive manner in the case under litigation;
3. discretion in defining facts of the case.

Analogy as a means of elimination of legal gaps, which is used by courts, was referred to in national reports from nearly all of the Constitutional Courts (Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Italy, Latvia, Lithuania, Macedonia, Montenegro, Poland, Portugal, Russia, Serbia, Slovenia, Spain, Switzerland, Turkey, Ukraine). The following types of analogies were referred to in some national reports: a) an analogy of law, when general principles of law are applied to the settlement of an

analogous case, and b) an analogy of a law, when the settlement of an analogous case is grounded by the norms of a law (Belarus, Russia and Ukraine).

Although the majority of Constitutional Courts referred to legal gaps as an anomaly of the legal system, it should also be noted that several national reports (Armenia, Russia) remarked upon positive aspects to legal gaps, in that they stimulate the practice of interpretation and application of the law (Russia), and that judicial institutions acting as negative legislators have an impact on the development of public relations (Armenia).

1.1.5. Peculiarities of legal gaps in the public and private law.

As noted above, the national reports emphasise that there are limits to the courts' abilities to fill legal gaps by way of analogy and interpretation of law. This is especially so with regard to the elimination of secondary legal gaps (or indirect, or apparent legal gaps, or those of legal regulation). See Austria, Hungary, Portugal, Switzerland. Another limitation should also be distinguished: under the legal doctrines of a number of states, analogy is not to permissible, tolerable or possible in criminal law and in other areas of public law (Azerbaijan, Belarus, Lithuania, Russia, Turkey, Ukraine). This is explained by the fact that, allegedly, legal gaps, which could be filled by courts, are non-existent and impossible in public law. Otherwise, the principle of legal certainty and other general principles of law, constitutional rights and liberties of the individual would be violated (Slovenia).

However, it should be noted that such an approach was formulated with a view to ordinary law and ordinary courts applying and interpreting it. The constitution, as supreme law, unlike ordinary law, is not and may not be distributed into the public and private law, since it is integral to the rights and liberties of the individual. A thesis by H. Kelsen should be cited here, which states that the distribution of law into public and private law is purely ideological.⁴ Constitutional courts may state the existence of legislative omission even in criminal law, where it is established that ordinary law-making institutions improperly executed (failed to execute) their constitutional duty to criminalise a certain deed, i.e. to name it as a crime (this is noted in the national report of Portugal). National reports also mention views expressed in constitutional scientific doctrines that legal gaps are not peculiar to public and private law (Armenia, Switzerland).

⁴ Ibid, p. 231-233.

1.2. The concept of legislative omission

Constitutional courts exercise the control of anti-constitutionality of legislative omission, as emphasised in more than one national report (Hungary, Italy, Portugal and Spain). However, a particularly delicate problem arises both in scientific doctrine and in legal practice: how to reconcile the autonomy of political activities of common law-making institutions, *inter alia* their liberty to create rules of law, with the need to ensure the subordination of activities of these institutions to the Constitution. The problem appears elementary at first. All state power institutions, including law-making institutions, are subordinate to the Constitution. At the same time, the balance between the entitlement of law-making institutions to enact legal acts and their duties to enact those legal acts in compliance with the norms of the Constitution is in jeopardy.

The balance is clear enough (although it provokes much discussion), when law-making institutions initiate and enact legal regulation. The most important point is that they do not violate any constitutional requirements. If under these circumstances their initiative was later acknowledged as anti-constitutional by Constitutional Courts, the institution in question would be under a duty to amend these regulations. Meanwhile, where law-making institutions improperly exercise the requirements of the constitution, and do not establish the exhaustive legal regulation that should be established under the constitution, upon acknowledgement of such legal regulation as illegal by the Constitutional Courts, these institutions must enact legal regulations in line with constitutional requirements. In these cases, Constitutional Courts find themselves in a very difficult position. As guarantors of the Constitution they become the institutions prompting law-making institutions to enact certain missing legal regulation. Thus, Constitutional Courts may be wrongly assumed to have turned into initiators of law-making, although that would cast doubt on the invulnerability of the principle of separation of powers (Poland, Portugal, Spain).

National reports noted that the initiative of law-making is simply determined by the Constitution itself – it draws up all guidelines for law-making. The existence of legislative omission implies improper execution of requirements of the Constitution to establish necessary legal regulation, in subordination to the duties, defined in the constitutional text (Italy, Poland, Portugal, and Spain). Under the circumstances, when law-making institutions do not enact a legal regulation when one needs to be established, this is a virtual (or absolute, unconditional) omission. If the regulation is inadequate and incomplete, this is a partial (relative) omission (Poland).

National reports raise an issue as to how constitutional requirements should be established to enact necessary ordinary legal regulation, the failure or improper execution of which gives rise to legislative omission. These reports note that such constitutional requirements should be established in legal norms expressing the constitutional order (Poland), also providing examples of constitutional rules, the contravention of which gives rise to constitutionally significant legislative omission (Austria, Portugal). For instance, the national report of Portugal notes that their scientific doctrine pursues the establishment of classification of norms of the constitution, which provide for the duty of action by law-making institutions, i.e. it obliges them to enact legal regulation. National reports emphasise that anti-constitutionality due to legislative omission should be acknowledged when specifically binding constitutional rules or constitutional principles are violated (Poland, Portugal). On the other hand, while emphasising that, naturally, anti-constitutionality due to omission should be acknowledged under circumstances when rules and principles explicitly defined in the text of the Constitution are contravened, it is discussed and herewith acknowledged that anti-constitutionality due to omission should also be acknowledged under circumstances when unwritten (implicit) principles of the Constitution are contravened, i.e. those principles which are indirectly provided for in constitutional rules, but are not directly consolidated in the text of a constitutional act. It is maintained that, predominantly, the concretisation and detailing by ordinary legislative (juridical) means the obligation to enact legal acts (Portugal).

It was mentioned that specifically binding rules and principles of the Constitution (both written and unwritten) place an obligation on law-making institutions to establish necessary legal regulation and that improper execution of this obligation may create preconditions for the appearance of anti-constitutionality due to legislative omission. National reports also emphasised that the Constitution contains not only specifically binding, but also programmatic rules (Austria, Portugal). The reports mentioned that most scientific doctrines take the view that contravening these rules, which generally consolidate goals and objectives of the national policy, may not necessarily per se determine inconsistency with the Constitution due to omission. Nonetheless, the national report of Portugal noted the existence of opinions to the effect that anti-constitutionality due to legislative omission can occur when law-making institutions remain passive with regard to economic and social factors, which determine effective implementation of a programmatic constitutional rule, and do not pursue it through the establishment of appropriate ordinary legal regulation. This report

emphasises that subjective reasons for appearance of legal gaps are improper execution of obligations by law-making institutions to enact necessary legal regulation, so that it may be accomplished both through action and inaction.⁵

Therefore, improper execution of the duty to enact necessary legal regulation, the identification of forms thereof could be distinguished as the second feature of legislative omission (the first, as noted, is the identification in the Constitution and its provisions and principles of the constitutional duty to enact necessary legal regulation).

Under Portuguese scientific doctrine, improper execution of the duty to enact necessary legal regulation is shown in the following forms of action and inaction:

- a. absence of action (to establish necessary legal regulation) of law-making institutions. Such absence of action will be treated as omission, when no ordinary rules at all have been enacted, as required for the specification of a certain constitutional norm, to enable its execution. In this event, the constitutional norms are insufficiently explicit to be executed by themselves, thus they indirectly oblige law-making institutions to enact ordinary legal acts;
- b. improper action (to establish necessary legal regulation) by law-making institutions. This is where law-making institutions fail to execute their customary duty to improve, renew or amend existing legal acts. It is emphasised that this is not a full or a partial absence of law (omission), but rather a gap in the improvement and revision of existing law. This becomes an essential gap when the absence of these amendments impacts upon the practical implementation of fundamental rights;
- c. insufficient action on the part of law-making institutions.

⁵ Incidentally, the national report of Portugal notes that simple inaction by a law-making institution (contravening the general obligation of enacting legal acts) is insufficient to cause anti-constitutionality due to legislative omission. Rather, the legal obligation under the constitution has to be not executed (i.e. the special duty to enact certain legal acts is not fulfilled); thus anti-constitutional legislative omission creates a regular vacuum which is impossible to fill by special means. The acknowledgement of omission as being constitutionally significant requires the enforcement of the constitutional requirement to act.

As previously mentioned, there are two types of legislative omission. The first is real, absolute or unconditional omission, when law-making institutions do not establish legal regulation that ought to be established. The second takes place when they establish incomplete, insufficient legal regulation. This is partial (relative) omission (Poland, Portugal). Real omission is caused by improper execution of the duty to enact necessary legal regulation by law-making institutions, manifesting itself precisely in the above forms of inaction and action. In this context it is useful to remember that some of the states have concluded that a legal gap may only be found to have breached the Constitution when this was caused by an action of the law-making subject, i.e. improper execution of obligations consolidated in the Constitution to enact legal regulation, concretising that consolidated in the Constitution and/or giving more detail to it (Italy, Lithuania). Gaps caused by inaction may only be criticised by constitutional control institutions that give advice to the law-making subject regarding its amendment (Italy, Lithuania). Sometimes, it is noted in scientific doctrine that legislative omission created by inaction may also be described as a definitive legal act contravening the Constitution (Portugal).

The national report of Portugal notes a third aspect of the legislative omission – the problem of the period for law-making institutions to execute their constitutional obligation of establishing necessary legal regulation. There are two fundamental opinions in scientific doctrine on this issue. Some authors dismiss the significance of the time-period, noting that legislative omission is found not on the grounds of observing (failing to observe) the terms allocated for establishment of necessary ordinary regulation, but on the grounds of significance of legal means to be enacted for the implementation of the constitutional norm and the necessity thereof for the purpose of realistic execution of the constitutional norm; in other words, legislative omission is easy to state, taking into consideration the real need for the intervention of law-making institutions. Other authors maintain that in constitutional matters you cannot disentangle a defined time period from the assessment of the absence of an ordinary legal rule, as the existence of anti-constitutional legislative omission depends on the nature (character) of constitutional rules and the correlation between the constitutional requirements in them and the criterion of time plays an important role.

The initiation of a legislative process is not sufficient to eliminate legislative omission. This may only be eliminated by an enacted and effective legal act, which consolidates the necessary ordinary legal regulation that ought to be established under the Constitution (Portugal).

The existence of legislative omission implies improper execution of the constitutional requirements to establish necessary legal regulation, lack of attention to the duties defined in the constitutional text (Poland, Portugal, and Spain). However, the essence of legislative omission would be reflected more clearly by the definition provided in more than one national report whereby legislative omission is understood as a legal gap prohibited by law, first of all, by *jus supremum* (the constitution) (Armenia, Czech Republic, Lithuania).

Why is this latter definition more precise? Because in essence all national reports emphasise that legislative omission is related to anti-constitutional activities by law-making institutions, but improper execution of the requirements of the Constitution to establish necessary legal regulation, inattention to the duties, defined in the constitutional text, should not always both, theoretically and practically, necessarily be acknowledged as anti-constitutional. The Constitutional Court may interpret it as not being in contravention of the Constitution or not even faulty. Even if it is held to be faulty, it may still be constitutionally compliant. It is worth remembering at this juncture that some of the states conclude that a legal gap may only be acknowledged as contravening the Constitution when it was caused by an action of the law-making subject, i.e. improper execution of the obligations consolidated in the Constitution to enact legal regulation concretising that consolidated in the Constitution and/or giving more detail thereto (Italy, Lithuania), while a gap caused by inaction may only be criticised by the constitutional control institution, may even be acknowledged as faulty and counsel may be given to the law-making subject regarding its amendment (Italy, Lithuania). This is because, as noted, Constitutional Courts may apply the following ways of resolving problems of legal gaps:

1. amending the legal regulation containing legal gaps by way of its interpretation and, thus, filling the gaps;
2. acknowledging a legal regulation containing legal gaps as contravening the constitution, obliging the law-making subject to amend it;
3. although not acknowledging legal regulation containing legal gaps as contravening the constitution, criticising it and advising the law-making subject as to how to amend it, and clarifying matters to the courts, which should take account of such interpretation by Constitutional Courts. Therefore, national reports emphasise that legislative omission exists only when Constitutional Courts state that the legal regulation containing legal gaps

contravenes the constitution, i.e. anti-constitutionality due to legislative omission is stated.

The acknowledgement of a legal gap, which is prohibited by the constitution, in scientific doctrine leads to a discussion as to ways of eliminating illegal legal gaps from the legal system, and what provision should be made in the legal system for legal mechanisms that would facilitate their elimination. The answer, of course, is that the illegality of the lack of legal regulation, i.e. the existence of legislative omission which is prohibited by the Constitution may only be stated by the constitutional control institution. The legislator or other law-making institution may not state the existence of the illegality of legal regulation established by a law or any other legal act enacted by it, since this would virtually negate the point of settlement of constitutional cases (Lithuania).

The national reports emphasised that their scientific doctrines maintain that Constitutional Courts always encounter legal gaps in one way or another – only the methods used by courts to deal with them are different. As previously mentioned, Constitutional Courts may:

1. amend the legal regulation containing legal gaps by way of its interpretation and, thus, fill the legal gaps;
2. where they find that a legal regulation containing legal gaps is in contravention of the constitution, oblige the law-making subject to amend it;
3. where they do not find that a legal regulation containing legal gaps is in breach of the Constitution but have criticised it, advise the law-making subject as to how to amend it and, crucially, clarify the matter to courts, which must take these interpretations by Constitutional Courts into account when deciding such cases.

The scientific doctrine of more than one country acknowledges that Constitutional Courts may state anti-constitutionality of legislative omission (Hungary, Italy, Lithuania, Poland, Portugal, and Spain). Only one of them (Portugal) maintains that legislative omission created by inaction may be stated by Constitutional Courts as a certain legal act contravening the constitution; the others emphasise that although the term anti-constitutional legislative omission is used, in fact Constitutional Courts state that a legal regulation containing legal gaps, rather than a legal gap, contravenes the Constitution (Hungary, Italy, Lithuania, Poland, Spain). Other

national reports maintain that their scientific doctrine makes no mention of powers of Constitutional Courts to state legislative omission anti-constitutional, although Constitutional Courts may state that a legal regulation which contains a legal gap contravenes the Constitution (Switzerland). The third group of national reports note that their scientific doctrine makes no distinction between the terms legislative omission and legal gap (Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Georgia, Latvia, Macedonia, and Ukraine). The fourth group of national reports note that their scientific doctrine names secondary and legal regulation gaps as legislative omission (Montenegro, Russia). The national report of Turkey emphasises that their national doctrine tends to use the term “omission of the legislative organ” rather than “legislative omission.”

1.3. The concepts of the Constitutional Court or the corresponding institution which implements the constitutional control as a “negative” and “positive” legislator

It should be noted that in their national reports, most Constitutional Courts (Armenia, Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Spain, Hungary, Italy, Latvia, Lithuania, Macedonia, Montenegro, Poland, Portugal, Russia, Serbia, Slovenia, Switzerland, Ukraine,) emphasised, using H. Kelsen’s terminology, that their scientific doctrine maintains that Constitutional Courts may be rated as “negative legislators”.⁶

⁶ From this perspective it is useful to explore the national report of Hungary, which briefly presents the position of H. Kelsen on the situation of constitutional courts in the system of state powers and on the functions they exercise. It notes that the theory of the negative legislator was created by H. Kelsen who first issued it in French in 1928, and repeated in his report made at the conference arranged by the constitutional law association of Germany on 23-24 April 1928; he disputed the arguments levelled at constitutional courts that they contravene the separation of powers and interfere with law-making. H. Kelsen emphasised that in some ways, constitutional court act as the legislator enacting general rather than individual legal norms, when they annul law; in other words they are negative legislators. According to Kelsen, as the activities of the constitutional court prevent the concentration of power in the hands of one state institution, it strengthens the separation of powers instead of contravening it.

It is true that, while exercising their mission to secure constitutional justice and guarantee the supremacy of the Constitution in the legal system, the Constitutional Courts exercise special functions – acknowledging laws and sub-statutory legal acts as contravening the Constitution and thus implementing their obligation to eliminate illegal provisions from the legal system. However, these are authentic functions of the Constitutional Courts: these functions let the Constitutional Courts be referred to as “negative legislators”. Acting as negative legislators the Constitutional Courts base their role upon two pillars: the principle of the rule of the law and the moral requirement to be neutral (Hungary). In this context mention should be made of the national report of Spain, which stresses that the liberal principle of the rule of the law requires the Constitutional Courts to be as neutral as possible.

On the other hand, national reports also emphasise that in order to guarantee constitutional justice, Constitutional Courts not only exercise their authentic functions – eliminating illegal provisions from the legal system – but also interpret constitutional norms (Austria, Estonia, Hungary, Lithuania). Sometimes, when faced with difficult cases, Constitutional Courts in the process of interpreting the Constitution have to leave the framework of positive law and issue specific instructions to law-making subjects (Hungary). Where this is so, Constitutional Courts must be moderate but pro-active too, as they may interpret the Constitution strictly as well as liberally. (Hungary, Lithuania). Hence, Constitutional Courts are viewed not only as being “negative legislators” which eliminate anti-constitutional ordinary regulatory norms and, thus, correct this system, but also as official interpreters of the constitution, disclosing the content of constitutional regulation in their jurisprudence, which continually develops the constitutional system and guides the future development of the entire legal system (Austria, Estonia, Lithuania, Portugal).

The national report of Spain confirms that although the liberal principle of the rule of the law requires the Constitutional Courts to be as neutral as possible, the principle of the social state consolidated in the Constitution of Spain requires the Constitutional Court to provide within constitutional doctrine guidelines on social policy which would bind political institutions. In their scientific doctrine this is viewed as an active role of the Constitutional Court.

National reports also emphasise that, while guaranteeing constitutional justice, Constitutional Courts do not simply execute their authentic functions, eliminating unlawful provisions from the legal system and interpreting constitutional norms, but they also interpret the norms of ordinary legal acts

if their constitutional compliance is called into question. In this event Constitutional Courts occasionally “establish” a new legal regulation, and thus they are referred to as “positive legislators” (Azerbaijan, Estonia, Latvia, and Lithuania). It is noted that as a “positive legislator” the Constitutional Court does not just form official constitutional doctrine. Where it approves a certain law as not being in breach of the constitution, the Constitutional Court virtually sanctions the result of the activities of the legislator. In addition, sometimes the Constitutional Court, when deciding between possible alternatives of interpretation of a disputed legal act, will provide a somewhat different meaning to that act than that provided under the previous practice of application of that act, and states that “only in this” interpretation the disputed legal act does not contravene the Constitution (Lithuania). Under certain circumstances Constitutional Courts may also prescribe methods for the interpretation of certain legal regulations (Latvia).

As noted in more than one national report, within some scientific doctrines, Constitutional Courts, although not referred to as “positive legislators”, may act as activist courts (Armenia, Hungary, Spain, Ukraine). National reports from those Constitutional Courts which note that their scientific doctrines adopt the view that Constitutional Courts are “positive legislators” also emphasise that they are “active”. For example, the national report of Lithuania emphasises the activism of the Constitutional Court in scientific doctrine when solving the problems of elimination of legal gaps (for example, where the Constitutional Court adopted measures with the most lenient possible legal consequences due to the appearance of a legal gap as a result of one of its own rulings, acknowledging a certain legal regulation, *inter alia* legislative omission, as contravening the Constitution⁷). As a matter of fact, some national

⁷Such measure is suspension of the official publication of the ruling. The law-making institution is given time to amend the legal regulation before the ruling takes effect, thus preventing gaps of legal regulation are prevented. Such practice was not only consented, but also criticised by constitutionalists. It is maintained that “in Lithuania, until the Constitutional Court ruling whereby certain legal regulation is recognised as conflicting with the Constitution has come into effect (its official publishing and entry into force are postponed), in the legal sense this ruling does not oblige the legislator to resort to corresponding legislative actions. While postponing the official publishing of its own ruling, the Constitutional Court merely gives the legislator the chance to bring the legal regulation in line with the Constitution by his own initiative, thus enabling him to ‘forestall’ the legal consequences which would appear after the Constitutional Court ruling came into force”. The national report of Lithuania also presents another way of preventing

reports note that from the viewpoint of scientific doctrine the Constitutional Court may not generally be referred to as a “legislator” (even a negative one) (Turkey).

2. CONSOLIDATION OF CONTROL OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION IN NATIONAL CONSTITUTIONS, CONSTITUTIONAL JURISPRUDENCE AND OTHER LEGAL ACTS

2.1. The Constitution in the national legal system

2.1.1. The Constitution as a legal act of the supreme legal power. The activities of Constitutional Courts is grounded on the theory “hierarchy of norms” proposed by the representatives (A. J. Merkl, H. Kelsen) of the “Viennese school of law”. Indeed, the Austrian national report noted that this theory is regarded by the Austrian Constitution and the jurisprudence of the Constitutional Court as a precondition for the Constitutional Court to administer constitutional justice and legality. At the heart of this theory is the premise that every legal act of a lower legal power provides more detail to a legal act of a higher legal power. Therefore, ordinary legal regulation is regarded as elaborating on constitutional

legal gaps or other unwanted consequences which may be caused by an abrupt elimination of norms contravening the Constitution from the legal system. This is the revival of legal norms which were invalidated on the grounds of acknowledgement as anti-constitutional upon the entry into force of the Constitutional Court ruling. The main argument for stating the revival of the legal norms which had been rendered invalid by the norms that had been pronounced unconstitutional is that “one is not considering here the powers of constitutional courts to bring back into force the power of the legal norm which was abolished or amended by the unconstitutional legal act, but the revival of the norms associated with the legal effect of the decision whereby the unconstitutionality of the legal act which had abolished or amended the previous legal regulation is stated, which is directly provided for in the constitution (laws) of the state, or which appears *ipso iure*, i.e. which is determined by the essence of the decision itself”. Thus, the legal literature of Lithuania not only notes constitutional possibilities to assess that a legal gap as the failure of legal regulation of specific public relations contravenes the Constitution, but attempts are also being made to propose further guidelines for resolving the issue of legislative omission. It is maintained that such extension of boundaries of the Constitutional Court jurisdiction is a phenomenon of jurisdictional discretion, which does not deviate from European trends.

provisions, while ordinary laws are elaborated by sub-statutory acts (administrative legal acts). Thus legal acts of lower legal power may not contravene legal acts of higher power, primarily, the Constitution.

Various national reports (from Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, France, Georgia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Macedonia, Moldova, Montenegro, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovenia, Spain, Switzerland, Turkey, Ukraine) note that the legal system consolidates the principle of supremacy of the constitution, implying that the Constitution occupies an exceptional – supreme – position in the hierarchy of legal acts, that legal acts of lower power may not contravene legal acts of higher power, i.e. no laws or any other legal acts may contravene the constitution, while sub-statutory acts may not contravene laws. The principle of supremacy of the Constitution is consolidated either directly in the Constitution (Hungary, Germany, Lithuania, Portugal, Spain, etc.), or is logically derived from the Constitution (Bosnia and Herzegovina).

It should also be noted that the Constitution is supreme law with regard to international legal acts (Estonia, Hungary, Lithuania, Russia, Spain), and with regard to legal acts of the European Union (Lithuania). The national report of Cyprus notes that, under the Cypriot Constitution, European Union law has precedence over the Constitution of Cyprus. In Estonia in the event of such a collision, the law of the European Union has precedence over the national legal norms, including the constitution, in those areas, which are attributed to the exceptional competence of institutions of the European Union, or to shared competence.

2.1.2. The Constitution is not just a legal act, or just a text: the jurisprudential Constitution. The national report of Austria notes that the theory of the “hierarchy of norms” also implies that the Constitution without a constitutional control institution possessing powers to state that ordinary legal acts are in conflict with the constitution, is *lex imperfecta*. The Constitution becomes *lex perfecta* only when the Constitutional Court may acknowledge ordinary laws contravening the constitution; in other words, the Constitutional Court imposes sanctions on the legislator when the latter improperly executes its obligations to enact laws complying with the Constitution. Only the active position of the Constitutional Court ensures a realistic as opposed to an alleged implementation of the principle of supremacy of the Constitution. In this context it is especially relevant to note that the principle of

precedence of the Constitution would generally be illusory without the Constitutional Court – there would be nobody to state the conflict of legal acts of lower power with legal acts of higher power; and nobody able to state officially that legal acts contravening the Constitution may and do exist. The authors of the theory of the “hierarchy of norms” also created the doctrine of the “margin of tolerance”, whereby anti-constitutional laws and illegal sub-statutory acts are valid until the Constitutional Court annuls them. This doctrine consolidates the presumption of constitutionality and legality of laws and other legal acts; all legal acts comply with the constitution, unless otherwise decided by the Constitutional Court.

The role of the Constitutional Court in ensuring the principle of supremacy of the Constitution is fundamental. Through constitutional control the Constitution as a legal act turns into “living” law. Although national reports state that the Constitution is primarily understood as a legal act possessing supreme legal power (Austria, Germany, Hungary, Lithuania, Portugal), they also point out that the constitution, in its interpretation, turns into the jurisprudential or the “living” Constitution (Hungary, Lithuania, Portugal). The trends of development of such conception of the Constitution were particularly evident, when the European constitutional system began to gravitate towards values, towards fundamental rights (Austria).

The German national report explains that their Basic Law (the Constitution) implies that the constitutional order is grounded on fundamental rights. All organs of state power (legislative, the executive and the judicial are under an obligation to protect them. This is precisely why the constitution, which is grounded on values, from which the fundamental values are the main human rights, may not be identified with positive law (Hungary). The national report of Lithuania notes that in the same way as the law cannot be treated simply as a text, and which sets out *expressis verbis* certain legal provisions and rules of conduct, one should not treat the constitution, as a legal reality, simply as its textual form. The Constitution may not be comprehended only as the entirety of explicit provisions; the Constitution as the legal reality comprises various provisions – constitutional norms and constitutional principles, which in various formulations of the Constitution are directly consolidated or are derived from it. Some constitutional principles are consolidated *expressis verbis* in constitutional norms, others are not consolidated *expressis verbis* but are reflected in and derive from constitutional norms, as well as from other constitutional principles reflected in these norms, from the entirety of the constitutional legal regulation, from the meaning of the constitution, as the act consolidating and safeguarding the system of the fundamental values of the national community – the civil Nation – defining

guidelines to the overall legal system. Constitutional principles do not only reveal the letter of the constitution, but also its spirit – those values and objectives, which were consolidated by the Nation in the Constitution by way of a certain chosen textual form, the linguistic expression of its provisions, upon determining certain constitutional norms, upon explicit and implicit consolidation of a certain constitutional legal regulation. Contraposition may not and does not exist between the letter and the spirit of the Constitution – the letter of the Constitution may not be interpreted or applied in a way that negates the spirit of the constitution, which may be comprehended only as a legal regulation viewed in its entirety, and only upon evaluation of the purpose of the Constitution as a public treaty and the act of the supreme legal power; that the spirit of the Constitution is expressed by the entirety of the constitutional legal regulation, all provisions thereof – and the norms of the Constitution directly set forth in the text of the constitution, and the principles of the constitution, also those, which derive from the meaning of the entirety of the constitutional legal regulation and from the Constitution as the act consolidating and safeguarding the system of the fundamental values of the national community and defining guidelines to the overall legal system.

It may be stated that in the practice of the Constitutional Courts the Constitution is not just treated as a legal act, which only consolidates explicit legal provisions. The Constitution is understood as more than the text of a legal act (for example, the Portuguese national report notes that the Portuguese Constitutional Court developed a concept of the Constitution whereby, in addition to the formal constitution, there also exists an unwritten material constitution, which, although its grounds and limits are defined by the formal Constitution, completes and develops the latter. Moreover, it is also essential to emphasise that the constitution, as a legal reality, comprises not only explicit provisions of the text of the Constitution and implicit provisions of the Constitution derived thereof, but also provisions of the Constitution of a specific different origin (for instance, the national report of Denmark notes that in Denmark the Constitution is supplemented with customs possessing the power of the constitution).

Constitutional courts develop the following concept of the constitution: the official constitutional doctrine *inter alia* discloses the content of various constitutional provisions, their interaction, and the balance of constitutional values, the essence of the constitutional legal regulation as a single entirety (Armenia, Austria, Estonia, Germany, Hungary, Latvia, Lithuania, Poland, Portugal and Russia). The formation of the official constitutional doctrine (both as a whole and on each individual issue of

constitutional legal regulation) – is not a “one off” act, it is a gradual and consistent process, which is uninterrupted and never fully completed. The versatility and plenitude of the legal regulation consolidated in the act of supreme law can be seen in the formulation of new provisions of the official constitutional doctrine (Hungary, Lithuania).

Some national reports note that the Constitution should not be made absolute, since its provisions, although they may be applied directly, are especially abstract. In that case, the legislator and other law-making institutions should give more detail to constitutional regulation by means of ordinary law (Estonia). Occasionally it is also emphasised that constitutional regulation, related to the system of values, particularly, with human rights, may provide for a narrower scope of protection of the system of values in comparison to that provided for in international legal acts – in this instance a broader scope of protection, as well as of defence of human rights should be chosen (Slovenia).

2.1.3. The Constitution as a law without internal contradictions. It should be noted that integrity is inherent to the Constitution. All provisions of the Constitution are interconnected not only formally, but also according to content: the content of some provisions of the Constitution determines the content of others. No contradiction is possible between constitutional principles and constitutional norms; together, these comprise a harmonious system. Specifically, constitutional principles organise constitutional provisions into a harmonious entirety, allowing no internal contradictions in the Constitution or such interpretation thereof, when the meaning of any of the provisions of the Constitution or any of the values consolidated in and protected by it is distorted or negated (Hungary, Lithuania). The national report of Spain notes that the Constitution is not a mere collection or the sum of unrelated obligations; on the contrary, it is the fundamental legal order of the political community. The constitutional order, the fundamental values whereof are fundamental human rights, is the basis of the society organised into a democratic state (Germany).

On the other hand, the suggestion was also made that even though, purportedly, some contradictions between the provisions of the Constitution are discernible; this does not result in constitutional provisions becoming inapplicable or even invalid (Estonia).

2.1.4. The Constitution as a law without gaps. The nature of the Constitution itself, as the act of the supreme legal power, and the idea of constitutionality imply that the Constitution may not and does not have

any gaps. In this context one should remember the theory of H. Kelsen⁸, which also means that legal phenomenon such as legal gaps do not exist, since all law stems from the main legal norm (the constitution). However, it should be noted that the national reports of the majority of the Constitutional Courts did not present an opinion as to whether their constitutional jurisprudence views the Constitution as law possessing no gaps.

Some Constitutional Courts treat the Constitution as law possessing no gaps (Albania, Armenia, Czech Republic, Hungary and Lithuania). For instance, in Albania the Constitution is considered exhaustive, it may only be detailed by way of developing its provisions. The jurisprudence of the Constitutional Court of Lithuania states that the Constitution may not and does not have any gaps. In Hungary the practice of the Constitutional Court consolidates that the Constitution is viewed as a unified and consistent system, wherein no legal gaps may exist. The Constitutional Court of Armenia notes that the Constitution has no gaps; possible deficiencies of the Constitution are not deficiencies of the Constitution as supreme law, but simply deficiencies in its text.

Some other Constitutional Courts maintain the position that the Constitution is the law, which may have gaps (Austria, Azerbaijan, Estonia, Montenegro, Portugal and Turkey). National reports point out that the Constitution may have gaps, since it designates general and abstract rules, it consolidates a general “compromise regulation”, which provides no concrete and precise solutions; alongside, it is noted that the general character of the Constitution allows the interpretation thereof in such a way that a number of possibilities may be found for the purpose of resolving individual problems, while the gaps of the Constitution itself may be filled through interpretation of the constitution, particularly, those provisions connected with human rights (Austria, Estonia). The Constitution does not regulate all relations, and in this aspect it is not law without gaps (Portugal). In the opinion of the constitutional Court of Turkey, the Constitution is not law possessing no gaps; moreover, none of its provisions allow the Constitutional Court to fill the gaps available in the constitution, however, in some (rare) instances the Constitutional Court does fill such gaps.

The Constitutional Court of Croatia noted that it does not decide on the “constitutionality of the Constitution”, therefore, it does not state whether the Constitution possesses legal gaps or not.

⁸ Ibid, pp. 207-210.

The Constitutional Court of the Republic of Macedonia does not assess the Constitution from the aspect of whether or not it has legal gaps since for the Constitutional Court; it is an act in view of which it appraises the conformity of the other lower legal acts (laws and sub-statutory acts).

2.2. The *expressis verbis* consolidation in the Constitution concerning the jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps

National reports note that, in line with constitutional provisions, Constitutional Courts investigate the compliance of legal acts of various kinds with the Constitution.

The following are noted as objects of constitutional control:

- legal acts of legislative power – laws (Armenia, Austria, Belgium, Croatia, Estonia, France, Germany, Hungary, Latvia, Lithuania, Poland, Portugal, Russia, Slovenia), although, alongside, it is noted that the concept of laws in the jurisprudence of Constitutional Courts does not usually just comprise legal acts and legal norms enacted by legislative power (Hungary). In addition, the object of the constitutional control may be not only ordinary laws, but also constitutional laws (Lithuania);
- legal acts of executive power, i.e., administrative legal acts, which are sub-statutory acts (Austria, Hungary, Lithuania, Russia, Spain). Some reports do note that administrative acts only become constitutional control objects when they violate certain constitutional provisions: either those which guarantee fundamental rights and public freedoms, or those which define the scope of competence proper to the Central State and to the various Autonomous Communities (Spain);
- legal acts of local self-government institutions (Portugal);
- laws of federation subjects (Belgium – acts of community character and regional laws), administrative acts (Austria, Germany, Russia), even constitutions of such subjects (Russia);

- international treaties (Austria, Lithuania). In addition, it is noted that their compliance with the Constitution may be investigated only when they are signed (Spain) or only when they are not effective (Russia).

National reports also note that, as a rule, legal acts of general as opposed to individual character are investigated (Austria), although exceptions exist (Croatia, Lithuania), also revisions are made to those rulings of courts which violate constitutional rights and freedoms (for example, Germany, Spain).

In summary, the national reports, with the exception of Portugal, all state that the text of the constitutions do not *expressis verbis* set forth that the Constitutional Court may state the presence or absence of legal gaps and legislative omissions. Its logical outcome is that none of the constitutions provide for special procedures for investigation of legal gaps and legislative omissions.

Article 283.1 of the Constitution of Portugal sets out the competence of the Constitutional Court over identification of contradictions to the Constitution due to inaction (omission): "At the request of the President of the Republic, the Ombudsman, or, on the grounds of the breach of one or more rights of the autonomous regions, presidents of Legislative Assemblies of the autonomous regions, the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable". However, there is no special procedure within the Portuguese Constitution for the investigation of legislative omission (it is set out in the law, which establishes the status, activity and procedure of the Constitutional Court).

2.3. Interpretation of the jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps in the constitutional jurisprudence

In the jurisprudence of the majority of Constitutional Courts their jurisdiction to investigate and assess the constitutionality of legal gaps is disclosed on the grounds of legal regulation explicitly and implicitly consolidated in the Constitution.

2.3.1. Interpretation of the jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps in constitutional jurisprudence, when the Constitutional Court has more exhaustively revealed its powers explicitly consolidated in the Constitution to investigate and assess legislative omission. It was mentioned that the powers of the Constitutional Court to investigate and assess legislative omission is explicitly consolidated only in the Constitution of Portugal – consequently, only this Constitutional Court could clarify more exhaustively its obligations explicitly consolidated in the Constitution. The Constitutional Court of Portugal has noted more than once that breaches of the Constitution due to omission exist only when the Constitution establishes a concrete requirement on law-making subjects, while the latter fail to execute it. The Constitutional Court indicates the following circumstances describing omission: a concrete and precise obligation, which is established to the law-making subject by the Constitution and the implication and scope whereof is clearly defined, leaving no freedom of manoeuvre in decision-making – to interfere or not. The objective of the constitutional provision is implemented, when the law-making subject enacts legal norms corresponding to a concrete and precise constitutional obligation. Contravention of the Constitution due to omission implies contravention of a sufficiently precise rule consolidated in the constitution, which was not implemented by the legislative power within a sufficient (due) period of time.

2.3.2. Interpretation of the jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps in the constitutional jurisprudence, when the Constitutional Court has more exhaustively disclosed its powers to investigate and assess legislative omission implicitly consolidated in the Constitution. Most of the Constitutional Courts derive their right to investigate and assess legislative omission from implicit constitutional regulation.

2.3.2.1. The jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps arising from implicit constitutional regulation. This report mentioned that only the Constitution of Portugal explicitly consolidates the powers of the Constitutional Court to investigate and assess legislative omission. The right to investigate and assess the constitutionality of legislative omission of other Constitutional Courts is *expressis verbis* consolidated in the law regulating the activity of the Constitutional Court (or is derived from it).

Several Constitutional Courts derive their powers to investigate and assess legislative omission from the entire regulation of the constitution, as supreme law. It was noted that only through the activity of the Constitutional Court does the Constitution become a “living” constitution, not just a legal act, which is something more than the formal text of the legal act, and that from this viewpoint gaps may not and do not exist in the Constitution. Therefore, the methodological position to investigate anti-constitutionality of gaps of ordinary law arises from the fact that no such legal regulation may be established and is not established in legal acts of lower power, the assessment of which with regard to its compliance with the Constitution would become impossible. Therefore, we should ascertain the following: what is the meaning of that legal regulation established in legal acts of lower power? The national reports (Austria, Spain) note that the theory of the “hierarchy of norms” also means that the Constitutional Court is the negative legislator, and may therefore eliminate only existing legal norms from the legal system, that the jurisdiction of the Constitutional Court includes the control of existing legal norms only, rather than their absence, i.e. legislative omission (Spain). The finding that even norms that are no longer in force are anti-constitutional is complicated enough from this perspective, although sometimes possible (Austria). It should be emphasised that the majority of national reports, which noted that in constitutional jurisprudence the Constitutional Courts interpreted their powers to investigate legislative omission as arising from implicit constitutional provisions (Austria, Italy, Lithuania, Poland, Romania, Spain, Switzerland, Turkey), state that the elimination of legislative omission, which implies improper execution of the requirements of the Constitution (normally they are named as constitutional obligations, which should be concrete and precise) to establish necessary legal regulation, in breach of the obligations defined in the constitutional text, implies only the acknowledgement of the incomplete, insufficient legal regulation as anti-constitutional (i.e. the statement of anti-constitutionality of partial (relative) omission), rather than the acknowledgement of inaction of law-making institutions as anti-constitutional. On the other hand, the Czech Republic, Germany and Hungary investigate absolute omission.

It should be noted that there is a considerable variety of reasoning, upon which Constitutional Courts ground their conclusions regarding the competence of the Constitutional Court to investigate and assess the implicit consolidation of legislative omission in the Constitution. In any case, Constitutional Courts note that they primarily state partial (relative) omission only.

The exclusive powers of the Constitutional Court of Lithuania to officially interpret the constitution, to present the official conception of constitutional provisions in its jurisprudence - to form the official constitutional doctrine – arise from the Constitution itself. The jurisprudence of the Constitutional Court follows the provision that the Constitutional Court has constitutional powers not only to state that a legal act of lower power (or part thereof) has a legal gap, *inter alia* legislative omission (only partial (relative) omission), but also, by its ruling adopted in a constitutional justice case, to acknowledge such legal regulation as contravening legal acts of higher power, *inter alia* the Constitution. The Constitutional Court accepts a petition, which disputes a real or an alleged legal gap, *inter alia*, legislative omission, available in a certain legal act (or part thereof) (so that the Constitutional Court could, by its ruling, acknowledge the respective legal regulation as contravening legal acts of higher power, *inter alia* the Constitution) only in pursuance of certain conditions formulated in constitutional jurisprudence.

The Constitutional Court of the Czech Republic clarified that its competence of supervision of legal norms comprises the assessment not only of the text of a legal act, but also legal gaps that may be caused by this text (i.e. partial (relative) omission). Inaction by the legislator (more precisely – improper action) causing unacceptable inequality according to the Constitution contravenes the Constitution. The Constitutional Court distinguishes primary and secondary legal gaps: in fact, secondary (non-authentic) legal gaps, as incompleteness of legal regulation, have been recognised by the Constitutional Court as contravening the Constitution. According to the Constitutional Court, a non-authentic legal gap occurs when the written law is insufficient in comparison to clear regulation of other similar instances (in the aspect of the equality principle and other general principles of law). In the opinion of the Constitutional Court, the abolition of a legal regulation or part thereof is an *ultima ratio* decision, therefore it gives priority to a different decision, i.e. the Constitutional Court itself tends to fill legal gaps caused by deficiency of legal regulation (the Constitutional Court interprets legal regulation in such a way that this regulation will comply with the Constitution).

The Constitutional Court of Austria and the Federal Tribunal of Switzerland note that they have no clear powers to examine constitutional issues related with legal gaps. However, such competence arises when the Constitutional Court implements the competence implicitly consolidated in the constitution, and from the principles of equality and the state under the rule of law. The report of the Constitutional Court of Austria notes that clear jurisdiction of this court to investigate omission is not distinguished. At best,

there is at least an indirect possibility to point out the omission detected in legal regulation and to present such statement of the omission as an argument, which grounds the contravention of the existing legal norm to the Constitution (statement of a partial (relative) omission).

The national report of Belgium highlights the lack of mention in the Constitution and the organic law on the Constitutional Court of investigation of anti-constitutional gaps. The Court itself, in its jurisprudence, while executing the control of constitutionality of the norms of laws, states and sanctions the investigation of constitutionality of legal gaps. At first, legislative omissions were stated in the cases regarding the constitutional principles of equality and non-discrimination, later in cases relating to the principle of legality.

The report of the Constitutional Court of Spain notes that legislative omission exists when the Constitution obliges the law-making subject to enact certain norms, which they then fail to do. Conclusions as to the competence of the Constitutional Court to investigate and assess legal gaps (legislative omission) arise from its competence, i.e. securing the pursuance of constitutional rules by state institutions. The Constitutional Court may not investigate anything that is absent in the text, i.e. it may not investigate absolute omission: the right of the Constitutional Court to state that a rule contravenes the Constitution because it is not established could result in interference with the competence of the legislator. The Constitutional Court may state only partial (relative) omission, while acknowledging the regulation to be in breach of the Constitution.

The Constitutional Court of Italy in its jurisprudence draws a distinction between legal gaps arising from inaction and those arising from incomplete action (so-called "partial inaction of the legislator"). The court may not only abrogate a norm contravening the Constitution, but also interpret it in such a way that it then complies with the Constitution. Having stated that a legal norm contravenes the Constitution in such a way that clear legal regulation is not established, (so-called "partial inaction of the legislator"), the Constitutional Court does not point out the missing fragment of the legal norm, but notes a general principle, which should be reflected in the content of the legal norm. The Constitutional Court also pronounces on legal gaps that appear through emerging due to inaction by the legislator. Under these circumstances, although the Constitutional Court may not find that the Constitution has been breached, it will criticise the legislator to an extent, so that the latter regulates certain relations (instances) and prevents potential constitutional contraventions

(occasionally such decisions are referred to as instances of "ascertained, but not declared" unconstitutionality). Since these comments are set forth in the reasoning part of the decision, the Constitutional Court occasionally has to repeat them in subsequent decisions.

The Constitutional Court of Montenegro derives the right to investigate legal gaps implicitly from the essence, spirit and purposes of law. The national report notes that legal gaps are filled by courts of general jurisdiction which apply law, but sometimes the Constitutional Court fills them indirectly itself, through interpretation of the Constitution and law.

The report of the Constitutional Tribunal of Poland notes that a literal interpretation of Article 188 of the Constitution determining the limits of competence of the Constitutional Tribunal prevents a conclusion that control of the constitutionality of legislative omissions falls within its area of competence. It is not admissible to control absolute legislative omissions, i.e. situations where there is absolutely no regulation. Article 188 of the Constitution does not allow a "legal gap" to be turned into an object of constitutional supervision, in each instance the supervision must be carried out for a specific binding obligatory normative act. In the Polish legal system, in the context of legislative omissions, (in the sense of the structure of the system) there exists a certain discrepancy. On the one hand, Article 77.1 of the Constitution determined liability for damages resulting from illegal actions or inaction by the public authorities. On the other hand, considering the formulation of Article 188 of the Constitution, the constitutional draftsmen does not allow such supervision, which would be carried out due to "legal gaps" caused by total inaction on the part of the law-maker. The most which Article 188 of the Constitution allows (and even then only indirectly) is supervision of the constitutionality of relative omissions of legislation. In its judgment of 24 October 2001 the Constitutional Tribunal of Poland distinguished legislative omission and incomplete regulation (omission of law-making). According to the Tribunal, a legislative omission occurs when "a given issue is deliberately left out of the legal order by the legislator". In the instance of omission of law-making, intentional action of the law-maker is not a determining element. However, the important fact is that the law-maker, when regulating a given area of relations, "has done it in an incomplete way, regulating it in a piecemeal fashion". The omission of law-making is particularly significant in the area of public law. The existence of omission leads to situations where a public authority body is not capable of acting in the instance of such omission considering the demand for legality (Article 7 of the Constitution of the Republic of Poland). In the area of

private law, which is characterised by a broad freedom of conduct of subjects of its regulation (participants of legal relations), a more flexible approach to the examination of the issue of the omission of law-making must be applied (in the sense of legal consequences). The Tribunal decided that legislative omission “is not subject to the competence of the Constitutional Tribunal”. However, with regard to incomplete regulation, the Tribunal took a stance that enables its application of constitutional supervision of such regulation. In this instance it was argued that “whereas parliament was entitled to a very broad field subject to its decisions, as to which matters should be regulated by way of legislation, once such a decision is made, the regulation of the respective matter must be enacted with due respect for the constitutional requirements”.

The report of the Constitutional Court of Macedonia notes that the competence to investigate legal gaps may be derived indirectly in cases where the Constitution determines the obligation and the term for the establishment of certain legal regulation, but the legislator does not establish it.

The Constitutional Court of Romania investigates legal gaps within a limited scope. In the jurisprudence of the Constitutional Court the notions of a legal gap and of legislative omission were used in decisions of two types:

- a. those where a legal gap was the basis for acknowledging a certain norm was in breach of the Constitution;
- b. decisions where the Constitutional Court determined that the petition is unacceptable.

It should be noted that the Court will state a legal gap, and on the basis of this, will acknowledge a particular norm as contravening the Constitution only in cases (with rare exceptions) that the legal norm consolidating values safeguarded by the Constitution is abrogated, while a new legal norm is not enacted.

The Serbian Constitution does not directly establish powers for the Constitutional Court to investigate legal gaps or legislative omissions. The Constitutional Court, while executing the functions of protection of constitutionality and legality, investigates petitions regarding the failure to regulate some issues in the law, which according to the Constitution, should have been regulated.

The Constitutional Court of Turkey has stated that it is beyond comprehension that the absence of legal regulation may be subject to constitutional control. However, in some decisions the court still considered

whether legislative omission may be characterised as imperfect regulation and if so, whether this deficiency may form grounds for acknowledgement of contravention to the Constitution. The Constitutional Court has also noted that non-exhaustive legal regulation, when the Constitution demands exhaustiveness, may be acknowledged as contravening the Constitution. The Constitutional Court of Turkey may state an omission only when the regulation under investigation makes no mention of the facts obligatory under the constitution, moreover, the omission alone provides no sufficient grounds to state that the regulation contravenes the Constitution (thus, partial (relative) omission is under investigation).

Furthermore, the national reports (Azerbaijan, Estonia, Germany, Hungary and Slovenia) also emphasise that the Constitutional Courts, irrespective of whether they have the powers to investigate and assess legislative omission under the laws regulating their activity or derive the powers from those laws, they also base such powers upon implicit constitutional regulation.

For instance, the national report of the Constitutional Court of Azerbaijan notes that the Constitution does not *expressis verbis* authorise the Constitutional Court to investigate and assess the constitutionality of gaps of legal regulation, however, the competencies of the Constitutional Court to investigate and assess the constitutionality of gaps of legal regulation arise implicitly from the Constitution as such, as well as from the competence of the Constitutional Court to interpret legal norms.

The competence of the Supreme Court of Estonia to investigate and assess the constitutionality of legal gaps (legislative omission) derives from Article 14 of the Constitution – the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. Later, it was consolidated in the Constitutional Review Court Procedure Act.

The Constitutional Court of Slovenia is distinguished in that the type of investigation of omissions it carries out varies according to whether the law under investigation is of material or procedural nature. Another peculiarity should also be noted: this court, irrespective of the formulation of the petition, may on its own raise the issue of compliance of legal gaps with the constitution, it also scrutinises legal gaps of those legal acts, which were not effective at the moment of filing the petition, if at that time the consequences of their unconstitutionality or unlawfulness were not remedied.

The Constitutional Court of Hungary may acknowledge inaction in the area of legislation as contravening the Constitution – where the Constitutional Court *ex officio* or upon receipt of a petition establishes that the legislative institution failed in the execution of its obligations as a legislator, arising from laws, and inaction by this institution, i.e., the failure to enact a certain legal act, contravened the constitution, it obliges the institution to execute its obligation and determines the term for doing so. However, the Constitutional Court does not examine all legal gaps. In essence, it only performs an investigation if due to the absence of legal regulation a situation contravening the Constitution occurs. The national report splits the instances of investigation of omissions into six types. It is noted that frequently the issue raised in the petition provides no basis for a finding of an omission contravening the constitution, since the issues not discussed in the legal norm are discussed in case-law. Under these circumstances the Constitutional Court does not undertake investigation.

The report of the Federal Constitutional Court of Germany notes that basic freedoms may be violated not only through interference by the state, but also through legislative omission. The court enjoys a broad competence to investigate legislative omissions, the constitutionality whereof, by the way, may also be disputed in the form of an individual complaint. This can happen both when the rights of the person are violated through the application of a concrete law, and when the state fails to execute its obligation to protect fundamental rights. The court carries out the investigation of omission in the process of executing abstract and concrete control. The court distinguishes genuine (absolute) and non-genuine (partial (or relative)) omission. Genuine omission occurs when the legislator generally fails to enact a legal norm compatible with the obligation of the legislator to protect (including not only the instances when no legal regulation has been enacted in general, but also instances when the regulation exists, but the protection to be ensured by the regulation is not provided). Non-genuine omission is when a specific provision is enacted, however, but it is disputed, in that it does not correspond to the obligation of the legislator to protect (it is not appropriate or sufficient). A person filing a constitutional complaint should be personally and directly affected by the disputed legal regulation. While examining the constitutional complaint regarding non-genuine omission (deficiency of a legal act) the Constitutional Court may state that a legal act contravenes the Constitution and is acknowledged as invalid. Having encountered the issue of a genuine omission, the Court may state only the violation of the fundamental right.

There are no formal powers in the Russian Constitution for its Constitutional Court to investigate legal gaps; nonetheless, it performs them *de facto*. This position of the Court was formulated in the ruling of 12 December 1995, whereby the investigation of a person's complaint regarding the implementation of his rights may also include the investigation and assessment of gaps of legal regulation.

The Constitutional Council of France should be distinguished in this group of Constitutional Courts. The Constitutional Council, which in the Constitution, in organic or other laws is not provided for in terms of the instances and procedures of investigation of legal gaps caused by the legislator, while performing its constitutional functions, applies the mechanism of prevention of legal gaps, i.e. it may establish "negative incompetence" by the legislator.

Some Constitutional Courts mentioned that they had no jurisdiction to investigate and assess the constitutionality of legal gaps (Bosnia and Herzegovina, Bulgaria, Cyprus, Denmark, Georgia, Ireland, Latvia, Luxemburg and Norway).

2.3.2.2. The doctrine of Constitutional Courts, related to the consequences of statement of legislative omission. Many national reports discuss the consequences of acts of Constitutional Courts, whereby legal norms, as well as legislative omission (since legislative omission is generally acknowledged as partial (relative) – in this instance legal regulation is under consideration too) are pronounced anti-constitutional.

Once the Constitutional Court of Lithuania has found legislative omission and has acknowledged the legal act which does not contain the necessary legal regulation as contravening the Constitution, it is mainly up to the law-making subject that brought about the omission to eliminate it. The Constitutional Court has no powers to control the execution of this obligation – whether the execution is delayed or not. The decision of the Constitutional Court of Lithuania of 8 August 2006 states the following:

"After the Constitutional Court has recognised by its ruling that a legal act (part thereof) of lower power is in conflict with a legal act of higher power, *inter alia* the Constitution, a constitutional duty arises to a corresponding law-making subject to recognise such legal act (part thereof) as no longer valid or, if it is impossible to do without the corresponding legal regulation of the social relations in question, to change it so that the newly established legal regulation is not in conflict with legal acts of higher power, *inter alia* (and, first of all) the Constitution".

While this remains outstanding, the corresponding legal gap (which, as emphasised in this Constitutional Court decision, is not legislative omission) persists. In order to remove it some time might be necessary. However, even though some considerable time might be needed, this does not mean that the Constitutional Court is granted the powers to investigate the compliance of the same legal act with respect to legal acts of higher power, *inter alia* the Constitution, which in the same aspect has already been investigated by the Constitutional Court in an earlier considered constitutional justice case, and upon investigation of which and entry into force of the corresponding Constitutional Court ruling the said legal gap precisely appeared.

In the decision of 8 August 2006 the Constitutional Court stated that legal gaps, including those occurring as the result of a Constitutional Court ruling, which acknowledges certain legal regulation as anti-constitutional, may be eliminated not only by institutions that apply law, i.e. not only law-making institutions, but also courts (e.g., while applying the analogy of law, general principles of law, legal acts of higher power, first of all, the constitution, also by interpreting law). Constitutional jurisprudence notes that legal gaps in legal acts of lower power may only be filled by courts *ad hoc*, i.e. in this way – the application of law – legal gaps are eliminated only for an individual legal relation, due to which the dispute is resolved in the case taken to court. Final elimination of the legal gap (also legislative omission) is possible only by the enactment of respective legal act by law-making institutions. This cannot be done by courts, they can fill legal gaps in legal acts of lower power *ad hoc* only, since courts, not legislative institutions, administer justice (in the positive and the broadest sense of this notion). The Constitutional Court noted that such limitation of possibilities of courts in this area is particularly obvious when gaps in substantive law are encountered, however, this does not rule out the possibility for courts to fill the legal gap in a legal act of lower power *ad hoc*.

In the constitutional system of Austria the consequences of legislative omission should be remedied by the legislator.

The Constitutional Court of Azerbaijan noted that a legal gap occurs when a legal act is found to be in breach of the Constitution. Since direct application of the Constitution is not always possible, the main task of the legislator is to fill the original legal gap as soon as possible. In some cases the Constitutional Court does not eliminate a legal act or its provisions, allowing sufficient time for the enactment of a new legal act.

In Bulgaria, although legislative omissions are not investigated, where the Constitutional Court pronounces a law to be anti-constitutional, the law which was in force before the enactment of the disputed law is resurrected. The Constitutional Court argues that if “resurrection” of the eliminated law was not allowed in such cases, an unacceptable gap in the legislation would occur. The Constitutional Court only revises the constitutionality of laws and has no power to provide mandatory guidance for execution to state institutions, as well as to the National Assembly. Consequently, the Constitutional Court cannot make the Assembly fill the gaps it has identified either.

In Montenegro, if required, the Government takes measures for implementation of rulings of the Constitutional Court: it does so pursuant to the procedure and in the manner prescribed by a concrete legal act of the Government.

The report of Croatia notes that the Constitutional Court has not formulated the doctrine of consequences caused by stating a legal omission. Under the Law on the Constitutional Court of Croatia, the Constitutional Court is under the obligation to notify the Government or the Parliament of a legal gap.

The Constitutional Court of Latvia, which does not investigate legislative omission, notes that in the investigation of the compliance of some legal norm with a norm of higher power, a decision by the Court may give rise to a legal gap. In order to avoid such situations, the constitutional Court of Latvia not only establishes provisional regulation, but at times also prescribes behaviour in a concrete situation.

According to the jurisprudence of the Constitutional Tribunal of Poland, “in the case of a gap <...>, pursuant to Article 4.2 of the Act on the Constitutional Tribunal, (it) can only convey its comments to the competent bodies in order for it to be eliminated, as a necessary means of assuring cohesion of the legal system in the Republic of Poland”. This view continues to be upheld in the jurisprudence of the Constitutional Tribunal of the period following the entry into force of the Constitution of the Republic of Poland of 2 April 1997 and the presently binding Act on the Constitutional Tribunal adopted in 1997.

The report of the Constitutional Court of Macedonia notes that when a legal act is found to be in breach of the constitution, a legal gap occurs. However, the court cannot oblige the legislator to enact a new law instead of that which was acknowledged as contravening the constitution, it may not instruct as to the content of the new law. Filling such legal gaps is the task of the legislator.

The Constitutional Court of Portugal has not formulated the doctrine of consequences caused by statement of legislative omission, either. It only informs a competent law-making institution of the omission. The Court has noted that in certain instances a constitutional requirement exists to undertake legislative steps, while the failure to do so (omission of a legislative measure or failure to execute constitutional rules) causes a concrete and specific situation of violation, therefore, in presence of a petition from an institution entitled thereto, the Constitutional Court may undertake the assessment and decision-making whether the requirement was executed to undertake concrete legislative measures for the purpose of harmonising the legal regulation due to which the omission was stated.

In Slovenia within a period of time determined by the Constitutional Court the institution that enacted the regulation must eliminate the contravention to the Constitution or the illegality (legislative omission). Where necessary, pending the amendments to the problematic provisions, the Constitutional Court may temporarily determine the way in which the omission should be filled in the course of practice of application of the said provision. If required, the Constitutional Court determines which state institution should implement its ruling, and how it should do so.

The Constitutional Court of Hungary may acknowledge inaction or lack of performance in the area of legislation by a law-making institution as contravening the constitution, either *ex officio* or upon receipt of a petition. If it finds a breach, it places the institution concerned under a duty to execute its obligation and sets a time span for it to do so. The Constitutional Court also provides guidance as to the content of the norm to be enacted.

In Germany, where the Federal Constitutional Court finds a law to be in breach of the constitution, this does not always mean that this law is proclaimed invalid. Occasionally, the Constitutional Court, seeking to prevent unacceptable legal gaps in legal regulation, will simply state inconsistency with the Constitution. This allows a smoother transition period, in circumstances where a null and void decision would cause even more complications (greater inconsistency with the Constitution and of no benefit to the petitioner). This often happens in cases of violation of the principle of equality. The Constitutional Court sometimes makes suggestions which are of use to the legislator in pursuing the correction of the legal regulation that contravenes the principle of equality. The legislator should establish a legal regulation that will comply with the Constitution. The Constitutional Court will often prescribe a time limit for this to be achieved.

The Constitutional Court of Ukraine does not assess the constitutionality of legal gaps (legislative omission). However, it notes that it is up to the legislator, rather than the Constitutional Court, to iron out legal gaps emerging when the Constitutional Court pronounces a legal act (or part thereof) to be in breach of the Constitution.

2.4. The establishment, either in the law which regulates the activity of the Constitutional Court or in other legal act, of that court's jurisdiction to investigate and assess the constitutionality of legal gaps

In this instance the jurisdiction of Constitutional Courts to investigate and assess legal gaps is related not to constitutional, but rather to ordinary regulation, i.e. the law or another legal act which regulates the activity of the Constitutional Court.

2.4.1. The jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps, which is *expressis verbis* established in the law or in another legal act which regulates the activity of the Constitutional Court. As noted, the entitlement of some Constitutional Courts to investigate and assess the constitutionality of legal gaps is *expressis verbis* consolidated in the law governing the activity of the Constitutional Court (Estonia, Germany, Hungary and Slovenia).

The competence of the Supreme Court of Estonia to investigate legislative omission is consolidated in the Constitutional Review Court Procedure Act. This Act confirms the court's competence to investigate the compliance with the Constitution of legal acts or failure to enact them. The law *expressis verbis* provides for this court competence to apply only to legislative omission. However, the Supreme Court also acknowledges that the President of the Republic may apply to the Supreme Court regarding deficiencies of a law submitted for promulgation. Upon establishment of legislative omission, the Court acknowledges it as contravening the Constitution.

The Law on the Constitutional Court of Slovenia provides that if the Constitutional Court establishes that a law, a sub-statutory act or an act of implementation of public authority contravenes the Constitution, or is illegal, since it fails to regulate certain relations, which it is supposed to regulate, or regulates them in the way that they may not be eliminated or proclaimed invalid, in this instance a declarative decision is made.

Under the Law on the Constitutional Court of Hungary, the Constitutional Court may acknowledge inaction in the area of legislation as contravening the Constitution. Where the Constitutional Court *ex officio* or upon receipt of a petition establishes that the law-making institution failed in the execution of its obligations as legislator, arising from laws, and the inaction by that institution (i.e. the failure to enact a certain legal act), contravened the constitution, it places the institution under an obligation to perform its duty and establishes the time frame for doing so.

It follows from the Law of the Federal Constitutional Court of Germany that a constitutional complaint may be filed due to inaction of state institutions. Initially this court investigated only constitutional complaints regarding the obligation of the legislator to act as set forth in the laws. Later, it began to investigate constitutional complaints related with the protection of the fundamental rights.

The Constitutional Court of Moldova's position is close to that of the courts in this group. Although its Constitution does not provide for the investigation of legal gaps, the procedure on their resolution is set forth in Article 79 of the Constitutional Jurisdiction Code, whereby upon statement of the gaps related to the presence in the law of failure to implement the provisions of the Constitution, it attracts attention of respective bodies with an official statement regarding the elimination of the gap.

2.4.2. The jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps, which is implicitly established in the law which regulates the activity of the Constitutional Court. Some Constitutional Courts implicitly derive their entitlement to investigate and assess the constitutionality of legal gaps from the laws which regulate the activity of the court (Armenia, Azerbaijan and Croatia). There seems to be larger number of such courts, but it is Armenia, Azerbaijan and Croatia which emphasise this in their national reports.

In Armenia the entitlement of the Constitutional Court to investigate and assess the constitutionality of legal gaps is derived from Article 5 of the Law on the Constitutional Court, which establishes that the Constitutional Court acts in accordance with the principle of investigation of all circumstances of a case *ex officio*, as well as other provisions of general character of the constitution, defining the competence of the Constitutional Court. No specific procedure is set out in the law for the investigation of legislative omission – general procedural rules apply. Upon establishment of omission the Constitutional Court states its contravention to the Constitution.

The national report of Azerbaijan notes that the Law on the Constitutional Court establishes the powers of the Constitutional Court to dispute and assess legal gaps in the process of interpretation of the Constitution and laws.

In Croatia the entitlement of the Constitutional Court to investigate and assess the constitutionality of legal gaps derives from Articles 104 and 105 of the Act on the Constitutional Court. The Constitutional Court may investigate complaints, which note that legal regulations were not enacted that ought to have been enacted, under the Constitution, a law or any other legal act.

2.4.3. Special procedure for investigation of legal gaps (legislative omission), provided for in the law or another legal act, which regulates the activity of the Constitutional Court. Special procedure for investigation of legal gaps (legislative omission) is only set out in the Law on the Constitutional Court of Portugal. Other states apply general procedure in cases of legal gaps (legislative omission), and investigation of compliance of legal acts with the Constitution.

2.4.4. Subjects empowered to eliminate legislative omission and the procedure for elimination of legislative omission as provided for in the law, other legal acts that regulate the activity of the Constitutional Court or in other legal acts in general. The majority of national reports note that laws and legal acts which regulate the activity of Constitutional Courts or other laws and legal acts do not stipulate who should eradicate legislative omission and how they should do this. The Constitutional Court of Portugal only states that where legislative omission is found, the Constitutional Court shall inform the competent legislative institution. Neither the Law on the Constitutional Court, nor other legal acts (including the Regulation of the Parliament) state who should be informed nor how to eliminate the legislative omission. Under the Law on the Constitutional Court of Croatia, the Court is obliged to notify Government or Parliament regarding the legal gap.

On the other hand, some national reports (Hungary, Slovenia) note that their national legal order establishes the subjects empowered to eliminate legislative omission and the procedures applied to eliminate it. The Law on the Constitutional Court of Slovenia provides that upon enactment of a legal act contravening the constitution, the institution has to eliminate such contravention or illegality within the period of time determined by the Constitutional Court. In the Parliament, amendments to a law related to the decision of the Constitutional Court are heard according to a simplified procedure. The Constitutional

Court of Hungary may acknowledge inaction in the area of legislation as contravening the Constitution and direct the competent institution to execute its obligation within the period established by the Constitutional Court.

3. LEGISLATIVE OMISSION AS AN OBJECT OF INVESTIGATION BY THE CONSTITUTIONAL COURT

3.1. Application to the Constitutional Court

Having surveyed the national reports, one may make certain conclusions as to the variety of subjects that are entitled to appeal to the Constitutional Court. These subjects are provided for in the Constitution of the country, and in the laws which regulate the activity of the Constitutional Court. Generally, they are also political power institutions – the Parliament, the President, the Government, groups of Members of Parliament, courts, other institutions (the ombudsman, municipal institutions, etc.) as well as natural and legal persons. The issue of legislative omission is raised only in those states where the Constitutional Courts may assess the constitutionality of legislative omission. As noted, a number of Constitutional Courts noted that in general they have no jurisdiction to investigate and assess constitutionality of legal gaps (Bosnia and Herzegovina, Bulgaria, Cyprus, Denmark, Georgia, Ireland, Malta, Norway, Latvia, Luxemburg,) or deal with it *de facto* only (Russia) or, having encountered such problems, apply the mechanism of “negative incompetence” (France), etc.

Let us look at examples of only a few states, where some groups of subjects are entitled to appeal to the Constitutional Court, the constitutional systems of which acknowledge the institute of investigation of legislative omission.

For instance, in Armenia a petition to the Constitutional Court may be filed by the President of the Republic, the National Assembly, at least 1/5 of all deputies, the Government, municipal institutions (when their rights are violated), any person with regard to a wholly enacted legal act, provided that all measures of legal defence were exhausted, the courts, the Prosecutor General, the Human Rights’ Defender, candidates for the post of President of the Republic and candidates for election as Members of the Parliament. However, not all of them may raise the issue of legislative omission. It may only be done by the President, 1/5 of all Members of the National Assembly, the municipal institutions, natural and legal persons, the courts and the Prosecutor General, as well as the Human Rights’ Defender.

In Austria, where the Constitutional Court may be applied by the Federal Government, Governments of Lands, 1/3 deputies of the Parliament (applicable to each house) in the instance of abstract control, and the Supreme Court, the Administrative Court, the second instance court, also the Independent Administrative Panel or the Federal Prosecutor in the instance of concrete control, while in the instance of an individual complaint institute – a person, disputing an administrative decision of the final level, and in the instance of both, abstract and concrete control, the petitioners that appeal to the Constitutional Court regarding the constitutionality of a certain legal act. They may ground doubts by legislative omission, but cannot dispute the constitutionality of legislative omission.

In the Czech Republic, petitions regarding the annulment of a legal act or parts thereof as enacted by the Parliament may be filed to the Constitutional Court by the President, at least 41 deputies or 17 senators, the Government, somebody who has filed a constitutional complaint, a person that applied about renewal of the procedure, and the courts. Petitions regarding the annulment of other legal acts, (regulations of the Government, legal acts enacted by state administrative institutions, regional and municipal decrees) may be filed with the Constitutional Court by the Government, at least 25 deputies or 10 senators, somebody who filed a constitutional complaint, somebody applying regarding renewal of the procedure, the Regional Assembly, the Ombudsman, the Minister of the Interior, the Director of a Regional Institution, a municipal council. An individual constitutional complaint, (which may only be filed together with a petition to initiate the procedure of revision of the norms, *inter alia* to establish legislative omission) may be filed by a natural or legal person, a municipal council or a higher self-government institution.

In Estonia, the constitutional control of legal acts in the Supreme Court is possible in the instance of concrete and abstract control. Concrete control of legal acts is executed by the Supreme Court according to petitions of general competence courts. Under the law which regulates the activity of the Supreme Court, these courts are empowered *expressis verbis* to dispute the existence of legislative omission in the Supreme Court. In the instance of abstract control, the President of the Republic may apply to the court for preventive control of a legal act, while the Minister of Justice and the councils of local municipal institutions (when the rights of local self-government are violated) – for preventive and successive control. Pursuant to the decisions of the Supreme Court, legislative omission may also be established in the course of abstract control. The national report emphasises that, meanwhile, the

Supreme Court has resolved an issue regarding the presence of legislative omission subsequent to the petition of the Minister of Justice and the President of the Republic.

In Lithuania, the Constitutional Court may be applied by at least 1/5 of the Members of the *Seimas* (the Parliament), the courts, the President of the Republic, and the Government. No special procedure for the investigation of legislative omission *inter alia* the subjects that could raise the issue of legislative omission is established/provided for *expressis verbis* in the Constitution or in the laws. However, in accordance with the official constitutional doctrine formulated in the jurisprudence of the Constitutional Court, all the above subjects may raise the issue of investigation and assessment of legislative omission in their petitions.

In Spain, depending on the object of investigation (object of petition), application may be made to the Constitutional Court:

- a. by directly affected natural and legal persons, along with public and private bodies (this will in all cases depend on the right or freedom invoked), the Ombudsman, the Public Prosecutor's Office in the instance of appeal for protection, when due to certain provisions or omission of a legal act of executive or judicial power or due to legal acts of legislative power, which have no power of laws, fundamental rights and freedoms are violated;
- b. by the head of the Government, the Ombudsman, 50 deputies of the Congress (the Lower House), 50 senators (the Higher House), the Governments and Legislative Assemblies of the Autonomous Communities, as well of courts of general jurisdiction and judges in the instance of the appeal of unconstitutionality.

In Portugal, a special procedure is established for the investigation of unconstitutionality by omission involving legal acts of executive power. The only subjects that may appeal to the Constitutional Court with a petition "to review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable" are the President of the Republic, the Ombudsman, or, pursuant to the violation of the law of autonomous regions, the chairmen of legislative institutions of autonomous regions. The legal system of Portugal distinguishes concrete and abstract control by the Constitutional Court. In the instance of concrete control, the Court

investigates petitions, related to cases resolved by lower courts. Such appeals to the Constitutional Court may be made by anyone who is a procedural party to the case. The instances of review of abstract constitutionality are sub-divided into the following categories: preventive review cases, successive review cases, and cases involving the review of unconstitutionality by omission. The President of the Republic, the Prime Minister, one fifth of the Members of the Assembly of the Republic, and the Representatives of the Republic in the Azores and Madeira autonomous regions are competent to ask the Constitutional Court for a preventive assessment of the constitutionality of rules. The President, the Chairman of the Assembly, the Prime Minister, the Ombudsman, the Attorney General and 1/10 of the Members of the Assembly may initiate the procedures of successive unconstitutionality review.

Under Article 142.3 of the Constitution of Belgium application may be made to the Constitutional Court by any state institution which is established by the law, any person who has grounds, and, as regards a prejudicial matter, by any court.

In Slovenia, petitioners may raise the issue of unconstitutionality of a legal gap in a law, or of legislative omission in the course of constitutional proceedings. Anyone with a valid legitimate interest may file a petition to the Constitutional Court; petitions may also be filed by the National Assembly, 1/3 of deputies of the National Assembly, the National Council and the Government. Courts may also apply, where they deem a respective law or part thereof as unconstitutional. In addition, the following institutions may file a petition: the Ombudsman for Human Rights, the Information Commissioner, the Bank of Slovenia and the Court of Audit, the State Attorney General, representative bodies of local communities, associations of local communities, and the national representative of trade unions for an individual activity or profession. A proposal to verify the compliance of an international treaty with the Constitution, in the course of ratification of the international treaty, may be filed by the President of the Republic, the Government, 1/3 of the National assembly deputies. In Slovenia the issue of an unconstitutional legal gap may occur in the investigation of any other constitutional complaint.

In Hungary, any natural or legal person in legal capacity may appeal to the Constitutional Court regarding the statement of unconstitutional omission, which the Court may also investigate *ex officio*. It should be noted that the establishment of legislative omission may not be an appeal of the court: it may not be argued that the court should apply norms that are provided for in the Constitution,

but have yet to be enacted (under these circumstances the only legitimate measure is the statement *ex officio* of the unconstitutional omission by the Constitutional Court).

In Germany, the Federal Constitutional Court for the purpose of guarantee of the precedence of the Constitution, according to petitions is empowered to control all three state powers. In its decision-making this Court has regard to fundamental human rights and other provisions of the Constitution. The following may apply to the Federal Constitutional Court of Germany: the Federal Government, Governments of the Lands, 1/3 Members of the Bundestag in the instance of abstract control; the courts in the instance of concrete control; in certain instances citizens may also file individual constitutional complaints regarding decisions that violate their rights, or regarding an enacted legal act, provided that their direct connection and direct impact of the act is substantiated. In Germany, legislative omission may be the object of investigation by the Constitutional Court; it may form grounds of the constitutional complaint.

Under Article 168.1 of the Constitution of Serbia the procedure of verification of constitutionality may be initiated by state authorities, bodies of local self-government, at least 25 deputies. Also the procedure may be initiated by the Court itself. Pursuant to Paragraph 2 of this article, any natural or legal person is entitled to raise the issue of verification of constitutionality and legality.

3.2. Legislative omission in the petitions of the petitioners

Which arguments form grounds for the petitions of the petitioners to investigate the constitutionality of legislative omission? Let us conduct a brief review of the practice that has emerged in several states.

In Armenia the petitioners may base their petitions to the Constitutional Court on the presence of legal gaps in legal regulation. The report of Armenia notes that from 1 June 2006 to 15 September 2007 a total of 83 petitions were received regarding the compliance of legal acts with the Constitution, including 14 petitions where the presence of a legal gap raised queries, and that most frequently legal gaps were disputed in individual complaints. In the above period a total of 448 individual complaints were received, including 25 that were accepted, which include 13 where questions had arisen over a legal gap. It is also noted that there are no special requirements for such petitions.

In Austria, as noted in this report, in the instances of both, abstract and concrete control, petitioners that apply to the Constitutional Court regarding the constitutionality of a certain legal gap, may ground their doubts by legislative omission, however, they may not dispute the constitutionality of the legislative omission as such – the Constitutional Court acknowledges legal regulation as contravening the constitution, rather than the inaction of a law-making subject (statement of partial (relative) legislative omission).

In the Czech Republic, legislative omission is more frequently noted in the petitions of courts of general jurisdiction and persons. If legislative omission forms grounds for the petition, this fact should reflect in the petition in a natural way. But since no special procedures for the examination of the issue of legislative omission in the Constitutional Court are established, no special requirements for such petition are established, either. The petition should comply with general requirements established in the Act on the Constitutional Court.

In Estonia, courts of the first and the second instances are entitled to initiate constitutional control procedure in the Supreme Court (their entitlement thereof is established expressly and includes *inter alia* the possibility to complain about failure to legislate). The Supreme Court in its full composition investigated legislative omission in four cases, the Constitutional Review Chamber of the Supreme Court in five cases. Application was made to the Supreme Court because of legislative omission by the Chancellor of Justice, the President of the Republic and the courts. No special requirements exist as to the form, content or structure of petition regarding the unconstitutionality of legislative omission: general requirements apply to such petitions, as provided for in the Constitutional Review Court Procedure Act.

In Lithuania, while applying to the Constitutional Court, petitioners may provide arguments in their petitions which ground the contravention of disputed legal regulation to legal regulation of higher power, as those legal acts under dispute should establish the missing legal regulation. The Constitutional Court has not received many petitions disputing a legal gap (and legislative omission) factually or allegedly available in a certain legal act (or part thereof). By 15 October 2007 the total of only seven rulings stated the existence of legislative omission. Three more rulings did not state legislative omission, although the petitioners requested it. The issues of unconstitutionality of legal gaps were most frequently raised by courts, although occasionally groups of Members of the *Seimas* also used this argument. There are no specific requirements for these petitions

in the Constitution or the Law on the Constitutional Court. However, they are formulated as follows in the jurisprudence of the Constitutional Court:

“<...> namely: if the laws and other legal acts (parts thereof) of lower power do not establish certain legal regulation, the Constitutional Court has constitutional powers to recognise them as being in conflict with the Constitution or other legal acts of higher power in cases where the fact that the said legal regulation is not established in the laws or other legal acts under scrutiny might result in breaches of the principles and norms of the Constitution, and the provisions of other legal acts of higher power”.

In Spain, parties to constitutional proceedings may base their petition on any circumstances, due to which a legal act may be acknowledged as contravening the Constitution, including the existence of a legal gap left by the legislator. The object of constitutional control may only be such legislative omissions, which relate to the text of the disputed legal act (partial (relative) omission). Nevertheless, legislative omission is rarely stated as grounds for a constitutional complaint. According to the practice of the Constitutional Court of Spain, the statement of legislative omission is most frequently requested in legal regulation, which may have violated the principle of equality or the fundamental human rights.

As noted in this report, in Portugal only certain subjects (the President of the Republic, the Ombudsman or the Chairman of law-making institution of autonomous regions) may appeal to the Constitutional Court due to omission, which is an object of special procedure. However, the national report of Portugal emphasises that the practice of the Constitutional Court had very few cases, raising the issue of legislative omission and that they all occurred through application by the Ombudsman. Special requirements apply to petitions requesting to state unconstitutionality of legislative omission: those requesting an assessment as to whether the Constitution has been contravened by omission of legal regulation measures should be addressed to the President of the Constitutional Court. The petition should specify which norm of the Constitution cannot be implemented due to such omission.

The national report of Slovenia notes that in the Constitutional Court the petitioner may refer to the fact that an unconstitutional legal gap (omission of the legislator) exists in the disputed legal act; however, there have not been many cases where the petitioner itself raised the issue of legislative omission. Most frequently the issue of legislative omission is raised

by individual petitioners in their petitions. There are no special requirements to be found as to the content and structure of the petition filed due to gaps of legal acts in the Constitution, the Act on the Constitutional Court or the jurisprudence itself. The application to the Constitutional Court should always specify and provide grounds for the contravention to the Constitution of the disputed legal act.

In Hungary, the Constitutional Court deals with petitions in accordance with their content; if the petitioner requests it to state omission, the Constitutional Court deals with such petition within the limits of its competence. There are no special requirements to the application regarding the omission: the petitioner must specify the omission and which provision of the Constitution is contravened by this omission.

In Germany, the petitioner, while applying to the Constitutional Court, should specify the subject-matter of the complaint. In the instance of legislative omission it is sufficient to attribute the omission to a certain institution and briefly describe it. In filing a complaint regarding the failure to execute the obligation to protect fundamental rights, the petitioner must prove that a state institution has failed completely to undertake any required protection measures or enacted such legal norms, which are inappropriate and completely inadequate for the pursued objective to protect human rights. In principle, there is no need to specify which measures should be undertaken. However, if the petitioner believes the state will only fulfil its duty to protect human rights by enacting a specific measure, the petitioner must state this fact very clearly, and the nature of the measure to be enacted. It should be noted that in Germany a period is fixed for filing the complaints. This depends on which omissions – real or alleged – are subject to the unconstitutionality dispute. As noted in this report, in the legal system of Germany a real omission is that omission where the legislator in general fails to enact a certain legal norm, which is in harmony with the obligation of the legislator to protect the fundamental rights (including not only the instances, when in general no legal regulation is enacted, but those where the regulation exists but the protection to be guaranteed by the regulation is not provided), while an alleged omission occurs when a specific provision has been enacted, but there is an argument to the effect that it does not comply with the obligation of the legislator to protect; it is inappropriate or inadequate. If the subject-matter of the constitutional complaint is an alleged omission, the constitutional complaint should be filed within the period of 1 year. If the legislator enacted a respective legal norm, even though it does not guarantee appropriate protection of the fundamental rights, the

legislator is deemed to have fulfilled its duty to legislate. Considering the successive nature of the omission contravening the Constitution it is difficult to set a starting point; however, in principle, the constitutional complaint is acceptable as long as the omission exists, therefore in the instance of real omission the term of 1 year does not apply.

It should also be noted that in states where the Constitutional Courts do not investigate the issue of constitutionality of legal gaps, the Constitutional Courts receive applications from petitioners whose petitions are founded on legal gaps, which in their view, may give rise to breaches of legal regulation (Bosnia and Herzegovina, France, Georgia, Latvia, Russia). For instance, in Latvia 3-4 petitions of this nature are received per year.

3.3. Investigation of legislative omission on the initiative of the Constitutional Court

In Armenia, under the Law on the Constitutional Court, the Constitutional Court may look into all circumstances of the case *ex officio* without limitations. The Court assesses the law and the existing practice of implementation of the law.

The Constitutional Court of Austria may initiate investigation *ex officio* without overstepping the limits of its authority, however it should be related to a petition "from outside".

In Estonia the Supreme Court has no obligation to investigate legislative omission *ex officio*. Nevertheless, the Supreme Court in its full composition initiated investigation of legislative omission in the case of Brusilov, as the petitioner had no other effective legal measures for the defence of his violated right. The Supreme Court also acted on its initiative when investigating legislative omission in the "Resettlers case". The other cases connected with omission were initiated by the petitions of the President, the Chancellor of Justice or the courts.

Before 15 October 2007 in Lithuania, legislative omission was stated in a total of seven rulings of the Constitutional Court. All the above cases were taken to court on initiative of the courts or groups of Members of the *Seimas*, who did not directly request a ruling of unconstitutionality of the disputed provisions due to legislative omission and based their argument on contravention of the Constitution on other arguments. However, the Constitutional Court, having assessed the regulation disputed by the petitioner stated legislative omission in all these cases. It stated legislative omission and acknowledged the acts wherein legislative omission

was stated as contravening the Constitution, although the constitutional breaches occurred because of failure to establish the missing legal regulation in those legal acts. Legislative omission was not mentioned *expressis verbis* in these rulings. The Constitutional Court simply stated that the regulation ran counter to the Constitution because it did not establish a certain legal regulation that should have been established.

In Spain the Constitutional Court is empowered to limit itself to the subject and grounds of investigation specified in the petition. However, technically it can reformulate the grounds of petitions, and identify the principal presumption (reason) of the violation due to which the petition was filed, i.e. a certain legal norm (provision) which petitioners have challenged on the basis of its regulation or failure to regulate.

In Slovenia, both the petitioner and the Constitutional Court can initiate the investigation of legislative omission. Under the Law on the Constitutional Court, the Constitutional Court, irrespective of the petition and provided that there is sufficient basis to do so, may raise the issue of constitutionality of a legal gap in a law. The Constitutional Court is not restricted by the limits of investigation specified in the petition. The Constitutional Court may also investigate the constitutionality of legal acts not specified in the petition, which are either correlated or which need to be investigated in order to resolve the case.

The Constitutional Court of Hungary may establish legislative omission both *ex officio*, and on the grounds of petitions. Under the Law on the Constitutional Court, the Constitutional Court, having established legislative omission caused by the failure of the legislator to execute its legislative obligations as set out in the law, in breach of the constitution, will order the responsible subject to perform its duty within a fixed time span. It should be noted here that the Constitutional Court does not investigate all legal gaps: investigation is performed in essence, when a legal gap results in contravention of the Constitution.

Other Constitutional Courts (e.g. Czech Republic and Portugal) are not empowered to investigate legislative omission *ex officio*.

3.4. Legislative omission in laws and other legal acts

Under the Armenian Constitution, the Constitutional Court investigates the constitutional compliance of laws, resolutions of the National Assembly, presidential decrees and orders and decisions of the Prime Minister and legal acts enacted by municipal

institutions. It also examines the constitutional compliance of the obligations of international treaties before the ratification of the treaty. The national report of Armenia notes that legal gaps detected in the above legal acts should be investigated in each case in the assessment of constitutionality of legal acts. If elements of legal regulation are missing in a legal act of lower power, when they should be in there according to a legal act of higher power which is in line with the Constitution, the legislative omission will be held to have breached both the Constitution and the legal act of higher power. It is also noted that hitherto only a single case has occurred in the practice of the Constitutional Court when the legal gap was investigated while resolving the unconstitutionality of a sub-statutory legal act.

The national report of the Czech Republic notes that the Constitutional Court investigates the compliance with the constitutional order of laws and other legal acts where they contravene the Constitution or the laws. The Constitutional Court stated in one of its decisions:

“The Constitutional Court <...> has the power to repeal a rule of a lesser legislative force than an act, but only because of its incongruence with the constitutional order or laws. The Constitution does not give the Constitutional Court the right to abolish sub-statutory legal regulations of a lesser legal force for their incongruence with sub-statutory norms of a greater legal force or even for incongruence with a sub-statutory norm of a greater legal force. Thus, in terms of the abstract review of norms, the Constitutional Court is not a universal guardian of the congruence of a hierarchically built legal order on all its levels.”

This statement indirectly notes that the Constitutional Court is primarily the protector of constitutionality, even in the assessment of sub-statutory legal acts. It is also applicable to the procedure of statement of legislative omission.

In Estonia, as well as examining the constitutionality of legal gaps available in laws, the Supreme Court may also assess the constitutionality of other legal acts effective in the legal system of Estonia, and may establish legislative omission in the delegated legislation.

In Lithuania, the Constitutional Court is entitled and indeed obliged to state the presence of legislative omission in all legal acts, the control of which is within its jurisdiction.

The national report of Spain notes that, in principle, attention is only paid to legal gaps arising from the constitution, when a clear and implicit mandate of the Constitution is provided to enact a certain legal act or when legal or administrative omission violates fundamental human rights. Administrative legislative omission, unlike juridical legislative omission, in principle is not dealt with in constitutional procedure, unless it interferes with rights protected by the Constitution. In Spain, insufficient or inappropriate regulation in legal acts enacted by the government is not the object of constitutional investigation, unless exceeded authority (*ultra vires*) is encountered, since the Constitution delegates the power of enactment to the Government only within the limits of strictly defined competence.

In Portugal, the Constitutional Court may state missing legal regulation in laws, executive legal acts or regional decrees. This implies that if the Constitution is not executed due to the absence of any other legal rules or due to gaps of other origin, it is not regarded as a constitutionally significant omission.

In Slovenia, while implementing abstract constitutional control, the Constitutional Court may state the presence of legislative omission in legal acts of all levels. Some cases arose in the practice of the Court because the legislator left the regulation of certain relations to be regulated by acts of executive power, which was not in line with the Constitution (in the broad sense legislative omission is stated in this way).

In Hungary, the Constitutional Court does not perform investigation of all legal gaps: investigation in essence is performed, when a legal gap causes violation of the Constitution.

3.5. Refusal of the Constitutional Court to investigate and assess legal gaps

Constitutional courts do not always undertake the investigation of issues raised regarding constitutionality of legal gaps. A partial discussion at least of more typical practice of such decisions is therefore expedient here.

The national report of Armenia notes that, if the submitted petition corresponds with the requirements raised thereto, the Constitutional Court must accept, examine and assess the constitutional compliance of the legal gap, which is raised in the petition.

The national report of the Czech Republic notes that the Constitutional Court is entitled to refuse to examine the submitted petition, if it does not comply

with certain requirements. The Act on the Constitutional Court names the reasons for which a Justice Rapporteur may reject a petition:

- a. when the petitioner fails to remedy flaws in the petition within the time-period appointed;
- b. when the petition is submitted after the time-period specified for its submission by the Act on the Constitutional Court (in the event of constitutional complaints, within 60 days of the delivery of a respective decision);
- c. in the event of a petition filed by a person unauthorised to do so;
- d. the Constitutional Court is not empowered to decide on the issue raised in the petition;
- e. when the petition is unacceptable (for example, regarding an issue where a decision has already been made).

The Act on the Constitutional Court also notes the reasons for which the Court panel may refuse the examination of the petition: it is not expressly grounded or in certain definite instances is not subject to examination by the Constitutional Court.

In one case in Estonia, the Supreme Court declined to investigate the issue of a gap in legal regulation, as the petitioner exceeded its rights of initiating constitutional procedure. The Court decided that there are limits to the entitlement of the Chancellor of Justice and of the President to dispute improper action of the legislator. The President may only assess those legal acts which were submitted to him for promulgation and only when the norm, which was not enacted, should be included in the legal act or is in immediate relation thereto. Therefore, the President may not dispute improper action of the legislator, when the norm, which was not enacted, should be included into any other act which has already been enacted or effective. In this case the Supreme Court used the arguments of the doctrine of “political issues” and of the discretion of the legislator, stating that the legislator is competent to resolve which reforms to introduce and which groups of the society to support by these reforms. Therefore, the Court does not analyse the political expedience of the judgments enacted – the Court may only investigate the compliance of an act with the Constitution. In another case the Supreme Court of Estonia refused to acknowledge the unconstitutionality of the norm challenged by the Chancellor of Justice, since the Court may not proclaim national law as improper due to its contravention of European Union law. The Supreme Court rejected without examination five

individual complaints requesting that a certain legal act be pronounced unlawful due to legislative omission. The Court decided that in those instances petitioners made an inaccurate assessment of the situation; that legislative omission did not exist, while the legal regulation was sufficient in pursuance of the guarantee of the petitioners’ procedural rights.

In Lithuania, the Constitutional Court rejects the investigation of legal gaps due to the absence of grounds for investigation of legislative omission, i.e. when the Constitutional Court may not state that certain legal regulation should be established precisely in the legal acts under investigation and that the failure to establish it contravenes the provisions of the Constitution. Also, having acknowledged a certain legal regulation as contravening the Constitution in the previous case and thus creating preconditions for occurrence of a legal gap, in a subsequent case the Constitutional Court may not acknowledge that this legal gap, which appeared as a consequence of its own activity, is legislative omission, since this would negate the obligation of the Constitutional Court to acknowledge legal regulation as contravening the Constitution.

The national report of Spain notes that the Constitutional Court only examines those legal gaps that arise from the violation of the constitutional mandate (when a legal norm, the enactment whereof is provided for in the constitution, is not enacted). According to the Court’s practice, “it is obvious that it is not possible to deduce the unconstitutionality of a rule due to not regulating a specific matter unless, as has been said, an express constitutional mandate exists, aimed moreover at that rule and not at a different one”. Technically, there is no legal gap, consequently, no necessity to perform constitutional control, when legislative inaction is the result of political choice.

In Portugal, the Constitutional Court refuses the assessment of unconstitutionality of the norm due to omission, which is mentioned in the petition when concrete control of norms is at stake. It decides thus due to the absence of legality of the petitioner’s petition, and due to failure to follow the rules of procedure. However, these are not instances of real refusal, since the procedural rules were violated in these instances. The Constitutional Court can decline to examine the case for formal reasons, which depends on the President of the Court, who resolves whether petitions stemming from omission should be accepted for examination or not, even if tentatively the entire petition should be acceptable. If the President of the Court considers the petition deficient, he notifies the petitioner and gives some instruction as to how to cure the defect. Petitions will not be

accepted if they are filed by a person or institution not entitled to do so, or if the indicated deficiencies are not remedied. The final decision over acceptability is made by the Court panel. The national report of Portugal points out a situation where in the course of the Court's proceedings of the case due to omission, a law is enacted the omission whereof has been addressed. The Constitutional Court of Portugal had three such cases in its practice. In all three cases the Constitutional Court resolved in favour of the proceedings (eliminating the option of rejection because the need for examination no longer existed), and resolved that because the legislation was in place, contravention of the Constitution due to omission was absent. The Court emphasised that the presence of the omission is assessed at the moment of the court announcing its resolution. Thus, in the constitutional jurisprudence of Portugal such instances do not form grounds for the refusal of examination of a case due to unconstitutional omission, but it is acknowledged that the omission does not exist. A similar instance occurred in another case, although in that instance a normative act was not promulgated on the very day of the decision by the court. Nevertheless, the legislator had already enacted the main principles of the law, regulating the legal relations as an object of the petition, and the court resolved that this was sufficient for the acknowledgement of absence of constitutional omission.

In this context it should be noted that Constitutional Courts, which do not investigate unconstitutionality of legal gaps, refuse to investigate petitions, which are grounded on the presence of legal gaps in legal regulation (for example, Latvia, Ukraine).

3.6. Initiative of investigation of the “related nature”

An absolute majority of Constitutional Courts noted that they do not perform any investigation of the “related nature” for the procedure of statement of legislative omission (for example, Armenia, Czech Republic, Estonia, Lithuania, Slovenia, Turkey and Ukraine). The Constitutional Courts of Bosnia and Herzegovina and Montenegro noted that in some cases they resolve issues related to constitutionality of abstract legal regulation, if such legal regulation presumes contravention of constitutional human rights. Spain emphasised in its report that the investigation linked with securing equal rights of individuals may be regarded as investigation of the “related nature”. In this sense, the initiative for its examination corresponds to the claimant denouncing discriminating treatment, since it falls to him to provide a *tertium comparationis* and to demonstrate the identity of reason which imposes equal treatment

for the supposition that is excluded or not contemplated in the rule applied to his prejudice. In Portugal, the Constitutional Court emphasised that while considering the issue submitted to it, which was not deemed to have caused the problem of legislative omission, it decided that some situations may be viewed as analogous to situations of legislative omission, upon statement of which the fundamental rights and freedoms are endangered. According to the Constitutional Court of Portugal, examples of such situations may include cases where a new law annuls the existing law enacted for the purpose of implementation of the constitutional norm, cases when contravention to the Constitution results from insufficient or improper application of the existing laws, and cases where contravention to the Constitution is caused by absence of regulation of legal relations in “analogous” situations.

4. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1. Peculiarities of the investigation of legislative omission

The mission entrusted to constitutional control institutions is to guarantee the constitutionality of laws and other legal acts. Some Constitutional Courts do so in the execution of both the control *a posteriori*, and the control *a priori* (for example, Cyprus, Estonia, Hungary, Ukraine). The competence of other courts as a rule only includes control *a posteriori* (Croatia, Germany, Macedonia, Poland, etc.). Other courts, as a major part of their activities, implement a *a posteriori* form of control, while *a priori* control applies only to the verification of constitutionality of international treaties before ratification (Belarus, Czech Republic, Lithuania, Russia, Slovenia and Spain). The French Constitutional Council executes only *a priori* control of the constitutionality of laws.

Constitutional control institutions investigate and assess legal issues. The compliance with the Constitution of a disputed act or its provisions is performed according to the content, form of the act, and the enactment procedure. The investigation of legislative omission ought to be deemed one of the aspects of investigation of the constitutionality of laws and other legal acts, facilitating the guarantee of compliance of the legal system with the constitution, the supreme law of the country. It should be noted that the Constitutional Courts in a number of European countries investigate and assess legislative omission (Austria, Azerbaijan, Belgium, Croatia, Czech Republic, Estonia, Germany, Hungary, Italy, Lithuania, Montenegro, Poland, Portugal, Serbia, Slovenia, Spain,

Switzerland and Turkey). With certain exceptions, the Constitutional Court of Russia may be attributed to this group, which *de facto* investigates gaps of legal regulation, as well as the Constitutional Council of France, which, for the execution of a priori control resolves the problem of legislative omission on a certain level while applying the investigation mechanism of “negative incompetence”.

The practice of Constitutional Courts in each of these states is noted by peculiarities of the scope, methodology, and decisions made in the investigation of legislative omission. The intensity of investigation is different, too. The peculiarities and limits of the investigation of legislative omission are caused by the peculiarities of the national constitutional proceedings, the object of petitions and the place of the act under inspection within the legal system, etc., established in the Constitution and in laws. Occasionally, due to a small number of such cases examined, no conclusions are suggested, regarding the peculiarities of examination of such cases (Croatia).

The other group of Constitutional Courts and constitutional control institutions does not resolve the problems of legislative omission. It results from both the scientific doctrine prevailing in a country and the effective legal provisions defining the jurisdiction (competence) of constitutional control institutions. Some institutions performing the function of constitutional control note that the concept of legislative omission in general is not known in the system of the country (Denmark), that it is not used in the constitutional jurisprudence (Norway). According to the Supreme Court of Ireland, the concept of legislative omission which is defined in the questionnaire as “a legal gap prohibited by the Constitution (or any other act of a higher power)”, is not known in constitutional law or in the legal system of the country. The national report of Georgia emphasises that the presence of a legal gap does not form grounds for the appeal to the Constitutional Court, while the Constitutional Court has stated that the investigation of legal gaps is not the competence of the Constitutional Court. In 1994, the Constitutional Court of Bulgaria established that it has no competence to resolve regarding petitions requesting the assessment of the existing gaps of laws, since the court only investigates laws already enacted. More recently (in 2001) the Bulgarian Constitutional Court of Bulgaria has stated that it may not interpret constitutional provisions in such a way that the interpretation would limit the powers given by the Constitution to the National Assembly. Through interpretation the Constitutional Court may not provide concrete instructions to the National Assembly as to its behaviour; naturally, neither may it limit its function of sovereign legislator: the issue of gaps in the legislation does not belong to the area of constitutional

supervision due to the doctrine that the Constitutional Court may not interfere with the constitutional powers given to the National Assembly only. The powers of the Constitutional Court are strictly and broadly defined, and powers that are not provided for may not be justified. Therefore, the Constitutional Court may not decide, how legal gaps should be corrected. The Constitutional Court refuses to accept the challenges created by legal gaps even when legal regulation is missing in that aspect, when it is provided for in the Constitution that this aspect is subject to regulation by a law. In general, should any relations be regulated by a law, although they are not, this forms grounds for the Constitutional Court to refuse the investigation of this issue irrespective of a gap which occurs in legal regulation. The constitutional control system of Luxemburg has no investigation of legal gaps, either.

Apparently, as regards the review of peculiarities of investigations by Constitutional Courts, which investigate and assess legislative omission, it would be most reasonable to start with the Constitutional Courts, which have a rich history of this type of investigation and have formulated consistent constitutional doctrine for the investigation of legislative omission. Legal literature on the issue of legislative omission often remarks upon the Constitutional Courts of Portugal and Hungary, which are entrusted with competence to state unconstitutionality of inaction by law-making subjects.

The Constitution of Portugal establishes that, at the request of the President of the Republic, the Ombudsman, or presidents of Legislative Assemblies of the autonomous regions, the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable; if the Constitutional Court identifies the unconstitutionality of inaction, it notifies the competent legislative institution about it. The Constitutional Court of Hungary is also empowered to state unconstitutionality of subjects of law-making. Under the Law on the Constitutional Court of Hungary, six types of legislative omission are distinguished:

- a. unconstitutional failure to perform a legislative duty arising from a concrete statutory authorisation;
- b. failure of the legislator to perform a legislative duty following from a provision in the Constitution;
- c. failure to adopt an Act of Parliament specified in the Constitution and necessary for the enforcement of a fundamental right;

- d. failure to perform a legislative duty needed for the enforcement of a subjective right (the legislator shall meet its obligation to legislate even in the lack of a concrete mandate by a law if it recognises that there is an issue requiring statutory determination within its scope of competence and responsibility);
- e. a special case of unconstitutional omission when the Parliament fails to amend an Act of Parliament which has become unconstitutional by way of an amendment of the Constitution;
- f. unconstitutional omission in case of a failure to provide for the harmonisation of international law and domestic law, violating a fundamental right.

Not only the Constitutional Courts of Portugal or Hungary, which were awarded with the above powers by the Constitution or the law (these courts reasonably claim to be leaders of this investigation), but also the Constitutional Courts possessing no powers directly consolidated in legal acts may take pride in rather mature experience of investigation of constitutionality of omissions in legal regulation (Austria, Germany, Italy, Lithuania, Poland, Slovenia, Spain and other Constitutional Courts).

National reports do not emphasise the areas of legal regulation where the most frequent disputes arise regarding the unconstitutionality of gaps of legal regulation existing therein. Nevertheless, some of the national reports emphasise that the majority of problems of this kind appear in the area of protection of personal rights and freedoms (Italy, Portugal, Slovenia), and in the implementation of the principle of equal rights (Belgium, Poland). The investigation of omissions in the instances of violations of constitutions of the countries and the fundamental human rights established in the Convention for the Protection of Human Rights and Fundamental Freedoms is also a practice of some Constitutional Courts of some countries.

The analysis of the practice of Constitutional Courts in the examination of constitutionality problems of legislative omission emphasises the features characteristic of concrete courts, and an individual approach towards the mission of the court to investigate and assess gaps of legal regulation.

For instance, the Constitutional Court of Portugal is distinguished not only by the fact that its competence to investigate gaps of legal regulation is provided for in the Constitution or that it has accumulated significant experience of examination of such issues. The national report notes that with the understanding

that in certain instances legislative decisions are required and the failure to execute them (legislative omission or failure to execute a constitutional rule) is in contravention of the constitution, and having received a request, the Court may undertake to assess and resolve, whether the requirement was executed to initiate concrete legislative measures to remedy the legal regulation due to which the omission was stated. The supervision procedures applied may be related to any such "issue" with regard to which the Constitution, as noted above, provides for the obligation to adopt legislative measures "essential" for the implementation of constitutional rules. In this aspect, as noted in the national report, the activity of the Constitutional Tribunal of Portugal does not distinguish itself from any of its other activities. The national report emphasises that other courts of the country which have requests to verify procedural laws, do not raise the issue of omissions. The Constitutional Tribunal does not assess legislative omissions occurring in the course of resolving concrete juridical disputes by way of judicial proceedings. The investigation of omission is limited by the necessity to interpret and assess the *norma normarum* fact of refusal to execute as such, while a concrete constitutional obligation exists with regard to competent legislative institutions.

Rulings by the Constitutional Court of Hungary make statements of the presence of omission and of its essential elements, and the legislator is given a time span to remedy the omission. The reasoning which substantiates the ruling includes arguments forming grounds for the Constitutional Court to state the fact of omission. Such competence of the Constitutional Court is logically derived from the concept that where the Court finds there has been a breach of the Constitution, the legislator must eliminate the omission, since the Constitutional Court cannot assume responsibility for legislation. In Hungary, in the practice of guaranteeing constitutionality, investigations related to the identification of omission have a rather broad application. The Constitutional Court, pursuant to its competence, has more than once established the necessity to undertake legislation.⁹

⁹ In recollection of the fact that for the entire decade since its establishment the activity of the Constitutional Court of Hungary was frequently named as "activist", the authors of the national report naturally noted that L. Sólyom, the President of the Constitutional Court of Hungary, wrote that judicial "activists" are generally fond of aspects of omissions.

The Constitutional Court of Spain investigates omissions while executing the constitutional control both, *a priori*, and *a posteriori*. Before 1985, in the execution of *a priori* control the Constitutional Court used to establish the way for the legislator to remedy legislative omission, and this was a necessary precondition for the guarantee of constitutionality of draft legal acts under preparation (since 1985 in Spain such control applies to international treaties only, and until then it used to apply also to organic laws). In the opinion of the Constitutional Court of Spain, in the execution of control of this kind the judicial intervention is less “aggressive” (provided that it is assessed in the aspect of separation of powers), since in this instance the legislator is the only subject that fills the gap specified by the Constitutional Court, while the Court confines itself to the role of an assistant. The establishment of legal regulation always remains in the hands of legislative power. In the instance of a *a posteriori* control the investigation of legislative omission is distinguished by the fact that the Constitutional Court of Spain operates on the legal text (or the system), which expresses the final willpower of the legislator and according to which individual legal acts are occasionally enacted, too.

In Italy the Constitutional Court most frequently identifies omissions while verifying legal norms related to cases dealing with the implementation of human rights (social rights, such as rights to maternity allowance and invalidity pensions, and procedural ones), when similar legal regulation does not include all groups of people and this is not justifiable by objective differences between those groups.¹⁰ Generally, in the context of disputed regulation the Constitutional Court of Italy seeks the only suitable possibility to supplement regulation, and if it identifies (as is usually the case) that various, parallel, although not similar decisions, rather than a single decision regarding the improvement of legal regulation (i.e. which would be constitutional) are possible, it refuses to accept such petition for investigation. Therefore, there is a single “supplementing” ruling (no. 218 of 1995), wherein the contravention of a legal act to the Constitution is stated.

¹⁰ For example, by the decision in case no. 109 of 1986 the request for investigation was rejected regarding the compliance to Article 3.1 of the Constitution of Italy (the principle of equality) of a provision of the decree on the annulment of decisions on the extension of the term for the debtors of compulsory eviction from municipal flats. The Court emphasised that the legal regulation was incomplete and in this instance the Court would have had to assess whether the exemption to a concrete category of the population is related with increased requirements to this category. Such assessment, in the opinion of the Court, would equal legislative function, which was apparently not granted to the Constitutional Court.

It should be noted that in Croatia the Court also investigates the constitutionality of judgments of other courts on interpretation of gaps (for example, in its ruling no. U-III-1621/2001 of 30 March 2005 it recognised the judgment of the Supreme Court of Croatia on the content gap of the principle of equality consolidated in the Labour Code, as unconstitutional). Since the number of constitutional justice cases on legal gaps and legislative omission is small, the national report notes that it would be particularly difficult to identify any peculiarities of investigation of these cases.

In Austria, in the review of both concrete and abstract norms, legislative omission, even if unconstitutional, is principally excluded as a procedurally admissible argument. In this regard, the application would have to be rejected. When, however, the constitutionality of an existing regulation depends on the condition that no related unconstitutional omission has occurred, then the omission may indirectly be made a procedural topic and even the subject matter in dispute *per se*. Such statement of omission would be an argument grounding the nonconformity of the existing legal regulation with the Constitution. As noted in the national report, certain legal-political tendencies demonstrate that the jurisdiction of the Court tends to recognise legislative omissions as an object of investigation, primarily in the area of interpretation of the fundamental social rights (which, according to the present constitutional situation, do not exist in the rank of the constitution).

The Constitutional Court of the Republic of Lithuania formulated the official constitutional doctrine of such investigation whereby the investigation is only possible under the following conditions:

- a. if laws or other legal acts (parts thereof) of lower power do not establish certain legal regulation, the Constitutional Court enjoys the constitutional power to recognise that these laws or other legal acts (parts thereof) contravene the Constitution or other legal acts of higher power in cases when due to the fact that this legal regulation is not established in precisely the investigated laws or other legal acts (precisely in the investigated parts thereof) the principles and/or norms of the Constitution and provisions of other legal acts of higher power may be contravened;
- b. if such legal regulation must not be established in precisely that disputed legal act (in precisely that part thereof), the Constitutional Court states that there is nothing to investigate regarding the request of the petitioner;

- c. a legal gap, which appeared due to the fact that the Constitutional Court recognised certain legal regulation as anti-constitutional may not be considered by the Constitutional Court as legislative omission. Moreover, note is certainly taken of how the said legal gap occurred (i.e. whether it is legislative omission, created by the law-making action of the subject that issued the legal act or this legal gap occurred under other circumstances, for example, due to the fact that, by its ruling, the Constitutional Court recognised legal regulation established in a certain legal act (or part thereof) as contravening the Constitution or another legal act of higher power).

Therefore, the Constitutional Court may state legislative omission which is in the acts under investigation in those instances, when due to the fact that the legal regulation is not established precisely in the laws or other legal acts under investigation (precisely in the parts thereof under investigation), the principles and/or norms of the Constitution, those of other legal acts of higher power may be contravened.

The Constitutional Tribunal of Poland comprehends the omission under investigation as “incomplete regulation”, as certain legislative deficiency (a flaw). According to the Constitutional Tribunal of Poland the control of “legislative inaction” does not fall within the jurisdiction of the Tribunal, which is implemented by rulings finalising the investigation of the cases of all types (with the exception of the cases initiated due to the constitutional complaint). In the ruling of 2 July 2002 the Constitutional Tribunal “disassociated” the execution of such control of gaps present in legal regulation. It noted that it did not possess the requisite competence. The formula of the “negative legislator” proposed by H. Kelsen was also reflected in the ruling of 7 August 1998, wherein the Tribunal stated that “object of proceedings before the Constitutional Tribunal <...> could consist exclusively of a normative act (its specific provision), on the basis of which a court or a public administration body had issued a final decision concerning freedoms, rights or obligations laid down in the Constitution.” The consequence of the possible identification by the Constitutional Tribunal of incompatibility with the Constitution would consist of the elimination of the challenged provision from the legal system. Therefore the Tribunal performs the role of a “negative legislator”, but it does not have any law-making prerogatives. The Constitutional Tribunal distinguishes legislative omission and incomplete regulation (omission of law-making). According to the Constitutional Tribunal, legislative omission occurs when “a given issue is deliberately left outside the scope of legal regulation by the legislator”. The

investigating of constitutionality of the legislative omissions is not “the object of cognition on the part of the Constitutional Tribunal”. The approach of the Constitutional Tribunal to incomplete legal regulation is different. The Constitutional Tribunal of Poland verifies the constitutionality of such regulation.

The practice of several decades of the Constitutional Court of Serbia allows the conclusion that while in the execution of a posteriori control of laws and all normative acts when encountering legislative omission or a gap of the legal regulation in disputed acts this court identifies the presence of a legal gap as the grounds for unconstitutionality or illegality of a disputed normative act. In several decisions the Constitutional Court of Serbia stated that the unregulated issues which ought to have been regulated by a law or a sub statutory act, is the reason for the unconstitutionality or illegality of the entire disputed act.

The national report of Slovenia *inter alia* notes the peculiarities of investigation of legislative omission in constitutional justice cases related to the implementation of fundamental rights and freedoms. One example is the case examined by the Constitutional Court of Slovenia over election rights. The ruling stated that neither the National Assembly Elections Act, nor the Local Elections Act provided for detailed and clear regulation for voting by mail. The presence of such a gap in the above legal acts was deemed anti-constitutional and in breach of election rights. Considering the above, the Constitutional Court ordered the filling of the existing gap in legal acts within the period of one year. The Constitutional Court of Slovenia executes *a posteriori* control as well as *a priori* control. In the application of this form of control it may only state legislative omission while investigating the constitutionality of international treaties.

The Federal Constitutional Court of Germany executes both abstract control (when the Federal Government, the Land government or 1/3 of members of the Bundestag apply to the Constitutional Court), and the concrete control of norms (when courts apply to the Constitutional Court). An application to the Federal Constitutional Court may be filed, when there is a clear violation of rights and freedoms. The national report provides a number of examples of constitutional jurisprudence, but does not distinguish the type of case where legislative omission arises most frequently.

The Supreme Court of Estonia encounters the issues of legislative omission in the execution of both abstract and concrete control. In the execution of abstract constitutional control in two cases this court presented an exhaustive interpretation of principles of control of

legislative omission. In addition, in the so-called Utility Works Case, the Supreme Court reviewed the constitutionality of legislative omission on the basis of a referral by a court within concrete norm control.

Some Constitutional Courts within their jurisprudence use the categories of “legislative gaps”, “unconstitutional gaps of law”, “reproduced omission” or “a legal gap as the grounds for unconstitutionality or illegality of a disputed normative act”. (For instance, in its jurisprudence, the Constitutional Court of Bulgaria uses the concept of “legislative gaps” in order to identify gaps in laws, i.e. the entire absence of legal regulation in a concrete instance (for example, the law does not provide for the possibility of declaring the removal of a justice of the Constitutional Court, if, while being a member of parliament, he participated in the enactment of the law under investigation by the Constitutional Court (ruling no. 1/95 in case no. 9/95), leaving the problem of legislative gaps for the decision of the National Assembly).

The Constitutional Court of Belgium (the Court of Arbitration before 7 May 2007) initially investigated “unconstitutional gaps of laws” in disputes, whether the legislator pursued the principle of constitutional equality and non-discrimination; afterwards such gaps were stated or detected while executing the control of the constitutional legitimacy principle, i.e. the rule, inscribed in a number of constitutional provisions, whereby essential aspects should be regulated by the legislator itself, and not delegated to the executive authorities. The national report notes that this Court investigates both requests for annulment of an act and prejudicial issues. With regard to requests for annulment, in its various decisions the Court annulled the laws only inasmuch as they “do not provide for” or “the law is not applicable”, i.e. unconstitutionality is recognised due to the incomplete nature of the law – consequently, its gaps. It should be noted that in the opinion of the Cassation Court, application to the Constitutional Court is not necessary, if the party to the case raises the issue of a gap. Under the Constitution, this court resolves issues regarding the violation of a law, a decree or an ordinance, however, such argumentation in the opinion of the authors of the national report, should not be deemed finite: the Constitutional Court ought to be addressed on any issue, which may be raised due to the constitutionality of the norms, which it is competent to verify.

In the jurisprudence of the Constitutional Court of Armenia a specific definition of the omission under investigation is formulated. Situations where legal uncertainty stems from the interpretation of legal provisions in the process of implementation of the law that is in conflict with the Constitution, and this interpretation cannot directly become an object of

constitutional control are known as “reproduced gaps”. Such cases of constitutional justice are often connected with issues of human rights, while in the instances of constitutional breaches by legal acts, the main conclusions from those cases are that legislative omission has a direct negative impact on the implementation of constitutional rights and freedoms, and prevent the development of a democratic state under the rule of law.

The Constitutional Court of Turkey connects legal gaps with “defective regulation”. It may only state omission when no elements obligatory under the Constitution are identified in the legal regulation under investigation. In addition, the fact of omission alone (or, “defective regulation”, as the Court defines omission) is not in itself sufficient grounds to state the non-conformity of the regulation to the Constitution.

Some courts relate the peculiarities of investigation of legislative omission with the fact that they may encounter such issue only as the problem of the main investigation. For instance, the Constitutional Court of Russia investigates legislative omission as a problem, related to the key issue raised in the request: It is examined following the procedure of resolution of constitutionality verification of ordinary norms or disputes of competence. Neither there are any peculiarities of proceedings in the examination regarding the protection of personal rights, while analysing laws on the organisation and activity of public authority, as well as gaps in the material, procedural, private or public law.

Two points distinguish the Constitutional Council of France from other Constitutional Courts or analogous institutions. Firstly, it executes control a priori, secondly, it investigates the problem of legislative omission only to a certain level applying the investigation of “negative incompetence” (between 1982 and 2005 it adopted 83 decisions, related with “negative incompetence”, i.e., the failure to execute entire competence in the entrusted area, and on these grounds annulled disputed provisions in 23 cases, while the requests of 60 decisions were rejected).

One more peculiarity in the practice of the Constitutional Council of France is that the strictness of control of “negative incompetence” of the legislator is determined by the accuracy of constitutional verification norms or the requirements of higher accuracy raised by them for the legislator. The accuracy of constitutional requirements is particularly connected with public freedoms and finance law, tax law, as well as criminal law. Regarding the first area, it should be noted that Article 34 of the Constitution of France provides that laws should establish rules for the fundamental guarantees provided to citizens,

while pursuing the implementation of constitutional rights and public freedoms. This is the requirement to the legislator to properly select the implementation guarantees essential for the rights protected by the constitution, and it should be implemented particularly precisely. For instance, the provisions related with the guarantees of the right to private life and the fundamental guarantees provided in pursuance of implementation of public rights, should also include “appropriate and specific” guarantees, so that they comply with constitutional requirements. Therefore, the law should be accurately formulated and the establishment of definitions may not be determined by the executive power which should safeguard the implementation of the law (Decision no. 2004-499DC of 29 July 2004). In the area of tax law, in the application of Article 34 of the Constitution of France, the law should establish the grounds for exaction of taxes of all types and sizes, methods of exaction. Criminal law is yet another area demanding extreme accuracy. Article 8 of the Declaration of the Rights of Man and of the Citizen provides that the law shall only provide for such punishments as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offence. Out of this rule the Constitutional Council formulated the requirement that the legislator should define violations in sufficiently clear or precise words aiming at the prevention of arbitrary rule. The Constitutional Council recognises those provisions of criminal law as unconstitutional, wherein the definition of the violation by means of unclear concepts presumes the arbitrary rule by the judge. On the other hand, there are areas wherein “negative incompetence” does not entail any such consequences. Social law is such an area. According to Article 34 of the Constitution of France designed for labour, trade-unions and social protection rights, a law “establishes fundamental principles”. This requires a lower level of accuracy than under the circumstances, when “a law provides for the rules”. The Constitutional Council also recognised broad possibilities for the legislator to make assessment in the area of economic and social rights consolidated in the Preamble (which is a part of the constitutional system) to the Constitution of 1946.

The Constitutional Court of Moldova occupies an intermediate position between the courts investigating legislative omission and those that recognise, but do not investigate it. The national report notes that if in the course of investigation of a case the Constitutional Court of Moldova states the presence of certain legal gaps related with the implementation of constitutional provisions, it will point out the problem of respective bodies by an official address regarding the elimination of these gaps.

Other Constitutional Courts recognise the existence of the problem of legislative omission in general, but do not investigate it (Albania, Cyprus, Georgia).

Under the Constitution of Georgia, the Georgian Organic Law on the Constitutional Court of Georgia and the Law on Constitutional Proceedings, the Constitutional Court of Georgia has no competence to examine legislative omissions, and if it receives a request for investigation of something like this, it will decline to accept it. Under Article 146 of the Constitution of Cyprus, the Supreme Court of Cyprus does not investigate legislative omissions. The theory of the constitutional law of Cyprus puts more emphasis on the administrative omission, when sub-statutory acts do not implement the requirements derived from a law.

The Constitutional Court of Latvia can be distinguished from the above courts by the fact that in its jurisprudence it has somewhat greater “freedom” to speak of omissions. The occurrence of a legal gap is recognised as a possible consequence of the Court’s resolution regarding the compliance of legal norm with a norm of higher power. In order to avoid this situation, the Constitutional Court of Latvia not only establishes temporary regulation, but occasionally also advises on how to proceed in a concrete situation. For example, in one case, the Constitutional Court of Latvia determined that the unlawful legal regulation would remain in force for a fixed period, i.e., until the legislator remedies the flaw. The Constitutional Court of Latvia “prompted” the legislator that it had to try to resolve the situation in such a way that account was taken both of the rights of home owners and those of former tenants. Moreover, the time for elimination of lacuna is also provided so that – as the Court notes in the fact-establishing part of its ruling – a more effective mechanism could be created to monitor whether any arbitrariness occurs in instances where home owners seek to evict tenants or unlawfully increase their rent.

4.2. Establishment of the existence of legislative omission

Under which criteria are gaps of legal regulation in constitutional jurisprudence recognised unconstitutional?

Reports from courts that investigate and assess legal gaps prohibited by the Constitution, note that it is crucial when identifying legislative omission to ascertain whether a specific constitutional requirement to adopt certain rules has been executed (Austria, Hungary, Italy, Portugal, Spain). In their responses, the majority of Constitutional Courts acknowledge that lack

of legal regulation or incomplete regulation is the main argument in the identification of legislative omission. “Explicit obligation”, “rule establishing a concrete obligation”, “special obligation of the legislator”, “implementation or the failure to implement legislative measures”, “inaction by the legislator”, “lack of content of legal norms”, “partial inaction by the legislator”, “incomplete regulation” – are the categories used to describe the practice of the Constitutional Courts in the investigation of legal gaps contravening the Constitution.

The identification of legislative omission is usually related to the absence of certain provisions of a law (or of another legal act), which the Constitution states should be in place, and to failure to execute a certain mandate. The lack of such legal regulation allows the issue of lack of constitutionality to be raised. In the practice of courts that investigate legislative omission, concrete elements of legislative omission are identified by the character, the scope of control executed, and the legal verification measures applied.

For instance, in the opinion of the Constitutional Court of Spain, unconstitutional legislative omission occurs when the Constitution imposes on the legislator the need to issue rules of constitutional development and the legislator fails to do so. In pursuance of establishing the omission understood in this way, the Constitutional Court, primarily has to do the following:

- a. establish the need for the development of constitutional rules;
- b. identify the existence or absence of such rules;
- c. having ascertained that such rules are not adopted, confirm that the legislator has not performed his task.

The national report notes that the first imperative does not create major problems in cases of fundamental human rights, since such rights are always directly applied. In the instance of identification of legal rules it is important to have those rules in a law, regardless of the formal name or the object of regulation. The crucial point is not the regulation technique or method, or even the time of enacting legal regulation, but the fact that the development of constitutional rules is not guaranteed. Therefore, reference may only be made to a legislator who neglects constitutional tasks where the legal regulation relevant to that development is missing.

The approach of the Constitutional Court of Portugal is similar. In determining the existence of legislative omission, the Court finds it highly relevant that the

legislative omission is identified in cases where rules are not followed, that place the legislator under an express obligation to enact legal measures to implement the Portuguese Constitution. Under this interpretation, for a legislative omission to exist, at constitutional level there must be “a concrete, specific requirement to legislate, set out in a rule that possesses a sufficient degree of precision” (ruling no. 474/02). This is to say that there must definitely “[be] a specific incumbency on the legislative authorities which they refrain from fulfilling” (ruling no. 359/91). This is a constitutional requirement the meaning and scope of which are clearly defined. The main criterion whereby legislative omission is stated is the failure to implement or the implementation of legislative measures aiming at the execution of constitutional rules. In the establishment of the cases of legislative omission, the checking of the implementation of the obligation to enact legislation and the results of verification of the results of execution of obligations are not the most significant aspects of the investigation. The pivotal point is an investigation aimed at the precise evaluation of the compliance of legislative measures with the constitutional imperatives that create “a specific, concrete constitutional incumbency or charge, <...> whose meaning and scope are clearly defined and leave the legislative authorities no margin for manoeuvre as regards their decision to intervene” (ruling no. 276/89). A further instance of occurrence of legislative omission is the abolition of the laws that are intended for the implementation of constitutional rules without enactment of legal regulation safeguarding a concrete constitutional imperative.

Sometimes, Constitutional Courts (Austria and Italy) attribute significance to the establishment of legislative omission of failure to execute mandates arising from the Constitution. For instance, in the practice of the Constitutional Court of Austria, legislative omission (inaction of the legislator) is stated when the legislator did not execute the mandate provided for in the Constitution (*Verfassungsauftrag*) or when a legal act violates fundamental rights. In Italy, omission is perceived as “incomplete action” and as a gap originating in the legal system after corresponding legal acts are recognised as unconstitutional by the Constitutional Court, however, only so-called “partial inaction of the legislator” may be and is investigated as the object of a constitutional justice case. The Court enacts so-called “additional” rulings to “overcome” such inaction.

Frequently (Estonia, Hungary, Lithuania and Poland) legislative omission is related to the lack of content of a legal act.

The Constitutional Court of Hungary states legislative omission when a concrete lack of content of a legal act is identified (most frequently such deficiency interferes with full implementation of some fundamental right). Therefore, in the holding part of its ruling the Constitutional Court often draws the legislator's attention to positive requirements as to how to regulate specific issues.

In the jurisprudence of the Constitutional Court of Lithuania the key arguments for the statement of legislative omission and acts stating legislative omission recognised as contravening the Constitution were that the failure to identify the lacking legal regulation in those acts would contravene the Constitutional and/or the law. Poland draws a distinction between legislative omission and incomplete regulation (law-making omission). The Polish Constitutional Tribunal executes control of precisely that kind of incomplete regulation, i.e. legal acts, which have been enacted but do not regulate certain relations. Under Article 188 of the Polish Constitution, the Constitutional Tribunal may only investigate constitutionality of concrete norms. The key argument for the statement of legislative omission (i.e., legal non-regulation) is the statement that normative regulation complying with the Constitution is lacking. In Estonia, in the course of identification of legislative omission, the Supreme Court should in the first instance determine whether the missing norm should be incorporated into the disputed legal act.

The criteria for identification of legislative omission of a more concrete character arranged in a more consistent or fragmentary form may also be found in the jurisprudence of Constitutional Courts (Germany, Russia).

In Germany, legislative omission is usually identified where there is no legal regulation (genuine omission) or where the legal regulation exists, but the requisite protection is not guaranteed (non-genuine omission). When assessing legislative omission, the German Federal Constitutional Court takes into account the principle of the state under the rule of law and the principle of democracy. It also considers the fact that the legislative authority must take essential decisions on its own, rather than obliging the executive authority to do so. Petitioners basing their cases on legislative omission need to demonstrate that the public authority did not enact relevant regulation, which would have protected its rights, or that the legal regulation in force does not guarantee the protection of rights of the petitioner.

As noted, the constitutional jurisprudence of Russia formulated the criteria which are taken into account when gaps in legal regulation are found unconstitutional. For instance, the general law criterion of a definite, explicit and unambiguous legal norm is derived from the constitutional principle of equality of all before the law and the court (Article 19.1 of the Constitution of Russia). It is grounded on the fact that equality can only be ensured through a similar understanding and interpretation of legal norms by all who apply the law. The obscurity of the content (gaps) enables the law being applied to be interpreted in an unrestricted manner. The option of arbitrariness may not be justifiable. Those norms are recognised as unconstitutional and possessing gaps which contravene the following principles: stability of law and normative definiteness of law, inadmissibility of abuse of one's rights, justice, humanity and proportionality, balance between violation and responsibility, inability to be a judge in one's own case, confidence of a citizen in law and justice, guarantee of execution of court decisions, *non bis in idem*, *audi alteram partem*, etc.

More than one Constitutional Court relates legislative omission to adequate guarantees of protection of human rights (Belarus, Belgium and Czech Republic). For instance, in the Czech Republic, the key criterion for the recognition of omission as contravening the Constitution is the fact that such omission highlights "undue inequality" which allows different assessment of two or more groups of persons, when such assessment is not justified by the protection of public interests or action for the benefit of society. The Constitutional Court of Belgium also encounters the issues of legal gaps (internal or ordinary and external or qualified) while resolving cases on the guarantee of the principles of equality and equal treatment. According to the report of the Constitutional Court of Belarus, the key criterion for identification of legislative omission for this court is the fact of infringement of human rights giving rise to constitutional breaches.

It should be noted that when stating the problem of legislative omission some courts (Germany and Russia) also take into account the fundamental principles of law (e.g., equal rights, clarity of legislation, unambiguous legislation, stability of the law, non-abuse of rights, justice, humanity, and that of a democratic state under the rule of law). Moreover, in some states (Slovenia) the arguments for identification of legislative omission are provided for directly in the Law on the Constitutional Court.

The statement of legislative omission is always related to investigation of the scope of regulation. In such instances, the petitioner's request becomes an important aspect of the court's activity i.e. whether Constitutional Courts are bound by the object of the

request, and whether the limits of the request are exceeded should this be necessary. Replies to these questions are grounded on different arguments of the Constitutional Courts.

Some Constitutional Courts in their case examination, keep to the object of investigation stated in the request. For example, the Constitutional Tribunal of Poland investigates the norms disputed by the petitioner staying within the limits of the request.

Other Constitutional Courts (Hungary, Lithuania, Serbia, Slovenia, Russia and Ukraine), in the investigation of requests may step over their limits. Some courts frequently indulge in such practice; others do so rarely.

For instance, the Constitutional Court of Serbia investigates disputed provisions of a law or another legal act, but is not bound by the petitioner's request and has the option to investigate the content of the entire disputed act, other provisions thereof, or undertake the examination of the context of regulation established by this act. Incidentally, the Constitution of Serbia and the Law on the Constitutional Court allows for the Constitutional Court, at its own initiative, with reference to a decision adopted by the vote of two thirds of justices, to begin the verification of constitutionality or legality. This is especially important when an issue arises regarding the identification of legislative omission.

The Constitutional Court of Russia may also overstep the limits of the request, while investigating the disputed provisions by associating them with other provisions of a disputed act, also taking account of their place in the system of legal norms and the meaning highlighted in the course of its application.

In Lithuania, by 15 October 2007 seven rulings stated legislative omission, i.e. the disputed legal regulation was recognised unconstitutional since it did not contain certain regulation which should have been established. In each case, the Constitutional Court stated legislative omission after it assessed the regulation disputed by the petitioner, although the petitioners in their requests did not directly request a ruling of unconstitutionality due to legislative omission and either argued that the Constitution had been breached for other reasons or, usually, did not request an investigation of those legal acts, wherein the Constitutional Court, by executing constitutional control, stated the presence of legislative omission. Thus we also encounter initiative on the part of the court. A further example of such judicial initiative in investigation is the Constitutional Court of Slovenia which, irrespective of the formulations of the request of the petitioner, may raise the issue of unconstitutionality of legal gaps of its own volition.

Another significant aspect for the understanding of the scope of investigation of legislative omission is the possibility of assessment of valid and invalid legal regulation.

Some Constitutional Courts effectively only investigate and assess those omissions which are present in valid legal acts. The Constitutional Court of Russia only investigates the constitutionality of valid normative acts. Of course, under Article 43.2 of the Law on the Constitutional Court, as a certain exception, in some instances, while pursuing the protection of constitutional rights and freedoms of citizens, the constitutionality of the law abrogated or invalidated in the course or in the start of the case examination may be subjected to verification. However, such verification is impossible, if the disputed law lost effect prior to the start of the Constitutional Court proceedings.

Other Constitutional Courts investigate legal gaps both in valid legal acts and in those instances, when legal acts are abrogated and no legal regulation is enacted in its stead. (Czech Republic, Lithuania, Poland, Portugal, Slovenia and Turkey). For instance, the Constitutional Court of Slovenia also investigates legal gaps in those legal acts which were invalid at the time of submitting the petition. If a regulation or general act issued for the exercise of public authority ceased to be in force when a request or petition was lodged and is challenged by that request or petition, and the consequences of its unconstitutionality or unlawfulness were not remedied, the Constitutional Court decides on its constitutionality or legality. In instances of regulations or general acts issued for the exercise of public authority, the Constitutional Court decides whether its decision has the effect of annulment or abrogation. Meanwhile, the Constitutional Court of Lithuania may state legislative omission of invalid legal regulation, with the exception of the legal acts enacted and effective prior to the enactment of the Constitution.

The majority of Constitutional Courts did not express an opinion as to whether, in the identification of legislative omission, the Constitutional Court assesses legal provisions only or the practice of their implementation too. Some national reports (Hungary and Slovenia) note that the Constitutional Courts take into account the practice of implementation of legal regulation. Alongside, it should be noted that the Constitutional Court of Hungary not only takes into account the practice of implementation, but also assesses the legal act under examination in the context of the entire legal system.

The identification of legislative omission is not a self-serving legal action. It implies a legal obligation on the part of parliament (another law-making institution) to rectify the stated legal flaw. Some Constitutional Courts, in an endeavour to secure greater guarantees for proper filling of gaps, provide guidelines regarding the time span for rectification and the content of the legal act, so that it complies with the constitutional imperatives (Armenia, Azerbaijan, Germany, Hungary and Lithuania). Others wait for the statement of obligations of the legislator to enact the missing regulation (Estonia and Poland).

There are several examples illustrating the decisions of the first group. For instance, in the opinion of the Federal Constitutional Court of Germany, it is essential to give the legislator an indication of the time limit for the correction of unconstitutional provisions of laws (as was established, for example, in the case of long-term insurance allowances for child-care). The Constitutional Court of Hungary, while establishing the fact of *lacuna legis*, also provides guidelines for the content of the norm to be enacted. Under the circumstances, an unconstitutional situation has arisen precisely due to lack of the content of a certain norm (often, the said lack interferes with the enjoyment of a fundamental human right). This is why, in the resolution part of its ruling, the Constitutional Court gives the legislator positive requirements for the regulation of certain issues. The Constitutional Court of Azerbaijan also proposes a constitutional legal version of solutions for social contradictions and conflicts with regard to both positive and the negative legislation.

Meanwhile, under Article 4.2 of the Law on the Constitutional Tribunal, the Constitutional Tribunal of Poland may only transfer its comments to competent bodies for the purpose of initiating the elimination of legal gaps as a prerequisite safeguarding the clarity of the Polish legal system. Certain peculiarities are also characteristic of the Constitutional Court of Moldova. Under Article 79 of the Constitutional Jurisdiction Code, once it has identified a legal gap in a case before it which is connected with the implementation of constitutional provisions, it will point this out to the relevant bodies by way of an official address regarding the liquidation of these gaps. In this regard, the Constitutional Court of Bulgaria is the most consistent, since it does not provide guidelines to the legislator (the National Assembly) as to the filling of the existing legal gap in the legislation, since, according to the Constitutional Court, it only verifies the constitutionality of laws (Article 149.1.2 of the Constitution of Bulgaria) and may not decide how gaps should be filled.

No review of the establishment of legislative omission would be complete, without mentioning a few peculiarities of the activity of the Constitutional Courts encountering legislative omissions.

For instance, the Constitutional Court of Croatia investigates the constitutionality of decisions of other courts on the interpretation of gaps (by the ruling of 30 March 2005 in case no. U-III-1621/2001 it recognised unconstitutionality of the decision of the Supreme Court of Croatia regarding the gap of the content of the principle of equality consolidated in the Labour Code).

The Constitutional Court of Slovenia is distinguished by the fact that the type of investigation of omission it carries out varies according to whether the law under investigation is of substantive or procedural character, and whether the omission has been defined in an act of public law or private law.

In the legal system of France, which is characteristic of the constitutional control a priori, the legislator is effectively punished for failure to execute the rules of competence by way of recognising the disputed provision as anti-constitutional. The recognition of the provision, as well as the entirety thereof from which it may not be separated, as anti-constitutional, means that the law may not be promulgated. In order not to complicate the legislator's task unduly, the Constitutional Council frequently uses various interpretative techniques created by it and allowing the avoidance of the above consequences, particularly direct interpretation, which is applied when a legal gap or insufficiency of a law is encountered. The Constitutional Council may facilitate overcoming the difficulties through interpretation with reservation, without any changes to the letter of the law or distortion of intentions of the legislator.

One more example of avoidance of complications in the legislation can be seen in the practice of the Constitutional Court of Spain, which generally does not avoid stating omission, to refrain from establishing legislative omission in cases where judicial institutions have acted to take account of the requirements arising from constitutional principles, although no law existed relevant to the implementation of constitutional imperatives.

4.3. The methodology of revelation of legislative omission

In the investigation of constitutionality of laws and other acts the Constitutional Courts apply a classical scheme of investigation: they ascertain the content and the requirements of respective constitutional

norms and principles of the legal regulation, compare the lower legal regulation with the higher legal regulation and determine whether or not the higher complies with the lower regulation. This scheme in principle fits the investigation of legislative omission. The particularity only determines an increased attention to the constitutional imperatives (or imperatives of higher regulation), which should be consolidated in the provisions of a law (or a legal act of lower level). Consequently, it is necessary to determine not only what has already been established, but also what has yet to be established although it should have been established in a law, pursuant to the Constitution.

The majority of national reports (Croatia, Estonia, Lithuania, Portugal, Slovenia, Spain, etc.) note that in the investigation of the instances of legislative omission, the Constitutional Courts apply a complex methodology of investigation and use various methods or combinations of methods in order to interpret the law.

Various well-known methods of law interpretation are applied to the constitutional control: grammatical, systemic, comparative, historical, teleological, etc. Only through the usage of all instruments of legal techniques is it possible to reveal the content and meaning of legal regulation consolidated in legal acts, to discern the peculiarities of such content. If it simply applied the grammatical method of law interpretation, the court would only reveal "surface matters"; it would not be able to interpret the in-depth content of the law. Therefore, the revelation of the content of the law through the application of various methods (their combinations) of interpretation of law should be deemed the everyday work of the Constitutional Courts and by no means an exception.

Some national reports note that in the investigation of legislative omission the same methods apply as in other instances of constitutional control executed by the Constitutional Court (see the reports of Lithuania, Serbia, Slovenia, Russia, etc.).

For instance, in the investigation of compliance of a disputed legal regulation with the Constitution and laws, also to the extent that the legal regulation to be established is lacking, the Constitutional Court of the Republic of Lithuania applies similar methods of interpretation as it does in other cases. It adopts the stance that the interpretation of the Constitution may not just be verbatim, using a linguistic or verbal method, but that the interpretation of the Constitution necessitates the application of various methods of interpretation of the law: systemic, general principles of law, logical, teleological, intentions of the legislator, precedents, historical, comparative, etc.

This Constitutional Court applies the same methods of interpretation of law to the investigation of legislative omission. The Constitutional Court of Russia acts in a similar way, when examining problems related to lack of clarity in legislation (a gap of a law). It applies various methods of interpretation of law: grammatical, logical, historical, systemic, teleological, etc. Obviously, it may be concluded that when they come across investigation of legislative omission, these courts apply conventional methodology, which is perfectly sufficient for the examination of constitutionality of such situations.

On the other hand, when some courts examine the issue of legislative omission, they attach different significance to certain methods or their groups. Here, the object of investigation has a certain impact on the selection of the methods of interpretation of the law, according priority to some.

In this regard the experience of the Constitutional Court of Portugal is to be noted. This court attaches great importance to the establishment of the legal normative content of a concrete constitutional parameter which will determine the resolution of the decision: was the Constitution contravened or not? Such methodology should facilitate the reply to the question: does legislative omission exist? The Constitutional Court of Portugal does not consider the grammatical method as the key element of interpretation (it contends that it is not sufficient to make word-for-word reference to the "terms of the law" and immediately decide upon legislative omission). In the opinion of the Court, it is much more important to ascertain teleological aspects (practical expedience, need for the measures implemented) of a constitutional rule, which establish the requirement to undertake legislation. This teleology is interpreted taking account of the main ratio iuris of the rule, in pursuance of the systemic approach. Moreover, in the enactment of its rulings the Constitutional Court of Portugal also used the historical method. Unlike the examination of requests for investigation of matters other than omission, decisions regarding omission are rarely grounded on comparative law or on precedents of foreign courts.

Some courts (Estonia, Spain) emphasise the significance of systemic methods. The Spanish Constitutional Court takes the view that due to the special nature of legal gaps, the most suitable methods for determining omission out of common methods of legal interpretation are the systemic and teleological methods, while the establishment of omission is dominated by the systemic method in the jurisprudence of the Supreme Court of Estonia. It should be noted here that other methods are deployed if the court ascertains that such interpretation has produced no results.

Having encountered legislative omission, other courts tend to employ the comparative method for their investigations (Armenia, Croatia, Moldova, Montenegro and Serbia). Some of them, for example, the Constitutional Court of Croatia, employ the method of comparison of constitutional jurisprudences and take especial note of the practice of the constitutional control institutions of Germany and Austria, together with trends in corresponding jurisprudence of other states. The practice of investigation of legislative omission of other courts, alongside the common methods of the law interpretation, frequently refer to the practice of application of the Convention for the Protection of Human Rights and Fundamental Freedoms (Lithuania, Moldova, Montenegro, Serbia, Russia, etc.). Such investigations in the countries of the European Union find relevance not only in the practice of application of the Convention for the Protection of Human Rights and Fundamental Freedoms, but also in the experience of the jurisprudence of the Court of Justice of the European Communities (for instance, the national report of Lithuania notes that the Constitutional Court has more than once emphasised that the jurisprudence of the European Court of Human Rights, as the source of interpretation of the law, is relevant to interpretation and application of Lithuanian law and that the same may be stated about the jurisprudence of the Court of Justice of the European Communities and the Court of First Instance).

The responses of the Courts that do not investigate omission do not include any of its investigation methods, although these courts do not normally refute the problems of existence of omission (e.g. Constitutional Courts of Latvia, Ukraine and the Supreme Court of Cyprus). The response of the Federal Tribunal of Switzerland notes that in the interpretation of a law or in the investigation of the constitutionality of lower norms, it applies various methods of interpretation of law.

4.4. Additional measures

The statement of legislative omission implies the absence or insufficiency of legal regulation or of legal regulation of lower level. If such regulation is related to the implementation of constitutional rights and freedoms, that would also imply insufficient protection of constitutional rights and freedoms. Under these circumstances, some Constitutional Courts, although on a different level, broadly apply additional measures (Azerbaijan, Croatia, Slovenia, Spain, Russia, etc.). According to the reports of some other courts, the statement of contravention of legislative omission to the Constitution is a sufficient legal action and nothing further is needed (Bulgaria, Portugal, etc.).

The most “radical” measure is the permission of the Constitutional Court to temporarily apply the provision containing omission according to the doctrine created by the court itself or to otherwise temporarily fill the gap (Austria, Azerbaijan, Russia, Slovenia, Spain). Courts will often choose to do this in order to avoid more serious negative consequences, which would appear in the absence of legal regulation. However, such temporary application of provisions containing omission is normally bound by certain conditions: such provisions may be applied only while pursuing the doctrine formulated in the constitutional jurisprudence; the court formulates the concept of such provisions, a method of application of such provision may be determined, etc.

For instance, the Constitutional Court of Spain, seeking effective guarantee of the constitutional imperative, if it appears that the legislator failed to do so, may allow the application of the provision containing omission according to the doctrine formulated by the Court. For example, in the case of the legal procedure of conscientious objection to military service the Constitutional Court of Spain stated that the fact that no procedure had been established for the regulation of such objection allows the conclusion that a basic protection of this right is necessary, i.e. a temporary halt to the calling to military service of those claiming conscientious objection until a suitable procedure can be put in place. In the opinion of the court, such application of additional measures is a sufficient minimum to guarantee human rights and freedoms.

The Constitutional Court of Slovenia, if required, may temporarily establish a way of rectifying the omission in the practice of application of a provision of a legal act that contravenes constitutional requirements.

In certain cases of investigation of legislative omission (e.g. in the investigation of deficiency of legal regulation of the constitutional process) the Constitutional Court of Croatia was forced to create procedural provisions and did so employing special investigation (by analogy it used respective rules of the civil, penal, and administrative procedure codes). Having established indefiniteness or gaps in a legal norm and when pursuing the protection of rights and freedoms of a citizen, the Constitutional Court of Russia will give the law-makers an option, until the legislator amends or supplements the law, to enact a decision pursuant to the interpretation of the norm presented by the Court (it may also suggest applying the analogy of the law, the procedure relevant to the protection of personal rights). The Constitutional Court of Austria by analogy (*per analogiam*) applies the constitutional standard (most frequently, the principle of equality) and due to this legislative

omission acquires the status of “quasi-corrected omission”. Where it encounters legislative omission in the area of protection of human rights, the Constitutional Court of Azerbaijan fills the gap on its own or recommends to the law-making institution that it reconsider the unconstitutional provision. It will also order courts not to apply this provision.

As an additional measure for the protection of constitutional rights and freedoms some courts apply the postponement of the announcement and coming into force of their ruling (Croatia, Estonia and Lithuania). For example, in Lithuania the postponement of official publication of a ruling was applied. After the Constitutional Court postpones official announcement of its ruling, the law-making institution is allowed time for adjusting the legal regulation prior to the ruling becoming effective and gaps of legal regulation are prevented. In Croatia by the Court’s ruling of 31 March 1998 its coming into force was postponed by 6 months so that the Parliament could amend the Law on the Rent of Premises, which was recognised as contravening the Constitution.

Notification to a respective institution should also be regarded as additional measure (for instance, the Constitutional Court of Moldova makes use of official addresses, while the Constitutional Court of Croatia notifies the parliament, if the Government failed to execute the obligation to regulate legal relations pursuant to the Constitution, laws, and other legal acts, also notifies the Government, if an empowered institution failed to execute the obligation to regulate legal relations pursuant to the Constitution, laws, and other legal acts), as well as the instruction to revise the decisions of courts, if they are grounded on the interpretation of a legal norm, which differs from the constitutional legal implication of this norm formulated in the constitutional jurisprudence (Russia), proposal of amendment to the act. If amendments to the legal act may not eliminate the consequences of application of such act, the Constitutional Court may remove them by the restitution of the parties to the initial position, compensation of losses or in other ways (Serbia).

A number of Constitutional Courts do not apply additional measures (for example, on concluding that no measures exist relevant to the implementation of the constitutional rule, the Constitutional Court of Portugal restricts to the statement of omission and the court itself does not undertake any other measures, even if omission is related with the implementation of fundamental rights).

4.5. The Constitutional Court investigates legislative omissions as a part of its investigation of the constitutional case, but it does not assess its constitutionality

A typical case: if legislative omission is the object of investigation of the constitutional justice case, it is not only analysed in the reasoning of the decision, but also its constitutionality is assessed (Austria, Croatia, Italy, Lithuania, Portugal, Slovenia, etc.). For instance, the Constitutional Court of Slovenia in general has no possibility to refrain from assessing unconstitutional legislative omission in the resolution part of its ruling (Article 48.1 of the Law on the Constitutional Court), if required, establishing in its decision which state institution and in which way must implement the ruling of the Court. In Italy the verdicts of the Constitutional Court in the area of omissions are frequently related with the statement that the legislator failed to execute its obligation and consequently will have to allocate financial resources required for the implementation of the relevant legal reforms. The identification of such resources is treated as a part of legislative function.

Occasionally, in the practice of other Constitutional Courts legislative omission is pronounced, however, the resolution of the decision does not make any assessment of its constitutionality (see the jurisprudence of the Constitutional Courts of Azerbaijan, the Supreme Court of Estonia, Germany and Spain). In one instance such decision is grounded on the possibility to establish transition regulation, in another instance, that the identification of legislative omission is related with investigations that are outside the competence of the court, in the third instance the court only gives notification to respective institutions about the necessity to fill the legal gap, in the fourth instance it is deemed sufficient to enact additional legal regulation.

Let us examine the peculiarities of a few such cases noted in national reports. For example, the Federal Constitutional Court of Germany in the case of the right to a teachers’ pension arising from state service, did not find violation of the principle of equality. However, it stated that the demand for establishment of transitional legal regulation arises from the principle of public confidence in the law (case *BVerfGE* 71, 255). Legislative omission investigated by the Constitutional Court of Spain is not always reflected in the resolution part of its rulings. Such choice is explained by the fact that some cases are exceptional, bordering on the sphere of investigations falling outside the jurisdiction of the Court (e.g. the rulings of 29 July 1986, 22 April 1993, and 18 November 1993).

The Constitutional Court of Azerbaijan does not always abolish a law or provisions thereof, but will issue a direct recommendation to parliament to enact a relevant law or amendments thereto within a defined time span (usually six months). In the reasoning part of its ruling the court provides arguments on the defined legislative omission, while in the resolution part it states the obligation of the legislator to fill this gap. The Constitutional Court of Serbia does not fill legal gaps. Instead, if it has found problems with constitutionality or legitimacy due to legal gaps, it notifies the National Assembly. This is the most significant form of reaction in seeking the elimination of legal gaps (over the past few years the Constitutional Court sent seventeen letters to the National Assembly notifying it of certain legal gaps or legislative omission, and in this regard, of the necessity to enact, amend or supplement a law, as well as a regulatory act of the National Assembly). Where it finds legislative omission, the Constitutional Court of Moldova issues an official address to respective state bodies. An official address is a form, in which the court implements its role as a “passive legislator” attracting attention of respective bodies to the gaps of effective laws.

If the Constitutional Court of Russia identifies legislative omission, which should be eliminated by the legislator, this legislative omission is recorded in the reasoning part of the ruling and the legislator is given some options for future action. One such option is the right of the legislator to adopt additional normative decisions on the issue under examination, while in the resolution part of the ruling the Constitutional Court recognises the law as complying with the Constitution.

Other particularities are possible. For instance, in the constitutional jurisprudence of Romania a legal gap is stated only in the instance (with rare exceptions) when legal norms consolidating the values protected by the Constitution are abolished and a new legal norm has not been enacted. One more exception is consolidated in the constitutional jurisprudence of Estonia. The Supreme Court of this country in two instances did not directly assess the constitutionality of legislative omission. In the first instance, when the norm was recognised unconstitutional, since it did not establish the regulation required by the Constitution, the resolution itself did not name this situation as legislative omission or a legal gap (ruling of 30 April 2004). However, the Court clearly indicated to the legislator that a gap was to be filled. In the second instance, although omission was encountered in legal regulation, the Supreme Court found that the contravention to the Constitution was due to lack of legal clarity, assuming that the legislator did not perceive the problem as legislative omission.

4.6. Assessment of legislative omission in the resolution part of the Constitutional Court decision

The complexity of investigation and assessment of legislative omission is reflected in the resolutions of constitutional justice cases. In such cases the Constitutional Courts seeking to optimise the constitutionality of the legal system, do not find it sufficient simply to recognise a law or other legal act or its respective provisions as unconstitutional. Constitutional courts, considering the impact of their decisions on the legal system and on the practice of implementation of the law, may instead decide to leave a legal act (or provisions thereof) in force, recognising the inaction by the legislator as in breach of the Constitution, and specify a time span for the establishment of the regulation which is obligatory under the Constitution. Alternatively, they may decide to place the legislator or another law-making subject under a duty to eradicate the legal gap, or they may pronounce the existence of a legal gap and note that this can be rectified by courts of general jurisdiction and specialised courts. As another possibility, they may place courts of general jurisdiction and specialised courts under an obligation to suspend the examination of cases and to refrain from applying the existing legal regulation until the legislator (another legal subject) fills the gap. Finally, they may announce their finding of a legal gap without any direct conclusions and without establishment of any mandates, or they may assess legislative omission in another manner.

4.6.1. Recognition of a law (of another legal act) as contravening the Constitution due to legislative omission. The Constitutional Courts of a number of countries (Armenia, Austria, Azerbaijan, Belarus, Czech Republic, Estonia, Germany, Hungary, Italy, Lithuania, Macedonia, Portugal, Russia, Serbia, Slovenia, Spain, Turkey) state the existence of legislative omission in the reasoning part of their decisions, and recognise a law (another legal act) as contravening the Constitution in the resolution part of the decision.

In Germany, where a constitutional complaint contends violation of a duty to protect by an existing law (non-genuine omission), the Federal Constitutional Court, in granting the relief sought, will stipulate the particular provision of the Basic Law which has been infringed, and the omission that has caused this infringement (§ 95.1 of the Federal Constitutional Court Act). If a constitutional complaint against a law is granted, then in accordance with § 95.3 of the Federal Constitutional Court Act, the Federal Constitutional Court will declare the law null and void.

It should be noted that in the resolution of its decision the Supreme Court of Estonia recognises a law (another legal act) as contravening the Constitution only while executing abstract control *a priori*. Once it has found legislative omission in a law, which the President of the Republic refuses to promulgate, the Supreme Court may recognise the law in its entirety as being in breach of the Constitution, it may not recognise a part of the law as contravening the Constitution.

One more circumstance is to be noted: the Constitutional Court, having recognised a law (or other legal act) as contravening the Constitution in the resolution part of its decision, will often supplement this decision by instructing the legislator or another law-making institution to remedy the unconstitutional situation.

Under these circumstances, some courts set a time frame for the legislator or other law-making institution to rectify the legal regulation (e.g., Slovenia). One example of such a decision in Slovenia is cited in Decision no. U-I-160/03 of 19 May 2005, which stipulated that within nine months of the publication of this ruling, the legislator was to correct the defined provisions of the Law on Radio and Television which contravened the Constitution. The Constitutional Court of Macedonia does not usually impose any obligations, once it has identified omission and stated contravention of the Constitution. In one case, however, the Court, whilst acknowledging the Decision on Adopting the Changes and Supplements to the Detailed Urban Plan of the 4th Urban Unit of the City of Ohrid as being in breach of the Constitution, noted a concrete obligation to enact a new legal act (ruling no. 217/1995 of 25 October 1995; however, it should be noted that in this instance a gap arose precisely because the Court had recognised a piece of legislation as contravening the Constitution). A ruling of the Constitutional Court of Russia states the obligation of the legislator to fill a gap in law; occasionally, the resolutions of its rulings give time spans within which the legislator should supplement or amend a law (rulings of 13 June 1996, 14 March 2002).

4.6.2. Recognition of provisions of a law (or other legal act) as contravening the Constitution due to legislative omission. In their decisions on omission, certain Constitutional Courts (Armenia, Austria, Azerbaijan, Belarus, Czech Republic, Estonia, Germany, Hungary, Italy, Lithuania, Macedonia, Portugal, Romania, Russia, Slovenia, Spain, Turkey) recognise respective provisions of a law (of another legal gap) as contravening the Constitution.

For instance, the Constitutional Court of Austria has pronounced even one or a few words of a legal provision unconstitutional. In exceptional cases this Court may also recognise an invalid legal norm as contravening the Constitution. The Supreme Court of Estonia notes in its report that in the resolution part of its rulings it recognises respective provisions of a law (or other legal act) as contravening the Constitution when it executes concrete control of the norm or abstract (*a posteriori control*).

Decision no. U-I-66/93 (2 December 1993) features in the Slovenian national report as an example of a resolution recognising provisions of a law (or other legal act) as being in breach of the Constitution. The decision uses the formula “within the scope which is not established”. In Lithuania, the Constitutional Court expressly notes which part of a legal act contravenes the Constitution. It should be noted that normally the phraseology is used that the disputed legal regulation “to the extent that is not”, or “to the extent that it does not establish” contravenes the Constitution and laws.

The Constitutional Court of Italy adopts “ablative”, “substitutive” and “additive” decisions. In “ablative” decisions the Court states the contravention of a norm to the Constitution within the scope by which it establishes what it should not establish (by decision of the Court this fragment is eliminated). In “substitutive” decisions, the Court pronounces constitutional contravention by a norm within the scope by which it establishes one thing instead of establishing the other (by decision of the Court one norm is replaced with the other). In “additive” decisions, the Constitutional Court states that a norm is in breach of the Constitution within the scope by which it does not establish what it should establish (by decision of the Court the norm is supplemented). It should be noted that in Italy several types of “additive” rulings are distinguished for the assessment of unconstitutional legislative omission: “additive of services” or “classical additive”, “additive of principle” and “procedure additive”. In the instances of “additive of services” or “classical additive” rulings the phrase “within the scope which is not established” is used and the Constitutional Court particularises the missing normative element. An example is ruling no. 497 of 1988 dealing with the establishment of the amount of unemployment allowance. In the instance of “additive of principle” rulings, the Court confines itself to noting in the resolution a general principle which the legislator should follow in seeking to overcome the specified legislative omission. See ruling no. 295 of 1991, which states that by pronouncing unconstitutionality of legislative omission while leaving it to the legislator who possesses undeniable competence in this area to establish legal regulation of this mechanism by way of abstract law-making, the Court itself provides the principle, which a judge of

ordinary court may apply in concrete cases, where he needs to temporarily fill a gap. "Procedure additive" rulings have become very common in the Constitutional Court's practice in recent years. They are often adopted in the investigation of issues of "power sharing" between the state and territorial autonomies, where the court does not rule on the content (which is lacking in the act under investigation) of legal regulation complying with the constitutional imperatives, but on the respective law-making procedures to be provided for in this legal regulation (e.g. in ruling no. 219 of 2005 a decision was made that the legal regulation lacked "suitable instrument to guarantee loyal co-operation between the State and the Regions").

4.6.3. Leaving a legal act (provision thereof) in force, whilst recognising the inaction of the legislator as anti-constitutional and specifying a time span for the adjustment of the legal regulation that is necessary under the Constitution. Some Constitutional Courts (Belarus, Bosnia and Herzegovina, Czech Republic, Hungary and Slovenia) leave a legal act or its provisions in force, whilst recognising the inaction of the legislator (or other law-making subject) as anti-constitutional and specifying the time span for the establishment of the legal regulation that is necessary under the Constitution.

For instance, in the resolution part of Case no. U-I-48/06 of 22 June 2006 on the compliance of Article 126 of the Law on Personal Income Tax with the Constitution, the Slovenian Constitutional Court instructed the National Assembly to correct the legal regulation before the end of 2006. Similarly, in ruling no. U 17/06 of 1996, the Constitutional Court of Bosnia and Herzegovina left the disputed norms in force but instructed parliament to correct the deficiencies giving rise to the constitutional breach within six months.

Where it identifies legislative omission, the Constitutional Court of Hungary will also sometimes leave the problematic norms in force and establish a time scale for establishing the obligatory legal regulation. (It should be noted that the term is established only in cases where the norm which is recognised as contravening the Constitution is left on the statute book).

The Constitutional Court of Turkey, if required, may set a time limit for a legislator to fill a legal gap (this does not normally exceed one year), giving effect to the decision to recognise the legal act as being in breach of the Constitution.

Once the Federal Constitutional Court of Germany has recognised a norm as giving rise to a Constitutional breach, it does not necessarily have to proclaim the

law null and void. It may sometimes state that it is incompatible with the Constitution. In circumstances where an unacceptable legal gap may be avoided, (for instance, where a declaration that an act that was in force and protected rights was null and void would bring into being a legal situation that might stray even further from the Constitution, incompatibility with the Constitution will be declared). Rulings of incompatibility are common in cases where the legislator has several methods at his disposal for the elimination of contravention to the Constitution, for example, in instances of violations of rights. Once incompatibility has been declared, the law is not deemed null and void, but the law is not applied to the extent to which it contravenes the Constitution, and only with regard to the person concerned (who filed the constitutional complaint). In order to avoid problems during the transition period, the Federal Constitutional Court may establish the consequences of its decision. The legislator is under a duty to regulate the legal situation so that it complies with the Constitution and a time scale may be fixed for this purpose. The Court may leave the problematic law in place on a temporary basis, or establish the provisions of the transition period, which will apply until the legislator harmonises legal acts with the Constitution.

4.6.4. Statement of the obligations of the legislator (of another law-making subject) to eliminate a legal gap. Courts of some countries (Austria, Azerbaijan, Belarus, Croatia and Slovenia) state the obligation of the legislator (or another law-making subject) to eliminate a legal gap.

For example, in cases of abstract constitutional control, after the establishment of the existence of a legal gap or legislative omission, the Constitutional Court of Croatia does not usually abrogate such legal act, but names it in the resolution part of its ruling as "possessing unconstitutionality or illegality". It will notify a competent institution of the problem, so that that institution can fill the legal gap or legislative omission. In Clause 3 of the resolution of ruling no. U-I-117/07 of 21 June 2007 the Constitutional Court of Slovenia instructed the National Assembly to remedy the incompatibility specified in Clause 1 of the resolution within 6 months of the day of publication of the Court's ruling.

4.6.5. Statement of the legal gap in the resolution part of the ruling with specification that it may be eliminated by courts of general jurisdiction or specialised courts. Occasionally, Constitutional Courts (Slovenia, Spain and Russia) declare a gap of legal regulation specifying in the resolution part of the ruling that it may be eliminated by courts of general jurisdiction and specialised courts.

In Slovenia such provision of the resolution is always related to the time scale within which the responsible law-making institution should fill the gap (for example, the resolution in the ruling of 17 May 2007 in case no. U-I-468/06). Thus, a resolution that simply states that the legal gap may be eliminated by courts of general jurisdiction is impossible. The Constitutional Court may, however, in such cases apply the authorisation determined in Article 40.2 of the Constitutional Court Act and determine a procedural methodology for courts which will be deciding in individual cases on circumstances regarding which the gap in the law had been established, until the unconstitutionality is remedied. In ruling no. 184/2003 of 23 October 2003 the Constitutional Court of Spain while recognising the genuine omission left by the legislator, encouraged its elimination by courts until the gaps are filled. The ruling of the Constitutional Court of Russia may specify that until the law is amended or supplemented, the procedural analogy must be applied of other norms of the law some provisions whereof are recognised unconstitutional.

4.6.6. The obligation of courts of general jurisdiction and specialised courts to suspend examination of cases and refrain from applying existing regulation until a gap is filled. The Constitutional Courts (Azerbaijan, Slovenia) may order courts of general jurisdiction and specialised courts to suspend the examination of cases and refrain from applying existing regulation until the legislator (or other law-making subject) fills the gap.

In a case in Slovenia where it was held that the legislator had to rectify the specified unconstitutional provisions of the Aliens Act within six months of the date of publication of the Court's ruling, the Court noted that courts may not order the deportation of a particular category of foreigners named in the resolution (although it did not order the courts of general jurisdiction to suspend the examination of cases), provided those foreigners satisfied certain conditions of permanent residence in the Republic of Slovenia (ruling no. U-I-284/94 of 4 February 1999).

4.6.7. Statement of a legal gap, without a direct conclusion and establishment of mandates. Occasionally, Constitutional Courts (Bulgaria, Czech Republic and Estonia) state a gap of legal regulation but do not make direct conclusions or establish mandates.

For instance, the Supreme Court of Estonia in the cases of *Tiit Veeber* and *AS Giga* established a gap in the procedural laws, which could be filled by a constitutionally validating interpretation. At the same time, it recognised that it is possible to do without the statement that the respective procedural regulation consolidated in the code contravenes the Constitution.

The Constitutional Court of Slovenia notes that such resolution is impossible according to the competence of the Constitutional Court. However, a case similar to the above situation occurred in the practice of the Court (Court's ruling no. U-I-168/97 of 3 July 1997), where the request to eliminate the legal act already investigated was declined on the grounds of *res judicata*, although the legislator had not rectified the lack of compliance of the law within the period established by the court in the previous case.

The Constitutional Court of Bulgaria only verifies the constitutionality of laws and is not entitled to issue mandatory instructions to state institutions, including the legislator. Therefore, it may not instruct the legislator to fill the legal gap identified by the Court. The Court only notes the existence of the legal gap and, without issuing any instructions, points out that the only body empowered to rectify the situation is the legislator which must therefore enact appropriate legal regulation.

The Constitutional Tribunal of Poland, "in the case of a gap <...>, pursuant to Article 4.2 of the Act on the Constitutional Tribunal, (it) can only convey its comments to the competent bodies in order for it to be eliminated, as a necessary means of assuring cohesion of the legal system in the Republic of Poland". Analysis of the legal nature of such rulings, i.e. those that identify omissions of law-making (incomplete regulation), leads to the conclusion that such rulings are of declarative character. This type of ruling does not create any new situation within the legal system. However, it establishes (states) previous inaction by the legislator, defines the boundaries of such omission and enables the future actions of the law-maker. These manifest in the creation of regulatory mechanisms that did not exist prior to the adoption of a respective ruling. Consequently, the actualisation of the constitutional obligation *sui generis* of the legislator takes place. The rulings of the Constitutional Tribunal which establish the fact of deficiency (omission) of the legislator primarily have the consequences of final guarantee. The final addressee of this ruling should be deemed the competent institution of law-making, which is responsible for the "flaw" in the regulation (omission of law-making). As a rule, this is the same institution, which enacted the normative act, "affected" by the omission of law-making, as noted by the Tribunal in a respective ruling. Since the ruling, verifying the existence of the "omission of law-making" is of interpretative character, the normative legal act which underwent supervision may also be deemed to have remained in the state of conditional compliance with the Constitution; the conditions for the statement of complete and unconditional compliance are provided by the elimination of the

omission performed by way of adoption of supplements to the respective normative legal act which underwent supervision.

The Constitutional Court of Cyprus leaves the obligation to fill legal gaps to the legislator. Provisions recognised as contravening the Constitution remain valid until parliament enacts new ones. The Constitutional Court is not empowered to force or demand that the legislator changes the legal norms recognised as contravening the Constitution. The final decision regarding the content of legal acts belongs to the legislator.

4.6.8. Other assessments of legislative omission.

National reports occasionally comment on resolutions of decisions that do not fit into any of the above categories. In summary they could be named as other assessments of legislative omission.

The Constitutional Court of Croatia may include instances of the omission identified in a special notification to competent institutions (to Government or to Parliament), so that they enact (or supplement) the required legal regulation which should have been enacted but has not been.

Upon establishment of omission, the Constitutional Court of Portugal declares the existence of contravention to the Constitution and then notifies the competent law-making institution. The law does not provide for any other effects. Non-compliance with the Constitution due to omission arises when “the Constitution contains a sufficiently precise and concrete order to legislate, such that it is possible to safely determine what legal measures are needed to render it executable”.

The Federal Constitutional Court of Germany may undertake various measures. The Constitutional Court may appeal to the legislator to undertake actions in a certain area, if in the opinion of the Court, the existing legal situation complies with the Constitution, but the Court is nonetheless of the view that the legislator should revise legal acts. The Court may also oblige the legislator to monitor practical instances of application of a concrete legal act (or of provisions thereof) (to perform “monitoring”) or to establish a probationary period. This may be so even though in the course of adoption of the ruling of the Constitutional Court itself the disputed legal provisions were not recognised as contravening the Constitution, but the Court perceives the need to monitor the legal practice in order to ascertain whether the amendment of laws is required. The Constitutional Court also states that the disputed law may be interpreted in such a way that it does not contravene the Constitution; therefore, such

complaints to the Court are rejected as unfounded (e.g. case *BVerGH* 33,303). In these circumstances, the Constitutional Court, seeking to ensure that all those applying the law know how to behave, provides the above constitutional interpretation in the resolution of its ruling. It should be noted that in Germany, in the course of dispute of genuine omission, the recognition of the law as invalid is impossible, since the law does not exist. The only remaining option is the recognition of violation of fundamental rights.

Occasionally, the Constitutional Court of Russia, in a concentrated form in its resolution specifies the necessity to apply the Constitution directly until the legislator amends or supplements the law (rulings of 29 April 1998, 27 June 2000, etc.) or briefly interprets the constitutional content of the provisions which should be remedied by the legislator and specifies the procedure of application of respective provisions of the law until the legislator enacts supplementary regulation (ruling of 11 March 2005).

In its practice the Constitutional Court of Spain frequently applies the so-called interpretative resolution, which, by interpretation in line with the legal wording, allows the rectification of unconstitutional occurrences that have arisen through defect or apparent tacit exclusions. In Spain, circumstances sometimes allow for a “reorienting” resolution of the ruling (applying such interpretation, which partially supplements the content of the legal provision). This allows for rectification of a constitutional breach that arose due to legislative reticence (for example, the resolution of ruling no. 103/1983 of 22 November 1983).

The practice of the Constitutional Court of Italy has many cases where the Court does not pronounce constitutional breach, but issues warnings to the legislator, asking it to eradicate doubts over the compliance of the relevant legal acts with the Constitution. Such admonitions are most frequently set forth in decisions, which refuse the solution to the issue in essence. Their form may vary from an ordinary proposal to the legislator to enact a certain provision to “threats” that abrogation procedures may be undertaken. Such admonitions are always set forth in the reasoning, not the resolution part of the decision.

Meanwhile, having established a legal gap, the Constitutional Court of Ukraine will dismiss the case, with the comment that filling legal gaps falls outside the competence of the Constitutional Court.

Other national reports note that they have no peculiarities in the formulation of resolutions.

4.7. The “related nature” investigations and decisions adopted

The majority of national reports (Armenia, Azerbaijan, Estonia, Czech Republic, Lithuania, Macedonia, Moldova, Russia, Serbia, Slovenia and Turkey) note that Constitutional Courts do not initiate any investigations of “related nature”. Only a few courts (Montenegro, Portugal, Spain) that carry out such investigations responded positively as to the execution of investigation of “related nature”.

Among the courts initiating such investigation the Constitutional Courts of Portugal and Spain should be mentioned first of all. The Constitutional Court of Portugal assesses issues of related nature relative to rules, normative segments or aspects which have not been applied by a decision which is subject to appeal on the grounds of their unconstitutionality, or, which, despite the fact that the appellant has pointed out possible breaches of the Constitution, have been applied by the judicial decision as *ratio decidendi* and form the object of the appeal on the grounds of constitutionality. Most investigations of such nature relate to discriminatory situations, in which – quite apart from other principles – the issues at stake involve situations of material inequality (e.g. rulings no. 690/98, 1221/96, 359/91.) In Spain such investigations of “related nature” are applied to the investigation of the consequences which emerged due to legislative omission, for example, while defending individual rights violated by the law, which is recognised as contravening the constitutional principle of equality. In Montenegro, where the Constitutional Court does not investigate instances of legislative omission, some cases were investigated when the violation of the human right to equal protection was investigated and acknowledged after there had been prohibition to apply for defence to court, although such right is not explicitly stated in the Constitution (however, concrete cases (or decisions) are not specified in the national report).

Some courts do not execute or initiate investigations of “related nature” (Armenia, Azerbaijan, Czech Republic, Estonia, Lithuania, Macedonia, Slovenia and Turkey). They explained in their reports why this is the case.

The Constitutional Court of Slovenia does not perform investigations of this nature precisely because its powers to investigate legislative omissions are set out expressly in the law. The competence of the constitutional control institutions of Estonia and Armenia includes the investigation of legislative omission. That is why it is stated that the concept of “related nature” investigations does not exist in their

doctrine of constitutional law. Whenever legislative omission was found in cases before the Lithuanian Constitutional Court, it made this assessment of its own initiative. Having looked at the regulation disputed by the petitioners, it stated legislative omission, even though the petitioners had not directly asked it to do so, basing their petitions instead on different arguments. Having stated that it had no “related nature” investigations in its practice, the Constitutional Court of Serbia added that under the effective constitutional provisions it does not only have the power to investigate constitutional complaints regarding fundamental rights and minority rights, but also to investigate similar cases according to the petitions of judges, prosecutors, assistant prosecutors as to decisions dismissing their functions and as to decisions related with the validation of the deputy mandate. In these cases the Constitutional Court will have a possibility to apply analogy in its investigation.

Some Constitutional Courts (Albania, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, France, Georgia, Germany, Hungary, Italy, Latvia, Romania and Ukraine) did not pronounce on this issue.

4.8. Methods of legal technique which are used by the Constitutional Court when it seeks to avoid legal gaps which would appear because of a decision pronouncing a law or other legal act to be in conflict with the constitution

It should be noted that the Constitutional Courts deploy various techniques in their endeavours to avoid legal gaps occurring as a result of rulings to the effect that a law or other legal act is in breach of the Constitution. These include postponement of the announcement of the official decision of the Constitutional Court, and the establishment of a later date for the coming into force of the Constitutional Court’s decision. Another method is a statement by the Constitutional Court that the legal act in question complies temporarily with the constitution, but that if it is not amended within a certain time, it will be in breach. Sometimes, too, legal acts are found to be in breach of the constitution, but are not eliminated from the legal system, or the legal act or its provisions are in fact found to be compliant with the constitution, with a view to avoiding a statement that this act or its provisions are in breach due to legislative omission. Another technique is the restitution of the previously effective legal regulation.

Some Constitutional Courts use several of the above methods; others do not apply any. As an example of the practice of the first group of courts, the Constitutional Court of Russia, trying to avoid norms that have been found unconstitutional but would create a legal gap were they to be removed, which in turn could violate the rights of citizens and other subjects and would not be removed through direct application of the Constitution, applies the following measures:

- a. it stipulates the precise date for the entry into force of the new regulation, which will fill the gap, and the repeal of the validity of the previous regulation;
- b. it stipulates the point at which the norm becomes invalid, before which time the legislator must make appropriate changes;
- c. stipulates the parameters of new regulation;
- d. without designating a precise date for the entry into force of the new regulation, stipulates the direct applicability of the Constitution;
- e. reinstates the regulation which was valid before;
- f. finds the norm unconstitutional, but refrains from recognising it as unconstitutional and null and void, as that would create a gap in regulation which in this instance may not be eliminated directly by way of application of the Constitution and requires systemic amendments to the law;
- g. reveals the constitutional legal meaning of the norm and, in this context, the required constitutional content of the norm, thus, seeking to avoid its recognition as unconstitutional. The practice of Constitutional Courts of Moldova and Ukraine reflects a different approach towards the application of such measures.

It should be noted that some states recognise that the constitutional justice institutions create legal gaps (e.g. Albania, Montenegro), while in other states this is not recognised (for example, the Constitutional Court of Romania does not recognise that the recognition of a law or another legal act as contravening the Constitution causes a legal gap, since a legal norm contravening the Constitution eliminated from the legal system is neither necessary, nor eligible).

4.8.1. Postponement of the official publication of the Constitutional Court's decision. Postponement of the official publication of the Constitutional Court's decision is one of the simplest methods of avoiding legal gaps, which would appear if a law or other legal act is recognised as contravening the Constitution. The application of this measure is noted in the national reports of Lithuania and Belarus.

For instance, in its ruling of 24 December 2002, when it recognised certain provisions of the Law on Local Self-Government as being in breach of the Constitution, the Constitutional Court of Lithuania noted that they are systemically connected with many other provisions of this law. This would mean that if the court's ruling was officially published immediately after its public announcement at the hearing, a vacuum in the regulation of local self-government would arise, which would disrupt the workings of local government and state administration. Recognising that the elimination of such a vacuum in legal regulation requires a certain period of time, the Constitutional Court established that the ruling was to be officially published in the official gazette ("*Valstybės žinios*") two months after its announcement at the public hearing of the Court.

In a later ruling (19 January 2005), although the announcement of the ruling was not postponed, the Constitutional Court gave more exhaustive reasoning for the postponement of the entry into force of the rulings:

"The Constitutional Court may postpone the official publishing of its ruling where necessary to allow the legislator time to remove the *lacunae legis* which would appear if the relevant Constitutional Court ruling was officially published immediately after it had been publicly announced in the hearing of the Constitutional Court and if they constituted preconditions to basically deny certain values protected by the Constitution. The said postponement of official publishing of a Constitutional Court ruling (*inter alia* a ruling by which a certain law (or part thereof) is recognised as contradictory to the Constitution) is a presumption arising from the Constitution in order to avoid certain effects unfavourable to the society and the state, as well as human rights and freedoms, which might appear if a relevant Constitutional Court ruling was officially published immediately after its official announcement in the hearing of the Constitutional Court and if it became effective on the same day that it was officially published."

The next occurrence of postponement of the official publication of a Constitutional Court ruling was when the Constitutional Court had considered a case on the compliance of the provisions of the Law on the Amount, Sources, Terms and Procedure of Payment of Compensation for Real Property Bought Out by the State, and on the Guarantees and Preferences Provided For in the Law on the Restoration of Citizens' Rights of Ownership to the Existing Real Property with the Constitution (Constitutional Court ruling of 23 August 2005). Under this law, government was entrusted with the task of establishing the amount, terms and procedure for payment of compensation. Once this was ruled in conflict with the Constitution, the Constitutional Court held that if the ruling was published straight after its public announcement during the Constitutional Court hearing, the provisions would not apply from that point. This could have created uncertainty and gaps in the legal regulation of restoration of the rights of ownership over existing real property. This would have hindered the restoration of these rights and might even have resulted in their temporary discontinuation. By postponing the official publication of the ruling in the official gazette (*"Valstybės žinios"*) the Constitutional Court not only took account of the fact that a certain time period was needed in order to make the changes to the laws, but also of the fact that the fulfilment of the state financial obligations to the persons to whom the rights of ownership to the existing real property were restored was related to the formation of the State Budget and corresponding redistribution of state financial resources.

4.8.2. Establishment of a later date for the entry into force of the Constitutional Court's decision. This measure is applied by the Constitutional Courts of Armenia, the Czech Republic, Turkey and the Supreme Court of Estonia.

The Constitutional Court of the Czech Republic may postpone the execution of its decision allowing the legislator time (normally one year) to amend or replace the legal regulation contravening the Constitution or absence thereof. The Supreme Court of Estonia may postpone the entry into force of its decision by six months, but this does not mean that the legal act contravening the Constitution may be applied until such time as the Supreme Court's decision becomes effective. The Constitutional Court of Turkey also undertakes measures to ensure that legal consequences arising from the occurrence of legal gaps created by rulings whereby legislative omission is recognised as contravening the Constitution are as lenient as possible. It will also establish later dates for the entry into force of its rulings.

The practice of the Constitutional Court of Armenia may perhaps also fall within this category. Having established that immediate announcement of recognition of a constitutional breach by a legal act could place the state and society as a whole in a difficult position; the Constitutional Court may recognise the disputed legal act as contravening the Constitution and establish a later date for the legal act to lose its force. Under such circumstances this legal act is held complying with the Constitution for the duration of the term established by the Constitutional Court.

4.8.3. Statement by the Constitutional Court that the legal act which was under investigation temporarily complies with the Constitution and instruction that this act will contravene the constitution, if it is not amended in a certain time. This technique is applied in the practice of the Constitutional Courts of Bosnia and Herzegovina, Croatia, Hungary, Latvia and Slovenia.

Although the Constitutional Court of Bosnia and Herzegovina notes that it has not developed the means of legal techniques applied for the purpose of avoiding legal gaps, which emerge upon recognition by the decision of a law or another legal act as contravening the Constitution, the Court did once establish a time span within which the legislator had to bring the law in line with the Constitution. Since the legislator failed to do so within the term established by the Constitutional Court, the law lost its legal power.

The Constitutional Court of Croatia seeks to avoid the appearance of legal gaps resulting from its decisions and, depending on the circumstances of the case, always takes account of the time required for the legislator to enact a new law, another legal act or a part thereof. Depending on the character (and significance to the society) of the legal act recognised as being in breach, it establishes a time span (which is allowed by the law) during which the legislator should enact a new law, another legal act or a part thereof. For example, in proceedings over the Law on Pension Insurance, the Constitutional Court established that the law will be effective for a further ten years after the adoption of the Court's decision. Occasionally, by separate decision, at the legislator's request the Court extends the period of validity of such legal acts.

In Latvia, when a legal norm is found to be in breach of the Constitution in a particular scope, a later date may be set for its loss of validity, so that the Constitutional Court allows the legislator time to put the legal system in order and to correct mistakes. In that period, depending on the provisions of the Constitutional Court's rulings, the legal act, which was

recognised as contravening the Constitution, is temporarily applied, but in its application account should be taken of the provisions of the Constitution and the international obligations of Latvia.

In Slovenia, under provisions of Article 48 of the Law on the Constitutional Court the adoption of a ruling of declarative character is possible, whereby the norm is recognised as unconstitutional but remains effective in the legal system. The Court did precisely this in rulings no. U-I-7/07, no. Up-1054/07. It also imposed a period of one year for the performance of the obligation to harmonise respective legal norms.

4.8.4. Recognition of a legal act as contravening the Constitution due to legislative omission, without its elimination from the legal system. This technique is applied by the Constitutional Courts of Estonia, Croatia, Germany and Spain.

As already mentioned, once it has pronounced a law to be in breach of the Constitution, the Federal Constitutional Court of Germany does not always rule that this law is null and void. Instead, it will sometimes state incompatibility with the Constitution, especially where it is trying to avoid an unacceptable legal gap, which could create a situation even more at variance with the Constitution. In cases of incompatibility, the law is not recognised invalid, but it is not applied to the extent that it contravenes the Constitution, and only with regard to the person concerned (who filed the constitutional complaint).

The Constitutional Court of Spain frequently adopts the so-called interpretative resolution, which imperatively interprets the content of the legal act under investigation in such a way that it is perceived as complying with the Constitution.

4.8.5. Interpretation of a legal act or its provisions as compliant with the Constitution in order to avoid the statement that the legal act or its provisions contravenes the Constitution due to legislative omission. The Constitutional Courts of some states – Austria, Estonia, Italy, Romania, and in some cases the Czech Republic and Germany – will interpret a legal act or its provisions as compliant with the Constitution to avoid a statement that the legal act or its provisions contravene the Constitution due to legislative omission. Meanwhile, if the Constitutional Court of Romania establishes that a certain interpretation of the law, not the law itself, contravenes the Constitution, the disputed act is not eliminated from the legal system, but it is applied according to the interpretation of the Constitutional Court. However, it is stated that parliament should amend the law to make it explicit and unambiguous.

4.8.6. Restitution of previously effective legal regulation. Portugal is noted for its deployment of this technique. If the Portuguese Constitutional Court finds the legal norm to be in breach of the Constitution or illegal, the old regime becomes valid directly the legal norm is announced as contravening the Constitution. At that point, those norms become effective which were in force prior to the enactment of the norm recognised as contravening the Constitution or illegal.

Restitution of previously effective norms also occurs in the systems of constitutional guarantee of Bulgaria and Latvia. Upon recognition by the Constitutional Court of Bulgaria that the law contravenes the Constitution, a legal gap emerges. The assumption that such gap is unacceptable forces the Court to conclude due to its interpretation that its rulings “resurrect” the law *ex lege*, which was in force prior to the enactment of the disputed law. Under the Constitution, a situation cannot be permitted where a law contravening the Constitution does not apply and a legal gap exists. The Constitutional Court of Latvia noted that, if required and possible, in the establishing part of the ruling it may recognise the restoration of validity of provisions of the legal act in force before the enactment of the provisions that the Constitutional Court had held to be in breach of the Constitution.

However, in other states such “resurrection” is not a widely spread method of juridical techniques.

4.8.7. Other decision models. The Constitutional Courts of some states (e.g. Montenegro) choose slightly different decision models, when trying to avoid the occurrence of legal gaps as a result of a decision recognising a law or other legal gap is being in breach of the Constitution.

The Constitutional Court of Montenegro leaves it to the legislator to remedy unconstitutional situations including legal gaps. Meanwhile, the Constitutional Court of Slovenia specifies the method by which the omission should be remedied and which institution should do so – under the Law on the Constitutional Court, the Court is allowed to do this. It can also apply the legal act possessing the gap contravening the Constitution as a temporary basis, pending resolution.

Some courts, in addition to the above methods, use juridical techniques of even greater variety. For example, in Lithuania, the Constitutional Court may, instead of postponing the date of announcement of its ruling, directly establish when and to which relations the application of the above ruling should be applied (ruling of 9 February 2007). The Constitutional Court

of Azerbaijan applies the analogy of the law, which is provided for in the Civil Code. It applies the analogy of the law in the area of civil and business relations, the protection of human rights and freedoms, and other issues. The application of the analogy of a law has been proposed by the Constitutional Court of Slovenia, having repudiated the contravention to the Constitution of the Law on Denationalisation, since *mutatis mutandis* other provisions of the same law may apply to the same relations (see ruling no. U-I-225/96, OdlUS VII, 7 of this Court of 15 January 1998). The Constitutional Court of Austria also applies the analogy of law to fill legal gaps and does not state the contravention of a legal gap to the Constitution. The Constitutional Court of Belarus may state that legal relations should be regulated by legal acts of higher power than those recognised as contravening the Constitution, or even the Constitution itself directly.

It should be noted that the Constitutional Court of Lithuania has stated that the legislator is obliged to establish temporary legal regulation by a law. In its ruling of 9 May 2006 the Court stated that from the date of official publication of the ruling, the provisions of the Law on Courts will no longer apply, and that this could cause problems with procedures for the appointment, promotion and transfer of judges or their dismissal from office as established in the Constitution. The legislator has a duty to fill in the resulting vacuum of legal regulation immediately. The Constitutional Court stated that should more time be necessary, the *Seimas*, taking account of the constitutional requirements disclosed in constitutional jurisprudence, has a duty to establish a temporary legal regulation. Having chosen this measure, the Constitutional Court did not postpone the ruling coming into effect.

The Constitutional Court of Spain noted in the report that it applies neither of the measures specified in the questionnaire. However, it gave an example of a case where a legal act was recognised as contravening the Constitution, but its abrogation was postponed. Another case noted by the Court – contravention to the Constitution was found but the legal act was not abrogated, as its provisions had already been implemented. This interpretation of the Constitutional Court should be applied in the future.

As mentioned, the Federal Constitutional Court of Germany, in addition to other measures of legal technique employed by this Court may appeal to the legislator to take action in a particular area where, in the opinion of the Court, the existing legal situation complies with the Constitution but the Court believes that the legislator should revise legal acts.

The Constitutional Court of Macedonia, seeking to avoid a legal gap, has been postponing final decision-making in several cases, since the old laws of the former Republic of Yugoslavia were not harmonised with the new Constitution of Macedonia.

The reports of other courts do not pronounce on this issue or they note that no legal techniques of such character are applied (Ukraine), or that such special measures are not provided for (Serbia), or that there are no peculiarities (Moldova), etc.

5. CONSEQUENCES OF THE STATEMENT OF THE EXISTENCE OF LEGISLATIVE OMISSION IN CONSTITUTIONAL COURT DECISIONS

5.1. The legislator's duties

The obligatory character of the Constitutional Court decisions is, perhaps, one of the axioms of modern constitutionalism. Otherwise, the constitutional control institutions simply would not be capable of performing the function of securing constitutionality of the legal system delegated to them. A common result of the constitutional justice case is the recognition of the compliance or the contravention of a law or other legal act (or provisions thereof) with the Constitution. In the first case the constitutionality of an act is validated and the concerns which caused the case to come to court are allayed. In the second case a law or other legal act (or provisions thereof), are removed from the legal system. Of course, in the development of constitutional control this classical dichotomy is no longer satisfactory. In their practice Constitutional Courts apply the recognition of laws and other legal act as complying with the Constitution with certain reservations, they elaborated the formulations of recognition of such legal acts (provisions thereof) as unconstitutional. The application of various corrective elements is related to the guarantee of a greater impact on the legal system and on the practice of law application.

Constitutional court decisions are primarily intended for the legislator and other law-making subjects. Their work is assessed in constitutional justice cases. In addition, a Constitutional Court decision often carries with it an obligation to undertake certain actions. Constitutional court decisions are final, not subject to appeal and binding on all, including the legislator. Therefore, reactions to Constitutional Court decisions, particularly, if concrete obligations to a respective subject (as well as the legislator) arise, should be determined by legal, rather than political, emotive or other factors.

The statement of legislative omissions – i.e. unconstitutional gaps of a law or of another legal act – may not be without legal consequences. The Constitutional Court decision carries with it the obligation to fill such legal gap with proper regulation, and to remedy the deficient legal regulation. Failure to comply with the decision, delays to filling an unconstitutional gap or the partial filling of such gap by the legislator (and by any other law-making subject) should be considered anomalies of the legal order, the presence of which is unjustifiable.

Active actions of the legislator are normally required to remedy legislative omission. “Holes” in anti-constitutional legal regulation or letting an “unfinished” law or another legal act stay as they are, mean that parliament, the representative political institution, which is entrusted with passage of legislation, does not perform properly and completely the constitutional mission delegated to it. The constitutional order always implies limitation of power. The idea of authority limited by the Constitution implies not only the prohibition on exceeding the authorisations established, but also the duty to fully execute them. Otherwise, the establishment of such limits would only be partially meaningful.

The majority of national reports (Azerbaijan, Hungary, Italy, Lithuania, Montenegro, Slovenia, etc.) note that Constitutional Court decisions, which state legislative omission, are executed by way of rectification, by the legislator, of the flaws of legal regulation committed by him. For instance, in Hungary it is noted that from the above statement of incompliance with the Constitution an imperative obligation arises to the legislator to adopt a norm eliminating the situation contravening the Constitution within the period which the Constitutional Court specifies in its ruling, in which the fact of omission is stated. This obligation is grounded on Article 49.2 of the Law on the Constitutional Court of Hungary, which establishes that institution at fault must execute its obligation within the specified time. Therefore, the statement of legislative omission in the decision of the Constitutional Court implies the obligation of the legislator to enact legal regulation removing the unconstitutional gap.

Peculiarities of investigation and assessment of legislative omission and of formulation of constitutional decisions in the Constitutional Courts of various countries in one way or another are connected with differences in the formulation of obligations to the legislator after the statement of the anti-constitutional gap of legal regulation in the constitutional justice case. In some countries such a decision of the Constitutional Court implies a formal demand to fill the gap (Austria, Estonia, Germany,

Hungary, Lithuania, Poland, Serbia and Slovenia), in other countries it is really only a formal piece of advice to remedy the stated lack of legal regulation (Spain) or a notification to parliament about the legal gap (Croatia and Portugal).

There are several examples of constitutional decisions from the first group. For instance, when the Constitutional Court of Slovenia states legislative omissions, the legislator must fill this gap. It was noted that pursuant to Article 49.2 of the Law on the Constitutional Court of Hungary, the legislator must properly eliminate the gap of legal regulation within the time span established by the Constitutional Court. Decisions adopted by the Supreme Court of Estonia are of obligatory character and must be heeded by the legislator which is obligated to implement them, i.e. to fill the legal gap. The national report of Poland notes that if the Constitutional Tribunal states omission of law-making (incomplete regulation), establishes its limits and specifies the actions the legislator needs to take in order to remedy the flaws that appeared, there is a constitutional obligation on the legislator to implement the Tribunal's decision and to fill the legal gap.

The national report of Germany, although this question has not been answered directly, allows the conclusion that the legislator must remove the gap of legal regulation. The experience of the Federal Constitutional Court of Germany is to be noted, which occasionally establishes temporary provisions to allow the legislator time to bring the regulation into line with the Constitution. In some instances the Constitutional Court will appeal to the legislator to take certain actions even though the existing legal situation is assumed to be constitutionally compliant. The Court can also charge the legislator with monitoring the legal regulation or can establish a probationary period, in cases where the disputed legal regulation does not contravene the Constitution at the time of adoption of the Constitutional Court decision, but the Constitutional Court finds it necessary to monitor legal practice in order to determine whether the laws need rectification. Another option for the Constitutional Court is the interpretation of legal regulation as reconcilable with the Constitution.

When the Constitutional Court of Austria recognises that the law contravenes the Constitution, a duty of legal regulation of a respective issue falls on the legislator, and the law must be “corrected”. In so doing, the legislator has to pursue the instructions set out in the decision of the Constitutional Court.

Some national reports in this group mention that general rules apply regarding the obligatory character of the decision. For instance, the report of Serbia notes that from the Constitution and from the Law on the Constitutional Court the obligation to execute decisions of the Constitutional Court arises to all drafters of legal norms, including the National Assembly. When the Constitutional Court found this law to be unconstitutional in its entirety, due to a legal gap, general rules applied to the execution of the court's decisions. The report notes that the following may be distinguished:

- a. a legal gap the presence of which caused the recognition of a legal act as unconstitutional; and
- b. a legal gap which emerged due to the Constitutional Court decision which eliminated this act from the legal system as of the day of official promulgation of the Constitutional Court decision.

These situations mean the necessity and the obligation of the legislator to regulate a certain area of social relations in a proper manner.

Sometimes, the obligation to execute the decision is connected with some of its additional consequences (e.g. inability to overcome the decision upon repeated adoption of a similar act). For instance, the national report of Lithuania notes that the rulings of the Constitutional Court are obligatory for all state institutions, courts, all enterprises, establishments, organisations, officials and citizens. The power of the Constitutional Court rulings is equated to the power of the Constitution. Consequently, the Constitutional Court ruling which recognises a law or another act of the *Seimas* as contravening the Constitution due to legislative omission is also binding on the *Seimas* – the Representation of the People – that enacted the law or the act. The obligation arises to the legislator to establish the necessary legal regulation for the purpose of fully implementing the Constitutional Court ruling. The power of the Constitutional Court ruling to recognise a law or a legal act unconstitutional due to legislative omission may not be overcome by repeated enactment of the same law or legal act.

In the Constitutional Court decisions of the second group of countries formal advice is given to follow the obligations of the legislator, or the legislator is notified about the legislative omission identified.

For instance, the verification of a legal act performed by the Constitutional Court of Spain directly does not obligate the parliament to execute the obligations of the legislator; it is a formal piece of advice

(admonition) to fulfil the duties of the legislator. The Constitutional Court of Azerbaijan actively supports Parliament in the implementation of its legislative powers. It provides recommendations to the legislator to make necessary normative changes in the effective legal regulation so that this legal regulation complies with the legal position of the Constitutional Court, set forth in its adopted rulings the execution whereof is obligatory to all.

The Constitutional Courts of Portugal and Croatia only notify the legislator about the legislative omission detected.

For example, after the Constitutional Court of Portugal identifies the existence of omission contravening the Constitution, it must notify the competent legislative body about it. In the legal system of Portugal the consequences of detecting omission contravening the Constitution are the same, no matter which competent legislative body in a specific case should adopt legislative rules necessary for the implementation of the constitutional provision. Irrespective of whether under the Constitution the power to enact respective legislative measures, the absence of which caused the statement of the existence of legislative omission, belongs to Parliament, the Government or the Parliaments of Autonomous Regions, the consequences of the above statement include only the obligation of the Constitutional Court to notify respective bodies competent to adopt a rule filling the legislative gap. It means that, unlike the consequences which are characteristic of the instances when actions contravene the Constitution, the rulings on contravention of legislative omission to the Constitution as such do not possess concrete legal efficacy and are not capable in their own right of bringing about any kind of alteration in the legal order.

In Croatia, if the Constitutional Court, in proceedings of abstract control, states the existence of a legal gap or legislative omission in the reasoning of the decision (such a request or proposal will be dismissed for lack of jurisdiction) it does not usually repeal such a provision or regulation but gives them the qualification of "observed appearance of unconstitutionality or illegality" and reports this to the competent body so that it may fill in the legal gap or the legislative omission. A second possibility is that in executing supervisory control over the enactment of regulations for the execution of the Constitution, laws and other regulations it delivers a report to the competent body (the Government or Parliament) for the enactment of the regulation (completely or in part) that was not enacted but should have been enacted.

An intermediate position between those two groups of decisions is taken by the decisions of the Constitutional Courts of Russia and Moldova. Under Article 79 of the Russian Federal Constitutional Law "On the Constitutional Court of the Russian Federation", if by the decision of the Constitutional Court of Russia a legal act is recognised as contravening the Constitution wholly or in part, or if the necessity arises from the Constitutional Court ruling to fill a gap in legal regulation, the state body or official who enacted that act, should resolve the issue regarding a new act. This should include provision for the adoption of provisions for the annulment of the act contravening the Constitution or for the amendment of or supplement to such act. These provisions are addressed to the State Duma, the President, the Government, the legislative bodies of subjects of the Russian Federation, or to the top officials and the bodies of the federal government. Article 28.1 of the Law on the Constitutional Court of Moldova establishes that public authorities must execute the acts of the Constitutional Court. The responsible body must examine the statement by the Constitutional Court that gaps of normative regulation exist, related to the failure to execute respective constitutional provisions. This body should notify the Constitutional Court as to the result of its investigation within three months.

The obligatory character of the statement of the duty to fill the gap of legal regulation is often related to the condition of executing this duty within a certain time span. This is an essential guarantee while securing the requirements arising from the Constitutional Court decision. In some countries the Constitutional Court itself establishes the term necessary for elimination of the gap of legal regulation (e.g. Hungary, Slovenia), in other countries the terms of examination of the issue and decision-making are established by the law (e.g. the Statute of the *Seimas*, which has the power of a law (Lithuania)).

For instance, pursuant to Article 48 of the Law on the Constitutional Court of Slovenia, the ruling of the Constitutional Court should also specify the term over which the gap of legal regulation should be removed. The obligation of the legislator to remove the gap of legal regulation is established pursuant to Articles 2 (principle of the rule of law) and Article 3 (principle of the separation of powers) of the Constitution, respectively the principle of a state under the rule of law and the principle of separation of powers. Article 49.2 of the Law on the Constitutional Court of Hungary obliges the legislator to properly eliminate a gap of legal regulation within the term established by the Constitutional Court.

Under the Statute of the *Seimas* of Lithuania, upon the entry into force of a Constitutional Court ruling that the law or part thereof) or another legal act (or part thereof) of the *Seimas* contravenes the Constitution or a constitutional law, the Committee on Legal Affairs or, by its advice, any other *Seimas* Committee must, within four months, (in special situations, this term may be extended up to 12 months), prepare and submit to the *Seimas* for consideration a draft amending the law (or part thereof) or any other act (or part thereof) adopted by the *Seimas* which the Constitutional Court declared contravening the Constitution; when preparing these drafts, one is to take into consideration the gaps, inconsistencies in legal regulation, other shortcomings and arguments set forth in the ruling of the Constitutional Court.

Another essential aspect in securing the execution of the Constitutional Court decision which states legislative omission is the guarantee of the method by which parliament will execute the obligation formulated in the act of the Constitutional Court.

In some countries general legislative rules are followed, (Estonia, Hungary and Russia). As noted, the term is established for the Parliament of Hungary to rectify the anti-constitutional gap, although in the statute of the parliament of this country no special provisions exist as to how Constitutional Court rulings stating omissions should be executed; therefore, the stance is taken that such omissions should be remedied according to the rules valid for the legislation of ordinary laws. The statute of the parliament of Estonia provides no guidance as to how the issues of implementation of the Supreme Court decisions (including those regarding omissions) should be considered, and one follows general provisions. The Regulations of the Federal Assembly House of Russia have no special provisions solely designed for the regulation of the specified problem. The examination of draft laws, also related to the filling of gaps revealed in the rulings of the Constitutional Court, takes place under general procedure, if the Government does not refer the draft to the State Duma as subject to urgent examination.

In the parliaments of other countries special rules for the activity of the parliament are established, which are designed to secure the implementation of Constitutional Court decisions (e.g. Lithuania. Its Statute of the *Seimas* even has an individual article regarding the implementation of the Constitutional Court decisions).

Another way to guarantee the implementation of decisions is a formal establishment of certain sanctions or procedures which guarantee the implementation of the decision. For instance, if the legislator fails to

execute its obligations within the time span established by the Constitutional Court, under Article 48 of the Law on the Constitutional Court, the Constitutional Court of Slovenia may perform a repeated supervision procedure of the same law and establish that the legislator violated Articles 2 and 3 of the Constitution. If possible, the Constitutional Court reduces the term allowed for the legislator.

However, only a few countries have such sanctions and procedures established. Elsewhere it is sufficient to follow the settled tradition and practice of one or the other institution. For instance, in Hungary failure to execute legislative duties does not carry any sanctions. The Constitutional Court of Spain has no legal instruments enabling the enforcement of law-making on the parliament, either. If a legal gap may be filled by means of the analogy of law, while cooperating with the judiciary, there is no legal need for new legislation. The Constitutional Court of Russia also has no special mechanism, which would affect parliament in the amendment of laws. In order to implement its decisions, it regularly (twice a year) sends to the State Duma the lists of its cases the resolution part whereof specifies the necessity to regulate certain matters by means of law. Moreover, according to the inquiries of the State Duma, the Constitutional Court submits proposals regarding the legislative plans of the parliament's activity during the autumn and spring sessions. Under Article 105 of the Constitution of Serbia, the Constitutional Court of Serbia has a possibility to present its opinion to the National Assembly and specify that law reforms and other measures are necessary (as well as the necessity to fill legal gaps in a law). The National Assembly examines the information and must inform the Constitutional Court about its conclusions.

A further issue worthy of attention in the context of the subject under discussion: are parliaments sometimes "slow off the mark" in rectifying flaws of legal regulation, in filling the gaps revealed that contravene the constitution?

The responses of some countries note that there were no cases when the parliament ignored the decisions of the Constitutional Court regarding legislative omission. Others did not respond to this question at all. The third group of countries noted instances when they do take their time in filling the gaps revealed. The report from the Slovenian Constitutional Court mentions cases where parliament and other law-making institutions were slow to rectify the gaps, so that the Court reminded them of their obligations in its annual report to the public. It is also noteworthy that in Slovenia, once the Constitutional Court has issued a declarative ruling specifying gaps in law and the time span during which

Parliament must rectify the gaps, the government has the right of initiative to submit a respective draft law (Article 2.2 of the Law on the Government).

It should be noted that the report of the Constitutional Court of Lithuania indicated that before 15 October 2007 a total of seven rulings of the Constitutional Court stated the existence of legislative omission in laws and that the *Seimas* did not react to all of the rulings in a timely and proper fashion.

Where parliaments do not react to the Constitutional Court decisions regarding legislative omission, this prompts reflection on the general security of Constitutional Court's decisions. In countries where no firm traditions of constitutional democracy have been formed, it is difficult to rely only on the good will and understanding of obligations of the parliamentarians. Therefore, all legal mechanisms should be deployed, to secure the implementation of constitutional justice. Constitutionalism means that all state institutions, including parliament which is entrusted with passage of legislation, follow the Constitution unconditionally in all cases and legal situations without exception. Therefore, upon statement of an anti-constitutional legal gap, parliamentarians have no choice but to draft, discuss and enact the necessary amendments of laws or other legal acts in a timely fashion, since any legal uncertainty or anomaly of the legal order undermines the confidence of citizens in the state under the rule of law, and in state institutions.

5.2. Duties incumbent on other subjects of law-making (e.g. Head of State, the Government)

The principle of obligation of the Constitutional Court decision imposes a duty not only on parliament as the legislative institution, but also other subjects of law-making. In the majority of the states (Azerbaijan, Lithuania, Portugal, Slovenia, etc.) the decisions of the Constitutional Courts regarding the contravention by omission of sub-statutory legal acts of the Constitution create legal obligations similar to those which are incumbent on the legislator and the respective institutions implementing law-making functions.

For example, in the Republic of Lithuania, an act of the President of the Republic, or of the Government may not be applied from the day of official promulgation of a decision by the Constitutional Court that the act in question is in conflict with the Constitution. In cases where unconstitutionality due to omission was stated, the said law-making subjects would be under a duty to establish the necessary

legal regulation so that the Constitutional Court ruling is implemented. By the way, before 15 October 2007 a total of seven rulings of the Constitutional Court stated only legislative omission existing in laws, therefore other law-making subjects did not have to resolve this matter.

The national report of Portugal emphasises that upon the statement of omission by the Constitutional Court, the duty of the same content arises to all subjects of law-making, whether it be the Assembly of the Republic, the Government or legislative assemblies of autonomous regions.

A statement of legislative omission in a ruling of the Constitutional Court of Russia implies the obligation of other law-making subjects to fill this gap in the proper manner. This arises directly from the provisions of the federal law, providing for a respective duty to the state bodies and officials that adopted the normative act recognised as unconstitutional.

Article 28.1 of the Law on the Constitutional Court of Moldova establishes that the state bodies must execute acts of the Constitutional Court. After the statement is made that gaps of normative regulation exist, which are related with the failure to execute certain constitutional provisions, the obligation arises to a respective body to examine this issue and notify the Constitutional Court about the results of investigation within three months. The act recognised as being in conflict with the Constitution or the laws of the country by the Constitutional Court of Azerbaijan must be reconsidered by the institution that enacted it. This institution should follow the guidelines specified in the ruling of the Court.

The issues of normative omission of acts of the Government have not been examined in the practice of the Constitutional Court of Serbia. If due to the decision of the Constitutional Court, the act has been eliminated from the legal system as unconstitutional or illegal due to the legal gap existing therein; other subjects of law-making (state bodies, organisations, which are trusted public authority and other organisations) should adopt a new act and regulate respective social relations. The national report of Serbia states that normally no problems appear due to the execution of the Constitutional Court decisions. If required, on request of the petitioner, the Constitutional Court applies to the Government regarding the guarantee of execution of the Constitutional Court decision, and asks to be kept informed of the measures applied.

In Montenegro, if required, the Government undertakes measures for the implementation of the Constitutional Court rulings: in so doing, it acts pursuant to the procedure and methods prescribed by the Act on the Government.

It was noted that the Constitutional Court of Hungary establishes the time it should take to rectify the anti-constitutional gap, although neither the statute of the parliament of the country, nor the regulation of work of the Government have special provisions as to how Constitutional Court rulings stating legislative omission should be executed. It is stated that such omissions should be remedied according to the rules valid for ordinary legislation.

CONCLUSIONS

The sixth part of the questionnaire was intended as a proposal to the authors of the national reports to summarise the experience of the Constitutional Courts in the case examination related to legislative omission. Not all Constitutional Courts were prepared to set forth such generalisations. Some cautiously formulated conclusions. Such cautiousness is understandable when the problem, which has not been deeply researched so far, is considered. Thus, the authors of the general report could hardly aspire to attain a finished and exhaustive statement of conclusions.

In effect, the conclusion to the report is in the nature of a sketch, highlighting some points of significance in the opinion of the authors of the general report. This is really an invitation to further discussion in Congress, where certain statements will be clarified or remarks revealing the essence and meaning of the investigation of legislative omission will be formulated anew. In summary, the national reports and the general reports are only a springboard for deeper study. One can imagine a painting here, which has only just been started; the real image will only be seen when the Congress is over. We have no doubt that all participants of the Congress will have an input in the consideration of the discussed institute of securing the superiority of the Constitution in the legal system. Please therefore simply consider the conclusions set forth below as an attempt, with reference to the national reports, to draw the most visible outlines of investigation of legislative omission in the practice of the Constitutional Courts of Europe.

It is noteworthy that:

1. The problems of legal gaps are analysed in the scientific doctrine of various countries and the impact of the doctrine is sensed in the constitutional jurisprudence one way or another. The legal literature of European countries presents various definitions of a legal gap, their versatility relates to differing perceptions of legal gaps. This also determines the possibility for classification of various legal gaps. In the evaluation of the variety of terminology used in the national reports and giving various names to legal gaps, one should agree with the statement given in the national report of Spain that the classification of the gap as a “gap”, “omission” or “deficient regulation” is ultimately the outcome of a convention concerning concepts that is not always shared by all authors.

2. In the national reports legal gaps are often treated as an anomaly of the legal system. In their national reports the majority of the Constitutional Courts emphasised that the dominant approach in legal scientific doctrine is that in legal practice all legal gaps cause legal problems of one character or another that need resolution. The Constitutional Courts find significant the methods of resolving the problems of legal gaps, which in one way or another are related to the execution of their functions as constitutional control institutions, i.e. what the Constitutional Courts may and do perform themselves while removing legal gaps and/or creating preconditions for such removal.

3. All Constitutional Courts come across the problem of legal gaps; only the ways they resolve the problem are different. Constitutional courts may:

- a. remedy the legal regulation containing legal gaps by way of interpreting the legal regulation and subsequently filling the legal gaps;
- b. while recognising legal regulation containing legal gaps as unconstitutional, direct the law-making subject to remedy it;
- c. refrain from recognising a legal regulation containing legal gaps as being in breach of the Constitution, but criticise it and advise the law-making subject how to rectify the problem and also make obligatory interpretation to the courts, which should take account of the interpretation of the Constitutional Court, when they decide respective cases.

4. The occurrence of the component of legislative omission in the constitutional justice is a natural phenomenon, reflecting the recognition of the significance of securing the constitutional imperatives in all aspects. The jurisprudence of Constitutional Courts of the countries of Europe has accumulated sufficient practice of investigation of anti-constitutional legal gaps to allow for summary and analysis.

5. The essence of legislative omission is revealed in the clearest way in more than one national report, whereby legislative omission is perceived as a legal gap prohibited by law, primarily the Constitution of the country. It should also be noted that although legislative omissions are primarily distinguished in the legal theory (doctrine), however, in some countries this concept was released into legal circulation through the Constitutional Court jurisprudence of those countries, rather than development of scientific doctrine.

6. The formation of the doctrine of constitutional investigation of legal gaps reflects a general trend of European constitutional justice, which is to strengthen the protection of constitutional origins in the legal system. Under the constitution, the existence of legislative omission means improper execution of the requirements to establish the necessary legal regulation, disregard of the obligations directly established in the Constitution. Instances where the legislator or other law-making institutions fail to establish the legal regulation which should be established are real (absolute) omissions, and when they establish incomplete and insufficient legal regulation, this is a partial (relative) omission.

7. The approach dominates in the national reports that the superiority principle of the Constitution is consolidated in the legal system, meaning that the Constitution occupies the exceptional – the highest – position, that legal acts of lower power may not contravene legal acts of higher power, i.e. no laws or other legal acts may contravene the constitution, and sub statutory acts cannot contravene laws. The principle of supremacy of the Constitution is consolidated either directly in the Constitution or derived from it. The investigation and assessment of legislative omission is related to the superiority of the constitution, and to securing the constitutional imperatives in the national legal system.

8. It is to be noted that only the Constitution of Portugal explicitly consolidates the mandates of the Constitutional Court to investigate and assess legislative omission, that only in some of the states the right of Constitutional Courts to investigate and assess the constitutionality of legal gaps is *expressis verbis* consolidated in the law which regulates the activity of the Constitutional Court.

A large part of the Constitutional Courts derived the delegation to investigate and assess legislative omission in constitutional jurisprudence from the overall regulation of the Constitution as supreme law. It must be stressed that these courts treat the official constitutional doctrine as a logical extension of the text of the Constitution and its principles and as possessing the power of the Constitution as such.

In some states, the analogous right of the Constitutional Court to investigate legislative omission is implicitly derived from the law which regulates the activity of the Constitutional Court, although it is not directly consolidated in that law.

9. Only a small part of the Constitutional Courts investigate legal gaps as the result of inaction of the legislator or another law-making subject (absolute omission). Many of them investigate and assess legislative omission only as the consequence of an improper action (rather than the inaction) of the legislator or other law-making subject (relative omission), i.e. in the latter instance establishing the lack (insufficiency) of the legal regulation or legal norms.

The Constitutional Courts of some countries investigate legal gaps in a very limited fashion.

10. In their national reports a small group of Constitutional Courts noted that they have no jurisdiction whatsoever to investigate and assess the constitutionality of legal gaps.

11. In the practice of Constitutional Courts investigating and assessing legislative omission the peculiarities may be noted of the scope, methodology of the investigation of legislative omission, of the decisions taken. The intensity of these investigations is irregular too. The peculiarities and limits of investigation of legislative omission are determined by the features of the national constitutional proceedings, the object of appeal and the position of the act under verification in the legal system, etc. established in the Constitution and in the laws.

12. As a rule, the identification of legislative omission is related to the absence of certain provisions which the Constitution stipulates should have been enacted, and with the failure to execute a certain requirement provided for in the Constitution. The lack of such legal regulation raises questions over its constitutional compliance. The majority of the national reports note that in the investigation of instances of legislative omission the Constitutional Courts apply complex investigation methodology, use various law interpretation methods or their combinations (grammatical, systemic, comparative, historical, teleological, etc.).

Only though the application of all instruments of legal technique is the content and essence of the legal regulation consolidated in legal acts revealed. Its peculiarities and deficiencies are also perceived, as well as the absence of legal regulation, when such absence contravenes the Constitution.

13. The complexity of investigation and assessment of legislative omission can be seen in the resolutions of constitutional justice cases. However, in these cases the Constitutional Courts which seek to secure constitutionality of the legal system as much as possible are not satisfied with the recognition of a law or another legal act or its provisions as contravening the Constitution. In order to achieve the greatest possible impact for their decisions on the legal system and the practice of law application, the Constitutional Courts may recognise a law, other legal act or provisions as being in breach of the constitution, but keep the law in question on the statute book, whilst recognising lack of action by the legislator (or other law-making subject) as anti-constitutional and specify the time span for introducing the law, which is obligatory under the constitution, should be established. Courts may also state the obligation of the legislator (or other law-making subject) to remove the legal gap, or state a gap of legal regulation and specify that it may be removed by courts of general jurisdiction and specialised courts. Alternatively, it may order courts of general jurisdiction and specialised courts to suspend the consideration of the cases and refrain from applying the existing legal regulation, until the legislator removes the gap. Equally, they may declare the existence of a gap in legal regulation without any direct conclusions and without giving any instructions or otherwise assessing legislative omission. Decisions of Constitutional Courts regarding legislative omission may be viewed as another argument confirming that Constitutional Courts do not only fit the role of the "negative legislator".

14. Constitutional courts use a variety of methods to avoid legal gaps occurring when a law or other legal act is recognised as being in breach of the Constitution. For example, they can defer the official publication of the Constitutional Court decision, and set a later date for it to come into force. They can also state that the legal act under scrutiny temporarily complies with the constitution, but stipulate that unless it is amended by a certain specified date, this will no longer be the case. Courts can also recognise legal acts as being in breach of the constitution, but not eradicate them from the legal system. They can interpret a legal act or its provisions as being constitutionally compliant, whilst avoiding stating it to be in breach due to legislative omission. In addition, they can restore the legal regulations that were in force before the regulations under challenge were enacted.

15. The differences in the investigation, assessment and formulation of constitutional decisions of legislative omission by the Constitutional Courts are connected with the different framing of obligations to the legislator when an anti-constitutional legal gap is stated in constitutional justice cases. In some countries this decision of the Constitutional Court means a formal requirement to remove the gap, while in others, it is simply a formal piece of advice to remedy the stated gap of the legal regulation, or to notify the parliament or other law-making institution about the stated legal gap. The majority of national reports note that Constitutional Court decisions, which state legislative omission, are executed, when the legislator or another law-making subject rectifies the flaws of legal regulation created by it. Constitutional court decisions related to statements of legislative omission have a substantial impact on law-making and legal practice.

Legislators and other law-making subjects do not always react to these decisions in a timely fashion and, in the application of the law, the approach set out by the Constitutional Court is not always followed. It is to be noted that in countries without extensive constitutional control traditions it is expedient to consider the possibility of providing for a mechanism of implementation of the Constitutional Court decisions regarding legislative omission directly in the Constitution or in laws.

16. The investigation and statement of legislative omission should be viewed as a significant constitutional control measure administered by the institutions executing constitutional justice functions. One might also venture to suggest that the experience of Constitutional Courts shows that the statement of legislative omission and the formulation of the obligation to remedy the legal regulation enhance the protection of rights and freedoms of the person. Needless to say, such control has a positive impact on national law-making.

17. Different competence of the Constitutional Courts and the established constitutional control possibilities, a different scientific doctrine and the attitude of the courts themselves determine today's institute of legislative omission, which is diverse and at times difficult to grasp. It is even more difficult to predict the future of the investigation of legislative omission in constitutional justice. On the one hand, perhaps, it may be noted that between the start of the last decade of the 20th c. and 2008 the number of such investigations was growing, that more than one Constitutional Court started the application of this concept in its practice pursuing creative interpretation of the Constitution. On the other hand, the nature of the concept and differing attitudes towards it

encourage a presumption that the investigations and assessments of legislative omission will probably not become a necessary attribute of every court, and, for now at least, will remain one of the instruments more or less frequently employed by the Constitutional Courts, securing the balance and constitutionality of the legal system.



CASE-LAW

Armenia Constitutional Court

Important decisions

Identification: ARM-1998-2-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 16.06.1998 / **e)** DCC-114 / **f)** On the conformity with the Constitution of the obligations fixed in the Agreement between the Government of the Republic of Armenia and the World Health Organisation on the Establishment of Relations in the Area of Technical Assistance" / **g)** *Tegekagir* (Official Gazette), 4/1998 / **h)**.

Keywords of the systematic thesaurus:

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

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

4.6.2 **Institutions** – Executive bodies – Powers.

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

Keywords of the alphabetical index:

Government action, review of constitutionality / Government, failure to act / Health, protection, state targeted programme.

Headnotes:

The Government has to undertake necessary and sufficient measures pursuant to Article 34 of the Constitution and the Law on Medical Support and Medical Service of the Population.

Summary:

The Constitutional Court heard a case concerning the conformity with the Constitution of the obligations fixed in the Agreement between the Government and the World Health Organisation on the establishment

of relations in the area of technical assistance. The Constitutional Court recognised that the obligations fixed in the Agreement signed on 17 September 1997 in Istanbul between the Government and the World Health Organisation were in conformity with the Constitution. The Court stipulated, however, that the Government had to undertake necessary and sufficient measures pursuant to Article 34 of the Constitution and the Law on Medical Support and Medical Service of the Population, in particular, to ensure the approval and implementation of annual State programmes on health protection of the population which are prescribed by the law.

The Constitutional Court found that the Government had failed to undertake measures pursuant to the implementation of the requirements of Article 34 of the Constitution and the above-mentioned Law as well as the requirements of the decision of Constitutional Court as of 18 February 1998, no. 90, because in practice the State health care programs had not been approved and published.

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.



Austria

Constitutional Court

Important decisions

Identification: AUT-1995-3-009

a) Austria / b) Constitutional Court / c) / d) 27.09.1995 / e) G 1256-1264/95 / f) Aktiver Kabelrundfunk / g) to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / h) CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

1.6 **Constitutional Justice** – Effects.

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, cable television.

Headnotes:

Legal provisions which excluded all so-called “active” cable broadcasting (*aktiver Kabelrundfunk*) by persons other than the Austrian Broadcasting Office constituted disproportionate interference with the exercise of the freedom to communicate information or ideas.

Summary:

The Court assumed jurisdiction in this case of its own motion following an appeal on the grounds of the unconstitutionality of administrative acts brought by the owners of stations who wanted to broadcast local news, feature films and reporting on their private cable television networks. They had not obtained the necessary licence: the Constitutional Law on Broadcasting defined the term “broadcasting” (an audio or visual broadcast, including cable television) and foresaw an implementing law which guaranteed

the balance, objectivity and pluralism of broadcasts and the independence of those responsible for administration. The Law on Broadcasting (*Rundfunkgesetz*) authorised only the Austrian Broadcasting Office (ORF) to organise radio and television. The Law on Regional Radio Stations (*Regionalradiogesetz*) granted other (private) individuals the right to run radio stations. The Regulations on Broadcasting (*Rundfunkverordnung*), which had the status of a law, introduced unrestricted cable television (so-called “active” cable radio broadcasting) only for the benefit of ORF. It allowed authorities to grant persons and private legal entities licences for so-called “passive” cable broadcasts, i.e. broadcasting texts (*passiver Kabelrundfunk*).

Recalling its Decision no. VfSlg. 9909/1983 and the European Court of Human Rights’ case law on *Informationsverein Lentia*, the Constitutional Court observed that the Constitutional Law imposing a licensing system on broadcasting companies was not contrary to Article 10 ECHR; the legislature had simply failed to adopt an implementing law. However, it was important to note that such an omission was not exempt from the Court’s competence. According to the Court’s interpretation, the provisions of the aforementioned Regulations on Broadcasting prohibited persons in legal ownership of private cable television networks from broadcasting anything other than texts. Therefore this represented disproportionate interference in the exercise of the freedom to broadcast (*Rundfunkfreiheit*). In setting aside these regulations, the Court made clear that cable broadcasts would be authorised without restriction.

The Court set a short period for the entry into force of the annulment because the legislator already knew since the time of the decision of the European Court of Human Rights about the infringement of Article 10 ECHR.

Languages:

German.



Belarus

Constitutional Court

Important decisions

Identification: BLR-1998-B-006

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 11.12.1998 / **e)** J-74/98 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/1998 / **h)**.

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.

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.

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

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

Keywords of the alphabetical index:

Court, powers, delimitation / Inquiry, pre-trial material.

Headnotes:

Entrusting a court of law (judge) with the task of formulating the charge against an accused in its ruling on the initiation of criminal proceedings is contrary to the Constitution and the provisions of the International Covenant on Civil and Political Rights.

Summary:

The Court examined the case on the basis of a constitutional motion of the President of the Republic of Belarus.

According to Article 404 of the Code of Criminal Procedure (“the Code”), concerning the formalities to be observed in the pre-trial preparation of a case, the ruling on whether criminal proceedings shall be initiated shall be made by a court of law (judge) on

the basis of the materials received from the investigating body. The court of law is also entrusted with the task of formulating the charge against the accused person, specifying the provision of the criminal law under which the person has been charged.

The Court, based on its analysis of the provisions of the Constitution and the International Covenant on Civil and Political Rights, found Article 404.3 of the Code to be unconstitutional on the following grounds.

Entrusting a court of law with functions that are characteristic of the prosecution bodies as well as with the task of administering justice is contrary to Article 60 of the Constitution and Article 14 of the International Covenant on Civil and Political Rights, which guarantee the protection of everyone’s rights by an independent and impartial court of law. The independence and impartiality of justice are based on the right of a court of law to adopt a decision as a body of justice with respect to charges already laid.

The Court considered that entrusting a court of law with the task of formulating the charges against an accused person may be regarded as a predetermination by the court of the guilt of the person, leading to a guilty verdict in the case, because a judge, having formulated the charge, may turn out to be bound by his or her own decision.

The Court ruled that the provision of Article 404 of the Code that entrusts the court with the task of formulating the charge against an accused person is in conflict with the principle enshrined in Article 115 of the Constitution of the administration of justice on the basis of adversarial proceedings and the equality of the parties involved in a trial. The Court also emphasised that observing the formalities for the pre-trial preparation of a case in their present form restricts the possibility for a person subject to prosecution to protect his or her rights and lawful interests both personally and with the help of defence counsel. This is contrary to Article 62 of the Constitution and to international standards.

The Court found that it would be possible to observe the formalities in question in expedited criminal proceedings in certain categories of cases provided that all requirements were respected as to the proper guarantee of the rights and lawful interests of all the participants in the process.

Languages:

Russian, English (translation by the Court).



Identification: BLR-2000-B-004

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 17.11.2000 / **e)** D-104/2000 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2000 / **h)**.

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.

3.23 **General Principles** – Equity.

5.2 **Fundamental Rights** – Equality.

5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.

Keywords of the alphabetical index:

Sentence, reduction, application, conditions.

Headnotes:

Laws on the reduction of sentences shall be applicable to convicted persons with regard to whom verdicts have not yet become final and binding because of a failure by the courts to examine appeals or challenges concerning their cases for long periods of time for reasons beyond the control of the convicted persons.

The law governing criminal procedure must lay down specific time-limits within which observations on the court record of the court of first instance must be examined, as well as the time-limits within which a criminal case subject to an appeal (challenge) must be referred to the relevant appellate court.

Summary:

The decision in the present case was based on the need to secure the constitutional principle of the equality of all citizens before the law, including those persons who have the right to a reduction of their sentence, and the need to take a more equitable approach to convicted persons with regard to whom guilty verdicts had not yet become final and binding on the day on which the relevant law on the reduction of sentences had entered into force.

The Court took into account the facts arising in practice in the courts, where appeals by convicted persons were not heard by the courts for long periods of time for reasons beyond the control of convicted persons, and because of this, guilty verdicts entered against those persons had not yet become final and binding on the day on which laws on the reduction of sentences entered into force. In such instances, the above-mentioned persons had no right to a reduction of their sentence, since the laws on the reduction of sentences allowed for such reductions to be applied only to convicted persons with regard to whom verdicts had already become final and binding on the day on which the relevant law on the reduction of sentences entered into force.

Such an approach constitutes an infringement of the right to equality of citizens, as well as of their right to appeal against verdicts returned with respect to them. (Certain convicted persons lodge no appeals against verdicts only in order to be entitled to a reduction in their sentence.)

The Court concluded that a fair solution could be found regarding the application of the reduction of sentences to convicted persons with respect to whom verdicts had not become final and binding. In that connection the Court ordered that the National Assembly should examine (on the basis of the interpretation set forth in the present decision) the application of the laws on the reduction of sentences of 18 January 1999 and of 14 July 2000 to convicted persons with regard to whom verdicts had not yet become final and binding, due to the failure of the courts to examine appeals (challenges) on their cases for long periods of time for reasons beyond the control of the convicted persons.

Moreover, in the Court's opinion, the law on criminal procedure must lay down specific time-limits within which observations on the court record of the court of first instance must be examined, as well as the time-limits within which a criminal case subject to an appeal (challenge) must be referred to the relevant appellate court.

Languages:

Russian, English (translation by the Court).



Identification: BLR-2001-B-005

a) Belarus / b) Constitutional Court / c) / d) 25.04.2001 / e) D-115/2001 / f) / g) *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2001 / h).

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.

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

5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.

Keywords of the alphabetical index:

Offence, customs, penalty / Customs, clearance, effectiveness / Confiscation, term, condition.

Headnotes:

Judicial practice that excludes the possibility of abrogating or revising judicial rulings on the termination of proceedings in cases of administrative customs offences is at variance with the requirements of the legislation on administrative offences.

The failure to apply the relevant provisions of the Administrative Code, as regards proper customs clearance of imported goods, constitutes a real threat for the economic and financial system of the country, its economic security, public health and even the life of citizens (for example, through the importation of low quality goods), and prevents the achievement of other socially significant goals of a state governed by the rule of law that are enshrined in the Constitution.

One of the principles of a state governed by the rule of law is not only the protection of individuals by law but also fairness, which is expressed in the inevitability of liability for offences committed and in the proportionality between the punishment and the offence committed.

Summary:

The conformity with the Constitution of Article 37 of the Administrative Code (“the Code”) was examined on the basis of Articles 40, 116.1 and 125 of the Constitution, Articles 7 and 11 of the Law on the Constitutional Court and Article 35 of the Law on the Prosecutor’s Office, on the basis of the constitutional motion of the Prosecutor-General of Belarus.

The Prosecutor-General noted that when exercising supervision over the legality of the examination of administrative cases by the courts it is in many instances established that the requirements of the relevant legislation are violated in the handing down of rulings of the courts of law on customs offences under administrative law (i.e. administrative, rather than criminal, customs offences). Appeals by public prosecutors against those rulings often find no satisfaction. A judicial practice has been established that erroneously excludes the possibility of quashing or revising judicial rulings terminating proceedings in cases of customs offences under administrative law, contrary to the requirements of Article 37.3 of the Code.

The Court analysed various provisions of the Constitution, the Code, a resolution of the Plenum of the Supreme Court which deals with the specified issues, and a number of cases on customs offences under administrative law examined by the courts of law. The Court concluded that the practice of the courts of law with respect to the examination of such offences is inconsistent and is at variance with the Constitution and with the law due to non-observance of the requirements of Article 37.3 of the Code. Under that provision, whereas a time-limit applies for the initiation of proceedings against customs offenders, no such time-limits apply to the confiscation of goods that are direct objects of administrative customs offences or to the sealing off of specially made premises used to conceal goods to avoid clearing customs. These measures shall be taken irrespective of the time of commitment or revelation of an administrative offence. The Court found that the failure to apply Article 37.3 of the Code constituted a real threat to the economic and financial system of the country, its economic security, public health and even the life of citizens (for example, through the importation of low quality goods), and prevented the achievement of other socially significant goals of a state governed by the rule of law that are enshrined in the Constitution.

At the same time the Court indicated that the legislative approach providing, on points of fact, for open-ended liability for administrative customs offences was not in line with the general principles of legal liability, under which time-limits are usually established after which a person can no longer be held liable for an administrative offence. For the purposes of securing the rights of citizens, the legislator may thus fix a maximum time-limit within which the given issue must be resolved.

The Court found that Article 37 of the Code, in so far as it allowed for the confiscation of goods that are direct objects of administrative customs offences, and

the sealing off of specially made premises used to conceal goods to avoid clearing customs, after the expiry of the time-limits fixed in Article 37.1 and 37.2 of the Code, was in compliance with the Constitution and with the laws of the Republic of Belarus.

The Court considered the application of a general three-year time-limit for the confiscation of goods or sealing off of premises to be admissible until the legislator had resolved the issue of setting time-limits for initiating proceedings for administrative liability.

The Court also pointed out that current judicial practice on the application of Article 37.3 of the Code was unconstitutional and ordered the Supreme Court to ensure uniformity of judicial practice.

Moreover, the Court ordered the National Assembly to consider the establishment of time-limits within which a person who had committed an administrative customs offence may suffer the confiscation of goods that are direct objects of administrative customs offences or the sealing off of specially made premises used to conceal goods to avoid clearing customs.

Languages:

Russian, English (translation by the Court).



Identification: BLR-2002-B-009

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 12.11.2002 / **e)** D-151/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)**.

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
4.10.7 **Institutions** – Public finances – Taxation.

Keywords of the alphabetical index:

Entrepreneur, illegal activities / Income, definition / Crime, elements / Criminal code.

Headnotes:

The notion of “income” for the purposes of the qualification of offences against the procedural law applicable to economic activities shall be defined directly in the Criminal Code or the relevant interpretation shall be specified by the legislative body, and this shall encourage the development of a uniform judicial practice based on the law.

Summary:

The Court was called upon to clarify the definition of the notion of “income” for the purposes of the qualification of unlawful entrepreneurial activities under the criminal law.

The Court emphasised that according to Article 233.1 of the Criminal Code, unlawful entrepreneurial activities shall be considered to be crimes, if those activities entail earning a high income. Article 233.2 of the Criminal Code provides for increased liability for unlawful entrepreneurial activities that entail earning a high income. The explanatory note to Chapter 25 of the Criminal Code sets out what constitutes a high income and a very high income. However, there is no definition of the notion of income itself, what comprises income or the method of calculating it for the purposes of the criminal law.

The notion of income arises in other legislative acts – in the Law on Individual Income Tax, the Law on Measures to Prevent the Legalisation of Fraudulent Gains, in Decree no.43 of the President of the Republic of Belarus of 23 December 1999 on the Taxation of Income in Certain Spheres of Activity, etc. An analysis of the content of these binding enactments indicates that the notion of income is defined differently depending on the purposes for which it is used.

For the purposes of qualifying unlawful entrepreneurial activities as criminal activities, the notion of income was clarified by Ruling no. 6 of the Plenum of the Supreme Court of 28 June 2001 on judicial practice in cases of unlawful entrepreneurial activities. Point 6 of this Ruling stated that “income arising from unlawful entrepreneurial activities shall mean the entire sum of proceeds in cash and in kind minus the expenses incurred in the receipt of these proceeds. Income in kind is subject to specification in monetary terms”.

The Constitutional Court emphasised in the present decision that by giving its interpretation of what was meant by income arising from unlawful entrepreneurial activities, the Plenum of the Supreme Court had in effect defined the notion of income under

which activities that resulted in the earning of a high income or a very high income shall be found to constitute a crime. Thus, the Plenum of the Supreme Court had acted as the legislator.

Based on Articles 97 and 98 of the Constitution, Articles 1 and 3 of the Criminal Code, Articles 70 and 72 of the Law on Binding Enactments of Belarus and Article 49 of the Law on the Judicial System and Status of Judges, the Court specified that for the purposes of the uniform and precise application of the terms used in the Criminal Code, only the legislator has the right to define the notion of "income" as applied to unlawful entrepreneurial activities and to other offences against the procedural law applicable to economic activities; that the definition of the notion "income" as applied to unlawful entrepreneurial activities should not be contained in the Ruling of the Plenum of the Supreme Court but in the Criminal Code itself, or shall be revealed by way of interpretation of that notion as applied to the criminal legal relations by the legislative body.

The Court ordered the National Assembly to amend the law in accordance with the given Decision.

Languages:

Russian, English (translation by the Court).



Identification: BLR-2003-B-002

a) Belarus / b) Constitutional Court / c) / d) 24.04.2003 / e) D-156/03 / f) / g) / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 1/2003 / h).

Keywords of the systematic thesaurus:

4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.

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

5.3.43 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Labour, dispute / Legal costs, employee, exemption / Prosecutor, appeal.

Headnotes:

According to the Labour Code (Article 241), employees are exempted from the payment of the national duty in relation to the examination of labour disputes. Levying the national duty on an appeal to the bodies of the Procurator's Office, that is an appeal by way of an application to review a judicial ruling on a labour dispute, is contrary to the Labour Code and the constitutionally guaranteed right of access to courts for all (Article 40 of the Constitution).

Summary:

In a petition to the Constitutional Court, on the basis of Article 40 of the Constitution, the officials of "Group CTC", a unitary enterprise, challenged the constitutionality of the Pinsk City Council Decision no. 104 of 27 December 2001 on the 2002 Budget of the City of Pinsk insofar that a part of it provided for the imposition of local charges on users of the infrastructure of the city.

The Court examined the provisions dealing with the enforcement of the payment of the national duty against persons appealing to the bodies of the Procurator's Office by way of an application to review a judicial ruling on a labour dispute.

The Constitutional Court found that, notwithstanding the requirement of the Labour Code of the Republic of Belarus that employees be exempted from payments of legal costs during the examination of labour disputes, no relevant addenda had been made to the Law on the national duty and that Law had not been brought into line with the Labour Code.

The Court recalled that according to Article 40 of the Constitution, everyone has the right to address personal or collective appeals to state bodies. State bodies as well as their officials must examine any appeal and furnish a reply on the merits within the period specified by law. Any refusal to examine an appeal must be justified in writing.

The Constitutional Court came to the conclusion that legislation in force on the national duty contradicted other legislation and was, therefore, in need of improvement for the purpose of ensuring better protection of the rights of citizens and the interests of the State. The Constitutional Court deemed that the issue on payment of the national duty on labour

disputes under appeal (to a court of law or the Prosecutor's Office) should be regulated in the same way in legislation, taking into account the provisions of the Labour Code laying down the exemption of employees from payment of legal costs while labour disputes are being examined.

In that connection, the Court invited the National Assembly of the Republic of Belarus to make the necessary amendments and addenda to the Law on national duty, as well as to other legislation in order to eliminate any contradictions and lacunas.

Languages:

Russian, English (translation by the Court).



Belgium

Court of Arbitration

Important decisions

Identification: BEL-1996-2-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 15.05.1996 / **e)** 31/96 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.06.1996; *Cour d'arbitrage - Arrêts* (Official Digest), 1996, 403 / **h)** *Information et documentation juridiques* (IDJ), 1996, liv. 7, 18; *Tijdschrift voor Bestuurswetenschappen Publiek Recht* (T.B.P.), 1996, 564; *Revue régionale de droit* (R.R.D.), 1996, 396; CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
 3.1 **General Principles** – Sovereignty.
 3.4 **General Principles** – Separation of powers.
 3.16 **General Principles** – Proportionality.
 4.5.4 **Institutions** – Legislative bodies – Organisation.
 4.6.9 **Institutions** – Executive bodies – The civil service.
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
 5.2 **Fundamental Rights** – Equality.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Parliamentary Assembly, official, right of appeal.

Headnotes:

The lack of a procedure granting officials of legislative assemblies the right to appeal against the administrative decisions of these assemblies or their bodies, while officials of administrative authorities can appeal to the Conseil d'Etat to have these authorities' administrative decisions set aside, infringes the constitutional principle of equality and non-discrimination established in Articles 10 and 11 of the Constitution. However, this discrimination stems from

a loophole in the law which the Court cannot fill. Only the introduction of relevant legislation could remedy this situation.



Summary:

A candidate for a post in the Regional Council of Brussels Capital, the legislative body of the Brussels Capital Region, appealed to the Conseil d'Etat, the highest administrative court, against the decision of the panel set up by the Council not to place him on the reserve list for the post. Without prejudicing the protection of their individual rights before the ordinary courts and tribunals, persons who can establish an interest may file an application to the Conseil d'Etat to have "the decisions and rulings of various administrative authorities" set aside by virtue of Article 14.1 of the Conseil d'Etat's consolidated Acts. This provision is, however, interpreted in such a way that it does not allow for appeals to have the administrative decisions of legislative assemblies or their bodies set aside.

The Conseil d'Etat asked the Court of Arbitration the preliminary question as to whether Article 14, thus interpreted, did not violate the principle of equality established in Article 10 of the Constitution. The Court confirmed that the particular nature of legislative assemblies, which are elected and hold residual sovereignty, requires that their independence be fully guaranteed, but added that this did not justify the fact that officials of legislative assemblies could not appeal against the administrative decisions of these assemblies or their bodies. The lack of this judicial review procedure, which is available to officials in administrative authorities, is disproportionate to the legitimate concern of safeguarding the freedom of action of elected representatives, because the interest protected by an application to have a decision set aside is as real and legitimate for officials of legislative assemblies as it is for those of administrative authorities.

According to the Court, the real discrimination does not arise from Article 14 but from a loophole in the law, namely the fact that there is no right of appeal against the administrative decisions of legislative assemblies or their bodies. The Court held that this situation could only be remedied by the introduction of relevant legislation, at which point consideration could be given to providing specific safeguards taking into account the independence that must be guaranteed to legislative assemblies.

Languages:

French, Dutch.

Identification: BEL-1996-2-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 06.06.1996 / **e)** 36/96 / **f)** / **g)** *Moniteur belge* (Official Gazette), 10.07.1996 / **h)** *Tijdschrift voor bestuurswetenschappen publiekrecht* (T.B.P), 1996, 642; CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

2.1.1.4.15 **Sources** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.

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

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

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

Keywords of the alphabetical index:

Motherhood / Parental right / Paternity / Recognition.

Headnotes:

Article 319.3.2 of the Civil Code, which makes recognition of paternity subject to the consent of the child when the child is over the age of 15 and when paternity has not been established by marriage, means that late recognition can be avoided and gives the child a role, which is not in itself disproportionate, in view notably of Articles 3.1 and 7.1 of the New York Convention of 20 November 1989 on the Rights of the Child. But this possibility is only open to the child in the case of late recognition by the father, not in that of late recognition by the mother. This is contrary to the constitutional principle of equality and non-discrimination established in Articles 10 and 11 of the Constitution. The discrimination is the result of a loophole in the law which the Court cannot fill.

Summary:

A man – whose paternity was not disputed – wished to recognise a child of over 15 (i.e. establish the child's relationship with him by descent), but did not receive the child's consent as required by

Article 319.3.2 of the Civil Code. He maintained before the court that this legislative provision was contrary to the constitutional principle of equality and non-discrimination. The court submitted this as a preliminary question to the Court of Arbitration. The Court replied that the fact that there was no procedure whereby a minor of over 15 years could refuse consent to recognition by a woman, when such a procedure existed enabling him or her to refuse consent to recognition by a man, was contrary to Articles 10 and 11 of the Constitution, but held that this discrimination did not arise from the provision to which the preliminary question related, but rather from the lack of any such measure in provisions relating to the establishment of maternal descent.

Languages:

French, Dutch.



Identification: BEL-1997-2-010

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 18.07.1997 / **e)** 54/97 / **f)** / **g)** *Moniteur Belge* (Official Gazette), 03.10.1997 / **h)** CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

3.16 **General Principles** – Proportionality.

5.2 **Fundamental Rights** – Equality.

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

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

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

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

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

Keywords of the alphabetical index:

Complainant / Criminal proceedings / Criminal inquiries, confidentiality / Victim, right.

Headnotes:

The statutory provision making access to the criminal file by anyone other than the person charged subject to certain conditions does not violate the principles of equality and non-discrimination set out in Articles 10 and 11 of the Constitution. The law is, however, discriminatory in that it does not provide for any judicial remedy against a refusal to grant the victim access to the criminal file during the inquiry.

Summary:

The parents of a girl having gone missing had obtained authorisation from the Principal Crown Prosecutor to consult the criminal file on the disappearance, subject to certain conditions which, in their view, made access impossible. In response to the parents' application to obtain a copy of certain parts of the file, the court found that no judicial remedy was possible against the sovereign ruling of the Principal Crown Prosecutor.

Nonetheless, the court decided to ask the Court of Arbitration whether discrimination did not occur between victims of an offence and other categories of person with regard to access to the criminal file.

Firstly, the Court had to determine which categories of person could relevantly be compared in order to monitor compliance with the constitutional principle of equality. It confined itself to a comparison between the accused person, who had access to the full case file for the purpose of his appearance before the court in chambers for a ruling on his detention, and the victim, whose access to the same file was subject to the conditions set by the King pursuant to Article 1380 of the Judicial Code – in this case the authorisation of the Principal Crown Prosecutor – without any statutory provision for a system of judicial remedy.

The Court considered that, given the confidentiality of inquiries, it was not unreasonable for the legislature to have made victims' access to the criminal file subject to certain conditions during the preliminary judicial investigation. However, the Court found that by establishing a system whereby, without any provision for judicial remedy, the Principal Crown Prosecutor determined the conditions according to which victims had access to the criminal file, the legislature had adopted a measure which was not in reasonable proportion to the objectives pursued, such that the principle of equality had been violated.

Languages:

French, Dutch, German.

*Identification:* BEL-2001-3-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 06.11.2001 / **e)** 140/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.12.2001 / **h)** CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

3.16 **General Principles** – Proportionality.

3.20 **General Principles** – Reasonableness.

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.

Keywords of the alphabetical index:

Tax, unequal treatment, married persons, cohabitants / Legislator, omission / Tax, deduction / Tax, spouse / Tax, cohabitants.

Headnotes:

Article 131 of the Income Tax Code, fixing the tax-exempted proportion of income at 165 000 BEF (4 090,24 €) for single taxpayers and 130 000 BEF (3 222,62 €) for married persons, is not contrary to the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution). Conversely, it is unjustified that married couples and unmarried persons living together should receive different treatment through the application to unmarried cohabitants (in the absence of any specific statutory provision) of the regulations for single taxpayers. However, this discrimination does not arise from the aforementioned Article 131 which was the subject of the preliminary question.

Summary:

When assessing tax on annual income, a tax-exempted proportion of income is allowed in Belgium, i.e. an amount that may be deducted from the taxable income on which tax is calculated. Married couples are required to make a joint declaration of income and both husband and wife are allowed a deduction of 130 000 BEF (3 222,62 €) each, in accordance with Article 131 of the 1992 Income Tax Code. The same provision specifies 165 000 BEF (4 090,24 €) as the tax-exempted proportion of income for a single person. Unmarried cohabitants are regarded as single persons for taxation purposes.

A married couple, both earning occupational income, laid a complaint against the personal income tax levy for the 1998 taxation year on the ground that discrimination between married and cohabiting persons existed in their estimation. After their complaint was dismissed by the tax authorities, they appealed to the taxation court. This court asked the Court of Arbitration to determine whether or not Article 131 of the Income Tax Code infringed the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) “construed to the effect that an unmarried cohabiting couple, both earning a significant taxable occupational income, qualify for twice the tax-exempted income amount of 165 000 BEF (not indexed), whereas cohabiting spouses, both likewise earning a significant taxable occupational income, can claim twice the tax-exempted income amount of 130 000 BEF (not indexed)”.

The Court firstly recalled its *modus operandi* for review in the light of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), and quoted the following recital appearing in many of its judgments and strongly resembling the phraseology of the European Court of Human Rights with regard to Article 14 ECHR:

“The constitutional rules of equality and non-discrimination do not rule out the possibility of different treatment being applied to different categories of people, provided that it is based on objective criteria and reasonably justified.

The existence of such justification must be appreciated in the light of the aim and the effects of the impugned measure and the nature of the principles at issue; the principle of equality is violated where it is established that there is no reasonable proportionality between the means employed and the aim.”

The Court held that the difference in treatment between spouses and unmarried cohabitants was

based on an objective criterion, namely their dissimilar legal position regarding not only their mutual obligations but also their pecuniary situation. This differing legal position could in some cases, where linked with the object of the measure in question, justify a difference in treatment between married and unmarried cohabitants.

The Court found that the different treatment of single and married taxpayers was not unjustified with regard to the level of the tax-exempted income amount, as the legislator may have taken account of the fact that regular subsistence expenses per head are generally lower for married couples than for single persons.

In the Court's view, this justification would nevertheless be unacceptable when comparing the situation of spouses with that of unmarried cohabitants, also jointly bearing regular subsistence expenses. These expenses being essentially unaffected by the married or unmarried status of persons living together, the distinction as to marital status was not material in determining the amount of tax-exempted income allowed them. Consequently, there was an unjustified difference of treatment between married and unmarried cohabitants.

The Court nevertheless held that the discrimination in question did not arise from Article 131 of the 1992 Income Tax Code. It had its origin in the application to unmarried cohabitants of the provision relating to single taxpayers, the legislator having failed to make any specific provision for the former.

Supplementary information:

The law of 10 August 2001 (Moniteur belge of 20.09.2001 – www.moniteur.be) laid down new tax regulations.

Cross-references:

Compare the German Constitutional Court's decision of 10.11.1998 (2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91), *Bulletin* 2000/2 [GER-2000-2-002].

Languages:

French, Dutch, German.



Identification: BEL-2003-2-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.05.2003 / **e)** 66/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 20.10.2003 / **h)** CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

4.7.2 **Institutions** – Judicial bodies – Procedure.

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

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

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

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:

Paternity, recognition, child's interest / Equality, age, omission in the law / Paternity, establishing child's consent / Omission, legislative.

Headnotes:

Ratification of the Convention on the Rights of the Child under a law of 25 November 1991 and passing of a law providing that children capable of discernment should be entitled to be heard in proceedings show parliament's desire to make it compulsory that a child's interests be taken into account in judicial proceedings affecting him or her, if appropriate by seeking the child's own opinion, where he or she is capable of expressing it with discernment, and, at all events, by requiring the judge to pay special heed to them.

There may be instances where establishing a child's paternity under a judicial procedure harms the child's interests. Although, as a general rule, it can be deemed to be in the child's interest to have his or her descent from both parents established, there can be no indisputable presumption that this is always the case.

Lack of a procedure enabling the courts to take into consideration the consent of a minor under the age of fifteen, given either in person if he or she is capable of discernment or through the child's representation

by the persons responsible for him or her, breaches the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Summary:

A biological father wished to acknowledge paternity of his two children, aged 11 and 9, but the children's mother opposed such recognition, pleading the children's interests in accordance with Article 319.3 of the Civil Code. The Liège Court of First Instance, before which the case had been brought, asked the Court of Arbitration to determine whether Article 319.3 of the Civil Code was consistent with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), since it authorised a court to take a child's interests into consideration where the child was over fifteen, but refused the court that possibility where the child was under fifteen.

The Court of Arbitration had already delivered a number of judgments in respect of Article 319.3 of the Civil Code, which provided that recognition of paternity of an unemancipated minor was admissible only with the consent of the mother and of the child, if over the age of fifteen. It also provided that any dispute would be decided by the courts, taking account of the child's interests.

In its Judgments nos. 39/90 of 21 December 1990 and 63/92 of 8 October 1992 the Court had held that this article breached the rules of equality and non-discrimination because it engendered a difference in treatment between fathers and mothers, since recognition of maternity, although rare by reason of application of the *mater semper certa est* rule, was not subject to the father's consent. In its Judgment no. 36/96 of 6 December 1996 the Court had held that, in so far as it required the consent of a child over the age of fifteen, this provision did not violate Articles 10 and 11 of the Constitution, although the fact that such consent was not required for recognition of maternity constituted a breach of those articles (omission in the law). The way in which those judgments had been applied had resulted in a difference in treatment according to the age of the child concerned: only those over fifteen benefited from judicial consideration of their interest in having their descent from their father proved by recognition of paternity.

In its Judgment no. 66/2003 the Court considered whether this difference in treatment was justifiable. It referred to Articles 3.1 and 12 of the Convention on the Rights of the Child and to the amendment made to the Judicial Code on 30 June 1994, in order to translate Article 12 of the Convention into national

law, and held that this showed parliament's concern that a child's interests should be taken into account in judicial proceedings affecting him or her, if appropriate by seeking the child's own opinion, where he or she was capable of expressing it with discernment, and, at all events, by requiring the judge to pay special heed to them.

Although, as a general rule, it could be deemed to be in the child's interest to have his or her descent from both parents established, there could be no indisputable presumption that this was always the case.

Since its outcome was that the interests of a child under fifteen were never taken into account in establishing paternity by recognition, the provision under consideration constituted a disproportionate interference with the rights of the children concerned.

The Court held that it was not for it to decide what form the possibility of judicial consideration of the interests of a child under fifteen or a child incapable of discernment should take, but that it was competent to find that the lack of any means for a court to consider the child's interests breached Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2003-3-012

a) Belgium / b) Court of Arbitration / c) / d) 08.10.2003 / e) 134/2003 / f) / g) *Moniteur belge* (Official Gazette), 19.01.2003 / h) CODICES (French, German, Dutch).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
 5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.
 5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, authority, parental / Child, right to raise / Child, best interest / Homosexuality, couple, child, care.

Headnotes:

In Belgium, parental authority is granted solely to persons to whom the child is related by descent. Children having only one parent from whom descent is proven but who have lived in a settled fashion in the household formed by that parent and a non-relation, both assuming responsibility for the child's maintenance, are thus subject to different treatment without acceptable justification. However, it is for the legislator to specify the form, the conditions and the procedure according to which parental authority might be extended in the child's interests to other persons not having this blood kinship with the child.

Summary:

Two women who cohabited as a couple for ten years, during which one of them bore a child through recourse to artificial insemination by donor, requested the Court of first instance of Antwerp, after their separation, to be allowed to exercise parental authority jointly. The court found that the Civil Code assigned the exercise of parental authority over a child solely to persons to whom it was related by descent, and decided to question the Court of Arbitration about the conformity of these provisions of the Civil Code with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The Court of Arbitration began by placing a general construction on the specific case before it, namely where a child has only one parent from whom its descent is proven but has lived in a settled fashion in the household formed by that parent and a non-relation who both assume responsibility for its maintenance.

The Court went on to observe that parental authority was an institution primarily intended to provide protection for an underage child who, being vulnerable and physically and mentally immature, must receive personalised care and special protection. In Belgium, the legislator had assigned this authority to the child's parents before all others.

In reply to the Council of Ministers' contention that there was no possible comparison between persons related to the child as its biological parents and persons not so related, the Court held that in view of the need to assign responsibility for children's

protection and social training to persons fit to assume it, all children's legal relationships with the persons bringing them up allowed of comparison.

The Court then invoked as the basis for its reasoning Article 3.1 of the Convention on the Rights of the Child providing that the child's best interests shall be a primary consideration, and Article 3.2 of the Convention requiring the State to afford the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her. Next, the Court observed that the legislator had taken many steps in that direction particularly in providing for joint exercise of parental authority (principle of "co-parenthood").

The Court nevertheless found that the present legislation did not allow a child placed in the circumstances defined above to have its right to protection and welfare given force of law, even in the event that the persons bringing up the child undertake to ensure them lastingly.

Parental authority cannot in fact be granted to the person forming a household with the child's parent, because there is no relationship by descent. Article 365bis of the Civil Code permitting the formation of personal bonds between a child and a non-relation does not allow this bond to be given such effects as would give legal effect on any undertakings which that person might offer to make in respect of the child. The child could therefore suddenly forfeit all entitlement to receive care, which includes the right to maintenance and to protection, from the person who has brought up the child where the couple separates and specifically where the parent from whom the child is descended has died.

The Court accordingly concluded that the category of children in question was treated differently without acceptable justification. However, it is up to the legislator to specify the form, the conditions and the procedure whereby parental authority might, in the child's interests, be extended to other persons to whom it is not related by descent. It follows that the provisions of the Civil Code concerning parental authority, as they stand, are not capable of being applied to this situation and cannot be considered discriminatory.

Languages:

French, Dutch, German.



Identification: BEL-2006-1-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.04.2006 / **e)** 57/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

4.7.15 **Institutions** – Judicial bodies – Legal assistance and representation of parties.

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Lawyer, fee / Liability, civil / Damage, reparation / Legislator, omission / Court, expenses, equality of arms.

Headnotes:

In Belgium, any party to proceedings must defray its own counsel's fees and expenses. In the opinion of the Court of Arbitration, it may be appropriate to amend this rule to the advantage of parties who have suffered a contractual or non-contractual tort (new Court of Cassation precedent), but the issue exceeds the scope of civil liability and bears on the actual principle of the rights of the defence and equality of arms. The party who must defend the suit may also need a lawyer. A respondent (at civil law) or defendant (in criminal proceedings where damages are claimed) who win the liability suit against them undergo discrimination in that counsel's fees and expenses needing to be paid for their defence cannot be charged to the claimant (at civil law) or complainant (in criminal proceedings) who loses the case. However, this difference in treatment does not stem from the provisions of the Civil Code mentioned in the preliminary questions, but is due to the lack of provisions enabling the court to charge the lawyer's fees and expenses to the unsuccessful party. It rests with the legislator to determine how and to what extent the recoverability of lawyer's fees and

expenses is to be regulated, it being understood that the legislator may be guided by the regulation of the recoverability of lawyer's expenses particularly in the Netherlands, France and Germany, and by Council of Europe Committee of Ministers' Recommendation no. R(81)7 on measures facilitating access to justice.

Summary:

I. In Belgian law, all parties to proceedings must normally defray the fees and expenses of their counsel themselves. In a judgment of 2 September 2004, the Court of Cassation, the highest court in the ordinary judicial system, accepted that Article 1151 of the Civil Code, providing that damages for breach of contract "shall comprise only what is a necessary outcome of the fulfilment of the agreement", which implied that fees and expenses for legal or technical counsel incurred by the victim of a contractual tort could constitute an element of the damage sustained, giving cause for compensation insofar as they possessed this character of necessity.

Having regard to this change in the practice of the Court of Cassation, a number of courts put preliminary questions to the Court of Arbitration to ascertain whether or not the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) were infringed. Specifically, the question arose whether, assuming that Articles 1149, 1382 and 1383 of the Civil Code were to be construed as including lawyer's fees and expenses in the damage subject to compensation, discrimination might be disclosed between claimants and defendants in proceedings on contractual or non-contractual liability or between defendants in such cases, depending whether or not they lost.

The Court replied firstly that the difference in treatment between the claimant or complainant, who could include lawyers fees and expenses in the damage sustained, and the respondent or defendant, who lacked this possibility, followed from the rules of civil liability embodied in Articles 1149, 1382 and 1383 of the Civil Code and was therefore founded on a relevant criterion: if the civil liability suit was declared valid, it was judicially established that the respondent or defendant had committed a tort, whereas the decision dismissing the claimant's or complainant's case did not contain the proof of a tort allegedly committed by them.

II. The Court nevertheless found that the issues raised by the preliminary questions exceeded the scope of civil liability. The right to apply to a court equally concerned freedom to bring action and to defend oneself before the courts.

In this matter the Court invoked the right to a fair hearing secured by Article 6 ECHR and the case-law of the European Court of Human Rights concerning the right of access to a court and the principle of equality of arms.

The Court observed that both a party incurring damage and a party contesting responsibility for such damage may need a lawyer and that the possible cost of an action may influence not only the decision to bring it but also the decision to defend it. As Belgian law now stands, the parties to proceedings can only receive compensation for lawyer's fees and expenses by submitting to the above-mentioned differences of treatment between claimants and respondents, and between respondents. Although these differences are justified under the rules of civil liability, they do not meet the requirements of a fair hearing and equality of arms since the parties bear the risk of an action to an unequal degree.

However, the Court did not consider that the discrimination lay in the above-mentioned provisions of the Civil Code; it was due to the lack of provisions enabling a court to charge the lawyer's fees and expenses to the losing party.

The Court held that in order to remove this discrimination, the legislator should determine how and to what extent the recoverability of lawyer's fees and expenses should be regulated.

The Court observed in this respect that their recoverability was the subject of statutory provisions particularly in the Netherlands, France and Germany and that according to Council of Europe Committee of Ministers' Recommendation no. R(81)7 on measures facilitating access to justice, "except in special circumstances a winning party should in principle obtain from the losing party recovery of his costs including lawyers' fees, reasonably incurred in the proceedings".

The Court concluded that the parties to proceedings were treated differently without reasonable justification but that this discrimination did not stem from Articles 1149, 1382 or 1383 of the Civil Code, so that the preliminary questions were to be answered in the negative.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2006-3-006

a) Bosnia and Herzegovina / b) Constitutional Court / c) Plenary session / d) 29.09.2006 / e) U-17/06 / f) / g) *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 14/07 / h) CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

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.

Keywords of the alphabetical index:

Remedy, proceedings, lack / Legislation, incoherence.

Headnotes:

The right to a fair trial is violated if the legislation simply mentions the formal possibility of a remedy, but does not stipulate the court proceedings necessary to achieve this remedy.

Summary:

On 5 July 2006, the Supreme Court of the Federation of Bosnia and Herzegovina asked the Constitutional Court to review the compliance with the Constitution and with Article 6.1 ECHR of several articles of the 1996 Law on Minor Offences Violating Federation Regulations (hereinafter referred to as "the Law". The articles of the Law in question were Articles 152, 153, 154, 155, 156 and 157.

Article 157 of the Law provides that the provisions of the Criminal Procedure Code which relate to a request for extraordinary review of a final decision will apply to proceedings on a request filed for judicial review. The Supreme Court argued that these

provisions were inconsistent with Article II.3.e of the Constitution and Article 6.1 ECHR, in that they stipulated the remedy that would secure access to the courts, but did not set out the procedure related to this remedy. They referred to the procedure involving an extraordinary legal remedy in criminal proceedings, which is not, in fact, provided for under the applicable law on criminal procedure. Access to court upon request for judicial review in proceedings for minor offences is accordingly prevented.

When the Law was passed, the Criminal Procedure Code for the former SFRY was in force and was subsequently adopted as the law of Bosnia and Herzegovina. Chapter XXIV of that Law provided that a request for extraordinary review of a final judgment could be used as an extraordinary remedy. In the Criminal Procedure Code enacted in 1998 in the Federation of Bosnia and Herzegovina, which superseded the Criminal Procedure Code of the former SFRY, there was no provision for an extraordinary legal remedy. Moreover, the current Criminal Procedure Code of the Federation of Bosnia and Herzegovina, which was enacted in 2003 and referred to here as the "Criminal Procedure Code of the Federation of Bosnia and Herzegovina" does not provide for this extraordinary legal remedy. Neither does it stipulate the proceedings necessary to achieve it. The Supreme Court contended that this state of affairs, where a legal remedy such as access to court is provided for in one law, and which refers to the procedure laid down by another law which does not in fact provide for such a remedy, is incompatible with Article II.3.e of the Constitution and Article 6.1 ECHR.

Articles 152 to 156 of the Law set out the requirements for filing a request for judicial protection. Article 157 provides that in cases of a request for judicial protection, the relevant provisions pertaining to extraordinary review of a valid judgment, stipulated by the Criminal Procedure Code valid in the territory of the Federation, will apply. However, the Criminal Procedure Code of the Federation of Bosnia and Herzegovina only stipulates one extraordinary remedy – renewal of proceedings. It does not contain any provisions on the proceedings to be conducted upon a request for extraordinary review of the valid judgment or upon a request for the protection of legality referred to in Article 157 of the Law. The legislator did not take into account this new legal situation after the new criminal procedure code came into force, and did not make changes or amendments to the challenged Law.

In the Federation of Bosnia and Herzegovina, the Law on Minor Offences of the Federation of Bosnia and Herzegovina entered into force on 29 June 2006. Article 83 of this Law provides that the challenged Law will cease to apply as soon as the new Law comes into force. Article 84 of the new Law also provides that any pending proceedings involving extraordinary remedies shall be completed by the relevant court under the previous law. It follows, therefore, that although the challenged Law is no longer in force, Articles 152 to 157 still apply. During the process of drafting new legislation on minor offences, the legislator did not take into account the fact that the provisions relating to proceedings involving extraordinary remedies referred to in Article 157 of the challenged Law were ineffective and therefore there were no provisions relating to such proceedings which could be applied by the courts.

The Constitutional Court observed that Articles 152 to 157 of the challenged Law only provided for the formal possibility of using an extraordinary remedy – a request for judicial protection. They did not stipulate the court proceedings which should be undertaken in order to achieve this remedy. As a result, there was an infringement of the principle of legal certainty, which requires states to provide clear and specific norms, available to all, to enable citizens to conduct themselves in accordance with these norms and to enable the competent authorities to ensure that all citizens can exercise their constitutional rights. These include the right of access to court, within the right to a fair trial, under Article II.3.e of the Constitution and Article 6.1 ECHR.

The Constitutional Court therefore pronounced the provisions of Articles 152 to 157 of the challenged Law to be inconsistent with Article II.3.e of the Constitution and Article 6.1 ECHR.

Languages:

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



Identification: BIH-2007-1-002

a) Bosnia and Herzegovina / b) Constitutional Court / c) Chamber / d) 21.12.2006 / e) AP-2271/05 / f) / g) *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 38/07 / h) CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.

Keywords of the alphabetical index:

Detention, lawfulness / Detention, psychiatric hospital / Mentally incapacitated, detention, preventative.

Headnotes:

There is a violation of the right to liberty and security in cases where persons who have committed a criminal offence in a state of mental incapacity are deprived of their liberty in a way which fails to meet the requirement of “lawfulness” under the European Convention on Human Rights, and where the legislation in force is imprecise, which may give rise to the arbitrary application of law.

Summary:

I. The appellants lodged appeals with the Constitutional Court claiming infringements of their rights to liberty and security under Article II.3.d of the Constitution and Article 5.1.e and 5.4 ECHR. The appellants had all been subject to security measures of compulsory psychiatric treatment and placement in a health-service institution, and had been placed in the Forensic Ward of the Correctional Institution of Zenica (“the Forensic Ward”). They argued that the requirements necessary to secure their freedom had been met by the adoption of new criminal legislation, that they could undergo medical treatment once they were discharged, and that the Federation of Bosnia and Herzegovina Criminal Procedure Code (CPC), which entered into force in 2003, contained no provisions to justify any further extension of their confinement. They suggested that the Forensic Ward was not an appropriate place to implement the security measures. They asked to be released, to

continue their medical treatment once they were discharged, and to be placed under the supervision of a competent social welfare centre.

The lower courts had imposed measures of compulsory medical treatment and placement in institutions, which were in place under the former CPC, on the basis that they had committed various criminal offences in a state of mental incapacity. Proper medical examinations had been undertaken, to establish that they were all suffering from serious mental disorders which posed a threat to public safety, and they therefore had to be medically treated and confined in medical facilities. The new Federation of Bosnia and Herzegovina Criminal Code (the CC) entered into force in 2003. It stipulates that measures of compulsory psychiatric treatment can only be imposed on persons who committed criminal offences in a state of substantially diminished mental capacity or in a state of diminished mental capacity if there is a danger that this mental state might push the perpetrator into committing further criminal offences. The new CC no longer imposes the security measures described above on those who commit criminal offences in a state of mental incapacity. The appellants based their request for discharge on precisely these grounds.

II. The Constitutional Court observed that when new legislation was adopted, the case-law pertaining to the extension of the measures was viewed differently in the Federation of Bosnia and Herzegovina. Since the adoption of the new CC and CPC, some courts have held that the persons concerned are no longer within their jurisdiction, but rather within the jurisdiction of social welfare centres. The courts have been imposing detention orders of up to thirty days in custody, under the new CPC, and then referring cases to the appropriate social welfare centre. The problem with the social welfare centres is that they have insufficient space and inadequate conditions for these persons. No procedure is set down. Consequently, mentally ill persons have been detained in the Forensics Ward in the absence of an official decision to justify it. Other courts have been adopting decisions on the extension of security measures already imposed in accordance with the former CPC and the Law on Protection of Persons with Mental Disabilities and the Law on Execution of Criminal Sanctions. The Constitutional Court observed that imprecise laws create scope for arbitrariness, which is demonstrated by the emergence of different case-law dealing with similar situations.

If courts consider that they have no jurisdiction, and the social welfare centres cannot cater for the persons being referred by the courts and have no set

procedures, there is a danger that detention measures will extend to persons who committed criminal offences in a state of mental incapacity. This is inconsistent with the requirements that must be satisfied for the deprivation of liberty to be “in accordance with the law” as referred to in Article 5.1.e ECHR. This is accentuated because the other provisions, i.e. the Law on Protection of Persons with Mental Disabilities and Law on Execution of Criminal Sanctions have not been brought into accord with the new criminal legislation and they only refer to the former CPC which is no longer in force.

The Constitutional Court observed that where detention has been imposed on those who have committed criminal acts whilst in a state of mental incapacity, this tended to be carried out in the Forensics Ward. This is still the case, even though new criminal legislation is now in force. They were usually placed on the prison ward, although when the security measure of compulsory medical treatment and placement in an institution was imposed on the appellants, the Law on Execution of Criminal Sanctions was in effect, which required the detention to be carried out in an institution designated for such patients or in a special ward of such an institution. Only in exceptional cases was the detention to be in a special ward of a correctional institution. However, the Constitutional Court noted that actual institution was not defined in the Law on Execution of Criminal Sanctions, and the appellants were assigned to the special ward of the prison in Zenica as a rule rather than an exception.

The Constitutional Court held that the assignment of mentally ill persons in a special ward is, to a certain extent, in accordance with the domestic law which provides for such a possibility in exceptional circumstances. However, it is out of line with the European Convention on Human Rights which requires mentally ill persons to be detained in a hospital, clinic or other appropriate institution.

The appeals also raise the issue as to whether the appellants were afforded the possibility of having the court examine the period of detention at regular intervals, as envisaged by Article 5.4 ECHR. There are no procedural provisions in the new CPC regarding persons who carry out crimes in a state of mental incapacity. It only provides for the matter to be referred to a body in charge of social welfare issues for the purpose of initiating the relevant proceedings. Yet there is no definition of the expression “relevant proceedings”. The Constitutional Court did not consider that the proceedings envisaged by the Law on Protection of Persons with Mental Disabilities could be “relevant proceedings” as mentioned in the new CPC. This law has never been updated or

harmonised with the amendments to CPC. Its provisions simply refer to the procedure prescribed by the former CPC which is no longer in force, and thus the circle is closed.

One might assume that the procedural rules of administrative proceedings would apply to these persons, as they are applicable to cases handled by social welfare agencies. Alternatively, the procedural rules of non-contentious proceedings might apply, as they are applicable in cases of enforced detention of mentally ill persons who have not committed a criminal offence. See Law on Protection of Persons with Mental Disabilities. However, there is no explicit definition in any of the legal provisions currently in force of which “court” the appellants are supposed to address; the proceedings which should be conducted in order to review the legality of extended detention, the time limit for a review of any extension of the measure, the procedural guarantees at their disposal; and the time frame within which a decision must be taken.

The Constitutional Court observed that the competent authorities are obliged to undertake appropriate legislative and other measures to ensure that the deprivation of liberty of persons who committed criminal acts in a state of mental incapacity is carried out legally, as required by the European Convention on Human Rights. This includes placing them in an appropriate health institution, as well as measures to provide them with the right of access to a “court” within the meaning of Article 5.4 ECHR.

The Constitutional Court accordingly concluded that in the present case, the appellants’ right to liberty and security under Article II.3.d of the Constitution and Article 5.1.e and 5.4 ECHR had been violated.

Languages:

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



Croatia

Constitutional Court

Important decisions

Identification: CRO-2003-2-009

a) Croatia / b) Constitutional Court / c) / d) 09.07.2003 / e) U-II-1315/2001 / f) / g) *Narodne novine* (Official Gazette), 122/03 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

3.13 **General Principles** – Legality.

4.6.3 **Institutions** – Executive bodies – Application of laws.

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

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

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

Keywords of the alphabetical index:

Law, omission / Public road, excessive use, compensation determination.

Headnotes:

The Constitutional Court of Croatia is not competent to review the constitutionality of laws or the constitutionality and legality of other regulations in a case where a proposal challenges a law or another regulation because the person or body issuing it has omitted to regulate a matter in that law or regulation.

Summary:

In response to a proposal brought by several proponents (applicants) seeking a review of the constitutionality and legality of the provisions of Articles 2 and 3 of the Ordinance on Excessive Use of Public Roads (*Narodne novine* no. 40/00;

hereinafter: the Ordinance), the Constitutional Court declared the proposal inadmissible.

The impugned provisions of the Ordinance read as follows:

Article 2

“1. Excessive use of a public road entails its use above the traffic load value for which it was planned, i.e. built, during the course of activities carried out by natural or legal persons on the public road.

2. Increased traffic load in relation to paragraph 1 of this article is an average annual daily increase of medium-weight and heavy lorries of more than 10 % in relation to the existing traffic load.”

Article 3

“The activities in Article 2.1 of this Ordinance are:

- production and/or exploitation of energy raw materials, mineral raw materials for the production of metals and their compounds, non-metallic minerals, construction stone, all kinds of salts and salted waters, mineral and geo-thermal waters for obtaining mineral raw materials, technical construction stone, construction sand and gravel, and brick clay;
- exploitation of renewable deposits of construction sand and gravel from the beds and banks of watercourses, lakes, man-made water reservoirs, regulated and non-regulated inundation areas, the mouths of rivers that flow into the sea, and canals connected to the sea;
- construction of transport, communication, energy, water, industrial, waste disposal and special-use facilities; and
- diverting traffic to other public roads because of closure of a public road for longer than 10 days.”

The applicants argued that the above-mentioned provisions of the Ordinance were not in accordance with the provisions of Article 25.1 and 25.3 of the Law on Public Roads (*Narodne novine* nos. 100/96, 76/98, 27/01, 114/01, 117/01 and 65/02; hereinafter: LPR) or with the provisions of Article 3 (the highest constitutional values); Article 5.1 (principle of legality); and Article 49.2 (entrepreneurial freedoms and market freedom) of the Constitution. The applicants elaborated on the violation by claiming that the only activity that led to the excessive use of a public road was transportation, and that activity was not included in Article 3 of the impugned Ordinance, that is to say, that the Minister of Maritime Affairs, Transport and Communications, who issued impugned Ordinance, had omitted to do so.

As to Article 2 of the Ordinance, the applicants claimed that that article did not set standards for determining compensation for excessive use of public roads, as required by the provision of Article 25.2 of the LPR.

Therefore, the applicants concluded that the impugned Ordinance did not, in practice, come into effect, and that the only existing administrative act regulating the amount of as well as the method of calculation and payment of compensation was the one by the County Authority for Roads in Karlovac.

Relying on the provision of Article 45 of the Constitutional Act on the Constitutional Court of Croatia, (*Narodne novine* no. 49/02 – revised text; hereinafter: the Constitutional Act), the applicants requested that the execution of the above decision be temporarily stayed, arguing that its application would lead to irreparable consequences for the company.

After reviewing the reasons stated by the applicants in their proposal and the contents of the impugned provisions of Article 25.2 and 25.3 of the LPR, the Constitutional Court held that the proposal was inadmissible insofar as it challenged the constitutionality and legality of the provisions of Articles 2 and 3 of the Ordinance.

The Constitutional Court found that the impugned provisions of Articles 2 and 3 as well as other provisions of the Ordinance did not set the standards for excessive use of a public road, but only stipulated excessive use of a public road and increased traffic load (Article 2.1 and 2.2) and activities (Article 3). The impugned provisions of the Ordinance and its other provisions did not set out the criteria.

The Court stated that the provisions of Articles 2 and 3 of the Ordinance did not regulate questions that should have been regulated in accordance with the parent act. In order for Article 25.1 to have legal effect, there must be standards set on the basis of the three cumulative legal requirements representing an indivisible set of legally relevant facts and that can only jointly lead to a finding of excessive road use, and accordingly to the obligation to pay compensation.

Therefore, the Court held that there was an omission in that part of the impugned Ordinance.

In accordance with the provision of Article 128.1.2 of the Constitution, the Constitutional Court decides on the conformity of other regulations with the Constitution and law. In accordance with the provision of Article 55.1 of the Constitutional Act, the Constitutional Court must strike down a law or some

of its provisions, where the Court finds the law or provisions not to be in accordance with the Constitution; or the Court must strike down a regulation or some of its provisions, where the Court finds the regulation or provisions not to be in accordance with the Constitution and the law.

It follows from the above that the Constitutional Court is not competent to review the constitutionality of a law or the constitutionality and legality of a regulation in response to a proposal challenging a law or a regulation because the person or body issuing it has omitted to regulate a matter in that law or regulation.

The Court had expressed its opinion on an omission in the law in its ruling no. U-I-709/1995 of 1 March 2000.

The Court found that there was an omission, which came about because the person issuing the impugned regulation (the Minister of Maritime Affairs, Transport and Communications) had not completely exhausted the authority set out in Article 25.2 of the LPR. The Court informed the Government of Croatia of its ruling.

The Constitutional Court found the part of the proposal that challenged the constitutionality and legality of the Ordinance in its entirety to be unfounded for the reason that the competent person had issued the Ordinance, on the basis of the legal authority under Articles 25.2 and 61.3 of the LPR, as an implementing instrument and its provisions regulated other issues that were also important for the excessive use of public roads found in Article 1 of the impugned Ordinance.

Therefore, the Court refused to grant the applicants' request for a temporary stay of the execution of the decision of the County Authority for Roads in Karlovac until the delivery of the decision on the proposal.

Languages:

Croatian, English.



Identification: CRO-2007-2-007

a) Croatia / b) Constitutional Court / c) / d) 18.04.2007 / e) U-X-1457/2007 / f) / g) *Narodne novine* (Official Gazette), 43/07 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.

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

Keywords of the alphabetical index:

Pension, survivor / Pension, widow / Pension, entitlement.

Headnotes:

In respect of the entitlement to survivors' pensions, married and common-law widows and widowers of deceased insured persons shall be treated alike. Common law widows and widowers are to be treated as members of the deceased's family.

Summary:

The Constitutional Court has the authority to observe the realisation of constitutionality and legality and to notify Parliament of any instances of unconstitutionality and illegality, under Article 128/5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court of the Republic of Croatia. It therefore informed Parliament that changes were necessary to the Pension Insurance Act (hereinafter referred to as ZOMO). The purpose was to regulate the legal requirements for entitlement to a survivor's pension for common law widows and widowers, as members of the deceased insured person's family.

Under the pension insurance system regulated by ZOMO, a survivor's pension is a long-term monthly income from pension insurance to which certain family members are entitled after the death of the insured person under general and special legal conditions. This pension is recognised on the grounds of contributions paid by the insured person for old

age, disability or death, and it is grounded on the obligation of spouses (insured persons) to support one another and their children, and other members of their family, under statutory conditions.

Article 21.1 ZOMO enumerates those who are to be considered family members, in the event of the death of the insured:

- widow/widower;
- divorced spouse entitled to be supported;
- children (born within or out of wedlock, or adopted);
- foster-children supported by the insured person, grandchildren supported by the insured person, provided that they have no parents, or if one or both parents are unable to work through disability;
- parents – father, mother, step-father, step-mother or foster-carer of the insured person who were supported by the insured person;
- children with no parents – brothers, sisters and other children the insured person supported, provided that they have no parents, or if one or both parents is unable to work due to disability.

With regard to the closest family members (widow, widower and children of certain age), ZOMO is grounded on the obligation of spouses to support one another and their children. However, with regard to other family members, such as divorced spouse, foster children, grandchildren, parents and children of certain age, ZOMO requires that the insured person supported them until his or her death. This fact must always be proven.

Under Article 63 ZOMO, the term widows and widowers, within the meaning of Article 21.1.1 ZOMO only includes those widows and widowers who lived with the deceased insured in a marital union. ZOMO does not recognise common law widows and widowers as members of the deceased's family. This category of widow or widower is not entitled to a survivor's pension, even in cases where the court had granted them the right to maintenance.

The Constitutional Court pointed out that in the Republic of Croatia, the family enjoys special state protection, and is therefore deemed a protected constitutional benefit. On the other hand, the Constitution recognises both marriage and common law marriages, and makes no distinction between the two in family matters. Both unions are regulated by law.

Against this background, and taking account of the legal nature and purpose of survivor's pensions within the pension insurance system, the Constitutional

Court held that there should be provision within ZOMO for entitlement to survivors' pensions for common law and married widows alike.

The Constitutional Court went on to examine the problems which might arise from entitlement by common law widows and widowers. It noted the impact of the Family Act and Article 8/2 of the Inheritance Act, which protect the inheritance rights of unmarried spouses.

The Constitutional Court also referred to the Act on the Rights of Croatian Homeland War Defenders and Members of their Families. This Act recognises common law widows and widowers as close family members, who are entitled to survivor's pensions. As pensions for this category of persons are funded from the State Budget, if the relatives of captured or missing Croatian defenders are entitled to pensions, then there is even more reason to recognise the position of common law widows and widowers within the pension insurance system regulated by ZOMO. This system is, after all, financed by contributions paid by insured persons.

The Constitutional Court also noted that, under Article 2.4.1 of the Constitution, the Croatian Parliament is empowered to regulate all issues regarding the rights of common-law spouses to survivors' pensions.

Cross-references:

- *Bulletin* 2007/2 [CRO-2007-2-007].

Languages:

Croatian, English.



Identification: CRO-2007-2-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 18.04.2007 / **e)** U-I-1152-2000 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 43/07 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 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:

Discrimination, justification / Pension, insurance scheme / Pension, entitlement.

Headnotes:

Differing pensionable ages to statutory or early pensions or different factors for calculating them based exclusively on difference in sex is in contravention of the constitutional guarantee of equality of the sexes, prohibition of discrimination on the grounds of gender and equality before the law.

The legal arrangements in force must comply with the relevant provisions of the Constitution. The possibility of a different legal solution does not mean that the legal arrangement is in breach of the Constitution, provided that the legislator does not exceed its powers.

Summary:

This case before the Constitutional Court was concerned with the age at which natural persons are entitled to draw pension, and the rights of married and common law widows and widowers, under the pension insurance system regulated by the Pension Insurance Act (hereinafter referred to as ZOMO).

Five natural persons had submitted different proposals for the Court to review the conformity of certain provisions of ZOMO with the Constitution.

The Constitutional Court initiated proceedings for the constitutional review of Articles 21.2, 30, 31, 66 and 78.2 of the Act. It repealed them all, ordering that Article 21/2 ZOMO would lose its force on 31 December 2007 and the remaining provisions on 31 December 2018. However, the Constitutional Court did not agree to a constitutional review of the provisions of Articles 21.1.1, 178, 179 and 182 ZOMO and Article 40 of the Pension Insurance (Revisions and Amendments) Act (*Narodne novine*, no. 147/02, hereinafter: ZID ZOMO/2002).

The Constitutional Court resolved to report to Parliament about the inherent unconstitutionality in the lack of entitlement of common law widowers and widows to survivors' pensions, under the Pension Insurance Act. It would inform Parliament of the need to amend the Act, to ensure common law spouses could have access to survivors' pensions.

The Constitutional Court also examined various transitional provisions, allowing access to statutory old age, early old age and survivors' pensions at differing ages. It held that this state of affairs was in order, because of the need to bring the pension system into line with changing social conditions.

1. Article 21.2 ZOMO

Under Article 21.2 ZOMO the Croatian Pension Insurance Bureau (hereinafter referred to as HZMO) determines the conditions under which an insured person is considered to support a member of his or her family, together with the conditions under which entitlement to a survivor's pension terminates because of changes in income or financial situation. The first petitioner argued that this contravened Article 14 of the Constitution (prohibition of discrimination on any ground and equality of all before the law).

The Constitutional Court found that the legislator, in Article 21.2 ZOMO, had allowed for direct, independent and unlimited regulation by a legal person with public authorities (HZMO) of the preconditions in substantive law under which a particular legal relationship is deemed to exist or not to exist. The Court held that this legislative activity was not in conformity with the principle of the rule of law, the highest value of the constitutional order, under Article 3 of the Constitution.

2. Articles 30, 31, 66 and 78.2 ZOMO

ZOMO provides for different ages, on the grounds of gender, for identical entitlements in various circumstances. Article 30 allow for different pensionable ages for men and women in respect of their statutory old age pensions. Article 31 provides for different ages for entitlement to an early old-age pension for men and women. Article 66 provides for different ages for entitlement to a survivor's pension for the mother and the father of a deceased insured person. Article 78.2 sets out different ages for the application of the initial factor for calculating an early old-age pension for men and women. The second petitioner contended that Articles 30 and 31 of Zomo resulted in discrimination on the grounds of gender, and accordingly contravened Articles 14.2 and 54 of the Constitution.

The third petitioner pointed out that Articles 30 and 31 ZOMO provide more difficult requirements for the entitlement to a statutory old-age or early old-age pension for men than for women. He emphasised that this right was acquired on the grounds of employment and payment of contributions, regardless of gender. He had the same concerns over Articles 66 and 78.2 ZOMO.

The Constitutional Court held that there was nothing in constitutional law that could justify different pensionable ages or entitlement to statutory or early old age pensions, or survivors' pensions solely on gender grounds under the ZOMO. It ruled that Articles 30, 31, 66 and 78.2 ZOMO were out of line with Articles 3 and 14 of the Constitution.

The Constitutional Court noted that there were complex problems associated with equalising pensionable ages for men and women in the ZOMO pension insurance scheme. It therefore stated that repealed Articles 30, 31, 66 and 78.2 ZOMO would lose their force as of 31 December 2018.

2A. Article 30 ZOMO

The fourth petitioner challenged that part of Article 30 ZOMO imposing a qualifying period of fifteen years for entitlement to a statutory old age pension. She suggested that it might contravene Articles 14.2 and 57.1 of the Constitution, which protect the rights of those who are sick, unemployed or otherwise incapable of work to assistance with their basic needs.

The Constitutional Court observed that there are no limits in the Constitution to the Croatian Parliament's powers to regulate preconditions for entitlement to a statutory old-age pension. Article 2.4.1 of the Constitution empowers Parliament to regulate economic, legal and political relations in the Republic of Croatia, independently and in compliance with the Constitution and the law. This includes the authority to impose a requirement for a certain number of qualifying years in order to obtain an old-age pension. The Constitutional Court emphasised that whatever legal arrangement is in place must be compliant with the relevant provisions of the Constitution. Although there is a possibility of differing legal solutions, the provisions may still be constitutionally compliant, provided Parliament has not exceeded its powers.

The Constitutional Court did not review the conformity of Article 30 ZOMO with Article 57.1 of the Constitution, since this provision is not relevant to the regulation of the pension insurance scheme.

3. Article 21.1.1 ZOMO

Under Article 21.1.1 ZOMO, in the event of the death of the insured person or of the beneficiary of a statutory or early old age or disability pension, the widow or widower shall be insured. The first and fifth petitioners criticised it.

The first petitioner challenged the state of affairs under the ZOMO, whereby all widows and widowers of deceased insured persons are deemed to have equal rights to survivors' pensions. No account is taken of the length of their marriage, any additional income, the fact that they may now be living with somebody else and whether or not the widow or widower had been making their own pension insurance contributions. She suggested this might be in breach of the Constitution.

The Constitutional Court found no breach of Article 14.2 of the Constitution. The solution outlined above represents a positive social-policy measure for vulnerable groups (such as widows or widowers who might otherwise lose their income) or one designed to improve the material position of the insured (such as widows or widowers who are themselves insured but who are entitled to a survivor's pension).

The Constitutional Court noted that the legislator had opted to bestow entitlement to survivors' pensions upon all widows and widowers, irrespective of other factors such as length of marriage, additional income, or living with somebody else. In terms of reviewing the constitutional compliance of Article 21.1.1 ZOMO, the fact that there are different conditions for entitlement to survivors' pensions does not necessarily mean that the legislation contravenes the Constitution.

The fifth petitioner was a common law spouse and not entitled to a survivor's pension. She suggested that Article 21.1.1 ZOMO was in breach of the Constitution.

The Constitutional Court noted that ZOMO entitles divorced spouses to survivors' pensions if the court has granted them the right to maintenance. However, common law spouses have no such entitlement, even though the court has granted them the right to maintenance.

The Constitutional Court noted that the family is under special state protection, and represents a protected constitutional benefit. Nonetheless, both marriage and common law arrangements enjoy constitutional and legislative recognition. The Constitution makes no distinction between marriage and common law situations in family matters.

If common law widows or widowers of deceased insured persons are not entitled to survivors' pensions, this results in inequality between two constitutionally recognised family unions, and contravenes the principle of equality, a crucial value of the constitutional order. The Constitutional Court took account of Article 61 of the Constitution, which recognises two kinds of family unions, and the legal nature and purpose of a survivor's pension within the pension insurance system, which is based on the obligation of the insured person to support family members. The Constitutional Court held that the ZOMO should provide for survivors' pensions for married and common law widows and widowers alike. The Constitutional Court will invoke its powers under Article 128/5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court, and report to the Parliament about this instance of unconstitutionality. It will point out the need for changes to ZOMO so that common law spouses can claim survivors' pensions within the pension insurance scheme regulated by ZOMO.

4. Articles 178, 179 and 182 ZOMO

Articles 178, 179 and 182 of the ZOMO provide for a transition period whereby, with effect from 1999, statutory and early pensionable ages will gradually increase by six months every year. The statutory pension age for men was 60 in 1998, and it will increase to 65 in 2008. Women were able to claim statutory pensions at 55 in 1998; this will increase to 60 in 2008. Early pension age will increase from 55 to 60 for men and from 50 to 55 for women.

The third petitioner contended that the disputed provisions were in breach of Articles 14 and 3 of the Constitution (equality of the sexes). This is one of the highest values of the constitutional order. The Constitutional Court observed that the measures contained in Articles 178, 179 and 182 ZOMO were necessary in a democratic society, to bring the national pension insurance system into line with changing social conditions. The low statutory and early pension ages were a legacy from the legal system of the former SRFY. They were no longer tenable and had been temporary measures. The Constitutional Court found that there were compelling reasons, acceptable from a constitutional standpoint, justifying the temporary existence of the disputed legal provisions in the legal order of the Republic of Croatia.

5. Article 40 ZID ZOMO 2002

Article 40 ZID ZOMO 2002 provides for a transition period, under which rights to survivors' pensions can be acquired under more favourable conditions than those provided for in ZOMO. However, this only applies to widows, not widowers.

The third petitioner suggested that this breached the requirement for equality between the sexes. The Constitutional Court noted that under Article 62 ZOMO, widows and widowers are equal in their entitlement to survivors' pensions. Article 40 ZID ZOMO/2002 departs from this position.

The Constitutional Court noted that there were constitutionally acceptable reasons behind the inequality on gender grounds, in Article 40 ZID ZOMO/2002. This is an applicable legal measure in the field of social policy, adopted by the legislator to correct existing inequalities in the material position of most widows, by comparison to widowers, after their husbands' deaths. It is aimed at the correction of a socially unacceptable state of affairs and envisaged for a specific legislative period only, making them temporary by nature. The Constitutional Court found that there were constitutionally acceptable reasons in this instance for the temporary survival of the disputed legal provisions within the legal order.

Cross-references:

- *Bulletin* 2007/2 [CRO-2007-2-008]

Languages:

Croatian, English.



Czech Republic Constitutional Court

Important decisions

Identification: CZE-2006-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 28.02.2006 / **e)** Pl. US 20/05 / **f)** / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

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

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

Keywords of the alphabetical index:

Parliament, failure to act / Failure to act, wrongful / Regulation implementing statutes / Contractual relations / Constitutionalism, Constitutional Court, protector.

Headnotes:

It is unconstitutional for parliament to remain inactive for a lengthy period of time, a notable example being its failure to adopt a statute defining the circumstances in which lessors are entitled to impose unilateral rent increases and alterations to provisions of tenancy agreements.

It is not acceptable to transfer the social burdens of one group (lessees) to a second group (lessors), neither is it permissible to establish various classes of lessor, where rent for property owned by one class is subject to regulation, but that of the other class is not. Because of parliament's inactivity in this sphere, the Constitutional Court has had to compensate for the missing legislation to protect landlords' rights by applying constitutional law principles. The Constitutional Court stressed that the ordinary courts must provide proportional protection of individual rights and legally protected interests, and that they must afford protection to lessors so that any lawsuits they submit requesting designation of an

increase in rents will not be rejected on the merits due to the lack of statutory rules.

Summary:

I. An appellate court petitioned the Constitutional Court to annul certain Civil Code provisions relating to the lease of flats. The first instance court in this case had resolved a lessor's claim against a lessee for the payment of rent by rejecting it on the merits. The lessor asked the lessee for rent as set out in the Civil Code. The amount of rent had never been agreed between them, it had only been officially designated by legislation which had subsequently been annulled by the Constitutional Court. According to a private expert opinion, the usual amount of rent was four times higher than the amount which the lessee was currently paying the lessor. The lessor accordingly asked for payment of the difference. The First Instance Court concluded that the action was not well-founded, since the amount actually paid corresponded to the level of rent last designated by official regulation, even though this regulation was now obsolete as a result of the Constitutional Court judgment. The lessor appealed, on the basis that this decision was in conflict not only with the constitutional provisions, but also with the relevant statutory provisions; the regulation in question had, after all, not been an enactment implementing the Civil Code. In the lessor's view, the Civil Code provisions in question could not be applied, if there is no further legal enactment implementing them; rather the court should designate the usual rent as the amount of rent applicable. The appellate court put forward the view that, unless the Civil Code provides otherwise, a contractual relationship cannot be modified without the agreement of both parties. According to the relevant provisions of the Civil Code, however, the manner of calculating rent, as well as further conditions of a rental agreement, can be laid down in separate legal enactment. The Court therefore petitioned the Constitutional Court to annul the relevant Civil Code provisions.

The appellate court pointed to an imbalance in the existing legal regulation of property rental. There are provisions in place to protect the rights of lessees, but not those of lessors. This affords a unilateral advantage to lessees. It also suggested that the gap in legislation alone resulted in an unconstitutional situation, due to the fact that the legal rules envisaged had yet to be adopted.

II. The Constitutional Court concluded that there were no grounds for annulling the affected provisions of the Civil Code. The wording of the Civil Code, which simply anticipates the adoption of additional rules, is not unconstitutional; what is unconstitutional is long-term inactivity of the legislature, resulting in

constitutionally unacceptable inequality and ultimately in the violation of constitutional principles.

The nature of a lease – including the lease of a flat – within the law of obligations, presupposes the maximum scope for the assertion of the autonomy of the will and the freedom of contract of the parties to the lease. Unilateral interventions are of legal relevance only where there is explicit statutory provision for them. *De lege lata* the possibility for the unilateral increase in the rent is one of those interventions, limited by the conditions under which the lessor may modify the previously negotiated or designated rent. Such rules have commonly been given the designation of “the regulation of rent”. The absence of the envisaged legislation results in the situation where a change in the content of the lease is, for the duration of the lease, a matter for agreement between the parties to the lease. Should no such agreement be reached, then, because of the legislature's inaction, there is no legal way of achieving a modification through the lessor's unilateral manifestation of intent.

As a consequence, regulated rent has effectively been frozen, a situation which further deepens the infringement of the property rights of the owners of those flats which are affected by regulation. The imbalance can only be redressed by the adoption of the legislation envisaged. By failing to adopt it, the legislative body has brought about an unconstitutional situation, namely a “sanctioned” inequality between lessors, who are able to lease flats for the customary rent, and lessors who are obliged to let their property for a rent in the amount which prevailed prior to the annulment of the rules on the regulation of flats.

As the protector of constitutionalism, the Constitutional Court cannot restrict its function to that of a mere “negative” legislator and needs to establish some scope for the maintenance of fundamental rights and basic freedoms. Ordinary courts must, even in the absence of specific rules, decide on the increase in rent, according to the local conditions, and in such a way that it does not result in discrimination. As such cases will involve the ascertainment and application of ordinary law, over which the Constitutional Court has no competence, it declined to suggest a specific decision-making approach which could displace the ordinary courts in their mission. The Constitutional Court accordingly rejected the petition on the merits.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2002-2-006

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 15.07.2002 / **e)** 3-4-1-7-02 / **f)** Petition of the Legal Chancellor to declare Sections 31.1, 32.1 and 33.2.1 of Local Government Council Elections Act partly invalid / **g)** *Riigi Teataja III* (Official Gazette), 2002, 22, Article 251 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

2.1.1.4.11 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Charter of Local Self-Government of 1985.
 3.3.1 **General Principles** – Democracy – Representative democracy.
 3.18 **General Principles** – General interest.
 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
 4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
 4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.
 5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
 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:

Deputy, political responsibility / Election, electoral list, non-party / Election, candidate, requirements / Municipality, election.

Headnotes:

The exclusion of lists of citizens' electoral coalitions (lists where the candidates belong to a grouping that does not represent a formally constituted political party) from standing for election in local elections may disproportionately restrict the right to present candidates, to stand for election and to vote. Rules

preventing persons and groups enjoying real support among the voters from standing for election may result in the formation of representative bodies that are not sufficiently representative.

Summary:

The Parliament (*Riigikogu*) adopted a new Local Government Council Elections Act ("the Act") on 27 March 2002, according to which party lists and individual candidates could run for office in local councils. Under the previous Act of 1996, lists of citizens' electoral coalitions (non-party lists) could also participate in the elections.

The President of the Republic promulgated the Act, and it became effective on 6 May 2002. On 21 May 2002 the Legal Chancellor proposed that the Parliament bring the Act into conformity with the Constitution. The Legal Chancellor considered that the Act was unconstitutional, since it disproportionately restricted the freedom of election and universal and equal suffrage. The Parliament did not accept the proposal of the Legal Chancellor. The Legal Chancellor then applied to the Supreme Court for a declaration that Sections 31.1, 32.1 and 33.2.1 of the Act were invalid to the extent that they did not enable persons with the right to stand for election to participate in local elections on non-party lists.

The representative of the Parliament argued at the hearing that the proposal the Legal Chancellor had submitted to the Parliament and the proposal submitted to the Supreme Court differed from each other. In the former the Legal Chancellor claimed that the whole Act was unconstitutional. In the latter, specific provisions of the Act were disputed. Also, several new lines of reasoning were alleged to have been inserted to the proposal submitted to the Court.

The Supreme Court rejected the assertion of the representative of the Parliament. It considered the differences in the proposals of the Legal Chancellor not to be of a substantial nature. On the basis of the minutes of the Parliament, the Supreme Court concluded that the members of Parliament had understood which provision of the Act the Legal Chancellor considered unconstitutional. The members of parliament had discussed the proposal and voted on that.

The Supreme Court considered the aim of the amendments to the electoral legislation – to increase the political accountability of the persons elected to local government councils – a legitimate one. The means – exclusion of non-party lists – could also be legitimate. However, in the present legal and social context it is unconstitutional to prohibit non-party lists of candidates.

The Court observed that Article 156 of the Constitution not only guarantees the right to vote, but also the right to stand for election and the right to present candidates. The principles provided for by Article 156.1 of the Constitution ("the elections shall be general, uniform and direct") apply for all the subjective rights named above.

With reference to the European Charter of Local Self-Government, the Supreme Court noted that local governments must be formed in a democratic way. Democracy does not mean that subjective electoral rights cannot be restricted in a reasonable manner. For example, a monetary deposit or a certain number of support signatures may be required so as to discourage candidates who are not serious from running in the elections. The restrictions, however, must not prevent persons and groups who have real support from running as candidates. Such restrictions would violate the right to stand for election and the right to vote and present candidates, and would prejudice the foundations of local government through the fact that the representative body would not be sufficiently representative.

The Supreme Court analysed whether the restriction imposed by the Act was capable of prejudicing the representative quality of local government councils. In doing so, the Court observed that 768 lists of candidates took part in the previous local elections in 1999. These lists included 570 non-party lists, 180 party lists, and 18 lists of party election coalitions. In 120 local governments out of 247, only non-party lists were presented. Individual candidates were not able to compete with the lists of the candidates.

In 1999, non-party lists won 78 % of the seats in local government councils. In most of the local governments – with the exception of the bigger cities – both the candidates and the voters preferred non-party lists. Concerning the coming elections, the Supreme Court noted that the practice of the parties in power of designing electoral rules advantageous for themselves shortly before the elections cannot be considered democratic. The time-span between the enactment of the Act and the beginning of registration of candidates for the 2002 local elections was about three months – a period too short to establish new political parties (instead of rather informal non-party lists). Therefore, there would be no realistic alternative to the lists of the existing nation-wide parties. Moreover, due to the requirement that there be at least 1000 members to establish a political party, it would be impossible to establish local political parties in most of the local government areas. An alternative would be to run as a candidate in the elections on a political party list as a non-party candidate, or as a member of another political party.

Electoral law does not preclude this, but in such cases it is be the political party that decides on the right to stand for election.

The Supreme Court concluded that the Local Government Council Elections Act disproportionately restricted the right to present candidates, to stand for election and to vote, and was therefore in conflict with Article 156.1 of the Constitution read in conjunction with Article 11 of the Constitution, to the extent that it did not enable participation of non-party lists in local elections.

According to the Constitutional Review Court Procedure Act the Legal Chancellor requested the Supreme Court to declare the Local Government Council Elections Act partly invalid. The Supreme Court, however, observed that invalidating the contested provisions of the Act would not cause the norms concerning non-party lists to be re-enacted. The Supreme Court did not invalidate the disputed provisions. It merely declared the Act unconstitutional to the extent that it did not allow non-party lists to participate in local elections.

Supplementary information:

The Parliament subsequently amended the Local Government Council Elections Act and provided for participation of non-party lists in the 2002 local elections. According to the amendments, however, non-party lists will be not able to participate in local elections from the year 2005.

Cross-references:

- Decision 3-4-1-7-98 of 04.11.1998, *Bulletin* 1998/3 [EST-1998-3-007].

Languages:

Estonian, English (translation by the Court).



Identification: EST-2002-3-007

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 28.10.2002 / **e)** 3-4-1-5-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of Section 7.3 of the Principles of Ownership Reform Act / **g)** *Riigi Teataja III* (Official Gazette), 2002, 28, Article 308 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.

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

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

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

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

Keywords of the alphabetical index:

Ownership, reform / Property, unlawfully expropriated, return / Person, resettled / International agreement, return of expropriated property.

Headnotes:

In concrete review proceedings the Supreme Court reviews only the constitutionality of the provision relevant for resolving the initial case in the trial court. The provision is relevant if the trial court would have to make a different decision depending on whether the provision was found to be constitutional or unconstitutional. The Supreme Court is entitled to check whether the challenged provision is relevant for deciding the initial case. In so doing, the Supreme Court cannot assess whether the referring court correctly adjudicated the initial case.

The period of more than ten years of lack of certainty as to whether or not the unlawfully expropriated property of persons who resettled according to the treaties concluded with the German state was to be

returned violated the general prohibition of arbitrariness and the fundamental right to procedural fairness, and was contrary to the principle of legal certainty. Furthermore, the rights of the present users of the property had been violated, since their right to privatise the property depended on whether the persons who resettled had the right to the return of their property.

Summary:

In 1992 Ms Kalle filed an application with Tallinn City Assets Agency for the return of unlawfully expropriated property, namely, a house and a plot in Tallinn. Before the expropriation the property belonged to the great-grandfather of the applicant. The Tallinn Committee for the return of and compensation for unlawfully expropriated property (hereinafter the Committee) made several decisions with regard to the property in question, eventually dismissing Ms Kalle's application for a declaration that she was entitled to lodge a claim for ownership reform, because according to Section 7.3 of the Principles of Ownership Reform Act ("the Act"), applications for the return of or compensation for unlawfully expropriated property, which had been in the ownership of persons who had left Estonia, which had been expropriated on the basis of agreements entered into with the German state, and which was located in the Republic of Estonia, shall be resolved by an international agreement. The Committee considered it proved that the applicant's great-grandfather had left Estonia in January or February 1941 on the basis of the agreement entered into between the Soviet Union and Germany on 10 January 1941.

Ms Kalle filed a complaint with Tallinn Administrative Court against the decision of the Committee. She also challenged the constitutionality of Section 7.3 of the Act. Tallinn Administrative Court allowed Ms Kalle's complaint, also declaring the disputed provision unconstitutional and initiating constitutional review proceedings with the Supreme Court. The Constitutional Review Chamber of the Supreme Court reviewed the case, and decided to refer the petition to the Supreme Court *en banc* for review.

First, the Supreme Court dealt with a procedural issue. It held that the Court of constitutional review is entitled to check whether the challenged provision is relevant to resolving the initial case. In so doing, the Supreme Court – within the constitutional review procedure – cannot assess whether the referring court correctly adjudicated the initial case. The Supreme Court found that the challenged provision was relevant to resolving the case in question in the Administrative Court.

The Supreme Court noted the legislative history of the disputed provision. First, the 1991 resolution of the Supreme Council concerning the implementation of the Act contained essentially the same provision in a slightly different wording. In 1997 the Parliament (*Riigikogu*) amended the Act and transferred the provision from the implementing regulations to the main text of the Act. In spite of the disputed provision, Estonia never concluded any international agreement referred to in Section 7.3 of the Act. The Minister of Justice informed the Supreme Court that the Federal Republic of Germany had not taken any initiatives to conclude such an agreement, and had also sought to discourage Estonia from raising the issue.

The Supreme Court found that Section 7.3 of the Act required that the state, the government in particular, take measures in order to conclude an agreement concerning the return of property of persons who had resettled elsewhere. If this proved impossible because of the lack of will of the other party, then the regulation must be amended, so as to create clarity for persons having resettled and their successors, as well as for the present users of the unlawfully expropriated property, whose right to privatise the property depended on whether the persons who resettled had the right to the return of their property. Under the regulation as it stood, the property concerned could neither be returned nor privatised in favour of the present users. On the one hand, the individuals entitled to lodge claims for ownership reform had been given the hope that the relevant property would be returned or compensation paid; on the other hand, the current users of the property apparently had an indeterminate prospect of privatising the property in their use. The Supreme Court held that Article 13.2 of the Constitution (enshrining, *inter alia*, the principle of legal certainty) and Article 14 of the Constitution (the prohibition of arbitrariness and the right to procedural fairness), taken together, had been violated, since for a period of more than ten years the state had neither concluded the agreement referred to, nor changed the disputed provision of the Act.

The Supreme Court did not declare Section 7.3 of the Act invalid. The Court considered that if it declared the provision invalid, the property in question would have to be returned or compensation paid in accordance with the general procedure prescribed by the Act. The Court considered this to be a political decision not to be taken by the Court. It was up to the legislator to decide whether and under what conditions the property in question should be returned or compensation paid. Therefore, the Supreme Court declared Section 7.3 of the Act unconstitutional and ordered the legislator to bring the provision into conformity with the principle of certainty of the law.

Supplementary information:

Four justices out of seventeen delivered a dissenting opinion concerning the declaration of unconstitutionality. According to their view, the Supreme Court should have declared Section 7.3 of the Act invalid. The entry into force of the judgment of the Supreme Court should have been postponed for one year, in order to enable the legislator to enact new regulations.

Cross-references:

Decision of the Supreme Court:

- 3-4-1-10-2000 of 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009].

Decision of the European Court of Human Rights:

- *Sunday Times v. the United Kingdom*, 26.04.1979, *Special Bulletin ECHR* [ECH-1979-S-001].

Languages:

Estonian, English (translation by the Court).



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*.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.

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

5.3.35.1 **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 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 judgment 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 judgment, 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:

- 3-4-1-6-98 of 30.09.1998, *Bulletin* 1998/3 [EST-1998-3-006];
- 3-3-1-38-00 of 22.12.2000;
- 3-4-1-1-02 of 06.03.2002, *Bulletin* 2002/1 [EST-2002-1-001];
- 3-4-1-2-02 of 03.04.2002, *Bulletin* 2002/1 [EST-2002-1-002];
- 3-1-1-77-02 of 14.11.2002.

Languages:

Estonian, English (translation by the Court).



Identification: EST-2004-1-004

a) Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 06.01.2004 / **e)** 3-1-3-13-03 / **f)** Criminal case on charges brought against Tiit Veeber under Articles 148.1.7, 166.1 and 143.1 of the Criminal Code / **g)** *Riigi Teataja III* (Official Gazette), 2004, 4, 36 / **h)** <http://www.nc.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 1.4.6 **Constitutional Justice** – Procedure – Grounds.
- 1.4.13 **Constitutional Justice** – Procedure – Re-opening of hearing.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.37.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Proceedings, reopening, condition / European Convention on Human Rights, violation, ground for reopening proceedings.

Headnotes:

It has to be ascertained whether reopening proceedings is a necessary and appropriate remedy for a violation of a Convention right or a violation with a causal link to the former, found by the European Court of Human Rights. The reopening of proceedings would be justified only in a case of a continuing and serious violation and only where it is a remedy affecting the legal status of the person. The need to reopen judicial proceedings must be weighed against legal certainty and the possible infringement of other persons' rights in a new hearing of the matter.

The European Convention on Human Rights constitutes an inseparable part of the Estonian legal order, and under Article 14 of the Constitution, the guarantee of the rights and freedoms of the Convention is also the responsibility of the judicial power.

The Supreme Court may refuse to hear a person's petition only where there are other effective ways available for the person to exercise his or her right to judicial protection, which is guaranteed by Article 15 of the Constitution.

Summary:

In the *Veeber v. Estonia* (no.2) Judgment of 21 January 2003, the European Court of Human Rights found that the Republic of Estonia had violated Article 7.1 ECHR.

The Court observed that according to the text of Article 148.1 of the Criminal Code (hereinafter: "CC") before its amendment in 1995, a person could be held criminally liable for tax evasion only where he or she had already received an administrative penalty for a similar offence. The Court consequently concluded that that prerequisite was an element of the offence of tax evasion, without which there could be no criminal conviction. The Court further observed that a considerable number of the acts of which the applicant had been convicted took place prior to January 1995. The sentence imposed on the applicant – a suspended term of three years and six months' imprisonment – took into account acts committed both before and after January 1995. The Court pointed out that it could not be stated with any certainty that the domestic courts' approach had no effect on the severity of the punishment or had no tangible negative consequences for the applicant. That being so, the European Court of Human Rights found that the domestic courts had retrospectively applied the 1995 amendment to the law to behaviour which did not previously constitute a criminal offence and, in doing so, had violated Article 7.1 ECHR.

After the European Court of Human Rights had delivered that decision, T. Veeber filed a petition for the correction of court errors with the Supreme Court, requesting that the judgment of the Criminal Chamber of the Supreme Court of 8 April 1998, the judgment of Tartu Circuit Court of 12 January 1998 and the Judgment of Tartu City Court of 13 October 1997 be quashed and that he be acquitted under Articles 143.1, 148.1.7 and 166 CC. Counsel applied for dismissal of the civil actions.

The first question that had to be decided by the general assembly of the Supreme Court was whether and on the basis of which procedure the Supreme Court was competent to hear the petition. The second question was whether it was necessary to reopen criminal proceedings after a finding by the European Court of Human Rights of a violation of a Convention right.

As regards the first question, the general assembly found that even a broad interpretation of the grounds for review and correction of court errors set out in the Code of Criminal Court Appeal and Cassation Procedure (hereinafter "CCCACP") did not allow a new hearing of a criminal matter after the delivery of a judgment by the European Court of Human Rights. Examining whether the court was competent to hear the petition even though the CCCACP did not provide grounds for it to do so, the Court pointed out that according to Article 123.2 of the Constitution, the European Convention on Human Rights constitutes an inseparable part of the Estonian legal order, and

that the guarantee of the rights and freedoms of the Convention is, under Article 14 of the Constitution, also the responsibility of the judicial power. The general assembly found that in order for the judicial power to best fulfil that duty, an amendment to the procedural laws was required with a view to eliminating any ambiguity as to whether, in which cases and in which manner a new hearing of a criminal matter was to take place after the delivery of a judgment by the European Court of Human Rights.

That, however, did not mean that the Supreme Court had no jurisdiction to consider and determine T. Veeber's petition. In its Judgment of 17 March 2003 in case no. 3-1-3-10-02 (RT III 2003, 10, 95), the general assembly of the Supreme Court held that criminal proceedings might be considered in the Supreme Court even if the code of procedure did not provide for a direct ground to do so. The Supreme Court may refuse to hear a person's petition only where there are other effective ways available to the person for exercising his or her right to judicial protection, guaranteed by Article 15 of the Constitution.

The general assembly stated that in deciding whether to reopen proceedings, it had to be ascertained whether the reopening of proceedings would be a necessary and appropriate remedy of a violation of a Convention right or of a violation with a causal link to the former found by the European Court of Human Rights. In doing so, it was necessary to consider whether the finding of a violation or an award of just satisfaction by the Human Rights Court was sufficient for the person. The general assembly was of the opinion that reopening of proceedings would be justified only in cases of continuing and serious violation and only where it is a remedy affecting the legal status of the person. The need to reopen judicial proceedings must be weighed against legal certainty and the possible infringement of other persons' rights in a new hearing of the matter. Moreover, a prerequisite for the revision of a judgment that has entered into force is that there are no other effective means to remedy the violation.

Next, the general assembly assessed whether the reopening of criminal proceedings against T. Veeber concerning his conviction under Article 148.1.7 CC for acts committed before 1995 was justified on the basis of the *Veeber v. Estonia* (no. 2) Judgment of the European Court of Human Rights.

The general assembly was of the opinion that the fact that T. Veeber had been convicted for acts that were not punishable at the time they had been committed did not in itself constitute a ground to argue that his rights were still being seriously violated.

Furthermore, the general assembly pointed out that the European Court of Human Rights had ordered the Estonian Republic to pay T. Veeber 2,000 euros compensation for non-pecuniary damage.

The European Court of Human Rights held that it followed from Article 7.1 of the Convention that T. Veeber should not have been convicted under Article 148.1.7 CC for the acts committed before 1995. Thus, if the criminal proceedings were to be reopened, T. Veeber would be acquitted under Article 148.1.7 CC for the acts committed before 1995 on the ground of the absence of the necessary elements of the criminal offence. Pursuant to Article 269.3 CCP, such an acquittal would be accompanied by a partial refusal to hear the civil action. As the amount of the civil action would decrease considerably, the Court found it necessary to reopen proceedings under Article 148.1.7 CC for the acts committed before 1995. The judgments of conviction of the Criminal Chamber of the Supreme Court of 8 April 1998, of Tartu Circuit Court of 12 January 1998 and of Tartu City Court of 13 October 1997 were quashed.

There was one dissenting opinion.

Cross-references:

Supreme Court of Estonia:

- 3-1-3-10-02 of 17.03.2003, *Bulletin* 2003/2 [EST-2003-2-003].

European Court of Human Rights:

- *Veeber v. Estonia* (no. 2) Judgment of 21.01.2003, which entered into force on 21.04.2003, *Reports of Judgments and Decisions* 2003-I.

Languages:

Estonian, English.



Identification: EST-2004-1-005

a) Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 10.01.2004 / **e)** 3-3-2-1-04 / **f)** An action brought by AS Giga applying for a declaration of illegality of a measure taken by the Tartu City Government and a measure taken by the Tartu Police Prefecture / **g)** *Riigi Teataja III* (Official Gazette), 2004, 4, 37 / **h)** <http://www.nc.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

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.

5.3.13.2 **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.

Keywords of the alphabetical index:

Proceedings, reopening / European Court of Human Rights, decision, effect in national law / Human right, violation, continued.

Headnotes:

The Supreme Court may refuse to hear a person's petition only where another effective way is available for the person to exercise the right to judicial protection that is laid down by Article 15 of the Constitution.

A violation of Article 6.1 ECHR, found by the European Court of Human Rights, constitutes a violation of Article 15 of the Constitution.

Where the legislator does not provide for an effective and gap-free mechanism for the protection of fundamental rights, the judicial power must, according to Article 15 of the Constitution, guarantee the protection of fundamental rights.

A continuing and serious violation of a basic right may be sufficient to reopen the proceedings after the delivery of a decision by the European Court of Human Rights finding a violation of a Convention right.

Summary:

A petition filed in 1996 by AS Giga was not heard by the Estonian administrative courts to the extent that it related to the legality of the activities of the Tartu Police Prefecture, that is to say, the allegations that the police prefecture had violated Article 33 of the Constitution and Article 8 ECHR, as well as some provisions of the Code of Criminal Procedure. The circuit court dismissed the proceedings on the administrative matter on the ground that the hearing of the action did not fall within the competence of the administrative courts. On 15 January 1997 the Appeals Selection Committee of the Supreme Court did not grant AS Giga leave to lodge an appeal in cassation.

On 4 July 1997 T. Veeber filed an application (no. 37571/97) against the Republic of Estonia with the European Commission of Human Rights under former Article 25 of the Convention. In the *Veeber v. Estonia* (no. 1) Judgment of 7 November 2002, the European Court of Human Rights held that the Republic of Estonia had violated Article 6.1 ECHR on the ground that contrary to the requirements of the provision, the hearing of the matter by a tribunal had not been available to the applicant in an effective manner. The judgment of the European Court of Human Rights referred to the applicant's attempts to challenge the measures taken by the Tartu Police Prefecture in Estonian administrative courts.

The appeal by AS Giga against the acts of the police prefecture had not been reviewed by an administrative court, and with respect to contesting the activities of the police prefecture, AS Giga had not actually been able to exercise the right of appeal, which is guaranteed by Article 6.1 ECHR as well as Article 15 of the Constitution, in Estonian administrative courts. AS Giga argued before the Supreme Court in a petition for review that the above-mentioned judgment of the European Court of Human Rights constituted a new fact for the purposes of Article 75.2.1 of Code of Administrative Court Procedure (hereinafter "CACP").

Firstly, the general assembly of the Supreme Court examined whether the application by AS Giga was admissible in light of the fact that it was T. Veeber who had applied to the European Court of Human Rights and AS Giga that submitted the petition for review to the Supreme Court after the delivery of the *Veeber v. Estonia* (no. 1) Judgment by the European Court of Human Rights.

The general assembly was of the opinion that the petition by AS Giga was admissible. The European Court of Human Rights proceeded from the fact that all shares of AS Giga belonged to T. Veeber

(clause 9 of *Veeber versus Estonia* (no. 1) Judgment). For that reason, the European Court of Human Rights did not differentiate between the rights of T. Veeber and those of AS Giga.

Secondly, the Court considered and determined whether the Supreme Court was competent to hear the case and whether administrative court proceedings should be initiated.

The general assembly found that Administrative Court procedural law did not support AS Giga's position. AS Giga had exhausted the possibilities of appeal in cassation, as on 15 January 1997 the Appeals Selection Committee of the Supreme Court did not grant AS Giga leave to appeal in cassation. The grounds for review in administrative court procedure are set out in Article 75 CACP. The general assembly was of the opinion that the ground for review (Article 75.2.1 CACP) put forward in AS Giga's petition for review did not exist. Nor did any grounds exist under Article 81 CACP to support a petition for the correction of court errors.

However, the Court found that under Article 15 of the Constitution, the Supreme Court could refuse to hear a person's petition only where another effective way is available to the person for exercising the right to judicial protection provided for in that article.

The violation of Article 6.1 ECHR found by the European Court of Human Rights constitutes a violation of Article 15 of the Constitution. The general assembly was of the opinion that where an action alleging a violation of fundamental rights is filed with an administrative court and the action is not heard on the merits, the situation constitutes a continued and serious violation in itself. Pursuant to Article 14 of the Constitution, the guarantee of rights and freedoms is also the responsibility of the judicial power. The general assembly considered that where the legislator does not provide for an effective and gap-free mechanism for the protection of fundamental rights, the judicial power must, relying on Article 15 of the Constitution, guarantee the protection of fundamental rights.

Consequently, the situation was such that contrary to Article 15 of the Constitution, the action by AS Giga challenging the legality of acts carried out by the police prefecture had not been heard by Estonian courts, and AS Giga had not been able to exercise its right of appeal against the alleged violation of its rights. Thus, the administrative court proceedings of AS Giga's action had to be reopened to the extent that the circuit court had dismissed the proceedings in relation to the administrative matters, that is to say, as to the complaint against the acts of the Tartu Police Prefecture.

There was one dissenting opinion.

Cross-references:

Supreme Court of Estonia:

- 3-3-1-38-00 of 22.12.2000;
- 3-1-1-50-98 of 08.04.1998;
- 3-1-3-10-02 of 17.03.2003, *Bulletin* 2003/2 [EST-2003-2-003].

European Court of Human Rights:

- *Veeber v. Estonia* (no. 1) Judgment of 07.11.2002.

Languages:

Estonian, English.



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:

- 3-3-1-65-03 of 10.11.2003;
- 3-1-3-10-02 of 17.03.2003, *Bulletin* 2003/2 [EST-2003-2-003].

Languages:

Estonian, English.



Identification: EST-2005-3-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 19.04.2005 / **e)** 3-4-1-1-05 / **f)** Petition of the Chancellor of Justice to declare Article 701 of Local Government Council Election Act and Article 1.1, the first sentence of Article 5.1 and Article 6.2 of Political Parties Act partly unconstitutional / **g)** *Riigi Teataja* III, 2005, 13, 128 / **h)** <http://www.nc.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 1.2.1 **Constitutional Justice** – Types of claim – Claim by a public body.
- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.
- 3.3 **General Principles** – Democracy.
- 3.16 **General Principles** – Proportionality.
- 4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
- 4.9.6 **Institutions** – Elections and instruments of direct democracy – Representation of minorities.
- 4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
- 5.3.4.1.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, local, candidate / Accountability, political.

Headnotes:

The requirement for as wide a representation as possible of diverse political interests is vital for the functioning of democracy.

In the current legal and social conditions of Estonia, the aim of ensuring political accountability does not justify the restriction of the principles of local autonomy and equal right to stand as a candidate in the elections of local government councils.

The Chancellor of Justice has no competence to request the Supreme Court to declare an Act unconstitutional on the grounds that it is in conflict with European Union Law.

Summary:

I. On 21 December 2004 the Chancellor of Justice presented a petition to the Supreme Court on Article 70.1 of the Local Government Council Election Act (hereinafter 'LGCEA') and Article 1.1, the first sentence of Article 5.1 and Article 6.2 of the Political Parties Act (hereinafter 'PPA'). He suggested that they were in conflict with the Constitution and with the Treaty establishing the European Community, and invalid to the extent that they do not allow the formation of election coalitions of citizens in local government council elections nor political parties with a membership of less than one thousand persons, to decide upon and organise local issues, which EU citizens would also be able to join.

Article 6.2 of PPA establishes as a prerequisite for the registration of a political party a minimum membership of one thousand. This came into effect on 16 July 1994. The wording of Articles 1.1 and 5.1 of PPA came into force on the same date.

The Local Government Council Election Act came into force on 6 May 2002. It differs from previous regulations in that it allows persons to stand for election in local government elections only under the auspices of a political party or as independent candidates. On the basis of a petition of the Chancellor of Justice, in its judgment of 15 July 2002 in matter no. 3-4-1-7-02 (RT III 2002, 22, 251 [EST-2002-2-006]) the Constitutional Review Chamber of the Supreme Court declared the Local Government Council Election Act unconstitutional to the extent that it did not allow citizens' election coalitions to participate in local government elections.

On 30 July 2002 the Estonian Parliament amended the Local Government Council Election Act, allowing not only political parties but also citizens' election coalitions to submit their lists in local government elections. According to Article 70.1 of LGCEA, established by this amendment, the right of election coalitions to present lists of candidates expired on 1 January 2005.

II. The Court began by examining the restriction on standing as a candidate in local government council elections and then turned to that part of the petition relating to Article 48 of the Constitution. The Court then examined the petition the Chancellor of Justice had submitted. Finally, the competence of the Chancellor of Justice to review the conformity of Article 5.1 of PPA with European Union law was analysed.

In conjunction with the principle of equal treatment, under Article 12 of the Constitution, the principle of uniform elections means that equal possibilities must be afforded to all candidates for standing as candidates and for succeeding in the elections. Because of the proportional electoral system used in Estonia's local elections, those standing as individual candidates are in a different situation from those who stand as candidates in the lists of political parties.

Under the Constitution, local government is based on the idea of a community, with a duty to resolve the problems of the community and to manage day to day life. If the possibility of representing communal interests is made dependent on the decisions of political parties active at a national level, the representation of local interests may be in jeopardy. This in turn may be in conflict with the principle of autonomy of local government as established in Article 154 of the Constitution. Where there is a potential conflict between state and local interests, a member of a local government council must be able to resolve local issues independently and in the interests of their community.

Under Article 70.1 of LGCEA, only political parties may submit lists of candidates in local elections. Although the Political Parties Act does not prohibit the residents of a rural municipality or city to found a political party to exercise local power, the restrictions (especially the requirement of a minimum membership of one thousand members) render it practically impossible to found a political party at local government level.

The principle of local autonomy and the principle of equal right to stand as a candidate are not absolute rules. The rights arising from these principles may be limited if there is a constitutional value protected by

the restriction and if the restriction is necessary in a democratic society. The infringement of the principle of local autonomy as a general constitutional principle is also permissible if it is justified by the achievement of an essential constitutional value.

Giving the right of submitting lists only to political parties, on the basis of the Political Parties Act and the Local Government Council Election Act, is a measure necessary for guaranteeing political accountability. Therefore the Court examined whether restrictions on the right to stand as a candidate and of the principle of local autonomy as a way of increasing political accountability are sufficiently proportional in the narrow sense. It was found necessary to take into account the extent of the restriction of the right to stand as a candidate and of the principle of local autonomy, and the weight of these values in comparison with the need to guarantee political accountability.

Restrictions of the right to stand as a candidate prevent persons from participating in the elections. In the context of a proportional election system it is not reasonable to compare an independent candidate with a list as the election results indicate that only a very small number of candidates achieve the simple quota required for being elected. The fact that only political parties stand as candidates in local elections jeopardises the representative nature of local bodies of self-government.

The restriction of the right to stand as a candidate and of local autonomy is extensive. Although guaranteeing political accountability is a constitutional value, it is not a primary value arising from the principle of democracy. Besides political accountability, the requirement that different political interests be represented as widely as possible in political decision-making, is vital for the functioning of democracy in Estonia's political system.

The Court concluded that in the current legal and social conditions of Estonia the aim of ensuring political accountability does not justify the restriction of the principle of local autonomy and equal right to stand as a candidate in elections of local government councils. The Court declared Article 70.1 of Local Government Council Election Act invalid.

In relation to the requirement of a minimum membership of one thousand members for the registration of a political party under the PPA, the Court took the view that in principle several options are open to the legislator to rectify the unconstitutional situation. The Court accordingly limited the scope of its decision and found that it was sufficient to declare Article 70.1 of Local Government Council Election Act invalid.

Finally the Court dealt with the suggestion by the Chancellor of Justice that Article 5.1 of PPA is in conflict with European Union law. The Court dismissed the request as neither the Chancellor of Justice Act nor the Constitutional Review Court Procedure Act give the Chancellor of Justice the competence to request that the Supreme Court declare an Act unconstitutional on the ground that it is in conflict with the European Union law.

Supplementary information:

- Dissenting opinion of Justice Jüri Pöld
- Dissenting opinion of Justices Julia Laffranque, Tõnu Anton, Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister and Harri Salmann
- Dissenting opinion of Justice Lea Kivi

Cross-references:

- Judgment of the Constitutional Review Chamber no. 3-4-1-7-02 (RT III 2002, 22, 251) of 15.07.2002, *Bulletin* 2002/2 [EST-2002-2-006].

Languages:

Estonian, English.



Identification: EST-2006-1-001

a) Estonia / **b)** Supreme Court / **c)** En banc / **d)** 12.04.2006 / **e)** 3-3-1-63-05 / **f)** Appeal of Beate and Thomas Bodemann against Decision no. 12421 of the Tallinn City Committee for Return of and Compensation for Unlawfully Expropriated Property / **g)** *Riigi Teataja III (RTI)* (Official Bulletin), 2006, 19, 176 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

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

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

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

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

Keywords of the alphabetical index:

Partial decision / Judgment, execution, conditions / Restitution in relation to privatisation / Unconstitutionality, declaration / Ownership, reform / Property, unlawfully expropriated, return / Person, resettled / International agreement, return of expropriated property.

Headnotes:

It is primarily up to the executive and the legislator to decide upon the best way of resolving the issues of return, compensation or privatisation as regards property expropriated from the persons who had left Estonia on the basis of an agreement between the Soviet Union and the German state. Whatever decision is reached, further legislation will be needed, to resolve various practical issues. The General Assembly of the Court cannot usurp parliament's role and decide upon possible solutions and draft the pertinent legal regulations required. It is reasonable to give the legislator time to resolve such issues.

Where it is not clear which law should be applied, the Court may make a partial decision and continue the proceedings once the unconstitutional provision has been amended or declared invalid.

Summary:

There had been a long period of uncertainty as to whether unlawfully expropriated property of persons who resettled under treaties concluded with the German state should be returned. This was found to have violated the general prohibition of arbitrariness and the fundamental right to procedural fairness, and to be contrary to the principle of legal certainty. It had also had an adverse impact on the present occupiers of the property, as their right to take it into private ownership depended on whether those who resettled were entitled to the return of their property.

No steps had been taken by the legislator for a considerable length of time to rectify these problems. Section 7.3 of the Republic of Estonia Principles of Ownership Reform Act (referred to here as "PORA"), which had already been declared unconstitutional,

would have to be declared null and void, if parliament failed to resolve the problem within six months.

In 2002, the Tallinn City Committee for Return of and Compensation for Unlawfully Expropriated Property (referred to here as "the City Committee") repealed its decisions of 1993 and 1994, which resulted in the return of a residential house and a plot of land to U. Hamburg, the son of its former owner.

The rationale behind the repeal was that J. Hamburg, the former owner, had left Estonia on the basis of an agreement between the Soviet Union and the German state. Article 7.3 of PORA provides for the return of or compensation for unlawfully expropriated property to persons who left Estonia on the basis of agreements made with the German state only on the basis of an international agreement. No such agreement had been entered into at the time of the decision.

U. Hamburg died in 2001. His successors were B. and T. Bodemann.

Article 7.3 of PORA, which was declared unconstitutional by the General Assembly of the Supreme Court on 28 October 2002, is pivotal to the case.

In that judgment, the General Assembly argued that Article 7.3 of PORA was unconstitutional because the legislator had failed in its duty to set out clearly the rights of persons who resettled in Germany on the basis of an agreement entered into in 1941 and the rights of the persons occupying the property. Article 14 of the Constitution deals with the responsibility for the guarantee of rights and thus the executive and legislative powers are required to achieve a clear political agreement concerning the return of property both to the resettlers whose property was unlawfully expropriated and to their successors, and to those who occupy the property on the basis of tenancy agreements. The Court declared that Article 7.3 of PORA was in conflict with Articles 13.2 and 14 of the Constitution.

The General Assembly of the Supreme Court did not declare Article 7.3 of PORA invalid in 2002. Instead, it declared it unconstitutional and required that the legislator should amend it so that it conformed to the principle of legal clarity. This would overcome the problem of legal ambiguity. Until the Act was amended, no decision could be taken on the return of or compensation for resettlers' property.

Estonia and Germany had not entered into an international agreement to resolve the issue and the provision had not been amended since the judgment was handed down in 2002.

The General Assembly is still of the opinion that Article 7.3 of PORA is unconstitutional.

The only way to put an end to this unconstitutional situation, which has lasted for years, is to declare Article 7.3 of PORA invalid. This would clarify the legal situation not only of the resettlers but also of the lessees of the unlawfully expropriated residential buildings that had belonged to the former. Applications for the return of or compensation for the property on the part of the resettlers, as well as applications by the lessees of buildings, which had been in the ownership of the resettlers, would now have to be processed.

Under Section 58.3 of the Constitutional Review Court Procedure Act, the Supreme Court may postpone for a maximum of six months the entry into force of a judgment invalidating legislation of general application or a provision of such legislation.

The General Assembly may delay the entry into force of the declaration of invalidity of Article 7.3 of PORA for the following reasons:

It is primarily up to the executive and the legislator to decide upon the best way of resolving the issues of return, compensation or privatisation as regards property expropriated from the persons who had left Estonia on the basis of an agreement between the Soviet Union and the German state. Whatever decision is reached, further legislation will be needed, to resolve various practical issues.

The General Assembly of the Court cannot usurp parliament's role and decide upon possible solutions and draft the pertinent legal regulations required. It is reasonable to give the legislator time to resolve such issues.

The resolution of the appeal in cassation of B. and T. Bodemann will be possible once the General Assembly is clear as to which substantive law must be applied. The Court will accordingly deliver a partial judgment and will resume its hearing of the matter following the amendment or the repeal of Article 7.3 of PORA.

There were two dissenting opinions.

Cross-references:

- 3-4-1-5-02, *Bulletin* 2002/3 [EST-2002-3-007].

Languages:

Estonian, English.



Identification: EST-2007-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 31.01.2007 / **e)** 3-4-1-14-06 / **f)** Petition of the President of the Republic for the declaration of unconstitutionality of the Act Repealing Section 7.3 of the Principles of Ownership Reform Act of the Republic of Estonia / **g)** *Riigi Teataja III (RTI)* (Official Gazette), 2007, 5, 36 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.1.1 **Constitutional Justice** – Types of claim – Claim by a public body – Head of State.
 1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
 1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 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.
 5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Ownership, reform / Expropriation, compensation.

Headnotes:

The President of the Republic may contest legislative omission on the basis of earlier decisions by the Court if the norms which have not been enacted should form part of the contested legislation.

A piece of legislation which only affords a general right to protection to one group of persons is incompatible with the principle of equal treatment and unconstitutional, in the absence of any coherent arguments to support the enactment of such legislation.

Summary:

I. Under Section 7.3 of the Principles of Ownership Reform Act of the Republic of Estonia (PORA), applications for the return of or compensation for unlawfully expropriated property, previously owned by persons who left Estonia on the basis of agreements entered into with the German State and located in the Republic of Estonia, (referred to here as "resettlers") shall be resolved by means of an international agreement. In October 2002, the Supreme Court pronounced this provision to be in contravention of Sections 13.2 and 14 of the Constitution, as it infringed the principle of legal clarity and the right to organisation and procedure of the applicants. The Court found it impossible to decide on the return or privatisation of, or compensation for the property in the ownership of the resettlers until PORA was brought into line with the principle of legal clarity.

In April 2006, the General Assembly of the Supreme Court declared Section 7.3 of PORA void and decided that the relevant part of the judgment would enter into force on 12 October 2006 unless Parliament had adopted and promulgated an Act amending or repealing Section 7.3 of PORA. On 14 September 2006 Parliament passed an act to repeal Section 7.3 of PORA. However, the President of the Republic refused to proclaim the Act and filed a petition with the Supreme Court on 4 October 2006, when Parliament refused to bring the Act into conformity with the Constitution. On 12 October 2006, Section 7.3 of PORA became invalid, as the above Supreme Court judgment became effective. The President of the Republic argued that the act repealing Section 7.3 of PORA was unconstitutional because it violated the principle of legal clarity.

II. The Supreme Court deemed it possible to review the constitutionality of the act repealing Section 7.3, despite Section 7.3 being null and void as of 12 October 2006, because Section 2 of the contested Act contains provisions relating to the repeal which could be applicable once the provision became invalid. The President may contest legislative omission on the basis of earlier court decisions if the norms which have not been enacted should form part of the contested legislation or are in some way related to it.

The allegations of the President of the Republic that the general right to protection is not sufficiently

guaranteed for persons with legitimate expectation to the return or privatisation of and compensation for unlawfully expropriated property raise the question of the principle of equal treatment. The legislation in question guarantees the right to proceedings for those resettlers whose applications have been denied on procedural grounds, but not to those whose applications have been dismissed on substantive grounds. This runs counter to the general right to equality, as only one group is afforded protection. The Court could deduce no reasons from parliamentary discussions in the period leading up to the enactment of this legislation which could justify fettering the right to procedure and organisation, equality, and protection by state and by law. The restrictions are, accordingly, disproportionate and unconstitutional.

The Court also pointed out that PORA might contain other problems, in connection with the different treatment of those entitled to return, privatisation and compensation. The rules within the disputed Act did not solve the legal issues surrounding the repeal of Section 7.3; rather, they created more problems, due to the unequal treatment of different groups of resettlers.

Parliament had failed to adopt measures after the repeal of Section 7.3 of PORA which would enable the resettlers to exercise their rights. The contested Act conflicts with Sections 13, 14 and 12.1 of the Constitution and is unconstitutional. The Court upheld the petition.

Cross-references:

- Decision 3-4-1-5-02 of 28.10.2002 of the Supreme Court of Estonia, *Bulletin* 2002/3 [EST-2002-3-007];
- Decision 3-3-1-63-05 of 12.04.2006 of the Supreme Court of Estonia, *Bulletin* 2006/1 [EST-2006-1-001].

Languages:

Estonian, English.



France

Constitutional Council

Important decisions

Identification: FRA-2000-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 13.01.2000 / **e)** 99-423 DC / **f)** Act on the negotiated reduction of working hours / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 20.01.2000, 992 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

3.17 **General Principles** – General interest.

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

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

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

5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Freedom of contract / Clarity of the law / Working hours, reduction.

Headnotes:

The legislature failed to exercise its powers in setting a new precondition (an agreement on reducing working hours) for collective redundancy programmes in firms without making clear the consequences of failure to comply with this requirement, and, in particular, in leaving it to the administrative authorities and the courts to determine the impact of non-compliance on redundancy procedures.

Implementation of the substantive clauses of collective agreements concluded under and in accordance with the 1998 Act can only be challenged by the legislature on sufficient public interest grounds, which were not present in this particular case.

A breach of the principle of equal treatment may only be justified by a difference in situation as regards the purpose of the law. There is no such justification for the differences in overtime payment provided for by the act at issue, according to whether firms have reduced the working week to 35 hours for all their employees. The purpose of the law is to encourage uniform application of the 35-hour week; individual employees have no bearing on whether this is the case in their firm and the planned system does not act as an incentive to company managers.

Lastly, the category of employees who, on the introduction of reduced working hours, were already working part time and receiving the statutory minimum wage could not be excluded from the safeguards afforded by the act to other categories of full-time or part-time employees receiving the minimum wage for equivalent work without breaching the "equal work, equal pay" principle.

Summary:

The law referred to the Constitutional Council for examination, the so-called "second act on the 35-hour week", lays down the conditions for general application of the procedure to reduce the working week, the underlying principles having been set out in the Act of 13 June 1998.

While the first act was found to be constitutional (Decision no. 98-401 DC of 10 June 1998, see *Bulletin* 1998/2 [FRA-1998-2-004]), the second, which encountered considerable opposition in parliament, was referred to the Constitutional Council twice (by members of the National Assembly and the Senate respectively) and criticised on four counts; in at least one case, this entailed a major development in case-law which was welcomed by legal opinion (concerning freedom of contract, a principle which had already been upheld in the decision on the first act on the 35-hour week).

Without claiming in general, absolute terms that the inalterability of contracts is a constitutional requirement or incorporating the idea of "legitimate expectation" into the body of constitutional principles, Decision no. 99-423 DC confirms that existing contract agreements can only be challenged on sufficient public interest grounds.

Languages:

French.



Identification: FRA-2002-1-001

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

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

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

Headnotes:

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

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

However, lengthening redundancy procedures as a result of measures aimed at improving employee

information and giving greater rights to employees' representative bodies does not amount to excessive interference with free enterprise.

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

Summary:

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

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

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

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

Languages:

French.



Identification: FRA-2004-2-007

a) France / **b)** Constitutional Council / **c)** / **d)** 29.07.2004 / **e)** 2004-500 DC / **f)** Organic Law on the financial autonomy of territorial authorities / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 30.07.2004, 13562 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.6 **General Principles** – Structure of the State.

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

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

4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.

4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.

4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

Keywords of the alphabetical index:

Territorial authority, overseas, type, special status / Territorial authority, deliberative assembly / Territorial authority, own resources, threshold, global resources, decisive share / Law, constitutional objective, accessibility, intelligibility.

Headnotes:

In implementing the Act referred to the Constitutional Council, the legislator did not distort Article 72.2 of the Constitution (Section XII) by assimilating the special status territorial authorities (particularly the overseas authorities) to the three types – communes, departments and regions. However, in so far as the Act was to apply to the provinces of New Caledonia, covered by Section XIII of the Constitution, the legislator should first have consulted the Deliberative Assembly of New Caledonia, as required by Article 77 of the Constitution (Section XIII).

Laws express the general will. They are intended to lay down rules, and must therefore have standard-setting scope. The legislator must fully exercise the powers conferred on him by the Constitution. In this connection, the principle of clarity of the law, laid down in Article 34 of the Constitution, and also the constitutional objectives of intelligibility and accessibility of the law, derived from the Declaration of Human Rights of 1789, require him to adopt sufficiently precise provisions and unambiguous wording.

Summary:

In pursuance of Article 46 of the Constitution, the Prime Minister referred the Organic Law on the financial autonomy of territorial authorities, adopted under Article 72.2 of the Constitution, to the Constitutional Council. Article 72.2 of the Constitution, based on the Constitutional Act of 28 March 2003, provides that the tax revenue and other own resources of territorial authorities are to represent, for each type of authority, a decisive share of their resources.

The Organic Law adopted to implement that principle was required to define the concept of own resources for each type of territorial authority, and also the threshold below which those own resources did not constitute a decisive part of their global resources.

The Constitutional Council annulled two provisions in the Act:

- concerning the types of authority, it held that the Organic Law was not automatically applicable to the provinces of New Caledonia, which were institutions covered by Section XIII of the Constitution, and not institutions covered by Section XII (the only ones to which Article 72.2 applied automatically).
- moreover, the uncertain standard-setting scope and tautological character of the first criterion used to define “decisive share of own resources” in the Organic Law (Article 4.3) meant that the legislator had failed to exercise the powers conferred on him by Article 72.2 of the Constitution fully.

Languages:

French.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-1981-M-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 14.01.1981 / **e)** 1 BvR 612/72 / **f)** Aircraft noise / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 56, 54-86 / **h)** *Der Betriebsberater* 1981, 1180-1182; *Neue Juristische Wochenschrift* 1981, 1655-1659; *Zeitschrift für Luft- und Weltraumrecht* 1981, 281-290; *Europäische Grundrechtezeitschrift* 1981, 225-232; *Umwelt- und Planungsrecht* 1982, 19-22; CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
 5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.

Keywords of the alphabetical index:

Aircraft, noise, protection against / Legislation, subsequent improvement, obligation.

Headnotes:

Persons alleging that their fundamental rights have been violated by the effects of aircraft noise are in principle required to have recourse to the (non-constitutional) courts prior to approaching the Federal Constitutional Court.

The legislature has the duty, in certain circumstances, to improve regulatory provisions governing the abatement of aircraft noise.

Summary:

I. In their constitutional complaints, two residents living near an airport claimed, that the state authorities acted unconstitutionally by omitting to adopt effective protective measures against airport noise. They claim

that this violates their right to physical integrity stemming from Article 2.2 of the Basic Law. The complainants are of the opinion that the existing noise protection provisions – even if they might have originally been adequate – are no longer adequate due to a change in circumstances (increase in air traffic and use of louder aircraft). They believe that the state authorities have violated their constitutional duty by omitting to deal effectively with the noise nuisance.

II. The constitutional complaints were dismissed.

The First Panel's reasoning with regard to admissibility is in essence as follows:

The admissibility of the complainants' constitutional complaints can only be accepted with regard to their complaint that the legislature omitted to subsequently improve statutory protection measures in spite of ever-increasing aircraft noise.

To the extent that the complainants' constitutional complaints are directed at existing statutory provisions, they are already inadmissible due to their failure to comply with the one-year limitation period (Article 93.2 of the Basic Law). In addition, the requirement that recourse to the (non-constitutional) courts has been exhausted prior to resorting to the Federal Constitutional Court is not satisfied.

However, with respect to the allegation of a legislative omission, the admissibility of the constitutional complaints is not excluded from the outset. The complainants are personally, presently and directly affected by the omission complained of. In addition, constitutional complaints against an ongoing legislative omission do not, in principle, require that recourse be had to the (non-constitutional) courts previously or require that the one-year limitation period provided for in Article 93.2 of the Federal Constitutional Court Act be complied with. These kinds of constitutional complaints have only been regarded as admissible until now, by way of exception and only if the complainant is able to point to an express obligation in the Basic Law determining in essence the content and scope of the duty to legislate. However, the complainants' submissions lead to an accusation that the legislature omitted to fulfil those of its duties to protect and to act that can only be derived through constitutional interpretation from the basic decisions embodied in the fundamental rights. It cannot be assumed straight away that a citizen is entitled to resort directly to the Federal Constitutional Court also in such cases. This is because a decision on whether a statute should be enacted, and if so, on its content, depends on a variety of economic, political and budgetary factors, which are generally not suitable for judicial review.

The prerequisites for a constitutional complaint of this kind will generally include at least the legislature having remained totally inactive in spite of its existing duties to protect and to act. If, on the other hand, the legislature has taken action and the statute contains a regulatory provision – even if it is a regulatory provision denying protection – the legislature has not omitted to make a decision. Persons who consider this regulatory provision inadequate are obliged to challenge it directly by contesting its application in a case affecting them or – to the extent that the necessary preconditions have been fulfilled – challenge it directly by lodging a constitutional complaint within one year. The only possible basis for considering a constitutional complaint based on omission after expiry of the time limit for lodging one and outside the context of a challenge to its specific application is under the special aspect that the legislature has through its inaction violated a constitutional duty to subsequently improve a regulatory provision which was originally regarded as being in conformity with the Basic Law. The Federal Constitutional Court put aside all of these jurisdictional problems due to the importance attached to the abatement of noise and, after it emerged that the constitutional complaints at any rate had to be dismissed as unfounded, assumed for the benefit of the complainants that it had jurisdiction.

Regarding the question of whether the constitutional complaints were well-founded, the Federal Constitutional Court ruled as follows:

The right to physical integrity protected in Article 2.2 of the Basic Law is the review standard under constitutional law that is most suitable. A duty on the part of state organs to protect and promote the legal interests referred to in the aforementioned article, and in particular a duty to safeguard them against illegal encroachment by others, follows from the objective legal content of this right. It can at least be assumed for the benefit of the complainants that the protective duty derived from Article 2.2 of the Basic Law also includes a duty to abate the effects of aircraft noise which pose a risk to health. Furthermore, one can also assume, as do the complainants, that the legislature had an obligation to subsequently improve the noise protection measures originally taken by it.

Nevertheless, it is impossible to find a violation of the duty of protection that follows from Article 2.2 of the Basic Law in the legislature's omission to make subsequent improvements.

This is because it is first and foremost for state organs to decide on how this duty of protection should be satisfied. They must decide which measures are expedient and necessary to guarantee effective protection. Thus it is only possible for the Federal Constitutional Court to intervene in connection with a constitutional complaint of this type if the legislature has obviously violated its duty of protection. This limitation on review under constitutional law therefore appears necessary because the question of how a positive state duty to protect and to act that is only derived through constitutional interpretation from the basic decisions embodied in the fundamental rights must be implemented using active legislative measures is normally extremely complex. According to the principle of the separation of powers and the democratic principle, responsibility for the decision, which often requires compromises, lies with the legislature that has been directly legitimised by the people. Review of the decision by the Federal Constitutional Court is, as a rule restricted, unless legal interests of extreme importance are at stake. These considerations matter more if the issue is not just whether the legislature has violated its duty of protection, but where there is in addition dispute as to whether its violation is based on omitting to make a subsequent improvement. The Federal Constitutional Court can only find a constitutional violation of this kind where it is evident that, due to a change in circumstances, a regulatory provision which was originally legal has become constitutionally unacceptable and where the legislature has nonetheless remained inactive or has obviously adopted measures of subsequent improvement that are deficient.

The application of this review standard does not show that the legislature clearly violated its duty to protect citizens from aircraft noise that poses a danger to health by omitting to subsequently improve legislation. In the area of aircraft noise abatement, the fact that reliable scientific knowledge regarding the limits of reasonable aircraft noise pollution is not yet available and the fact that the material involved is complex and the legislature has to be given reasonable latitude for gaining experience and making adjustments in order to regulate it cannot be ignored. The measures which have been adopted to implement already existing and newly created regulatory provisions since the beginning of the 1970s contradict such a conclusion.

Languages:

German.



Identification: GER-1984-M-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 22.02.1984 / **e)** 1 BvL 10/80 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 66, 214-226 / **h)** *Der Betriebsberater* 1984, 965-966; *Der Betrieb* 1984, 1173-1174; *Deutsche Steuerzeitung, Eildienst* 1984, 172-175; *Wertpapiermitteilungen* 1984, 782-785; *Zeitschrift für Sozialhilfe und Sozialgesetzbuch* 1984, 264-265; *Höchstrichterliche Finanzrechtsprechung* 1984, 343-344; *Zeitschrift für das gesamte Familienrecht* 1984, 760-760; *Neue Juristische Wochenschrift* 1984, 2453-2454; *Die Information für Steuerberater und Wirtschaftsprüfer* 1985, 47-48; *Europäische Grundrechte-Zeitschrift* 1985, 147-149; CODICES (English, German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
 5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Equality, fiscal / Law, adjustment to changed circumstance / Income tax, law.

Headnotes:

The legislature should not create unrealistic limits in the income tax law in order to tax the allowance for necessary maintenance expenditure.

Summary:

I. The subject-matter of the proceedings is the question of whether the level of restriction to the deduction of the necessary maintenance expenditure for specific individuals, established by the 1961 Income Tax Act, was still compatible with the Basic Law of 1973.

§ 33.a of the Income Tax Act, in the version of 15 August 1961 (hereinafter: the Act), regulates the preconditions for the deduction of the necessary maintenance expenditure:

“Extraordinary burdens in special cases”

1. In the event of a taxpayer incurring necessary (...) expenditure for the maintenance and any vocational training of individuals for whom the taxpayer does not receive child allowance, on request the income tax shall be reduced by virtue of the expenditure being deducted from the income up to a maximum amount of 1 200 Deutsche Mark per calendar year for each maintenance recipient. This shall be conditional on the maintenance recipient having no or only very few assets. If the maintenance recipient has other income or remuneration determined for or suited to providing maintenance, the amount of 1 200 Deutsche Mark shall be reduced by the amount by which such income and remuneration exceed the amount of 1 200 Deutsche Mark ...”

Since the introduction of the general income tax, allowance has been made for the fact that a taxpayers' purchasing power is reduced by special necessary expenditure in the private sphere, which is not provided for in the basic allowance. All extraordinary burdens were originally covered by a catch-all provision. § 33.a.1.1 of the Tax Reform Act of 16 December 1954 established a separate provision for, and gave a more precise shape to, several frequently-occurring special cases of extraordinary burdens – including maintenance payments to individuals for whom the taxpayer does not receive any child reduction. At the same time, generalised maximum amounts were introduced. In accordance with § 33.a, the maximum amount for maintenance was initially 720 Deutsche Mark and was in line with the amount which was to be allowed for tax purposes for expenditure for the first child. § 33.a.1.3 of the Act furthermore provided for an allowance limit of 480 Deutsche Mark, above which the maintenance recipient's income and remuneration reduced the maximum amount of deductible maintenance payment. From 1957 onward, the maximum amount was 900 Deutsche Mark and the allowance limit was 480 Deutsche Mark; from 1961, both the maximum amount and the allowance limit were 900 Deutsche Mark, and from 1962 they were 1 200 Deutsche Mark. From 1962 onward, the value remained at the latter amount for 13 years.

The plaintiff of the initial proceedings ran a joint household with her mother, who was 62 years old. The mother drew a pension for incapacity to work amounting to 106.10 Deutsche Mark, and to 118.20 Deutsche Mark from 1 July 1973. The plaintiff

of the initial proceedings claimed for 1973 the amount spent on her mother, amounting to 1 200 Deutsche Mark, as an extraordinary burden in accordance with § 33.a.1.1 of the Act. In accordance with § 33.a.1.3 of the Act, the tax office offset the mother's own income and remuneration (pension and social assistance) against the maximum amount and rejected the plaintiff's request. In the objection proceedings, it recognised an amount of 600 Deutsche Mark for the first six months of 1973; it rejected the objection in other respects.

In response to the action filed against the ruling of the tax office, the Finance Court suspended the proceedings in accordance with Article 100.1 of the Basic Law and submitted to the Federal Constitutional Court the question of whether § 33.a.1.3 of the Act was still compatible with the Basic Law in the dispute in 1973.

II. The Federal Constitutional Court found that § 33.a.1 sentences 1 and 3 of the Act were incompatible with Article 3.1 of the Basic Law and null and void insofar as the deduction of necessary maintenance expenditure was restricted in 1973 by the maximum amount (sentence 1) and the allowance limit (sentence 3) of 1 200 Deutsche Mark each.

In the reasoning, the First Senate of the Federal Constitutional Court essentially stated:

The submitting court explicitly only submits sentence 3 of § 33 a.1 of the Act for review, i.e. the allowance limit above which the maintenance recipient's own income and remuneration reduce the deductible maximum amount. However, sentence 1 of § 33.a.1 of the Act must also be included in the review, since the deductibility of maintenance payments is determined by both provisions in conjunction.

The provisions to be reviewed lead to different treatment of taxpayers whose disposable income is reduced by necessary maintenance expenditure, and taxpayers who do not bear such burdens. Whether and to what degree the legislature is constitutionally obliged to alleviate or remedy this inequality is to be reviewed using the principle of fiscal equality derivable from Article 3.1 of the Basic Law. It is a fundamental principle of fiscal equality that taxation, and income tax in particular, is in line with economic purchasing power. Taxation in accordance with purchasing power leads to a situation in which any expenditure is significant in terms of income tax which is incurred outside the sphere of obtaining income – in other words in the private sphere – and is unavoidable for the taxpayer. The economic burden of maintenance obligations is a special circumstance which impairs the purchasing power.

The legislature cannot disregard this special burden without violating fiscal justice. The consequence is that it may not create unrealistic limits to tax allowance for necessary maintenance obligations.

Furthermore, the legislature may not simply disregard the order principle once selected. Even if going against the system per se does not in itself lead to a violation of Article 3.1 of the Basic Law, nonetheless a violation of the logic of the Law itself may indicate such a violation.

§ 33.a.1 sentences 1 and 3 of the Act do not comply with the constitutional requirements above for the dispute in 1973.

Social assistance Law can provide indications in answer to the question of whether the legislature adopting the fiscal legislation disregarded maintenance expenditure in an unrealistic manner, thereby violating the principle of taxation according to the purchasing power. The standard social assistance rates which, as a minimum income, are intended to make it possible to lead a dignified life, almost doubled in the period between 1962 and 1973. By contrast, the provision contained in § 33.a.1 sentences 1 and 3 of the Act, which in 1962 had just about complied with the standard rates of social assistance, had remained unchanged for 13 years. It was hence no longer able, at least in 1973 and 1974, to accommodate any reduced purchasing power brought about by the necessary maintenance obligations in accordance with the actual developments.

In the dispute of 1973, § 33.a.1 sentences 1 and 3 of the Act unrealistically disregard the reduction of purchasing power due to the necessary maintenance burdens, even if the standards which the legislature set itself in the past and in the subsequent period one taken as a basis. The legislature considers it necessary, in accordance with § 33.a.1 sentences 1 and 3 of the Act, to at least allow the necessary maintenance payments that reduce income roughly to the extent found in the sphere of the standard rates of social assistance. These roughly complied with the limits set by § 33.a.1 of the Act in 1962 and once again in 1975. At the end of 1973, by contrast, the maximum fiscal amount and the maximum limit of § 33.a.1 sentences 1 and 3 of the Act remained unchanged, whilst the standard social assistance rate had almost doubled. There is no factual reason for which the amounts of § 33.a.1 sentences 1 and 3 of the Act had not been adjusted to the changed cost of living in the period of 1962 to 1974.

That § 33.a.1 sentences 1 and 3 of the Act inadequately allow for the reduction in the purchasing power also emerges from a comparison with the basic allowance of 1680 Deutsche Mark, relevant to the dispute year, which is to exempt the minimum income from tax. Hence, § 33.a.1 sentences 1 and 3 of the Act cover the necessary maintenance expenditure only to a degree that is already below the minimum income which the legislature set according to the standards defined by it.

Languages:

German.



Identification: GER-1985-M-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10.12.1985 / **e)** 2 BvL 18/83 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 71, 255-275 / **h)** *Der Öffentliche Dienst* 1986, 86-89; *Neue Zeitschrift für Verwaltungsrecht* 1986, 369-371; *Bayerische Verwaltungsblätter* 1986, 493-493; *Zeitschrift für Beamtenrecht* 1986, 242-244; CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
3.10 **General Principles** – Certainty of the law.
3.17 **General Principles** – Weighing of interests.
4.6.9 **Institutions** – Executive bodies – The civil service.

Keywords of the alphabetical index:

Provision, transitional / Statute, retroactive effect / Public confidence, protection / Civil service, permanent, principles, traditional / Legitimate expectations, principle.

Headnotes:

As a general rule, a civil servant, like any other citizen, may not rely on the eternal existence of a statutory arrangement that is favourable to him or her. The constitutionally guaranteed protection of

legitimate expectation does not require that a person who has benefited from a particular legal situation, be protected from ever being disappointed by a change of that situation. However, the power of the legislature to issue specific legal provisions may be subjected to constitutional restrictions arising from the protection of legitimate expectation if, as here, the reform of the law affects present legal relations that have not yet been completed. In general, the confidence of the individual in the continuation of the legal situation benefiting him or her should be weighed together with the importance of the legislative concern for the general public. If the confidence in the continuation of the beneficial provision is not generally more worthy of protection than the public interest in a change, the change is compatible with the Constitution. (non official headnotes)

Summary:

I. The proceedings relate to the questions of whether the following is compatible with the Basic Law and with federal law:

- a. under § 51.2.2 first half-sentence of the Saarland Civil Service Act (hereinafter “the Act”), teachers at state schools who are civil servants retire at the end of the month preceding the beginning of the school year if they reach retirement age in the first half of that school year and
- b. this provision came into force on the day after the Act was pronounced.

In the Land of Saarland (state), until the provision under review entered into force, teachers who were civil servants and who taught at state schools retired, under § 49.2 of the Act, at the end of the month of the school year in which they had reached retirement age. As a result, teachers often continued working long after they reached the age of sixty-five. The new version of the provision, amended by Article 1 no. 23 of Act no. 1100 of 16 May 1978, was intended to counteract this. As provided by law, the amended version entered into force on 23 May 1978 and reads as follows:

“1. For a civil servant, the retirement age is the date on which he/she turns sixty-five. For individual groups of civil servants, statute may provide a different retirement age if the special nature of their official duties so requires.

2. A civil servant appointed for life retires at the end of the month in which he/she reaches retirement age. A teacher at a state school who is a civil servant and who reaches retirement age in the first half of the school year retires at

the end of the month preceding the beginning of the school year; a teacher who reaches retirement age in the second half of the school year retires at the end of the month in which the school year ends ...”

The plaintiff in the original proceedings was a teacher at a state school in the capacity of a civil servant. He was born on 20 November 1914, and under the old version of the provision submitted for review he would have retired at the end of the school year 1979/1980, that is, at the end of the month of July 1980.

After the new Law entered into force, the plaintiff received a letter from the responsible minister dated 3 July 1979 informing him that he would retire at the end of 31 July 1979. Following unsuccessful preliminary proceedings, the plaintiff filed an action at the Administrative Court to annul an administrative act.

Under Article 100.1 of the Basic Law and § 80 of the Federal Constitutional Court Act, the Administrative Court suspended the action and submitted the questions set out under a) and b) above to the Federal Constitutional Court.

II. The Federal Constitutional Court declared that § 51.2.2, first half-sentence of the Act is compatible with federal law. However, the constitutional principle of the protection of legitimate expectation, in conjunction with Article 33.5 of the Basic Law, is violated by the legislature’s omission to make a transitional arrangement for the benefit of the teachers who reached the age of sixty-five in the first half of the school year 1979/1980.

In essence, the reasons given for the decision are as follows:

§ 51.2.2, first half-sentence of the Act may be understood only as specifying the date of commencement of retirement and the retirement age. It provides that the retirement age for teachers who reach the age of sixty-five in the first half-year of a school year is now up to six months lower than the general retirement age for civil servants (§ 51.1.1 of the Act). They may, if applicable, commence retirement at the end of the month in which they reach the age of sixty-four and six months.

This content makes § 51.2.2 first half-sentence of the Act compatible both with constitutional law and with federal law.

No violation of Article 33.5 of the Basic Law is apparent. This section provides that the Law of the

civil service is to be laid down taking account of the traditional principles of the permanent civil service. It only guarantees the traditional core of structural principles of the permanent civil service. The principles of Article 33.5 of the Basic Law that are to be complied with, by the legislature do not include every individual provision. Consequently, a large number of provisions in civil-service law are not protected by Article 33.5 of the Basic Law. They may be altered without any effect on this provision.

The traditional principles of the permanent civil service also include the principle of appointment for life, by which the permanent civil service and its provisions are geared to the civil servant for life. However, this does not require the civil servant to carry out the duties of the office assigned to him or her until his or her death. The duty of a civil servant to serve the state in principle for life, finds its limit in the civil servant's fitness for service. When a specific age limit is reached, it is (irrevocably) presumed that he/she is unfit for service.

In this connection, the specification of a particular age limit is not constitutionally required. As a general rule, the civil servants of the federal government, of the *Länder* and of the municipalities retire at the age of sixty-five. However, it is impossible to find a traditional principle to this effect. Article 33.5 of the Basic Law does not require an age limit to be specified for all civil servants. In view of this constitutional provision, therefore, there are no objections to the Saarland legislature specifying a retirement age for teachers that is different from the standard retirement age.

But in view of the constitutional principle of the protection of legitimate expectation embodied in the status of a civil servant, § 51.2.2 of the Act gives rise to well-founded misgivings as it also applies to teachers who have reached their sixty-fifth birthday in the first half of the 1979/1980 school year. For them, the period of time in which they had to adjust to the retirement age was too short.

As a result of the weighing of interests, the legislature should have created a transitional provision for those civil servants who reached the age of sixty-five in the first half of the school year 1979/1980. Admittedly, the legislature is in principle entitled to allow legislation to come into force immediately, so that its objectives can be realised promptly. In specifying the retirement age and the date when retirement commences, the legislature intended, on the one hand, to counteract the fact that teachers spent a longer than average time in the civil service and, on the other hand, to make permanent positions available as a result of the earlier retirement of the previous holders of a

position. Despite all this, in the present case, priority must be given to the interests of the teachers affected. For these civil servants, the reform of the Law led to a rather abrupt change of their legal status – calculated from the date of the enactment, within two-and-a-half months, calculated from the date when it entered into force, within only five weeks – for retirement drastically changes the position of the civil servant under civil-service law. It is true that account may be taken of the interests of the teachers affected by providing for a relatively short transitional period, but in the present case the period was clearly too short.

Languages:

German.



Identification: GER-1993-M-001

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 28.05.1993 / **e)** 2 BvF 2/90 and 4, 5/92 / **f)** Pregnancy termination / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 88, 203-366 / **h)** *Niedersächsisches Ministerialblatt, Ausgabe A, Rechtsprechungsbeilage*, 1993, 586-588; *Europäische Grundrechte-Zeitschrift* 1993, 229-275; *Juristenzeitung Sonderausgabe* 1993, 1-51; *Neue Justiz Sonderheft* 1993, 1-38; *Nachrichtendienst des Deutschen Vereins für Öffentliche und Private Fürsorge* 1993, 274-277; *Neue Juristische Wochenschrift* 1993, 1751-1779; *Arztrecht* 1993, 209-220; *Familie und Recht Sonderheft* 1993, 1-44; *Zeitschrift für Sozialhilfe und Sozialgesetzbuch* 1993, 370-373; *Deutsche Medizinische Wochenschrift* 1993, 1127-1130; *Neue Zeitschrift für Sozialrecht* 1993, 353-360; *Medizinrecht* 1993, 301-322; *Entscheidungssammlung zum Arbeitsrecht*, § 1 LohnFG, no. 124; *Der Städtetag* 1993, 557-558; *Juristische Arbeitsblätter* 1993, 313-316; *Informationen zum Arbeitslosenrecht und Sozialhilferecht* 1993, 193-196; *Medizin im Sozialrecht B 210/10; Betrieb und Wirtschaft* 1993, 450-451; *Zeitschrift für das gesamte Familienrecht* 1993, 899-929; *Entscheidungssammlung zum Familienrecht*, GG Art 12, no. 18; *Arzthaftpflicht-Rechtsprechung* 0850/100; <http://www.bundesverfassungsgericht.de> (English version); CODICES (English, German).

Keywords of the systematic thesaurus:

- 1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
- 3.6.3 **General Principles** – Structure of the State – Federal State.
- 3.17 **General Principles** – Weighing of interests.
- 4.8.4 **Institutions** – Federalism, regionalism and local self-government – Basic principles.
- 5.1.1.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons.
- 5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.

Keywords of the alphabetical index:

Abortion, counselling concept / Protection, insufficient, prohibition / *Nasciturus*, protection.

Headnotes:

1. The Basic Law requires the state to protect human life, including that of the unborn. This obligation to protect is based on Article 1.1 of the Basic Law; its object and its scope are defined in Article 2.2. Even unborn human life is accorded human dignity. The legal system must create the statutory prerequisites for its development by granting the unborn its independent right to life. The right to life does not start with the mother's acceptance of the unborn.
2. The obligation to protect unborn human life is related to the individual life and not human life in general.
3. The unborn is entitled to legal protection even vis-à-vis its mother. Such protection is only possible if the legislature fundamentally forbids the mother to terminate her pregnancy and thus imposes upon her the fundamental legal obligation to carry the child to term. The fundamental prohibition on pregnancy termination and the fundamental obligation to carry the child to term are two integrally connected elements of the protection mandated by the Basic Law.
4. Termination must be viewed as fundamentally wrong for the entire duration of the pregnancy and thus prohibited by law (reaffirmation of BverfGE 39, 1 <44>). The right to life of the unborn may not be

surrendered to the free, legally unbound decision of a third party, not even for a limited time, not even when the third party is the mother herself.

5. The extent of the obligation to protect unborn human life must be determined with a view, on the one hand, to the importance and need for protection of the legal value to be protected and, on the other hand, to competing legal values. Listed among the legal values affected by the right to life on the part of the unborn are – proceeding from the right of the pregnant woman to protection of and respect for her human dignity (Article 1.1 of the Basic Law) – above all, her right to life and physical inviolability (Article 2.2 of the Basic Law) and her right to free development of her personality (Article 2.1 of the Basic Law). However, the woman cannot claim constitutionally protected legal status under Article 4.1 of the Basic Law for the act of killing the unborn which is involved in a pregnancy termination.

6. To fulfil its obligation to protect (unborn human life), the state must undertake sufficient normative and practical measures which lead – while taking the competing legal values into account – to the attainment of appropriate and, as such, effective protection (prohibition on too little protection). This necessitates a concept of protection which combines elements of preventative and repressive protection.

7. The woman's constitutional rights do not extend far enough to set aside, in general, her legal obligation to carry the child to term, not even for a limited time. The constitutional positions of the woman, however, do mean that not imposing such a legal obligation in exceptional situations is permissible, in some cases, perhaps even mandatory. It is up to the legislature to determine in detail, according to the criterion of non-exactability, what constitutes an exceptional situation. "Non-exactable" means that the woman must be subject to burdens which demand such a degree of sacrifice of her own existential values that one could no longer expect her to go through with the pregnancy (reaffirmation of BverfGE 39, 1 <48 et seq.>).

8. The prohibition on too little protection does not permit free disregard of the use of criminal law and the resulting protection for human life.

9. The state's obligation to protect human life also encompasses protection from threats to unborn human life which arise from influences in the family or from the pregnant woman's social circle, or from the present and foreseeable living conditions of the woman and the family, and counteract the woman's willingness to carry the child to term.

10. Moreover, the state's mandate to protect human life requires it to preserve and to revive the public's general awareness of the unborn's right to protection.

11. The Basic Law does not fundamentally prohibit the legislature from shifting to a concept for protecting unborn human life which, in the early phase of pregnancy, emphasises counselling the pregnant woman to convince her to carry the child to term; it could thus dispense with the threat of criminal punishment based on indications and the ascertainment of grounds supporting the indications by third parties.

12. A counselling concept of this type requires guideline legislation which creates positive prerequisites for action on the part of the woman in favour of the unborn. The state bears full responsibility for implementation of the counselling procedure.

13. The state's obligation to protect human life requires that the involvement of the physician, which is necessary in the interests of the woman, simultaneously serve to protect the unborn.

14. Characterisation in law of the existence of a child as a source of injury is excluded on constitutional grounds (Article 1.1 of the Basic Law). Thus, the obligation to support a child cannot be construed as an injury either.

15. Pregnancy terminations performed without ascertainment of the existence of an indication pursuant to the counselling regulation may not be declared to be justified (not illegal). In accordance with the inalienable principles prevalent in a state governed by the rule of law, a justifying circumstance will apply to an exceptional situation only if the existence of its conditions must be ascertained by the state.

16. The Basic Law does not permit the granting of a right to benefits from the statutory health insurance for the performance of a pregnancy termination whose legality has not been established. The granting of social assistance benefits in cases of economic hardship for pregnancy terminations which are not punishable by law according to the counselling regulation, on the other hand, is just as unobjectionable from a constitutional point of view as continued payment of salary or wages is.

17. The fundamental principle of the organisational power of the federal states applies without restriction if a federal regulation merely provides for a task of state to be fulfilled by the federal states, but does not make individual provisions that would be enforceable by government agencies or administrations.

Summary:

Joint proceedings were brought for the abstract judicial review of the question of whether various criminal, social security, and organisational provisions on pregnancy termination satisfy the state's constitutional duty to protect unborn human life.

It is the legislature's task to determine the nature and extent of the protection. The Basic Law identifies protection as a goal, but does not provide a detailed definition of the form it should take. Nevertheless, the legislature must take into account the prohibition of requiring too little protection so that, to this extent, it is subject to constitutional control. Taking into account conflicting legal values, it is necessary to provide appropriate protection, and it is essential for such protection to be effective. The measures taken by the legislature must be sufficient to ensure appropriate and effective protection and be based on a careful analysis of the facts and tenable assessments. The amount of protection required by the Basic Law does not depend on what stage the pregnancy has reached. The unborn's right to life and its protection under the Basic Law are not graded according to the expiration of certain deadlines or the development of the pregnancy. Thus, the legal system must provide the same degree of protection in the early phase of a pregnancy as it does later on.

If the legislature decides in favour of a counselling concept, its duty to protect unborn human life imposes on it restrictions in relation to the rules for the counselling procedure. This is important for the protection of life, because the emphasis of the guarantee of protection is shifted to preventative protection using counselling. Therefore, the legislature must take into account the prohibition of insufficient protection and make rules regarding the content of counselling, rules on how the counselling regulation is to be implemented, and rules on how counselling is to be organised – including the choice of people to be involved. These rules must be effective and adequate to persuade a woman, who is considering termination, to carry the child to term. Only then is the legislature's conclusion that effective protection of life can be achieved through counselling justified.

Languages:

German.



Identification: GER-1995-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 23.01.1995 / **e)** 2 BvE 6/94, 2 BvE 7/94 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 92, 80 / **h)** *Europäische Grundrechte Zeitschrift*, 1995, 193; *Neue Juristische Wochenschrift*, 1995, 2775; CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

1.4.6.1 **Constitutional Justice** – Procedure – Grounds – Time-limits.

Headnotes:

If an organ claims to be violated by the omission of the legislator, the time-limit of six months, within which the organ must bring its claim before the Constitutional Court, starts to run from the time of the adoption of the law in which the alleged omission is to be found.

Languages:

German.

**Identification:** GER-2005-2-002

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 18.07.2005 / **e)** 2 BvR 2236/04 / **f)** EU Arrest Warrant / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 113, 273-348 / **h)** *Neue Juristische Wochenschrift* 2005, 2289.

Keywords of the systematic thesaurus:

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

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

3.16 **General Principles** – Proportionality.

3.19 **General Principles** – Margin of appreciation.

5.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals.

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

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:

Extradition, request, from EU Member State / Extradition, protection / European arrest warrant, constitutionality / Extradition, national, prohibition, restriction, appeal to court.

Headnotes:

With its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizen's special association to the legal system that is established by them. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association.

The cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, which is considerate in terms of subsidiarity (Article 23.1 of the Basic Law).

When adopting the Act implementing the framework decision on the European arrest warrant, the legislature was obliged to implement the objective of the framework decision in such a way that the restriction of the fundamental right to freedom from extradition was proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, had to see to it that the encroachment upon the scope of protection provided by it was proportionate. In doing so, the legislature had to take into account that the ban on extradition was precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition.

The confidence of the prosecuted person in his or her own legal system is protected in a particular manner by Article 16.2 of the Basic Law precisely where the act on which the request for extradition is based shows a significant domestic factor.

Summary:

I. The complainant had German and Syrian citizenship. On 19 September 2003 an international arrest warrant was issued in Spain under which the complainant was charged with membership of a terrorist organisation. In view of his German citizenship, however, the German authorities refused the complainant's extradition.

On 23 August 2004, the European Arrest Warrant Act of 21 July 2004 entered into force. It incorporates the framework decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States into German law. Thereupon, extradition proceedings were resumed *ex officio*. On the basis of a European arrest warrant that was issued by the competent court in Madrid on 16 September 2004, the complainant was taken into custody pending extradition on 15 October 2004. He was charged with being a key figure in the European part of the terrorist Al-Qaeda network, who lent financial support to the network and facilitated personal contact between its members.

By order of 23 November 2004 the Hamburg Hanseatic Higher Regional Court declared the complainant's extradition admissible. The judicial authority granted extradition on 24 November 2004. The grant was made contingent on the condition that, after the imposition of a prison sentence, the complainant would be offered the possibility of returning to Germany to serve his sentence.

By order of 24 November 2004, the Second Panel of the Federal Constitutional Court issued a temporary injunction by which the complainant's surrender was suspended for six months at most, pending the decision on the constitutional complaint. By order of 29 November 2004, the Hanseatic Higher Regional Court rejected the complainant's application to be released from custody pending extradition.

By his constitutional complaint, the complainant challenged the order of the Hanseatic Higher Regional Court that declared his extradition admissible, and the decision of the judicial authority that granted extradition. He challenged, *inter alia*, an infringement of the ban on extradition pursuant to Article 16.2 of the Basic Law and the violation of his fundamental rights under Article 19.4 of the Basic Law (guarantee of recourse to the courts) and Article 103.2 of the Basic Law (ban on retroactive law). Moreover, the complainant contended that the German European Arrest Warrant Act and the Council framework decision lacked democratic legitimisation.

II. The Second Panel of the Federal Constitutional Court overturned the challenged order of the Hanseatic Higher Regional Court and declared the European Arrest Warrant Act void. The Panel's reasoning was essentially as follows:

The European Arrest Warrant Act infringed the ban on extradition enshrined in Article 16.2.1 of the Basic Law because the legislature did not comply with the prerequisites of the qualified proviso of legality under Article 16.2.2 of the Basic Law when incorporating the framework decision on the European arrest warrant into national law.

The ban on the extradition of Germans is based on Article 16.2.1 of the Basic Law. The protection of German citizens from extradition, can, however, be restricted by law subject to certain prerequisites pursuant to Article 16.2.2 of the Basic Law. The restriction of the protection from extradition is not a waiver of a state task that actually is essential. The cooperation that is put into practice in the "Third Pillar" of the European Union (police and judicial cooperation in criminal matters) in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, in particular having regard to the principle of subsidiarity.

When adopting the Act implementing the framework decision on the European arrest warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental right to freedom from extradition and in particular, the encroachment upon the scope of protection provided by Article 16.2 of the Basic Law were proportionate. The ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition. Persons who are entitled to enjoy the fundamental right in question must be in a position to rely on their behaviour not being subsequently termed as illegal where it complied with the law in force at the respective point in time. The confidence in one's own legal system was protected in a particular manner where the act on which the request for extradition was based had a significant domestic connecting factor. Anybody who, as a German, commits a criminal offence in his or her own legal area need not, in principle, fear extradition to another state power. The result of the assessment is different, however, where a significant connecting factor to a foreign country exists as regards the alleged offence. Anybody who acts within another legal system must reckon with his or her being held responsible there as well.

The European Arrest Warrant Act did not come up to this standard. It encroached upon the freedom from extradition in a disproportionate manner. When implementing the Framework Decision, the legislature failed to take sufficient account of the especially protected interests of German citizens; in particular, the legislature had not exhausted the scope afforded to it by the framework legislation. It could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of the framework decision. The framework decision permitted, for instance, the executing judicial authorities to refuse to execute the European arrest warrant if it related to offences that had been committed in the territory of the requested Member State. As regards such offences with a significant domestic connecting factor, the legislature would have had to create the possibility of refusing the extradition of Germans. Apart from this, the Arrest Warrant Act demonstrated a gap in legal protection concerning the possibility of refusing extradition due to criminal proceedings that have been instituted in the same matter in the domestic territory or because proceedings in the domestic territory had been dismissed or because the institution of proceedings had been refused. In this context, the legislature should have examined the provisions of the Code of Criminal Procedure to verify whether decisions by the Public Prosecutor's Office to refrain from criminal prosecution must be subject to judicial review regarding a possible extradition. The deficiencies of the legal regulation were also not sufficiently compensated by the fact that the European Arrest Warrant Act provided the possibility of serving in one's home state a prison sentence that has been imposed abroad. Admittedly, this was, in principle, a measure to protect the state's own citizens, but it merely concerns the serving of the sentence and not criminal prosecution.

By excluding recourse to the courts against the grant of extradition to a European Union Member State, the European Arrest Warrant Act infringed Article 19.4 of the Basic Law (guarantee of recourse to the courts).

The European Arrest Warrant Act partly incorporated the grounds for optional non-execution of the European Arrest Warrant that were provided in the Framework Decision. In doing so, the German legislature had essentially opted for a discretionary solution. What the fact that the procedure for granting extradition is complemented by specified grounds for refusing the grant gave rise to was that, in the case of extraditions to a European Union Member State, the authority responsible for granting extradition no longer merely decided on foreign-policy and general-policy aspects of the request for extradition but had to enter into a process of weighing up whose subject was in particular

criminal prosecution in the home state of the person affected. The fact that the procedure for granting extradition was complemented by additional constituent elements of offences that are contingent on discretion resulted in a qualitative change of the grant. The decision to be made, which was based on the weighing of facts and circumstances, served to protect the prosecuted person's fundamental rights and could not be removed from judicial review.

The European Arrest Warrant Act was void. Consequently, the legislature would have to revise the grounds for the inadmissibility of the extradition of Germans and would need to draft the case-by-case decision on extradition in such a way that it would be an act of application of the law which was based on weighing. Moreover, amendments were necessary as regards the drafting of the decision on the grant of extradition and concerning the decision's relation to admissibility.

As long as the legislature did not adopt a new Act implementing Article 16.2.2 of the Basic Law, the extradition of a German citizen to a European Union Member State was not possible. Extraditions could, however, be performed on the basis of the Law on International Judicial Assistance in Criminal Matters in the version that was valid before the entry into force of the European Arrest Warrant Act.

III. Three judges added dissenting opinions to the decision. One of the dissenting opinions, (that of Judge Broß), concurred with the result of the decision of the Panel majority but did not concur with the reasoning behind it.

Also the second dissenting opinion (that of Judge Lübke-Wolff) shared the Panel majority's opinion that the European Arrest Warrant Act did not take sufficient account of the fundamental rights of persons potentially affected by it, but did not agree with parts of the grounds and with the dictum on the legal consequences.

The third dissenting opinion (that of Judge Gerhardt) took the view that the constitutional complaint would have had to be rejected as unfounded because the declaration of nullity of the European Arrest Warrant Act was not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible.

Languages:

German.



Hungary

Constitutional Court

Important decisions

Identification: HUN-1998-C-001

a) Hungary / b) Constitutional Court / c) / d) 09.06.1998 / e) 23/1998 / f) / g) *Magyar Közlöny* (Official Gazette), 49/1998 / h).

Keywords of the systematic thesaurus:

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

1.3.2.2 **Constitutional Justice** – Jurisdiction – Type of review – Abstract / concrete review.

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

1.6.1 **Constitutional Justice** – Effects – Scope.

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.

Keywords of the alphabetical index:

Legislative task, performance, failure / Case, reopening / Legal remedy, essence.

Headnotes:

The Constitutional Court established unconstitutionality on the grounds of a lack of rules in the Act on Civil Procedure. In order for a constitutional complaint to be an effective legal remedy, Parliament should determine the legal consequences of a successful complaint to make it possible for petitioners to move for a new trial of their case by ordinary courts.

Summary:

The petitioner requested the Court to decide whether Parliament had created an unconstitutional situation by failing to perform its legislative tasks in order to make the constitutional complaint an effective legal remedy.

Under Article 43.2 of the Act on the Constitutional Court, the annulment of a legal rule affects neither

legal relationships which developed prior to the publication of the decision nor the rights and duties which derived from them. However, Article 43.3 makes it possible for the Constitutional Court to order the revision of any criminal proceedings concluded by a final decision on the basis of an unconstitutional legal rule, if the convicted person has not yet been relieved of the detrimental consequences, and the annulment of the provision applied in the proceedings would result in a reduction or in the setting aside of the punishment, in the convicted person's release, or in a limitation of his or her responsibility. In addition, Article 43.4 gives the Constitutional Court the discretionary power to annul an unconstitutional provision retroactively or prohibit its application in the special case under consideration if it thinks that this decision would serve the stability of the legal order or an important interest of the applicant.

Under Article 48 of the Constitutional Court Act, a constitutional complaint may be lodged with the Constitutional Court where a constitutional right has been violated due to the application of a statute contrary to the Constitution, provided that all other means of legal remedy have already been exhausted. The constitutional complaint regulated by Article 48 of the Constitutional Court Act is a legal remedy under Article 57.5 of the Constitution. This follows from the fact that such a complaint can be lodged with the Constitutional Court after the exhaustion of other legal remedies. A legal remedy should have legal consequences, which should include the possibility for reopening a case. The constitutional complaint serves as a final legal remedy for those whose constitutional rights have been violated. It is the essence of every legal remedy that it should be able to redress the grievance. Without this possibility, there is no difference between the two competencies of the Constitutional Court: the *ex post facto* review and the constitutional complaint. In the latter case, the Constitutional Court reviews the constitutionality of the statute applied in the given case and not whether the given decision made by judges or state authorities violates any of the petitioner's constitutional rights. The legal regulation in force was absurd, since it made the constitutional complaint almost superfluous in relation to popular action. Hence, the constitutional complaint is meaningless from the petitioner's point of view if the Constitutional Court cannot remedy the petitioner's grievance.

The Constitutional Court can prohibit the application of the statute judged unconstitutional. The Code on Civil Procedure, however, did not make it possible for petitioners to reopen their case. The constitutional complaint, in its current state, was not an effective legal remedy. Consequently, the Constitutional Court established in its decision an unconstitutional

omission in connection with the Civil Procedure Code and it called upon Parliament to regulate the legal consequences of a successful constitutional complaint.

Supplementary information:

The amendment in 1999 of the Act on Civil Procedure made it possible to move for a new trial of a case by ordinary courts provided that, on the basis of the complaint, the Constitutional Court establishes with retroactive effect the unconstitutionality of application in the given case of the contested statute. Thus, constitutional complaints have become an effective legal remedy.

Languages:

Hungarian.



Identification: HUN-2000-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 08.12.2000 / **e)** 45/2000 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 120/2000 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

3.18 **General Principles** – General interest.

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

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

5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Equality, anti-discrimination law, lack / Legislation, specific, lack.

Headnotes:

It is not in itself contrary to the Constitution that Parliament failed to pass a specific anti-discrimination

law. It does not follow from the Constitution that the legislature should enact an integral and extensive Act on non-discrimination.

Summary:

According to Article 70/A of the Constitution, human and civil rights are guaranteed for all without discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national or social origins, financial situation, birth or for any other reasons. The Constitution ensures that the discrimination described in Article 70/A.1 of the Constitution shall be strictly penalised by law. However, there is no specific anti-discrimination law in Hungary.

In the petitioners' view, Parliament created an unconstitutional situation by not enacting a specific anti-discrimination law. The petitioners argue that the existing legal provisions of the Hungarian legal system are not sufficient to combat discrimination.

The Court, by examining existing legal norms on discrimination held that the requirement to make a specific anti-discrimination law did not directly follow from the Constitution. In the Hungarian legal system there are several legal provisions which prohibit discrimination. There are norms against discrimination in the Civil Code. According to Article 8.2 of the Civil Code legal capacity shall be equal regardless of age, sex, race, ethnic background, or religious affiliation. Moreover, under Article 76 of the Civil Code, discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; violation of the freedom of conscience; any unlawful restriction of personal freedom; injury to body or health; contempt for or insult to the honour, integrity, or human dignity of private persons shall be deemed as violations of inherent rights.

The Criminal Code also contains provisions which penalise discrimination. For example, there is a rule making criminal offences against members of national, ethnic, racial or religious groups among a crime against humanity. Under this section, a person who assaults somebody because he belongs or is believed to belong to a national, ethnic, racial or religious group, or coerces him with violence or menace into doing or not doing or into enduring something, commits an offence and shall be punished with imprisonment of up to five years.

Article 5 of the Labour Code declares the prohibition of negative discrimination as a basic principle. Accordingly, it is forbidden to discriminate among employees on the basis of their sex, age, nationality,

race, origin, religion, political beliefs, membership in an organisation representing their interests or involvement in any related activities, as well as any other factor unrelated to their employment. However, at the same time discriminatory treatment arising unequivocally from the type or the nature of the work shall not be considered negative discrimination.

According to the Court, it is not per se unconstitutional that the legislature regulated against discrimination in different legal codes instead of making a specific anti-discrimination law. However, if a petitioner proves that not all aspects of discrimination are regulated and punished by law, the Court would declare unconstitutional Parliament's failure to pass such legislation.

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-2007-3-005

a) Hungary / b) Constitutional Court / c) / d) 17.05.2007 / e) 27/2007 / f) / g) *Magyar Közlöny* (Official Gazette), 2007/61 / h).

Keywords of the systematic thesaurus:

3.3.2 General Principles – Democracy – **Direct democracy.**

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

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

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

Keywords of the alphabetical index:

Legislative omission / Referendum, result, binding force on Parliament.

Headnotes:

The Constitutional Court identified an unconstitutional omission to legislate, as there was no provision within legislation as to how long the result of a decisive national referendum binds Parliament. Neither was there any provision for amending a statute enacted or confirmed as a result of the referendum or a statute confirmed by the referendum. Parliament had also

failed to deal with the possibility of initiating a further referendum on the same question.

Summary:

The Court reviewed petitions claiming that there had been an unconstitutional omission on the part of the legislator. The Court pointed out that the rule of law requires that legal institutions and instruments operate in a predictable way. The lacunae in the statutory provisions on referenda make it impossible to apply the current statute properly.

The Court emphasised that the right to referenda is a fundamental political right. According to the jurisprudence of the Constitutional Court every fundamental right entails not only an entitlement for a subjective protection but also an objective obligation of the State to provide the preconditions for the exercise of the right. With respect to the obligatory referendum, these institutional guarantees include statutory provisions regulating the binding nature of the result of the referendum and the possibility to initiate a further referendum on the same question.

Under Article 28/B.2 of the Constitution, a majority of two thirds of the votes of the Members of Parliament present is required to pass legislation on national referenda and popular initiatives. This means that although the Constitution contains detailed rules on referenda, a statute can limit the scope of the right to referenda in accordance with Article 8.1. of the Constitution. Besides, by a two-third majority of the Members of Parliament, it is possible to enact and amend constitutional provisions regulating the referenda and popular initiatives.

Justice László Trócsányi attached a dissenting opinion to the judgment. He argued that since the Constitution contains very detailed provisions on referenda and popular initiatives, statutes should not regulate questions affecting directly the direct exercise of power by the people. Regulating the questions required by the Constitutional Court in its current decision is possible only at a constitutional level.

Languages:

Hungarian.



Identification: HUN-2007-3-007

a) Hungary / b) Constitutional Court / c) / d) 22.11.2007 / e) 91/2007 / f) / g) *Magyar Közlöny* (Official Gazette), 2007/159 / h).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.

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

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

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

Keywords of the alphabetical index:

Civil proceedings, witness protection / Witness, protection / Legislative omission.

Headnotes:

If individuals who received witness protection (and secret handling of their data) during criminal proceedings are then deprived of such protection when called as witnesses in civil proceedings arising from damages for a criminal act, this violates the prohibition against discrimination.

Summary:

I. The petitioner requested a ruling of unconstitutional omission to legislate from the Constitutional Court. The petitioner expressed concern that the legislator had made no provision in civil procedure for the secret handling of the personal data of witnesses, who had been allowed secrecy during criminal proceedings, but were denied such protection during civil proceedings on damages caused by a criminal act or offence.

The Civil Procedure Act does not recognize the institution of confidential witness data. As a result, judges hearing civil lawsuits are under no obligation to accommodate requests to keep witness data secret. Ultimately, the decision whether to grant such requests rests with the judge. Witnesses under threat or other undue influence will make it difficult or even impossible to pass an objective judgment in a case.

II. The Constitutional Court observed that the fulfilment of the constitutional duty of jurisdiction and the state obligation to protect fundamental rights gives the basis for the protection of witnesses' lives, physical integrity and personal freedom. However, the right to defence of witnesses and victims is not a constitutional fundamental right, and the state has no constitutional duty to regulate and operate the witness protection system. The legislator is free to decide who to include in this system, and under what circumstances.

In this case the Constitutional Court found that there had been an unconstitutional omission to legislate, based on Article 70/A.1 of the Constitution. When judging discrimination, the bases for comparison were the provisions. These related to individuals who received protection as witnesses in criminal proceedings by secret handling of their data, who were then called as witnesses in civil proceedings regarding a remedy for damages resulting from a criminal act. The victim of the criminal act does not belong to this personal sphere, because he or she participates in the civil proceedings as a party, not a witness. The procedural position of witnesses belonging to this homogeneous group is comparable and essentially identical. Therefore, according to the Constitutional Court the differentiation between individuals taking part in the procedures as witnesses, in relation to the secret handling of personal data is not justified. It is arbitrary, and contravenes the prohibition of discrimination. The Constitutional Court called upon Parliament to fulfil its obligation to legislate by 30 June 2008.

Languages:

Hungarian.



Israel

Supreme Court

Important decisions

Identification: ISR-2003-1-003

a) Israel / b) Supreme Court / c) Panel / d) 16.01.2003 / e) H.C.J 212/03 / f) / g) 57(1) IsrSC 750 / h).

Keywords of the systematic thesaurus:

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

1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

4.2.1 **Institutions** – State Symbols – Flag.

4.2.3 **Institutions** – State Symbols – National anthem.

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.

4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.

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

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

Keywords of the alphabetical index:

Election, campaign, access to media / Media, broadcasting, restrictions.

Headnotes:

The absence of a statutory grant may be a lacuna in the law, rather than a conscious decision by the legislature, and, as such, can be filled through judicial interpretation.

The applicable test for the constitutionality of prior restraint on speech is whether there is near certainty that if the expression in question were to occur, the public interest would suffer serious and substantial injury. This standard also applies to the decisions of the Central Elections Committee.

Summary:

The National Jewish Movement Herut is a political party that ran in Israel's recent national elections. During those elections, Herut wished to broadcast, over both radio and television, a commercial that superimposed Arabic words – words heavily laden with anti-Israel symbolism – over Israel's national anthem. In the television version of the commercial, those words were accompanied by a picture of an Israeli flag, waving above the Israeli parliament, gradually changing into a Palestinian flag.

In Israel, the Chairman of the Central Elections Committee has some statutory authority to bar the broadcast of election commercials. For example, the relevant law places explicit restrictions on the appearance of children, the Army and terror victims in political election commercials. The Chairman used this authority to disqualify Herut's commercial, asserting that the commercial could lead to incitement and provocation, and that it showed contempt towards Israel's flag and national anthem. Herut appealed the Chairman's decision to the Supreme Court.

In its petition, Herut presented several legal grounds for having the Chairman's decision quashed. First of all, Herut pointed out that the law contained no explicit provision that granted the Chairman authority to bar radio – as opposed to television – commercials. Second, Herut asserted that the law granted the Chairman the authority to intervene only on the basis of limited grounds in the content of election commercials. Third, Herut also asserted that the Chairman's decision violated Herut's right to free speech, a right protected by Israel's semi-constitutional Basic Law: Human Dignity and Liberty. In his counterclaim, the Chairman of the Elections Committee asserted that there was no statutory basis for the judicial review of his decision by the Supreme Court.

Despite its unanimous agreement on several of the arguments presented, the Court disagreed regarding whether to overturn the decision of the Chairman, with a majority of the sitting justices refusing to overturn his decision. Regarding Herut's first argument, the sitting panel of three Justices agreed that a proper interpretation of the law granted the Chairman the right to interfere in the content of radio election commercials, even though he was only explicitly granted the right to intervene in the content of television commercials. The Court considered the absence of a statutory grant to interfere in the content of radio broadcasts as a lacuna in the law, rather than a conscious decision by the legislature, and, as such, saw fit to fill that lacuna through judicial interpretation.

Similarly, the Court also ruled that the Chairman's authority to intervene in the content of broadcasts extended beyond the grounds explicitly enumerated in the law. The Court asserted that such an interpretation was necessary for the proper regulation of election commercials. The Court also noted that, in the past, the Chairman has acted in accordance with that broader interpretation.

Similarly, the Court unanimously agreed that it had the jurisdiction to review the decision of the Chairman. Though the election law explicitly negated the authority of Israeli courts to review the decision of the Chairman, the Court asserted that the constitutional status of the arguments put forward were paramount to the ordinary status of the election law. As such, as the Supreme Court had authority to hear all constitutional actions, the Court held that it had jurisdiction to hear the case.

The Court, however, split regarding the question of whether the decision of the Chairman was an unreasonable violation of Herut's freedom of speech. Even here, the Court agreed that the applicable test for the constitutionality of a prior restraint on speech was whether there is near certainty that, if the expression in question were to occur, the public interest would suffer serious and substantial injury. The majority of the Court asserted that the Chairman's decision was a reasonable response to the possibility of provocation and incitement presented by the election commercial. In dissent, one justice asserted that any such provocation and incitement presented by the commercial would be tolerable in a democratic society, and that there were no grounds for banning the commercial.

Languages:

Hebrew, English.



Lithuania Constitutional Court

Important decisions

Identification: LTU-2006-M-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 08.08.2006 / **e)** 34/03 / **f)** On dismissing the legal proceedings / **g)** *Valstybės Žinios* (Official Gazette), 88-3475, 12.08.2006 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

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

4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.

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

Keywords of the alphabetical index:

Constitutional Court, legislative role / Civil servant, remuneration, / Legal gap, definition / Omission, legislative, definition.

Headnotes:

The absence of legal provisions regulating certain social relationships in part of a piece of legislation is to be treated as a legislative gap, or *lacuna legis*, if a corresponding legal regulation is neither explicitly nor implicitly established in other legislation, or in another part of the same piece of legislation.

A legal gap that is prohibited by the Constitution (or another legal act of higher power) is a legislative omission.

The Constitutional Court may recognise a legal gap, *inter alia* legislative omission, as being in conflict with legal acts of higher power, *inter alia* the Constitution, where there is a possibility that this might result in breaches of the Constitution or other legal acts of higher force.

Summary:

I. The Third Vilnius city local court presented a petition to the Constitutional Court. It concerned various provisions of the Law on Courts, the Law on Remuneration for Work of State Politicians, Judges and State Officials and Government Resolution no. 1494 on the partial amendment of government of the Republic of Lithuania Resolution no. 689 'On remuneration for work of chief officials and officers of law and order institutions and of law enforcement and control institutions' of 30 June 1997. It suggested that these ran counter to the principle of a democratic state under the rule of law, and the Constitution.

The problem the petitioner had identified with regard to the Law on Remuneration for Work of State Politicians, Judges and State Officials was that it did not establish any legal regulation of the remuneration of judges, to replace the previous legal regulation which the Constitutional Court had, in fact, pronounced to be incompatible with the Constitution in its ruling of 12 July 2001. The petitioner contended that this was in conflict with the Constitution and the constitutional principle of a state under the rule of law.

II. The Constitutional Court held that once one of its rulings takes effect, whereby part of a piece of legislation is found to be in conflict with the Constitution, certain indeterminate areas might appear in the legal regulatory order, known as *lacunae legis* (gaps), or even a vacuum. To avoid such a state of affairs, it is necessary to make changes to the legislation as quickly as possible, to remove any gaps and uncertainties. This will achieve clarity and precision of legislation, and will also mean that the provision in question fits in with other legislation.

It went on to say that the absence of legal provisions regulating certain social relationships in part of a piece of legislation is to be treated as a legislative gap, or *lacuna legis*, if a corresponding legal regulation is neither explicitly nor implicitly established in other legislation, or in another part of the same piece of legislation. This type of legislative gap appears for a variety of reasons, such as mistakes in law-making, or, sometimes, a deliberate omission. Big and small gaps may also occur when the Constitutional Court has pronounced certain legislation, or part thereof, to be in conflict with an act of higher force or the Constitution. All such gaps are to be assessed as uncertainties, shortcomings and deficiencies in the legal system, which need addressing.

The Constitutional Court sometimes recognises certain legal gaps in a piece of legislation (or part thereof) which can be described as uncertainties, but which do not clash with legal regulations within acts of higher force and do not, *per se*, create pre-conditions to breach them. The fact that the Court has acknowledged the existence of these gaps does not necessarily mean that the legislation under scrutiny is in conflict with legal acts of higher power, *inter alia* the Constitution. Moreover, the Court will occasionally find that particular gaps do not violate constitutional provisions, or provisions of acts of higher force. In other cases, the absence of explicit legal provision governing certain social relationships within a specific piece of legislation will be deemed a legislative gap (a legislative omission) which runs counter to the Constitution or other acts of greater legal force. This will be the case where the corresponding legal regulation is not established, either explicitly or implicitly, in other legislation or part of the same legislation, and where the absence of explicit provision cannot be viewed as implicit legal regulation.

"Legislative omission" is different from other legislative gaps. It happens as a consequence of the action of the legislator who enacted the legislation in question, but not as a consequence of his or her failure to act. It is not a consequence of an act (especially a lawful one) or failure to act on the part of any other subject. For example, a legal gap may exist in circumstances where nobody has even started to regulate certain social relationships, although there is clearly a need for regulation. This state of affairs should not be perceived as a legislative omission. Legislative omission cannot come about where the Constitutional Court has identified in a constitutional justice matter a conflict between a piece of legislation and the Constitution, or an act of higher legal force. The detection of legislative omission in a legal act of lower force may be sufficient to justify a ruling that this legislation is in conflict with the Constitution or other legal act of higher power.

The elimination of legal gaps (without excluding legislative omission) falls within the competence of the relevant legislative authority. Sometimes, it is possible to fill legal gaps in legal acts of lesser force in the course of application of the law. When courts do this, it is important to remember that the legal gaps are not removed for good – they are only filled *ad hoc*. Nonetheless, this helps to protect the individual rights and freedoms of somebody making a court application regarding rights which may have been breached in that particular sphere of social relationships.

In deciding upon the powers the Constitutional Court may have to recognise a legal gap (or other absence of explicit legal provision) in legislation of lesser force, it is necessary to consider how the gap appeared. Was it legislative omission, created by the legislator who passed the corresponding legislation without dealing with the matters that should have been covered in that legislation? Did it appear due to other circumstances? For example, did the Constitutional Court in its ruling pronounce it to be in conflict with the Constitution or other legal act of higher power?

The Constitutional Court described the regulatory system pertaining to judges' remuneration as "irregular and chaotic". This situation needs addressing without delay. Amendments are needed to the relevant legislation, to ensure constitutional compliance, clarity and precision, and harmony with other legislation. In this way, the provisions will no longer be open to different interpretation, and self-governance institutions of judicial power will not feel the need to resolve questions which, under the Constitution, should be addressed by Parliament alone.

The Court also held that the fact that a legal gap has arisen because the Court has recognised a conflict between the legislation in point and the Constitution, or other acts of higher force, does not necessarily signify a legislative omission which the Court must then investigate. If that was the case, the Court could end up effectively creating new regulations, which is not within its competence. It has also been mentioned that, under the Constitution, the Constitutional Court does not actually have the power to investigate the non-adoption of legislative decisions by state institutions, or avoidance or delay in decision-making or failure to act for other reasons. This is so, despite the appearance within the legal system of gaps or uncertainties, due to such failure to act.

The Constitutional Court held that it does have the power to recognise a legal gap, *inter alia* legislative omission, as being in conflict with legal acts of higher power, *inter alia* the Constitution. This is only so where the lack of legal regulation in the legislation under scrutiny could give rise to breaches of the Constitution. Where the law under dispute by the petitioner and under scrutiny by the Constitutional Court, does not establish certain legal regulation but it turns out that this is not necessary (in the case of the Parliament, President of the Republic or Government), and the Constitutional Court holds that the matter of investigation is absent in the case in the petitioner's petition, this will be grounds to dismiss the proceedings.

The Constitutional Court found that there might be gaps, insufficient clarity and precision in the regulations governing the remuneration of judges, which could give rise to misinterpretation, but there were no grounds to assess this as a legal gap, or legislative omission, to be addressed by the Court. The Court dismissed this part of the proceedings.

The Constitutional Court noted that the legislator is still under a duty to amend the regulations pertaining to judges' remuneration, to ensure their compliance with the Constitution. This constitutional duty on the legislator's part will not disappear until it is properly carried out.

The Constitutional Court refused to consider the petition, asking it to assess the compliance of the Law on Courts and Government Resolution no. 689 with the Constitution. The Constitutional Court had looked at this compliance issue before, and its ruling remains in force. It accordingly dismissed this part of the proceedings.

Languages:

Lithuanian, English (translation by the Court).



Moldova

Constitutional Court

Important decisions

Identification: MDA-2000-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary session / **d)** 18.05.2000 / **e)** 22 / **f)** Constitutional review of the Government Decision no. 747 of 03.08.1999 on the introduction of control on the imported goods before their dispatch, or on the regulation of goods' import-export procedure / **g)** *Monitorul Oficial al Republicii Moldova* (Official gazette) / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

4.6.2 **Institutions** – Executive bodies – Powers.

4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Good, imported / Custom regulation / Custom, clearance, effectiveness / Incompetence, negative / Interference, litigious / Appreciation, power, excess / Regulation, limited validity.

Headnotes:

Article 126.2 of the Constitution stipulates that the state must ensure the regulation of economic activity, and the administration of public property owned by it, under the law, as well as the protection of national interests involved in economic, financial and currency exchange activities.

Both parliament and government, pursuant to the Supreme Law, are entitled to regulate and promote the external economic activity, according to their legal powers. Thus, the parliament approves the main directions of the external economic activity and the principles of foreign loans and credits use, but the government ensures the protection of national interests involved in external economic activity, and promotes either a free-trade policy or a protectionist

one following the demands of national interest (Article 129 of the Constitution). Article 102.2 of the Constitution lays down that the government issues decisions and orders for law implementation.

Summary:

On 3 August 1999, the government adopted the Decision no. 747 on the introduction of control on the imported goods before their dispatch, pursuing the aim to improve the mechanism of goods' evaluation in custom-houses, statistic accounting and the control on the quality and conformity of imported goods, by means of which the way of implementing and monitoring the control on imported goods before their dispatch, is settled down.

The Court was asked to rule on the constitutionality of the Government Decision no. 747, by which, in the petitioner's opinion, the government submitted a new procedure of implementing and monitoring the control on the imported goods before their dispatch, namely the regulation of an export-import activity, violating the constitutional rules and assigning to itself improper obligations.

The petitioner considers that the decision has not been adopted in the view of implementing of some provisions of a concrete law, as provided for by Article 102.2 of the Constitution. The above-mentioned fact follows neither of the Law no. 1380-XIII of 20 November 1997 on the customs tariff, having been referred in the preamble of the contested decision.

The applicant argues that since the control on the imported goods to the Republic before their dispatch is within the area of external economic activity, the latter should be ascertained by a law, the adoption of which is within the exclusive power of the parliament.

The Court established that according to Article 66.d and Article 129 of the Constitution, the parliament is the body to approve the main directions of foreign and domestic policy of the state, and of its external economic activity. Article 96.1 of the Constitution lays down that the government is endowed to carry out the domestic and foreign policy of the state and exercises the general control over public administration. The normative acts of the government, by which the discharge of its duties are safeguarded, according to the Supreme Law are issued for law's application (Article 102.2 of the Constitution).

It is worth mentioning that the control on the imported goods is foreseen neither by the Republic legislation, nor regulated by the Law on the customs tariff, which is referred in the preamble of the contested decision.

The Constitutional Court pointed out that the government while adopting the Decision no. 747 and introducing the control on the goods before their dispatch, in case of the juridical aspect's ignorance, exceeded its powers described by the constitutional rules, and violated the principle of separation and cooperation of powers, as provided for by Article 6 of the Constitution.

According to the constitutional rules, the Decisions of the government cannot include primary judicial norms and cannot also establish general and mandatory norms. They must be subsequent to the laws previously adopted by the parliament.

It is also worth mentioning that the parliament by the Budget Law of 2000, no. 918-XIV of 11 April 2000, in Article 14.7 instituted the control on the imported goods (imported products), but according to Article 61.b of the Constitution, the government has been compelled to work out in term of two months the relevant normative acts and to set up the date of the mentioned in Article 14.7 control, informing in this way foreign business partners.

In spite of all these facts, the Constitutional Court cannot rule on the constitutionality of the contested Decision, on the reason that the Budget Law on 2000 does not set up any legal framework adequate for a static regulation of a whole mechanism of control on the imported goods before their dispatch. Moreover, in the view of application of the above-mentioned law, the government has been assigned the task of working out the relevant normative acts.

Exercising its power of constitutional review, the Court ruled on non-compliance with the Constitution of the Government Decision no. 747 of 3 August 1999 on the introduction of control on the imported goods before their dispatch.

Languages:

Romanian, Russian.



Poland Constitutional Tribunal

Important decisions

Identification: POL-2004-2-014

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04.05.2004 / **e)** K 8/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 109, item 1163; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 37 / **h)** CODICES (Polish, English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.19 **General Principles** – Margin of appreciation.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Family, protection, constitutional / Family, financial situation / Taxation, couple, married / Spouse, death / Fairness, principle.

Headnotes:

Tax burdens may not infringe the essence of the values protected by the Constitution.

From the rule of law principle (Article 2 of the Constitution) follows the prohibition on adopting laws that would surprise citizens by virtue of their content or form. Citizens should have the sense of relative legal stability in order to be able to arrange their affairs confident in the fact that, whilst taking certain decisions and undertaking certain actions, they do not expose themselves to adverse and unforeseeable legal consequences.

The recognition of family as a constitutional value protected and cared for by the State (Articles 18 and 71.1 of the Constitution) justifies the need to create legal provisions mitigating the risk of weakening economic bases for the existence of a family having suffered loss as the result of the death of one of the spouses, or even contributing to the strengthening of such bases.

Summary:

In relation to the community of property regime between spouses, legal provisions governing personal income tax (PIT) allow for a choice between the separate taxation of each individual spouse's income and joint taxation based on the so-called marital quotient method. The latter method consists in combining the incomes of both spouses (which is also the case when one of the spouses has no income, or an income below a level at which taxation applies), dividing this sum in half and determining the tax due as twice the amount due on the basis of this calculated half. Since the taxation rules envisage a non-taxable level of income and a progressive rate of taxation (i.e. the higher the income, the higher the tax in percentage terms), application of the marital quotient often allows for a reduction of the tax burden compared with that which would exist in the event that each spouse's income was taxed separately.

The ombudsman challenged Article 6.2 of the Personal Income Tax Act 1991 which, in the wording in force when the judgment was delivered, made the possibility of joint taxation conditional upon, *inter alia*, the fulfilment of two requirements: continuation of the marriage during the entire tax year and submission of an application concerning joint taxation as part of the joint tax return for a given year. These returns are filed by taxpayers following conclusion of the tax year, and by 30 April of the subsequent year at the very latest. The existence of these two requirements meant that any taxpayer whose spouse died during the tax year, or even following its conclusion but prior to the filing of the annual tax return, was unable to benefit from the joint taxation scheme.

The Tribunal ruled that Article 6.2 of the Personal Income Tax Act 1991 did not conform to Article 2 of the Constitution (the rule of law), Article 18 of the Constitution (protection of marriage) and Article 71.1 of the Constitution (the good of the family) of the Constitution insofar as it deprived the following persons of the right to joint income taxation of spouses subject to the community of property regime:

- a. taxpayers who were married prior to commencement of the tax year and whose spouse died during that tax year;

- b. taxpayers who continued to be married during the entire tax year and whose spouse died following conclusion of the tax year but prior to filing a joint tax return.

The legislator is entitled to a broad discretion when deciding which issues require statutory regulation. However, where Parliament has reached such a decision, statutory regulation of the relevant area must respect constitutional principles.

The acceptance, under certain conditions, of the joint taxation of spouses based on the marital quotient method, as envisaged by Article 6.2 and 6.3 of the Personal Income Tax 1991, does not constitute an exception from the principle of the universality of taxation (Article 84 of the Constitution), nor a privilege or a type of tax reduction (Article 3.6 of the Tax Ordinance Act 2003) but is one of the two equivalent methods of income taxation of persons under the community of property regime (alongside the method of separate taxation of each spouse's income – Article 6.1 of the Personal Income Tax Act 1991). Joint taxation is justified on the grounds of values expressed in Articles 18 and 71.1 of the Constitution and is also consistent with the regulations of the Family and Guardianship Code, stressing the economic dimension of the community formed by the family, in particular with the obligation of each of the spouses to contribute to fulfilment of the family's needs according to his/her abilities and earning capacity (Article 27 of the Family and Guardianship Code). It also corresponds to the fairness principle in taxation (expressed in Article 84 of the Constitution), according to which the tax burden should correspond to the taxpayer's financial capacity.

With the commencement of the tax year, spouses assume they will have the right to joint taxation and, acting on this assumption, they form plans regarding their level of income and expenditure. Where there exists a considerable difference between the personal incomes of spouses, or where one spouse does not earn any income, application of the marital quotient method is economically beneficial for them and justified from the perspective of the good of the family. However, as a result of the limitations stemming from Article 6.2 of the Act, the forecasting and shaping of spouses' life relations is accompanied by the risk of unexpected adverse financial consequences. The challenged provision allowed for a situation whereby, if the death of a spouse occurred during the tax year or following the conclusion of the tax year but prior to the filing of that year's annual tax return, the surviving spouse was deprived of the possibility to benefit from joint income taxation, contrary to their prior expectations. In enacting such a provision, the legislator adopted an excessively

formalistic condition for the applicability of the joint taxation system: namely, requiring both spouses to submit an appropriate application as part of their joint tax return following conclusion of the tax year. Accordingly, the challenged provision created a peculiar trap for taxpayers and, for this reason, the claim that it fails to conform to Article 2 of the Constitution is justified.

It is the legislator's function to amend the challenged provision so as to ensure its conformity with the Constitution. The broad discretion enjoyed by the legislator when shaping the tax regime enables a choice between several possible solutions to the present problem, including for example the right to combine the deceased spouse's income with income acquired by the surviving spouse either during the whole tax year or merely from the commencement of the tax year until the death of the other spouse.

The addressee of the norms included in Articles 18 and 71.1 of the Constitution, formulated as principles of State policy, is primarily the legislator. These provisions do not constitute a basis for the pursuit of individual claims.

Cross-references:

- Judgment K 18/98 of 07.06.1999, *Bulletin* 1999/2 [POL-1999-2-020];
- Judgment P 3/00 of 14.06.2000, *Bulletin* 2000/2 [POL-2000-2-015];
- Judgment SK 21/99 of 10.07.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 5, item 144;
- Judgment K 13/01 of 25.04.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 81.

Languages:

Polish, English (summary).



Identification: POL-2004-3-023

a) Poland / b) Constitutional Tribunal / c) / d) 13.10.2004 / e) Ts 55/04 / f) / g) / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

1.3 **Constitutional Justice** – Jurisdiction.

1.3.4.13 **Constitutional Justice** – Jurisdiction – Types of litigation – Universally binding interpretation of laws.

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.

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

4.7.15.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar.

Keywords of the alphabetical index:

Tax, advisor, participation in administrative proceedings / Legislator, omission.

Headnotes:

Only provisions which constitute the legal basis for a final decision of a court or an administrative organ as regards the complainant's constitutional rights and freedoms may be the subject of a constitutional complaint (Article 79.1 of the Constitution). Moreover, the complainant should prove that the contents of the challenged provisions were the source of the alleged infringement of his/her constitutionally guaranteed freedoms and rights. In other words, the complaint should make a *prima facie* case that elimination of the regulation leading to impermissible interference with his/her constitutional status is a prerequisite to restoring a state of conformity with the Constitution.

The absence of a defined legal regulation, anticipated by the author of the constitutional complaint, in the legal system (i.e. the legislator's failure to act) may not be removed by a so-called interpretative judgment of the Constitutional Tribunal, i.e. the Tribunal's finding that the reviewed provision is constitutional or unconstitutional provided that it is understood in a defined manner. The Tribunal does not have the competence to "supplement" law in force with a new legal norm; the creation of such a new norm is only possible via the legislative procedure.

Summary:

I. A tax advisor lodged a constitutional complaint challenging provisions permitting persons of that profession to appear before administrative courts as representatives of parties in tax cases. In the complainant's opinion, this legal regulation led to an unconstitutional prohibition on the participation of tax advisors as representatives in judicial proceedings other than those concerning tax issues. No such limitations have been set forth for persons admitted to the profession of an advocate or legal advisor.

The constitutional complaint was lodged with the Tribunal in connection with a decision of the Supreme Administrative Court refusing to allow the complainant to appear as a representative in proceedings concerning customs law. The applicant made reference to the Constitutional Tribunal's judgment of 10 July 2000 SK 12/99. In the aforementioned judgment the Tribunal ruled that Article 1 of the Civil Procedure Code 1964, understood as excluding financial liabilities stemming from administrative decisions from the notion of "civil cases" examined by common courts, was unconstitutional.

II. The Tribunal refused to admit the complaint against the preceding procedural decision of the Tribunal refusing to proceed further with the constitutional complaint.

The situation occurring in the case SK 12/99 (Judgment of 10 July 2000) was different. In that case, the Tribunal eliminated the legal norm, inferred from the challenged provision, which represented the unconstitutional narrowing of the scope of application of that provision.

Languages:

English, French.

*Identification:* POL-2005-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.01.2005 / **e)** K 24/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 11, item 89; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 1, item 3 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.

4.5.1 **Institutions** – Legislative bodies – Structure.

4.5.6.5 **Institutions** – Legislative bodies – Law-making procedure – Relations between houses.

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

4.17.4 **Institutions** – European Union – Legislative procedure.

Keywords of the alphabetical index:

Government, position on an EU legislative proposal / Parliament, committee, opinion, obligation to seek / Constitution, interpretation in a manner favourable to European integration.

Headnotes:

The Constitution contains no provisions which directly regulate the role of the two chambers of the Parliament (*Sejm*, the lower chamber and *Senate*, the upper chamber) in the process of adopting EU law. The constitutional norms must thus be interpreted in such a way so as to ensure that the influence of Polish State organs on the adoption of EU law is incorporated into the existing framework of the Polish system of government. Such an approach also conforms to the principle of interpreting the Constitution in a manner favourable towards European integration.

The *Sejm's* control over Council of Ministers' activity (Article 95.2 of the Constitution) is permissible solely insofar as specified by provisions of the Constitution or statute. The instruments of such control encompass, primarily: the vote of no-confidence (Articles 158 and 159 of the Constitution); the possibility to appoint a *Sejm* investigative committee (Article 111 of the Constitution); interpellations and Deputies' questions (Article 115.1 of the Constitution); questions on current affairs (Article 115.2 of the Constitution); and the right to review implementation of the Budget Act and to approve, or disapprove, financial accounts (Article 226 of the Constitution).

The competences and nature of the Senate stem directly from the principle of representation and, indirectly, from the principle of sovereignty of the Polish People (Article 4 of the Constitution).

As long as the constitutional legislator wishes to maintain a bi-cameral Parliament, both chambers should be guaranteed equal participation in activities concerning the shaping of Poland's position in the field of adopting EU law.

Summary:

According to EU law, the definition of organs within a Member State which shall determine the country's position with respect to EU legislative proposals, and the procedure for adopting such a position, remain within the domain of domestic law. Polish legal norms concerning these matters are contained in the Act on Co-operation of the Council of Ministers with the *Sejm* and Senate on Matters Connected to Membership of the Republic of Poland in the European Union of 2004 (hereinafter "the 2004 Act"). The 2004 Act imposes an obligation on the Polish government (Council of Ministers) to present various types of documents and legislative proposals, connected with Poland's membership of the EU, to the *Sejm* and Senate, or in some cases to their subsidiary organs. According to Article 9.1 of the 2004 Act, prior to the consideration of a legislative proposal by the Council of the EU, the Polish Council of Ministers is obliged to seek the "opinion of an organ authorised by the *Sejm's* rules of procedure" (European Affairs Committee) concerning the intended position of the Polish Council of Ministers as regards that proposal. Nevertheless, the Polish Council of Ministers is authorised to refrain from seeking the opinion of the appropriate *Sejm* organ due to "organisation of the activities of EU organs", with the exception of matters in which the Council of the EU takes is required to act unanimously, and matters "resulting in a significant burden on the State budget". It must be stressed that Article 9 concerns the stage of activity of drafting an EU legislative proposal when the Polish Council of Ministers has already adopted the position it intends to present at the Council of the EU forum; the opinion of the *Sejm* Committee, which does not bind the Polish Council of Ministers, refers, therefore, to a government position which is already "prepared".

A group of Senators challenged Article 9.1 of the 2004 Act before the Constitutional Tribunal, arguing that its failure to provide for the participation of an appropriate Senate organ, in the process of pronouncing an opinion on the government's position, infringes the principle that legislative power is exercised by both parliamentary chambers (Articles 10.2 and 95.1 of the Constitution).

The Tribunal ruled that the challenged provision, insofar as it omits the obligation to seek the opinion of an organ authorised by the Senate's rules of procedure, does not conform to Articles 10.2 and 95.1 of the Constitution (exercising legislative power by the *Sejm* and Senate).

The legislative competences specified in the Constitution should now be construed in a manner which takes account of the principally new

conditions for the adoption of legislation. Since legislation adopted by EU organs will be operative within Poland's territory, in part directly and in part following the adoption of implementing legislation by the Polish Parliament, the expression of opinions by the latter with respect to EU legislative proposals becomes a significant form of the Polish Parliament's joint participation in the adoption of EU law. The pronouncement of such opinions allows the domestic legislature to exert some influence on the process of the Union's development as a whole. Concomitantly, the participation of national parliaments in the process of adopting EU law constitutes a factor strengthening the credibility and democratic mandate of the Union's organs.

The fundamental reason for refusing to grant the Senate the right to pronounce an opinion on EU-related matters was the fear that the Senate would exercise control over the government in a manner which is constitutionally reserved for the *Sejm*. However, the Polish Parliament's co-decision procedure in respect of issues connected to the shaping Poland's negotiating position does not fall within the exercise of control (Article 95.2 of the Constitution) but, rather, within executing the legislative function (Articles 10.2 and 95.1 of the Constitution).

Dissenting opinions:

Judge Jerzy Ciemniewski: The challenged provision does not regulate the competences of the *Sejm* and Senate as constitutional State organs, but refers to the activities of their subsidiary organs, i.e. the authorised committees. Accordingly, Articles 10.2 and 95.1 of the Constitution may not represent the bases of constitutional review of this provision.

The pronouncement of opinions on legislative proposals does not fall within the scope of exercising legislative power, since it is not authoritative in nature. Pronouncing opinions which cause no legal effects and do not even have in their background any explicitly specified political consequences, may not be recognised as a realisation of State authority in the constitutional-legal sense.

Judge Ewa Łętowska: The Tribunal did not derive a norm from the Constitution such as would require granting the Senate competences mirroring those of the *Sejm*, following the example of the legislative competences. The Tribunal correctly identifies the existence of a constitutional lacuna. Accordingly, there exists no basis upon which to declare the unconstitutionality of the reviewed provision.

The competence concerned in the present case is not a clearly legislative competence. The challenged provision concerns an opinion regarding how the government should behave (Parliament's control function) in the procedure of adopting Community law (the legislative function). However, the two indicated constitutional bases of review concern the participation of both chambers in the process of directly adopting Polish law.

Judge Janusz Niemcewicz: The legislative function consists in adopting legal acts of statutory rank and the control function consists in acquiring information regarding the activity of the government and the administration subordinate thereto, as well as forwarding opinions and suggestions to the government. The examined competence relates to acquiring information about a position already adopted by the Council of Ministers and to the possible pronouncement of an opinion on this matter and, accordingly, it falls within the control function.

Cross-references:

- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 5, item 49.

Languages:

Polish, English (summary).



Identification: POL-2005-2-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.06.2005 / **e)** P 25/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 124, item 1043; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 6, item 65 / **h)** CODICES (Polish, English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.11 **General Principles** – Vested and/or acquired rights.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.

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

5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

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

Keywords of the alphabetical index:

Expropriation, compensation / Company, share, sale, obligatory, judicial protection.

Headnotes:

The principle of the protection of acquired rights is implicit in the rule of law principle (Article 2 of the Constitution). As such, it enshrines the will to guarantee individuals' legal security and to enable them to plan their future actions rationally, whilst at the same time prohibiting the arbitrary abolition or limitation of individual rights.

When reviewing the permissibility of imposing limitations on the protection of acquired rights, it is necessary to consider the following: firstly, whether such limitations are based on constitutional values; secondly, whether it is possible to achieve the given constitutional value without infringing acquired rights; thirdly, whether the constitutional values requiring a limitation on the protection of acquired rights may, in the given situation, be accorded priority over the values representing the bases for such protection; fourthly, whether the legislator has undertaken the essential steps to guarantee individuals the conditions to adapt to the new regulation.

The fact that an individual did not foresee the possibility of a change in the law does not mean that such a change will automatically infringe the principle of protecting acquired rights.

Expropriation (Article 21.2 of the Constitution) falls within the sphere of public law and envisages a compulsory deprivation of ownership in favour of the State Treasury or another public legal entity. Private law provisions envisaging the involuntary transfer of an ownership right from the hitherto owner to another person or persons should not be reviewed on the basis of the above article.

Article 21.2 of the Constitution provides for greater protection of ownership, permitting expropriation solely "for just compensation". "Just compensation" means fair, that is to say, equivalent, compensation. It should restore the owner to the same proprietary situation as that which pertained prior to expropriation. Under no

circumstances may compensation be decreased by the manner in which it is calculated, nor by the procedure under which it is paid.

The values set out in Article 31.3 of the Constitution (dealing with proportionality) express all aspects of public interest as a general determining factor of the limits of an individual's rights and freedoms (security of the State, public order, protection of the natural environment, protection of health, protection of public morals and protection of rights and freedoms of other persons). To determine whether the principle of proportionality has been infringed, one has to ask whether an appropriate relationship exists between the aim intended to be served by the challenged legal provision and the means leading to the achievement of this aim. It is possible to derive from Article 31.3 three requirements to be fulfilled by a provision limiting the exercise of constitutional rights and freedoms: indispensability, functionality and proportionality.

The right to appeal against a decision (by virtue of Article 78 of the Constitution) contains legal measures initiating review by a higher instance organ, i.e. ordinary appellate measures which are of an essentially devolutionary nature. This principle allows, however, for statutory exceptions. Nevertheless, statutory resolutions concerning court proceedings must take into account the requirement that court proceedings must have at least two instances (see Article 176.1 of the Constitution). The latter guarantee relates only to cases which fall, from beginning to end, within the jurisdiction of the judiciary.

Summary:

I. The compulsory purchase of shares (also known as "squeeze-out") was introduced to the Polish legal system by the Commercial Companies Code 2000 (hereinafter referred to as "the Code"). Article 418.1 of the Code envisaged that the aforementioned procedure should apply to shareholders representing less than 5 % of the company's share capital. Compulsory purchase could be performed by no more than five shareholders collectively holding no less than 90 % of the company's share capital. A company resolution authorising compulsory purchase must be adopted by a 90 % majority of votes cast, unless the company's corporate constitution envisages stricter requirements. Furthermore, Article 418.2 required the resolution authorising the purchase to specify the shares subject to compulsory purchase, the shareholders who have committed to purchase them and the amount of shares acquired by each purchaser. The price to be paid for compulsorily purchased shares shall be determined by an auditor (see Article 418.3, read in conjunction with Article 417 of the Code). In the event of a difference of opinion between the shareholders and the auditor,

Article 312.8 of the Code permits the initiation of court proceedings to resolve the dispute. However, the legislator excluded the possibility of appealing against the court's decision in this matter.

The proceedings were initiated by a question on the law by the Courts and by an application from the Ombudsman.

II. The Tribunal ruled that the provisions challenged, understood as not excluding the right of a shareholder prejudicially affected by the compulsory purchase of shares to challenge a resolution authorising such purchase, did not infringe the constitutional provisions indicated by the initiators of the proceedings. Two judges submitted a joint concurring opinion.

Article 418 of the Code regulates the involuntary transfer of ownership between private legal entities. Whilst this does not amount to expropriation, it involves similar consequences, namely the deprivation of ownership. This fact should be taken into account by the legislator, at least to the same extent as in cases of expropriation for public purposes.

In the present case, the interests of a joint stock company (in this context the interests of the majority shareholders), as well as the company's right to develop and pursue efficient economic activity, conflict with the rights of minority shareholders. Accordingly, mechanisms for protecting the latter are crucial, especially as regards providing an equivalent for a lost property right. This is achieved by the appropriate valuation of compulsorily purchased shares, performed on the basis of Article 418 of the Code.

Although the Code does not require that the reasons for compulsory purchase be stated in the resolution authorising purchase, minority shareholders are not deprived of the right to court protection. On the basis of Article 422 of the Code (motion to quash a resolution) a shareholder whose shares have been compulsorily purchased may claim that the resolution infringes good custom or the company's constitution, or is intended to affect him prejudicially. Such a shareholder may also challenge the resolution on the basis of Article 425 of the Code (motion to declare a resolution invalid).

A shareholder whose shares have been compulsorily purchased has the right to have a court review the auditor's valuation of the shares, under Article 312.8 of the Code. This constitutes an alternative mechanism for protecting such a shareholder's interests, alongside the possibility of challenging a resolution adopted in a general meeting before the Commercial Court (Article 422.1 and 422.2.2 of the Code).

Appointment of the auditor is the first stage in the proceedings. The interested shareholder may appeal to the Registry Court against the auditor's decision. The issue of share valuation is not, therefore, considered by the court from its outset to conclusion. Accordingly, Article 176.1 of the Constitution is not infringed.

Cross-references:

- Judgment U 1/86 of 28.05.1986, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1986, item 2;
- Judgment K 1/90 of 08.05.1990, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1990, item 2;
- Judgment K 14/91 of 11.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992/I, item 20; *Special Bulletin Leading Cases 1* [POL-1992-S-001];
- Judgment K 26/97 of 25.11.1997, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 5-6, item 64; *Bulletin* 1997/3 [POL-1997-3-024];
- Judgment K 41/97 of 08.12.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 7, item 117; *Bulletin* 1998/3 [POL-1998-3-023];
- Judgment K 23/98 of 25.02.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 2, item 25; *Bulletin* 1999/1 [POL-1999-1-005];
- Judgment SK 12/98 of 08.06.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 96;
- Judgment K 5/99 of 22.06.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, 5, item 100;
- Judgment K 8/98 of 12.04.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 110;
- Judgment SK 29/99 of 15.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 96; *Bulletin* 2000/2 [POL-2000-2-014];
- Judgment K 5/01 of 29.05.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 87;
- Judgment SK 29/01 of 25.02.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 3, item 26;
- Judgment SK 23/01 of 16.04.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 96; *Special Bulletin Human Rights Limitations* [POL-2002-H-001];
- Judgment P 13/01 of 12.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 4, item 42; *Bulletin* 2002/2 [POL-2002-2-019];

- German Federal Constitutional Court, 1 BvI 16/60 of 07.08.1962, *BVerfGE*, no. 14, item 263;
- German Federal Constitutional Court, 1 BvR 68/95 of 23.08.2000, *BVerfGE* 2002, no. 4, item 447;
- Judgment of the Court of Appeal in Paris, First Chamber, Section CBV of 16.05.1995, *Rev. Soc.* 535.

Languages:

Polish, English, German (summary).



Identification: POL-2006-1-001

a) Poland / b) Constitutional Tribunal / c) / d) 12.12.2005 / e) K 32/04 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 250, item 2116; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 11A, item 132 / h) Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.16 **General Principles** – Proportionality.
- 3.19 **General Principles** – Margin of appreciation.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
- 5.1.3 **Fundamental Rights** – General questions – Positive obligation of the state.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 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.
- 5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.
- 5.3.35 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

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

Keywords of the alphabetical index:

Police, surveillance, limits.

Headnotes:

Police surveillance activities are by their very nature secretive, carried out without the subject's knowledge and under conditions that provide the police with a wide margin of discretion. There is limited external control and limited guarantees of the rights of those who are the subject of the surveillance. These activities would be ineffective if they had to be made transparent. Such activity by the police is indispensable in a modern State, which is responsible for ensuring the safety of its citizens against terrorism and crime. Nevertheless, it should be accompanied by appropriate substantial guarantees, with clearly defined limits on interference with privacy as well as procedural guarantees such as the obligation to report the surveillance undertaken and to legitimise it by reference to an external agency; the obligation to notify the subject about the surveillance and what was found in a very limited way and from a certain point in time. Control mechanisms should also be in place in case of abuse on the part of the organisation controlling the surveillance.

Under Article 31.3 of the Constitution, regulations must answer the test of proportionality. They must be capable of bringing about the results intended, they must be indispensable for the protection of the public interest with which they are connected; and the results must be in proportion to the burdens they place on the citizen.

All constitutional rights and freedoms of individuals stem from human dignity (Article 30 of the Constitution). In the case of privacy, this relationship is of a specific nature. The protection of dignity requires the respect of purely private life; so that individuals are not forced into the company of others and do not have to share with others their experiences or intimate details.

Different areas of privacy exist, with differing levels of necessity for interference. For example, the respect for the privacy of the home places greater limits on the interference of the authority using wiretapping than the protection of the privacy of correspondence.

Provisions limiting rights and freedoms should be formulated clearly and precisely, in order to avoid excessive discretion when determining, in practice, the *ratione personae* and *ratione materiae* of such limits.

Summary:

I. Under the Police Act 1990 (hereinafter: "the Act"), police surveillance is conducted secretly and is based on the use of means such as wiretapping or control of correspondence and mail. Surveillance may be carried out for the purpose of the detection or prevention of the commission of certain criminal offences, the identification of perpetrators, as well as the obtaining and preservation of evidence. The basis for surveillance is, in principle, the issue of a decision by an appropriate regional court.

The Commissioner for Citizens' Rights alleged before the Constitutional Tribunal that certain provisions of the Act (see below) infringe numerous constitutional provisions relating to citizens' informational autonomy.

The Tribunal ruled that: Article 19.4 of the Act provides for the possibility of abandoning the destruction of materials collected in the process of surveillance conducted without the consent of a court. This does not comply with Articles 31.3 and 51.4 of the Constitution, which respectively provide for proportionality and the right to demand correction or deletion of incorrect or incomplete information acquired by illegal means. It is not inconsistent with Article 7 of the Constitution (functioning of public authority organs on the basis and within the limits of the law).

Article 19.16 of the Act prevents the subject from being informed about the surveillance while it is taking place. Insofar as this envisages the suspect and their defence counsel being informed about the surveillance once it has come to an end, this conforms to Articles 31.3 and 45.1 of the Constitution (right to a fair trial), Article 49 of the Constitution (privacy of communication) and Article 77.2 of the Constitution (recourse to the courts to vindicate infringed rights and freedoms cannot be barred).

There is no requirement within Article 19.18 of the Act to obtain the consent of a court to conduct surveillance when the sender or recipient has expressed consent for the transfer of this information. This does not conform to Articles 31.3 and 49 of the Constitution.

Article 20.2 of the Act allows the police to collect a very wide variety of information about those they suspect may have committed criminal offences. This does not conform to Articles 31.3 and 51.2 of the Constitution (prohibition on collecting unnecessary information about citizens) since it does not precisely specify the circumstances under which information may legitimately be collected about the suspected perpetrator of an offence neither does it specify an exhaustive list of the type of information which may be collected.

Article 20.17 of the Act deals with information collected for the purpose of investigating a criminal offence after a suspect has been acquitted or charges against him have been dropped. This is in line with Articles 31.3 and 51.2 of the Constitution.

Materials collected without the consent of a court represent a legal resource, directly the court does give its consent (pursuant to Article 19.4 of the Act). This can be used in the proceedings and the accusation cannot be made that advantage has been taken of "fruits of a poisonous tree". Nonetheless, subsequent consent may not be sufficient to justify the infringement of Article 51.4 of the Constitution. A statute may not influence the scope of a constitutional notion, especially when this has a negative impact on an individual's rights.

Article 19.16 of the Act does not exclude the possibility of divulging information about the surveillance when it has come to an end and no indictment has been lodged. The applicant here is challenging an interpretation which can be made of the challenged norm and arguably an unconstitutional conjecture. However, it has not been proved that this interpretation is carried out in general practice.

External control of surveillance activities can only be a safeguard of individual rights and freedoms if the controlling organ is independent and impartial. The difficulty is that in the situation described in Article 19.18 of the Act, consent to conduct these activities is granted by somebody with a personal interest in the surveillance activities (the recipient or sender of the information transfer). The consent in question represents a justification of encroachment upon the personal sphere of the person expressing it (*volenti non fit iniuria*). Using it to justify encroaching upon the private sphere of a third party constitutes a misunderstanding.

If somebody is acquitted or charges against him are dropped, data collected about him may contain data which could be of use to the police in their investigation of other people. Article 20.17 of the Act refers to information collected legally, with the consent of the court. The possibility of retaining this information does not include so-called sensitive information – disclosing race, ethnicity, political views, religious or philosophical beliefs, religious allegiance, political or union membership, or information related to health, addictions, or sexual practices.

A distinction has to be drawn between the absence of obstacles to making materials available upon the subject's request – which is ensured by the legislation presently in force – and the obligation to inform a person subject to surveillance about such a control. The

existence of the latter duty is desirable but it is not up to the Constitutional Tribunal to fill a legislative lacuna.

Cross-references:

Decisions of the Constitutional Tribunal of the Republic of Poland:

- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, no. I, item 12;
- Judgment K 9/95 of 31.01.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 1, item 2; *Bulletin* 1996/1 [POL-1996-1-002];
- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 6, item 188, *Bulletin* 2000/3 [POL-2000-3-020];
- Judgment K 22/01 of 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 216;
- Judgment K 41/01 of 30.09.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5A, item 61; *Bulletin* 2002/3 [POL-2002-3-030];
- Judgment P 6/02 of 10.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 91; *Bulletin* 2003/1 [POL-2003-1-009];
- Judgment SK 17/02 of 11.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 98;
- Judgment SK 12/03 of 09.06.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 51; *Bulletin* 2003/3 [POL-2003-3-024];
- Judgment P 3/03 of 28.10.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 8A, item 82;
- Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 4A, item 30;
- Judgment K 4/04 of 20.06.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 6A, item 64;
- Judgment K 31/04 of 26.10.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 9A, item 103; *Bulletin* 2005/3 [POL-2005-3-010];
- Procedural decision K 32/04 of 23.11.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 10A, item 126;
- Procedural decision S 2/06 of 25.01.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 1A, item 13.

Judgments of the European Court of Human Rights:

- *Klass and Others v. Germany*, Judgment 5029/71 of 06.09.1978, Publications of the Court, Series A, no. 28;
- *Malone v. the United Kingdom*, Judgment 8691/79 of 02.08.1984, Publications of the Court, Series A, no. 82; *Special Edition Leading Cases ECHR* [ECH-1984-S-007];
- *Kruslin v. France*, Judgment 11801/85 of 24.04.1990, Publications of the Court, Series A, no. 176-A; *Special Edition Leading Cases ECHR* [ECH-1990-S-001];
- *Huvig v. France*, Judgment 11105/85 of 24.04.1990, Publications of the Court, Series A, no. 175-B;
- *A v. France*, Judgment 14838/89 of 23.11.1993, Publications of the Court, Series A, no. 277-B;
- *Friedl v. Austria*, Judgment 15225/89 of 31.01.1995, Publications of the Court, Series A, no. 305-B;
- *Rotaru v. Romania*, Judgment 28341/95 of 04.05.2000, *Reports of Judgments and Decisions 2000-V*;
- *Doerga v. the Netherlands*, Judgment 50210/99 of 27.04.2004.

Languages:

Polish, English (summary).



Identification: POL-2006-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.02.2006 / **e)** K 9/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 34, item 242; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 2A, item 17 / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

Keywords of the systematic thesaurus:

- 2.1.1.3 **Sources** – Categories – Written rules – Community law.
- 3.26 **General Principles** – Principles of Community law.
- 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
- 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.
- 4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.
- 5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.
- 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
- 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, local / European Union, citizen, election, local, participation.

Headnotes:

Under Article 16.1 of the Constitution, the right to vote and to stand for election in local authority elections is contingent upon the condition of belonging to the self-governing community. Such a community is formed, under the law, by the inhabitants of the basic territorial division units. Permanent residence within the territory of the particular unit of local self-government is therefore the main prerequisite for belonging to the community in question.

Article 62.1 of the Constitution grants the right to participate in elections and to vote for representatives to local authorities to Polish citizens who attained the age of eighteen no later than the date of the election. There is an exhaustive catalogue of exclusions within Article 62.2 relating to persons who have been, on the basis of a final court judgment, incapacitated or deprived of public or electoral rights. The Constitution does not authorise the legislator to introduce any additional statutory exclusions in this regard.

The second sentence of Article 169.2 of the Constitution authorises the legislator to determine only the principles and procedures for holding elections and the requirements for their validity. This provision does not authorise a statutory determination of the group of persons vested with the electoral rights in question.

Electoral rights of EU citizens who are not Polish nationals and who do not reside permanently within the territory of any specific commune in Poland are not expressly envisaged in the Polish Constitution. Such rights are, however, a consequence of Poland's obligations stemming from its EU membership.

Summary:

I. Elections to local self-government units at every level – including communes, districts and regions – are held on the basis of the Electoral Law for Commune, District and Region Councils Act 1998 (hereinafter referred to as “Local Electoral Law”). The right to vote and the right to stand as a candidate in elections to a local self-government unit are vested in principle in Polish citizens who have reached the age of 18 by polling day and who reside permanently within the territory covered by the activities of the unit. Possession of electoral rights in elections to commune councils is also a condition for participation in direct elections of Heads of Communes, Mayors and Presidents of Cities – namely the executive organs of communes, elected by direct universal suffrage (Article 3 of the Direct Elections of Heads of Communes, Mayors and Presidents of Towns Act 2002). The right to stand as a candidate is, however, vested only in persons who have reached the age of 25.

According to the first challenged provision (Article 6.1 of the Local Electoral Law), the enjoyment of right to vote, and in consequence – pursuant to Article 7.1 of the same Act – also of the right to stand as a candidate in local elections, was made conditional upon being entered, not later than 12 months prior to the day of vote, in the so-called permanent register of voters (or electoral roll) maintained in the respective commune. A person who failed to obtain the respective registration by that deadline was not permitted to vote, or to stand as candidate, in local elections.

The Polish Parliament, in fulfilling duties stemming from European Community law (see, in particular, Article 19.1 EC and the Council Directive no. 94/80/EC of 19 December 1994), granted EU citizens who have reached the age of 18, but who are not Polish citizens, the right to vote and to stand as a candidate in elections to commune councils. However, the right to stand as a candidate was not vested in EU citizens deprived of the right to stand as a candidate in elections in their home Member State.

Moreover, EU citizens have the right to vote in elections of Heads of Communes, Mayors and Presidents of Cities (see above). The right to stand as a candidate in these elections is, however, reserved for Polish citizens. Enjoyment of electoral rights has been made conditional – similarly as in the case of Polish citizens – upon being entered, not later than 12 months prior to the day of vote, on the electoral roll (Article 6a.1 of the Local Electoral Law, this being the second provision challenged in the present case, read in conjunction with Article 7.1 of the same Act).

The constitutional review in the present case was initiated by the Commissioner for Citizens' Rights.

II. The Tribunal ruled that: Article 6.1, read in conjunction with Articles 5.1 and 7.1 of the Local Electoral Law, insofar as it deprives Polish citizens entered in the permanent register of voters during a period of less than 12 months prior to the day of vote of the right to vote and to stand as a candidate in elections to commune councils and in elections of Heads of Communes, Mayors and Presidents of Cities, does not conform to constitutional Article 31.3 of the Constitution (proportionality), Article 32.1 of the Constitution (equality), Article 62 of the Constitution (right of Polish citizens to vote for representatives to local self-government bodies) and the first sentence of Article 169.2 of the Constitution (principle of universal suffrage in local elections), read in conjunction with Article 16.1 of the Constitution (status of self-governing communities). It impinges on Article 52.1 of the Constitution (freedom of movement and the choice of place of residence and sojourn within the territory of Poland).

Article 6a.1, read in conjunction with Article 7.1 of the aforementioned Act, insofar as it deprives EU citizens not holding Polish nationality entered in the electoral roll during a period of less than 12 months prior to the day of vote of the right to vote in elections to commune councils, does not conform to the first sentence of Article 169.2 of the Constitution, read in conjunction with Article 16.1 of the Constitution and impinges on Article 52.1 of the Constitution.

The differentiation of citizens with regard to the exercise of their electoral rights in elections to organs of local self-government, despite the fulfilment of the requirement of belonging to the self-governing local community (of residing within the territory of the respective local self-government unit), infringes the principle of equality (Article 32.1 of the Constitution) since it is based on an irrelevant formal criterion, consisting of being entered in the register of voters no later than 12 months before the day of vote.

Directive no. 94/80/EC allows member states to make the electoral rights of EU citizens not holding the nationality of a respective Member State conditional upon residing within the territory of that State over a determined period of time. The challenged Article 6a.1 of the Local Electoral Law does not, however, refer to this criterion. It establishes a strictly formal condition of being entered in the permanent register of voters within a specified time frame. That is incompatible with Article 19.1 EC.

In light of the principle of equal treatment of EU citizens and Polish citizens in the context of Article 19.1 EC, the assessment of conformity of the provision indicated in point 1 of the ruling (concerning Polish citizens) with Article 169.2 of the Constitution applies to the provision indicated in point 2 of the ruling (concerning other EU citizens).

Supplementary information:

Electoral rights in elections to local self-government organs vested in EU citizens not holding Polish nationality, who reside in Poland and are members of local communities, are not their constitutional rights. Therefore, Article 31.3 of the Constitution, concerning limitations of freedoms and rights regulated in the Constitution, does not apply to them. For the same reasons, it is impermissible to directly apply the constitutional principle of equal treatment (Article 32 of the Constitution) to Polish citizens and to persons not holding Polish nationality.

The Constitutional Tribunal, when adjudicating upon the constitutionality of Poland's membership in the EU (Judgment of 11 May 2005, K 18/04 [POL-2005-1-006]), responded to constitutional doubts over the admissibility of participation by EU citizens not holding Polish nationality in local elections within the territory of Poland. The Tribunal ruled that the aforementioned Article 19.1 EC does not violate Article 1 of the Constitution (common good) and Article 62.1 of the Constitution (see above).

Languages:

Polish, English (summary).



Portugal Constitutional Court

Important decisions

Identification: POR-2002-3-008

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 19.11.2002 / **e)** 474/02 / **f)** / **g)** *Diário da República* (Official Gazette), 292 (Series I-A), 18.12.2002, 7912-7921 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to unemployment benefits.

Keywords of the alphabetical index:

Legislative omission, partial / Civil servant, unemployment, benefit, difference in treatment.

Headnotes:

A constitutional provision in respect of which unconstitutionality by omission is pleaded must be sufficiently precise and concrete for the Court to be able to determine what legal measures are necessary to implement it without having to give a decision on possible different policy choices. Hence, since the Constitution gives Parliament virtually unlimited possibilities, the Court could not find a violation of the duty to legislate on the basis of solely legal criteria. Consequently, since a political opinion cannot be the basis of a judicial finding of unconstitutionality by omission, it becomes impossible to reach such a finding.

A finding of unconstitutionality by omission therefore presupposes a concrete and specific case of violation of the Constitution, established on the basis of a sufficiently precise rule, which the ordinary legislature has not rendered enforceable in due time. Moreover, a finding of unconstitutionality by omission can also be based on constitutional provisions recognising social rights, provided the constitutional requirements are met.

Summary:

The *Provedor de Justiça* asked the Court to assess and review the unconstitutionality resulting from the lack of the requisite legislative measures for the rule contained in Article 59.1.e of the Constitution to be fully implemented in respect of public servants.

The Constitutional Court noted that, under the terms of Article 283 of the Constitution, a case of unconstitutionality by omission existed where:

1. a particular constitutional provision was not complied with;
2. that provision was not enforceable in itself;
3. the legislative measures necessary in the specific case were lacking or inadequate; and
4. that lack was the cause of failure to comply with the Constitution.

Accordingly, it was important to consider whether the constitutional provision concerning the right to material assistance in the event of unemployment met the requirements for finding a case of unconstitutionality by omission, even if that right was a social right and should not be regarded as analogous to rights, freedoms and guarantees. The material assistance referred to in Article 59.1.e of the Constitution must necessarily take the form of a specific benefit directly related to the situation of involuntary unemployment. This benefit must form part of the social security system and could only be established by means of legislation.

This was therefore a specific legislative obligation contained in a sufficiently precisely worded provision. That was of course without prejudice to the ordinary legislature's wide margin of appreciation. Parliament was required to provide a welfare benefit for those who found themselves involuntarily unemployed, but, in return, it could choose among the different forms of organisation and among the different criteria for fixing the amount of that benefit. Lastly, it should be noted that Article 59 of the Constitution was applicable to all workers, including, obviously, public administration workers.

Consequently, it could be concluded that the Constitution imposed on Parliament a specific and concrete obligation to provide a benefit corresponding to material assistance to workers – including public administration workers – who found themselves involuntarily unemployed, failing which an action might be brought for unconstitutionality by omission.

Although public administration workers, and more specifically those who were recruited to a post by appointment or by administrative contract, were

generally not entitled to unemployment benefit, because they were not affiliated to the general social security scheme, some of them were now entitled to unemployment benefit under special legislation. This did not apply to those who were recruited under a fixed-term contract and those who, by way of an exception, were employed under an individual contract. Subject to these exceptions, public administration workers recruited to a post by appointment or by administrative contract were not yet entitled to unemployment benefit or to any other specific benefit in the event of involuntary unemployment, because these workers could not join the general social security scheme.

In the instant case, the result was a partial omission, given that Parliament had implemented a constitutional provision which required it to secure the right to material assistance to workers who found themselves involuntarily unemployed, but it had only secured that right to some of them, as public administration workers generally were not included. This partial omission was in itself sufficient for a finding of unconstitutionality by omission. Furthermore, if one took into consideration the time which had already elapsed since the Constitution came into force, the obvious conclusion was that sufficient time had elapsed for the legislative task in question to be accomplished.

The Constitutional Court found, therefore, that the Constitution had been violated in view of the failure to take the legislative measures required for the implementation of the right provided for under Article 59.1.e of the Constitution, in relation to public administration workers.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2002-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 19.12.2001 / **e)** 349/2001 / **f)** Decision concerning the objection to the provisions of Articles 53 and 54.2 of the Family Code on grounds of unconstitutionality / **g)** *Monitorul Oficial al României* (Official Gazette), 240/10.04.2002 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Child, protection / Child, assistance.

Headnotes:

The stipulation in Article 54.2 of the Family Code of the presumptive father's sole right to bring an action contesting presumed paternity is unconstitutional in that it ignores the legitimate interest in so doing which the mother and a child born in wedlock may have.

Summary:

By a preliminary request of 28 March 2001, the Court of first instance at Alba Iulia referred to the Constitutional Court an objection challenging the constitutionality of Articles 53 and 54 of the Family Code.

In the statement of grounds of unconstitutionality, the impugned statutory provisions were alleged not to comply with Articles 16.1.2, 26.2, 44.1 and 45.1 of the Constitution.

According to Article 53 of the Family Code, "the father of a child born in wedlock is the mother's husband. The father of a child born after the dissolution, invalidation or annulment of a marriage is the mother's ex-husband, if the child was conceived while they were married and was born before the mother contracted another marriage".

On examining the plea of unconstitutionality with regard to Article 53 of the Family Code, the Court found that it was not contrary to Articles 16.1.2, 26.2, 44.1 and 45.1 of the Constitution.

Article 54.2 of the Family Code, though, provides that an action contesting paternity can be instituted only by the husband, whose heirs may continue the action instituted by him.

The Court held that the complaint of unconstitutionality bore on the right to family and private life, also secured by Article 8 ECHR.

In its Judgment of 27 October 1994 in the case of *Kroon and others v. the Netherlands* (*Bulletin* 1994/3), the European Court of Human Rights decided that it was contrary to Article 8 ECHR for a national law to prevent a married woman from denying her husband's presumed paternity in respect of a child conceived during their marriage.

The Court therefore considered it necessary to review its case-law regarding the unconstitutionality of Article 54.2 of the Family Code, as it found the text contrary to the provisions of Articles 16.1, 26, 44.1 and 45.1 of the Constitution.

Accordingly, it was noted that the stipulation in Article 54.2 of the Family Code of the presumptive father's right to institute an action challenging his paternity, to the exclusion of the mother and a child born in wedlock, infringes the principle of equal rights set out in Article 16.1 of the Constitution.

The fact that the presumptive father and the mother of the child each have a personal and separate motive for overturning the presumption of paternity does not warrant the discriminatory arrangements made by the impugned text. The specific motives may be different, but the common logic consists in ensuring that truth prevails over falsehood and, the reason being the same, the solutions must also be identical.

The Court also noted that Article 54.2 of the Family Code infringed Article 44.1 of the Constitution establishing equality between spouses, in denying mothers the right also to bring an action challenging presumptive paternity.

Regarding Article 26.1 of the Constitution on personal, family and private life, the Court held that the stipulation of the presumptive father's sole right to bring the action contesting the presumed paternity failed to reflect the requirements of paragraph 1 of the constitutional provision.

It further observed that the text at issue also infringed Article 26.2 of the Constitution in that it did not acknowledge the right of the child to bring an action contesting the presumed paternity.

It was accordingly noted that the conferment of this right on the child, being an expression of every persons' constitutional right to self-determination, would not go against the rights and freedoms of other people or offend public policy or morality.

Lastly, the Court found that Article 54.2 of the Family Code also infringed Article 45.1 of the Constitution securing to children and young people a special system of protection and assistance in the exercise of their rights.

Cross-references:

- *Kroon and others v. the Netherlands*, 27.10.1994, Vol. 297-C, Series A of the Publications of the Court; *Bulletin* 1994/3 [ECH-1994-3-016].

Supplementary information:

- Decision no. 349/2001, 19.12.2001 was published at the time, *Bulletin* 2002/2 [ROM-2002-2-002].

Languages:

Romanian, French (translation by the Court).



Identification: ROM-2002-M-001

a) Romania / b) Constitutional Court / c) / d) 07.11.2002 / e) 296/2002 / f) Decision relating to an objection alleging unconstitutionality of the provisions of Article 385⁹ of the Code of Criminal Procedure / g) *Monitorul Oficial al României* (Official Gazette), 881/06.12.2002 / h) CODICES (French).

Keywords of the systematic thesaurus:

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

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

1.6.1 **Constitutional Justice** – Effects – Scope.

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

4.7.2 **Institutions** – Judicial bodies – Procedure.

Keywords of the alphabetical index:

Legal *lacunae*, unconstitutional.

Headnotes:

Parliament is the sole authority empowered to establish the jurisdiction and procedure of courts and the remedies available against judgments handed down by the criminal courts. The Constitutional Court cannot therefore supplant parliament and add new provisions to those already prescribed.

Summary:

An objection alleging unconstitutionality of Article 385⁹ of the Code of Criminal Procedure, which explicitly restricts the cases in which appeals can be made against judgments handed down by the criminal courts, was lodged with the Constitutional Court.

These provisions were considered unconstitutional because they do not include as grounds for appeal “failure by the appeal court to hear the accused”, which is a violation of the right to due process and the right to a fair trial.

The Court found that the objections made to the legal provisions were that they did not provide for one specific ground for appeal, i.e. that there was a legal *lacunae*.

The Court's case-law stipulates that the Constitutional Court cannot supplant parliament and add new provisions to those already prescribed; hence the

objection alleging unconstitutionality on the grounds of a legal lacunae was inadmissible. Otherwise, such a review would be tantamount to interference in the powers of parliament, which, pursuant to the second part of Article 58.1 of the Constitution, is the country's sole legislative authority.

The Constitutional Court has laid down consistent case-law concerning the inadmissibility of criticism of legal lacunae. For example, in Decision no. 212 of 7 November 2000, published in the Romanian Official Gazette, Part I, no. 1 of 5 January 2001, and Decision no. 43 of 7 February 2001, published in the Romanian Official Gazette, Part I, no. 75, of 14 February 2001.

The Court found that the objection was also unfounded with regard to its merits, as parliament is the sole authority empowered to establish the jurisdiction and procedure of courts (Article 125.3 of the Constitution), and the remedies available against judgments handed down by the criminal courts (Article 128 of the Constitution).

The Court therefore held that the objection alleging unconstitutionality of the provisions of Article 385⁹ of the Code of Criminal Procedure was inadmissible.

Languages:

Romanian.



Russia Constitutional Court

Important decisions

Identification: RUS-1996-2-005

a) Russia / b) Constitutional Court / c) / d) 13.06.1996 / e) / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 02.07.1996 / h) CODICES (French).

Keywords of the systematic thesaurus:

1.6.5.5 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.

4.7.2 **Institutions** – Judicial bodies – Procedure.

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

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

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

5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.

Keywords of the alphabetical index:

Police custody / Notification of charges.

Headnotes:

The rule of criminal procedure according to which the time spent by the accused and his defence counsel consulting the case file is not taken into account in calculating the duration of police custody, is unconstitutional as a law-enforcement measure is unconstitutional because it unduly restricts the civil right to liberty and to legal protection.

Summary:

The proceedings were instituted because a citizen had complained that his constitutional rights and freedoms had been violated by Article 97.5 of the RSFSR Code of Criminal Procedure, according to which the time spent by the accused and his defence counsel consulting the case file is not taken into

consideration for calculating the duration of police custody as a law-enforcement measure. According to the applicant, this rule was not consistent with a number of , because it unduly restricted his right to individual freedom and inviolability as well as his right to legal protection and resulted in a violation of his rights and freedoms arising out of the exercise by other persons of their rights.

This unwarranted increase in the duration of police custody derived not only from the content of Article 97.5 of the RSFSR Code of Criminal Procedure as such, but also from the nature of the rules ensuring the right of the accused to receive complete information on the substance of an accusation and the evidence on which it is based. Consequently, finding the contested rule unconstitutional was not in itself sufficient for securing the rights of defence of the accused.

Given the task of protecting society against crime by a justifiable application of criminal law, the legislator must try to settle the above questions by appropriate legislation and regulations.

The most effective way to guarantee the constitutionality of criminal procedures would appear to be for the legislator to introduce the necessary changes to the system of criminal procedure in force or to create new legal instruments. If the courts were to correct legal procedure through a direct application of the right to legal protection, which is enshrined in the Constitution, it would still be difficult to guarantee the equality of citizens before the law and the courts through the practical application of the legal rules. However, the adoption of relevant legislative decisions which take into account the position of the Constitutional Court requires time.

In the event, the Constitutional Court found that Article 97.5 of the RSFSR Code of Criminal Procedure was unconstitutional.

Article 97.5 of the RSFSR Code of Criminal Procedure will therefore lapse six months after the announcement of this Decision.

The Federal Assembly of the Russian Federation must, within six months from the announcement of this Decision, resolve the question of amending the law of criminal procedure as regards the guarantee of the right of everyone to liberty, enshrined in the Constitution of the Russian Federation, in cases of arrest and remand in police custody as a law-enforcement measure.

Pursuant to Article 46.1 of the Constitution, before questions associated with the right of everyone to

liberty can be resolved by legislation, persons accused of committing a crime are entitled to submit to the court an appeal challenging the legality and the validity of remand in custody (detention on remand) at all stages of the criminal proceedings, including the period of consultation of the case file by the accused and his defence counsel.

Languages:

Russian, French (translation by the Court).



Identification: RUS-1999-1-001

a) Russia / b) Constitutional Court / c) / d) 02.02.1999 / e) / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 10.02.1999 / h).

Keywords of the systematic thesaurus:

- 1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
- 4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
- 5.1.4.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.
- 5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial by jury.

Keywords of the alphabetical index:

Death penalty / Jurisdiction, territorial / Assize Court, right to have a case heard / Criminal procedure.

Headnotes:

Until the law granting the right to trial by jury to all persons charged with an offence carrying the death penalty comes into force, the death penalty cannot be enforced.

Summary:

The Constitutional Court heard a case concerning the constitutionality of a number of legislative provisions relating to the Assize Court. The case was heard following a request from the Moscow City Court and complaints from a number of citizens.

The Constitutional Court found as follows:

When the Assize Court was set up on 16 July 1993, the federal law on amendments and additions to certain legal instruments was passed. The act came into force on the date of its publication, but in its entirety in only 9 of the 89 constituent entities of the Russian Federation.

Under Article 41 of the Code of Criminal Procedure, cases are tried by the court in the judicial district in which the offence was committed; if it is impossible to decide where the offence was committed, the case falls under the jurisdiction of the court in the judicial district in which the preliminary investigation or inquiry was completed. Under Article 42 of the Code of Criminal Procedure, cases which for whatever reason fall simultaneously under the jurisdiction of several equivalent courts are tried by the court in the judicial district in which the preliminary investigation or inquiry was completed.

The applicants considered that this could be used to justify refusing the right to trial by jury, as enshrined in Article 20 of the Constitution, to citizens charged with offences carrying the death penalty, in cases where no such courts had been set up in the territories concerned.

These and other legislative provisions were applied in specific cases and were used to justify refusing the right to trial by jury, as enshrined in Article 20 of the Constitution, to persons charged with offences carrying the death penalty.

Under Article 20.2 of the Constitution, until the death penalty is abolished, it may be imposed under federal law as an exceptional punishment for especially grave offences against the person, with the accused having the right to trial by jury.

It follows from this provision, in conjunction with Articles 18 and 46.1 of the Constitution, that in such cases the right of the accused to trial by jury is a specific guarantee of the right of every citizen to life (as a fundamental, inalienable right enjoyed by everyone from birth), a right explicitly secured in the Constitution itself.

Article 19 of the Constitution provides that all people are equal before the law and in a court of law. Accordingly, the right to trial by jury must be guaranteed, on an equal basis and to the same extent, to all persons charged with a serious offence regardless where the offence was committed, which court has general jurisdiction and which has specific jurisdiction over such cases and other similar circumstances.

The justification for the legislature's decision to institute trial by jury in only nine of the constituent entities of the Federation initially, having regard to the provisions of the former Constitution and organisational, material and technical considerations, was that trial by jury was to be introduced gradually as the judicial reform process advanced. However, that did not mean that there was no need to guarantee the right to trial by jury to all persons, everywhere, charged with offences carrying the death penalty; still less that legislation should not be passed, once the new Constitution came into force, ensuring that this right was exercisable throughout the country.

The contested provisions, which introduced trial by jury in only nine of the constituent entities of the Federation initially, are therefore not at variance with the Constitution.

In adopting the new Constitution and pursuing judicial reform, the legislature was required, in keeping with Section 6.1 of Title 2 ("Final and Transitional Provisions" and Article 20.2 of the Constitution), to ensure that suitable procedural machinery was in place for persons charged with serious offences, throughout the territory of the Federation, to exercise the right enshrined in the above-mentioned article.

It is over five years since the Constitution was adopted, which is a sufficient length of time for the legislature to have fulfilled this requirement. However, no changes to this effect have as yet been made to the law. What was intended as a transitional provision is in fact becoming a permanent restriction and therefore conflicts with Articles 19, 20.2 and 46.1 of the Constitution.

The Constitutional Court ruled as follows:

Persons charged with an offence for which federal law prescribes the death penalty as an exceptional penalty must in all cases have an effective right to trial by jury. Consequently, the Federal Assembly should immediately amend the legislation to ensure that throughout the territory of the Federation, all persons charged with an offence for which federal law prescribes the death penalty as an exceptional penalty are able to exercise this right. Until a law guaranteeing this right throughout the territory of the Federation comes into force, no person may be sentenced to death.

Languages:

Russian.



Identification: RUS-2002-2-001

a) Russia / b) Constitutional Court / c) / d) 15.01.2002 / e) / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 22.01.2002 / h).

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.

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

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

3.16 **General Principles** – Proportionality.

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.

4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Registration of parties and candidates.

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

5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, candidate, independent / Election, registration, rejection, illegal, evaluation / Election, Electoral Commission, decision, annulment / Election, invalidity / Constitution, direct application.

Headnotes:

It is not in accordance with the Constitution to restrict the powers of the Constitutional Court to quash decisions by the Electoral Commission to only those cases when the refusal to register a candidate might have an influence on the genuineness of the results of the expression of the voters' will. It is virtually impossible to prove such an influence in practice, which results in a denial of effective judicial protection of the electoral rights of the citizens.

Summary:

The Constitutional Court examined the constitutionality of several provisions of federal laws with respect to fundamental guarantees of citizens' electoral rights and with respect to the election of deputies in the State Duma (Lower Chamber) of the Federal Assembly. These provisions authorised the Court to annul the decisions of the electoral commission on the polling stations' report and results of the vote in an electoral constituency in cases of an illegal refusal to register a candidate. However, the decision of the commission could only be annulled if it was impossible genuinely to determine the results of the expression of voters' will.

The case was initiated by an individual complaint of a citizen, whose registration as a candidate for the State Duma was refused by an electoral commission in the 1999 elections. An appeal before different levels of ordinary courts against this decision was launched, but all the courts, including the Supreme Court, refused to admit the applicant's appeal, reasoning that the illegal rejection of a registration did not have an effect on the authenticity of the results of the free expression of the voters' will.

In the appeal lodged with the Constitutional Court, the applicant declared that if the registration is rejected it is in principle impossible to define the free expression of the voters' will during elections. Consequently, the challenged provisions exclude the exercise of the right to be elected, which is in conflict with Article 32.2 of the Constitution and international instruments concerning human rights.

The Constitutional Court noted that, in accordance with the Constitution, citizens have the right to vote for and to be elected to bodies of state power and to

local self-government bodies. Democratic and genuinely free elections entail, in particular, the right of all individuals who fulfil the requirements laid down by law to participate in elections as candidates and the right of other persons to express their position vis-à-vis these candidates by casting their vote in favour or against them. The unlawful denial of the right to stand for election could alter the free nature of elections for the candidates, as well as for the voters whose freedom of expression of will would be limited because they would be deprived of the right to vote for all candidates legally proposed to them.

The protection of electoral rights, including judicial protection, must be effective whether the violation of the right to be elected is discovered before the vote or at a later stage. The annulment of election results must not be excluded in order to ensure genuinely free elections.

However, the disputed provisions imply that the exercise of electoral rights during elections is sufficient, in itself, to allow notable violations of the rights of some candidates and voters to be ignored. This approach does not correspond to the provisions laid down in Articles 17 and 55 of the Constitution, which imply that the objective to guarantee the rights of a third party can only impose a proportional limitation of rights established by federal law.

In the case of the applicant, the electoral commission of the constituency and the courts based their decision on the fact that the disputed provision provides for the possibility of annulment of electoral results only when the violation of electoral rights has a proven influence on the genuineness of the results of the free expression of voters' will. However, such proof is practically impossible to obtain if a candidate's registration is unlawfully refused. Accordingly, the courts do not focus on the guarantee of the existence of the conditions of a truly free expression of the voters' will, but are rather concerned with a formal verification of characteristics such as the authenticity of ballot papers, correct voting procedures and correct ballot count.

Therefore, the expression used in the Law, "the genuineness of the results of the free expression of voters' will", enables authorities applying this law to ignore questions as to the influence of notable violations discovered on whether an adequate reflection of the true voters' will had been achieved. This practice does not ensure the effective judicial protection of citizens' electoral rights and consequently is contrary to the Constitution.

Since the recognition of the legal acts examined in the present case as being contrary to the Constitution creates a gap in the legislation, the Constitution must be directly applied. The courts must find adequate ways and procedures to protect active and passive electoral rights and should not limit themselves to simply acknowledging that a violation of electoral rights has occurred due to the unlawful refusal to register a candidate.

The principle of proportionality requires the implementation of a procedure of restitution or compensation in each case of violation of electoral rights. Provided a legal basis exists, the Court has the right to recognise the impossibility of organising new elections with the purpose of restoring citizens' rights to stand for election. In any case, the negative consequences resulting from unlawful acts (or omissions) of the electoral commissions should be offset and the good standing of the citizen restored by means of recognition of and compensation for damage caused to them on the basis of Article 53 of the Constitution.

To guarantee the appropriate reinstatement of violated electoral rights, additional legislative measures that would prevent the unjustified rejection of a candidate's registration or the annulment of a previous registration should be instituted. Such measures may include, in particular, giving reasons for the rejection or defining the relevant powers of electoral commissions and their responsibilities. In addition, judicial procedures should be improved in order to restore, in due time, passive electoral rights, and adequate compensatory mechanisms should be set up to restore violated rights resulting from the unlawful rejection of a candidate's registration.

Languages:

Russian.



Identification: RUS-2002-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 14.03.2002 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.03.2002 / **h)**.

Keywords of the systematic thesaurus:

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.

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

4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.

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

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

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

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

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

Keywords of the alphabetical index:

Arrest, warrant / Judgment, guarantees / Detention, maximum length / Constitution, transitional provisions.

Headnotes:

Keeping persons in custody, the arrest or provisional detention of a person for a period of more than 48 hours without a trial as prescribed by the Code of Criminal Procedure do not comply with the Constitution.

Summary:

The examination of the case was initiated on the basis of complaints of several citizens against the provisions of the Code of Criminal Procedure of the RSFSR, according to which the restriction of the liberty and personal inviolability of persons suspected of committing a crime for a period of 48 hours with the authorisation of the prosecutor but in the absence of a judgment is admissible. The applicants considered that these provisions were contrary to Article 22.2 of the Constitution, according to which arrest, custody and provisional detention are only allowed upon a court judgment and according to which a person cannot remain in custody for more than 48 hours unless a court judgment is delivered.

The Constitutional Court noted first of all that the right to liberty and personal inviolability enshrined in the Constitution is a fundamental human right. Specific constitutional guarantees in the sphere of criminal procedure for the judicial protection of this right have direct effect and consequently define the meaning, contents and application of the relevant provisions of criminal procedural legislation.

The Constitution of 1993 states in the Chapter on Concluding and Interim Provisions that until such time as the criminal procedural legislation of the Russian Federation has been brought into line with the provisions of the Constitution, the previous rules for arrest, detention and holding in custody of persons suspected of committing a crime shall be preserved. The Constitution imposes on the legislative body an obligation to introduce the necessary modifications in the legislation during this transitional period without specifying the duration of this transitional period.

The interim nature of arrest, provisional detention and custody procedures under the legislation previously in force was confirmed by the Federal Law of 1998 on the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols to the Convention. Referring to Articles 5.3 and 5.4 ECHR this law limited the application of the clauses to the period necessary to introduce the required modifications in the legislation.

If a right derives directly from the Constitution and the passing of a law is necessary to guarantee its authority, such a law must be adopted as soon as possible. The Constitutional Court has repeatedly stressed that since the adoption of the Constitution a significant time period has passed, sufficient for the legislative body to have enacted new legislation on criminal procedure so as to harmonise it with the Constitution. As this has not been done, the constitutional value of the interim provisions of the Constitution has changed. In other words, the interim regulations acquire in reality a permanent effect and thus violate both the right guaranteed by Article 22 of the Constitution and the principle of the direct effect of the rights and freedoms of humans and citizens. This amounts to a refusal to implement the guaranteed mechanism of judicial protection of established rights and freedoms, in particular by Article 9.3 of the International Covenant of Civil and Political Rights and by Article 5.3 ECHR.

Furthermore, the Constitutional Court observed that a new Code of Criminal Procedure was adopted on 18 December 2001. Under its provisions only a court is competent to rule on custody matters. However, in accordance with the Federal Law on the Entry into Force of the Code of Criminal Procedure, its

provisions shall enter into force as of 1 January 2004; until then the prosecutor will make the decisions on the matter, as was previously the case.

It is to be noted that since the previous procedure will be maintained until the aforementioned date, the legal requirement under the Concluding and Interim Provisions Chapter of the Constitution was applied in a strictly formal fashion by the legislative body, thereby violating the real meaning of this provision.

The Constitutional Court found that the challenged provisions of the Code of Criminal Procedure of the RSFSR were not in conformity with the Constitution and thus were inapplicable as of 1 July 2002.

The Federal Assembly must take steps immediately to introduce modifications and ensure the enforcement, as of 1 July 2002, of legal standards, introducing a judicial procedure upon arrest or remand in custody or the provisional detention of a suspected person for a period exceeding 48 hours.

Languages:

Russian.



Identification: RUS-2002-2-006

a) Russia / b) Constitutional Court / c) / d) 17.07.2002 / e) / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 31.07.2002 / h).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.18 **General Principles** – General interest.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 4.7.7 **Institutions** – Judicial bodies – Supreme Court.
- 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Prohibition of *reformatio in peius*.
- 5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Res judicata, setting aside, conditions / Judicial error / Sentence, cumulative.

Headnotes:

A final and binding judgment can only be set aside (*reformatio in peius*) for a convicted or released person) on the grounds of one-sided or incomplete preliminary investigation where there are new or recently disclosed facts or where a serious judicial error was made. The failure to combine the sentence imposed under the new judgment with the non-served part of the sentence resulting from the previous judgment is considered to be a serious judicial error.

Summary:

The Constitutional Court examined the constitutionality of certain provisions of the criminal law and criminal procedural law as well as legislation relating to the Prokuratura. These provisions allow for the setting aside or reversal of a final and binding judgment of acquittal, in supervisory proceedings, upon appeal by the prosecutor, on the grounds of one-sided or incomplete preliminary investigation as well as inconsistency of the court's findings with the facts of the case.

The examination of the case was based on an appeal by several citizens as well as by the request of a city court.

The Constitutional Court noted that in the country's legal system, the possibility of setting aside court judgments was based on Article 126 of the Constitution, according to which the Supreme Court, acting as a higher instance court in criminal cases, undertakes the judicial supervision of court activities concerning the common law and the provisions of several federal constitutional laws on court powers with respect to the examination of criminal cases through the mechanism of supervisory proceedings.

In accordance with the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights, a judicial decision shall be set aside if a new or recently disclosed fact clearly proves that a judicial error has been made. Pursuant to provisions of these instruments, the legal rules governing the participants in criminal proceedings cannot be arbitrarily modified, including with respect to persons concerning whom a final judgment has been delivered. *Reformatio in peius* for a convicted

(or acquitted) person, in cases where a judgment that has become final and binding is set aside, is generally not permissible.

Likewise, Article 4.2 Protocol 7 ECHR has established that the right not to be judged or punished twice does not prevent the reopening of a case in accordance with the law and criminal procedure of a State if new or recently disclosed facts that have come to light or a serious error in the previous proceedings are of such a nature as to have affected the judgment.

This provision and the provision of Article 55.3 of the Constitution state that the legislative body has a right to lay down procedures governing the setting aside of a judgment that has become final and binding and to determine in which cases such a setting aside of a judgment (including through supervisory proceedings) and reopening of the case on the basis of new or newly disclosed facts are possible. Exceptions to the general rule of prohibition of *reformatio in peius* are only acceptable as an extreme measure in cases where failure to correct a judicial error could alter the very meaning of the judgment as a measure of justice and disturb the necessary balance of constitutionally protected values, including the legitimate rights and interests of convicted persons and victims.

However, the bases for the examination of a judgment which has become final and binding, as provided for by the impugned provisions, go beyond this framework. They are not formulated in a clear and precise manner and do not exclude the arbitrary application of law. Consequently the principles of adversarial proceedings and equality of the parties' rights, as well as the principle of the presumption of innocence, are violated.

The provision according to which, where a one-sided or incomplete investigation or preliminary investigation is found to have occurred, the supervising court has the power to order a fresh investigation is also contrary to the principles of criminal procedure, as it illegally creates possibilities for the accusing party to prove the guilt of the accused even after the relevant judgment has become final and binding. For this reason, the supervising court cannot overturn a judgment of acquittal that has become final and binding, on the grounds that the judgment may be unjustified, if no errors were committed in the prior proceedings that fit the criteria spelt out in Article 4.2 Protocol 7 ECHR. Accordingly, the prosecutor cannot raise the question of the setting aside of such a judgment before the supervising court on grounds that fall short of these criteria.

The Constitutional Court also examined the constitutionality of a provision of the criminal law providing that if a convicted person committed a new crime after a sentence had been delivered against them but before they had finished serving the sentence, the Court should add to the sentence imposed in the new judgment the part of the previous sentence that remained unserved, either in full or in part. This provision serves as grounds to grant the supervising court the power to set aside the judgment for a period of one year after the judgment has become final and binding and open new legal proceedings in order to correct such a violation by the Court of First Instance.

The Court found that the legislative body must provide procedural means for the correction of such serious judicial errors, even after the relevant judgment has become final and binding. The contrary would imply that an unlawful exception would be made to the judgment delivered regarding the previous case, which would be incompatible with the principles of criminal law, and contrary to the very conception of justice, and for this reason would be impermissible in a state governed by the rule of law. The impugned provision aims to exclude the creation of a long period in which the judgment may be set aside, and as such does not disturb the balance of constitutionally protected values.

Languages:

Russian.



Slovenia

Constitutional Court

Important decisions

Identification: SLO-1995-1-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09.03.1995 / **e)** U-I-158/94 / **f)** / **g)** *Uradni list RS* (Official Gazette), 18/95; *Odločbe in sklepi ustavnega sodišča* (Official Digest), IV 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract); CODICES (English).

Keywords of the systematic thesaurus:

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.

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

4.6.2 **Institutions** – Executive bodies – Powers.

4.10.1 **Institutions** – Public finances – Principles.

4.10.6 **Institutions** – Public finances – Auditing bodies.

4.13 **Institutions** – Independent administrative authorities.

Keywords of the alphabetical index:

Court of Auditors, autonomy / Law, implementation, effective.

Headnotes:

The organisation of the Agency for Payment Operations as a public institution, the specific forms of subordinating the Agency to the Government and the management and control of its activities through its board, which have all been provided for as if the Agency were a public institution, are contrary to the constitutional concept of an autonomous and independent entity whose duties under the Constitution and its statute are to control and audit the manner of disposing of socially-owned property in the process of ownership transformation.

In a State governed by the rule of law, statutory provisions must be drafted in such a way as to make possible their effective implementation.

Summary:

The essence of the constitutional provision dealing with the separation of powers lies not in the manner of organising the relationships between individual branches of government or government organisations, but in its fundamental function of protecting individual freedom and dignity in relations with the government. Democratic efficiency of separation of powers depends primarily on the quality of mutual controls and restrictions, as well as on co-operation in the collective, balanced and efficient attainment of national objectives. This is why it is possible to have, and why indeed there are, various organisational forms of implementation of the principle of horizontal, vertical and functional separation of powers in accordance with specific historical and cultural circumstances of the constitutional system actually in force.

Modern constitutional systems also incorporate bodies and organisations which, due to their organisational characteristics and formal powers, cannot be ranged among any of the three branches of government. Such constitutional institutions include for example: the central bank (“monetary authorities”), the ombudsman, and the Court of Auditors.

In constitutional systems, where they exist, all these bodies and organisations are indisputably highly autonomous in relation to each branch of government. Their autonomy on the one hand, and their responsibility on the other are ensured by specific institutional requirements governing their independence, such as the professional and technical responsibility of holders of relevant public powers, procedural working rules prescribed by statute, a system of legal remedies against illegal acts, responsibility within the organisation, stability and transparency of the mandate of holders of responsible positions, a system of financing, etc.

The mere fact that in the former system the Public Audit Service was autonomous and that its independent status was provided for in the Constitution would be a sufficient reason for this status to be maintained while still dealing with socially-owned property. This is even more so because it is obvious that in the field of control over government expenditure in the new constitutional system, the Public Audit Service has been replaced by the Court of Auditors, which has also been granted an independent status by the Constitution. Nor is the Court of Auditors part of either judicial or of executive

authorities, but is an institution *sui generis*, whose function of controlling government expenditure makes it essential for it to be able to control financial aspects of all three branches of the State.

On the basis of the foregoing it was the duty of the National Assembly to provide the Agency for Payment Operations, Control and Information with an autonomous status and to make it bound by the Constitution. This is why the organising of this service as a "public institution", the specific forms of subordinating the Agency to the Government and the management and control of activities of the Agency through its board, which have been provided for as if the Agency were a public institution, are contrary to the constitutional concept of an autonomous and independent entity whose duties under the Constitution and statute are to control and audit the manner of disposing of socially-owned property in the processes of ownership transformation.

The decision was taken by the Court with two dissenting opinions.

For reasons of joint consideration and adjudication, this case was joined with case no. U-I-162/94 (resolution of 13 September 1994).

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-1995-2-011

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 30.03.1995 / **e)** U-I-32/95 / **f)** / **g)** *Uradni list RS* (Official Gazette), 44/95; to be published in *Odločbe in sklepi ustavnega sodišča* (Official Digest), IV/2 1995 / **h)** *Pravna praksa* (Legal Practice Journal), Ljubljana, Slovenia (abstract); CODICES (Slovenian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.10 **General Principles** – Certainty of the law.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
 5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Gap, legal, unconstitutional / Legal concept, undefined / Licence, geographic restriction / Resource, natural, right to exploit.

Headnotes:

The Law on the Protection of the Environment is in conflict with the Constitution in so far as it does not define the legal position of subjects who, on the basis of valid legislation, have existing rights to use or exploit natural resources owned by the state, and in so far as it does not define the concept or content of the legal term "geographic restriction on the licence".

Summary:

Article 17 of the Law on the Protection of the Environment determines that water, mineral deposits, freely reproducing wild animals, fish and other freely reproducing or free growing water animals and plants are the property of the Republic. State ownership has replaced the social ownership of natural resources. The consequence of the transfer of part of the natural resources into State ownership is that a licence is required for their use or exploitation by other legal or physical persons, as well as there being an obligation on the part of the State to produce a balance sheet detailing the natural resources and establishing both the actual and legal state of these resources. The State has assumed ownership of these natural resources with all their burdens and must respect the existing rights of subjects with respect to individual natural resources. In addition to administrative tasks relating to the use of natural resources and undertaken by the State on the basis of the Law on the Protection of the Environment, with the validation of the Law on Functions taken over by the State which had been performed until 31 December 1994 by municipalities, the State also assumed those administrative tasks which had until then been performed by municipalities on the basis of regional legislation. Legal acts (administrative decisions), giving rise to the subjective rights to use natural resources, now bind the State.

For legal relations which derive from administrative decisions which have been taken, before the adoption of new regional legislation, the applicable provisions of existing regional legislation shall be used. In so far as the State decides to award licences with regard to natural resources, it must behave according to the provisions of the Law on the Protection of the Environment and respect the applicable provisions of regional legislation in so far as these determine the conditions of use of natural resources which the

licence holder will have to respect. In awarding licences for the use of natural resources, the State must respect acquired rights. To do otherwise would be in conflict with Article 2 of the Constitution, which determines that Slovenia is a State governed by the rule of law.

The Law on the Protection of the Environment has determined a new legal regime for obtaining the right to use, manage or exploit natural resources. The third sentence of Article 21.7 of the Law on the Protection of the Environment states that existing licence rights shall be respected in determining the criteria for validating priority rights. These are held by the owner of the land on which the natural resource is found, but can be validated only by the owner obtaining a licence on the basis of a public call for applications. The provision that in determining criteria for validating priority rights, existing licence rights shall also be respected is not entirely clear, especially when there is competition between holders of existing licence rights and the owner of the land. These provisions also provide that a holder of existing licence rights must make an application in a public tender.

With the cited provisions, the Law on the Protection of the Environment does not annul these rights, but it does place the holders in a position, as the initiator claims, in which they must again apply for rights which have already been recognised with a legally binding administrative decision. The legislator should have regulated the transfer of existing licence rights into the new legal regime (licence relations) in the transitional provisions. Since the Law on the Protection of the Environment does not regulate the transformation of these relations, there is an unconstitutional legal lacuna, which is in conflict with the constitutional principle of a State governed by the rule of law. The Constitutional Court thus found on the basis of Article 48.1 of the Constitutional Court Act that the Law on the Protection of the Environment is in conflict with the Constitution.

The legislator must regulate the position of subjects whose right to use or exploit natural resources is based on valid administrative decisions in accordance with the principle of a State governed by the rule of law until 1 December 1995.

The Constitutional Court determined the implementation of this decision on the basis of Article 40.2 of the Constitutional Court Act. The established conflict with the Constitution means that the Government must respect existing licence rights and that it cannot therefore start or continue procedures for awarding licences in respect of those natural resources to which licence rights already exist, until it regulates by law the means of transferring existing licence rights into the

legal regime of licensing. Until an appropriate legislative arrangement for transferring existing licence rights into the new legal regime is in place, the holder of such rights is entitled to use or exploit natural resources, and the Government must allow the exercise of such rights.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-1998-M-001

a) Slovenia / b) Constitutional Court / c) / d) 08.10.1998 / e) U-I-12/97 / f) / g) *Uradni list RS* (Official Gazette RS), 82/98, *Odločbe in sklepi ustavnega sodišča* (Official Digest), VII,180 / h) *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

3.3 **General Principles** – Democracy.

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

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

4.9.13 **Institutions** – Elections and instruments of direct democracy – Post-electoral procedures.

Keywords of the alphabetical index:

Time limit, statutory provision, unconstitutional, bringing into conformity with Constitution by legislator / Constitutional Court, decision, manner of implementation / Electoral system / Referendum, on electoral system / Referendum, question / Referendum, legislative / Gap, legal.

Headnotes:

An interpretation which would consider that a proposal that the majority of voters who voted in a referendum on all proposed questions together, was considered passed, is in conflict with the Constitution. Only an interpretation by which a proposal for which

the majority of voters who voted on each referendum question individually was considered passed is in conformity with the Constitution.

The time limit for legislating a referendum decision: the National Assembly may not unnecessarily delay the meeting of this obligation, but must fulfil it in reasonable time – within the time which is necessarily required for the course of the legislative procedure. This requirement should also be inserted into the law which regulates referendums – this law should bind the National Assembly to translate the referendum decision into law within a specified time limit (in relation to the decision as to the extent, the legislator has a certain latitude for his/her own political judgment). There is no determined time limit to meet this obligation. This legal void is in conflict with the provisions of Article 90.1 of the Constitution, whereby the National Assembly is bound by the result of a referendum. The Constitutional Court thus charged the legislator to fill this legal void.

Similarly, insofar as it relates to a preliminary legislative referendum, a provision, according to which the National Assembly may not adopt a law which is in conflict with a referendum decision within one year of the holding of the referendum, is also in conflict with the Constitution. This provision allows the obligation of the National Assembly to abide by the result of a referendum to expire before the National Assembly translate it into law.

Enabling the National Assembly to adopt a law which is in conflict with a referendum decision within a time in which it has not yet legislated the solution accepted in a referendum is in conflict with the constitutional provision binding the National Assembly to the result of a referendum. The Constitutional Court charged the National Assembly to rectify this anti-constitutionality.

Cross-references:

Legal norms referred to:

- Articles 1, 3, 44 and 90 of the Constitution (URS);
- Articles 21, 26, 30, 40, 43, 48.2 of the Constitutional Court Act (ZUstS).

Languages:

English (translation by the Court).



Identification: SLO-1998-M-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.10.1998 / **e)** U-I-294/98 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 72/98, *Odločbe in sklepi ustavnega sodišča* (Official Digest), VII,185 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

3.3 **General Principles** – Democracy.

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

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

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

Keywords of the alphabetical index:

Gap, legal / Constitutional Court, decision, application / Referendum, for the establishment of municipality and the determination of territory.

Headnotes:

The Constitutional Court established that the National Assembly had violated the Constitution when it had not separated the Prihova settlement from the Mozirje Municipality and joined it to the Nazarje Municipality following a referendum on this issue. Thus, the Court abrogated Article 2.95 of the Act on the Establishment of Municipalities and the Determination of Their Territory, which refers to the Prihova settlement, established an unconstitutional gap in the Law in Article 2.98 and ordered the National Assembly to fill it.

On the basis of Article 40.2 of the Constitutional Court Act, which gives the Constitutional Court jurisdiction to determine the manner of the implementation of its decision, the Court temporarily (until the obligations imposed by this decision on the National Assembly are fulfilled) filled the gap in the Law that would occur through this decision.

Cross-references:

Legal norms referred to:

- Articles 1, 3, 9, 44, 138, 139 of the Constitution (URS);
- Articles 21, 43, 48 of the Constitutional Court Act (ZUstS).

Languages:

English (translation by the Court).

*Identification:* SLO-1999-M-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 01.07.1999 / **e)** Up-333/96 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), VIII, 286 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Foreigner, permanent residence, permission / Gap, legal.

Headnotes:

The Supreme Court had based its decision on Article 81 of the Foreigners Act (hereinafter: “ZTuj”), which the Constitutional Court found inconsistent with the Constitution for reasons of an unconstitutional gap in the law. By the interpretation of Article 81 of ZTuj, which is contained in the challenged judgments of the Supreme Court, the complainant was placed in an unequal position as compared to those foreigners who were not citizens of other Republics of the former SFRY, however who had had permanent residence in the Republic of Slovenia at the time of the introduction of ZTuj. The complainant’s right to equality before the law determined in Article 14.2 of the Constitution was thereby violated, as well as

equality in the protection of individual rights guaranteed by Article 22 of the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 14, 22 of the Constitution (URS);
- Articles 40.2, 49, 59 of the Constitutional Court Act (ZUstS).

Languages:

English (translation by the Court).

*Identification:* SLO-1999-2-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 08.07.1999 / **e)** U-I-87/99 / **f)** / **g)** *Uradni list RS* (Official Gazette), 76/99; *Odločbe in sklepi ustavnega sodišča* (Official Digest), VIII, 1999 / **h)** *Pravna Praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

1.4.1 **Constitutional Justice** – Procedure – General characteristics.

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

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

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

3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.

3.13 **General Principles** – Legality.

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

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

4.6.2 **Institutions** – Executive bodies – Powers.

4.16 **Institutions** – International relations.

4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.

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

Keywords of the alphabetical index:

Jurisdictional dispute / Constitutional Court Act, procedural requirements, precedence / State, defence / Air space, overflight.

Headnotes:

A political party has standing to file a petition for the review of the constitutionality and legality of a regulation only when such a regulation directly interferes with its rights, legal interests or legal position as a legal entity. The interests of a party's programme and policies, the (legal) interests of its individual members or even a general interest in respect for the democratic system, constitutionality and legality do not vest in a political party the right to file a petition for the review of constitutionality or legality. Similarly, the legal interest of the individual must be direct and concrete. A general and abstract legal interest, which anyone could demonstrate, does not suffice. The petitioner must demonstrate that the challenged regulation directly interfered with his own rights, legal interests or legal position, and that, if granted, his petition would entail a change in his legal position.

The Constitutional Court has jurisdiction to review the constitutionality and legality of regulations adopted by Slovenian state bodies. It lacks jurisdiction to review the constitutionality of decisions reached by foreign states or international organisations. Neither does it have jurisdiction to review the consistency of their decisions with treaties. Such review falls under the jurisdiction of international bodies and tribunals.

In view of its contents, the challenged Order is, according to the Constitutional Court, an act which should have been adopted as a statute. On the one hand it interferes with the question of state sovereignty, and, on the other hand, it concerns an area which has already been regulated by statutes and should therefore have been adopted by the National Assembly in statute form. No body other than the National Assembly may change and amend a statute which is in force. The Government Order can not fill in the gap of the statutory basis needed to grant a general permit for the flights of armed military aircraft over the territory of the Republic of Slovenia.

Summary:

Due to the lack of legal interest the petitions for constitutional and legal review of the disputed governmental act, allowing the NATO flights above Slovenia, were rejected.

The Constitutional Court commences proceedings for the review of the constitutionality and legality of regulations or general acts issued by statutory authorities if the procedural requirements determined by statute are met. There are no rules prescribed by statute or precedents concerning which of the procedural requirements is to be examined first. The order of precedence depends on the factual and legal circumstances of each particular case. Furthermore, it is necessary to consider that, first of all, the bases for establishing different procedural requirements are sometimes very much intertwined with each other and, secondly, that often the bases for establishing procedural requirements become intertwined with the bases establishing the merits of the petition. Thus, frequently it is impossible to consider individual procedural requirements according to an order of precedence, even if randomly ordered, and separately. In the case at issue, it is particularly the existence of the two already mentioned procedural requirements that could be disputed, but not necessarily according to the following order of precedence:

- a. the petitioner's standing (Article 24 of the Constitutional Court Act) and
- b. the legal character of the challenged act (whether a regulation is concerned) and thereby the jurisdiction of the Constitutional Court to review it (Article 21 of the Constitutional Court Act).

The decision that the air space of the Republic of Slovenia was allowed to be used by military aircrafts participating in the NATO air operations above the territory of the Federal Republic of Yugoslavia does not directly interfere with the right of citizens of the Republic of Slovenia to a healthy living environment (Article 72 of the Constitution). This right is guaranteed by statute. In the Environmental Protection Act, the population's health, their general well-being and the quality of their lives as well as the survival, health and condition of living organisms are stated as the measure of all actions and regulations on environmental protection. It is permitted to burden the environment, if the particular modification does not exceed the prescribed standards or frameworks allowing modifications. Article 15 of the Act introduces the principle of protecting these rights, which imposes on everyone who intends to make a modification to the environment the duty to

do everything necessary to safeguard the implementation of the right of others to a healthy living environment. Moreover, Article 15 provides legal protection to ensure the implementation of this right. The challenged Order imposes on the competent Ministries the obligation to take any measure necessary to implement it. In adopting these measures, the Ministries are to respect the environmental protection regulations, i.e. the limitation that the allowed overflights by military aircrafts must not exceed the permitted burden to the environment regarding noise and other modifications.

By means of a verbal note, dated 10 October 1998, NATO requested that the Government of the Republic of Slovenia to allow it uninterrupted access to the air space of the Republic of Slovenia to carry out air operations above the territory of the Federal Republic of Yugoslavia. The note was sent through the Mission of the Republic of Slovenia to the NATO headquarters, i.e., through diplomatic channels. By means of a verbal note also, the Government notified NATO on 11 October 1998 of the contents of the challenged Order. The Government's decision allowing the flights by the NATO military aircrafts over Slovenia does not *stricto sensu* impose any international obligations on the State of Slovenia. In the case at issue no contractual relationship was established between Slovenia and NATO, according to Article 13 of the Vienna Convention on the Law of Treaties. By unilaterally assenting to such interventions in Slovenian air space for an indefinite time, or until the NATO air operations against the Federal Republic of Yugoslavia cease, the Government agreed to tolerate such interferences with its sovereignty during the period for which the permission was granted. In this regard such an assent could be ascribed the character of a legal, not merely political, action. However, such an assent could not result in establishing a unilateral obligation towards NATO under international law, which would practically have the same consequences as those a state assumes when it enters into a treaty. A unilateral revocation on the part of Slovenia of the assent or permission allowing the flights of the NATO military aircrafts to carry out air operations above the Federal Republic of Yugoslavia would not violate an international law obligation, nor result in consequences under international law. But a revocation of the permission granted to the NATO flights over Slovenia could entail consequences in the realm of foreign affairs.

The Constitutional Court has jurisdiction to review the constitutionality and legality of regulations adopted by Slovenian state bodies. It lacks jurisdiction to review the constitutionality of decisions reached by foreign

states or international organisations. Neither does it have jurisdiction to review the consistency of their decisions with treaties. Such review falls under the jurisdiction of international bodies and tribunals. The decision on air-strikes against the Federal Republic of Yugoslavia was made by the NATO alliance or their individual members – foreign countries. Thus, the Constitutional Court lacks jurisdiction to review their decisions.

The challenged Order was applied and had actual effects; it thus had the effects of a regulation. The Constitutional Court established that the challenged Order should have been adopted in the form of a regulation, i.e. in the form of a statute adopted by the National Assembly, from which it follows that the Constitutional Court would have had jurisdiction to review it. However, regardless of the above mentioned characteristics of the challenged Order, the petitioner can not be granted standing to file a petition. The character of the act is not such as to give grounds to the belief that any of the petitioner's rights was violated in the procedure of its adoption. The consequences of the act, i.e. the partial transfer of sovereignty over the State air space, are truly such as might affect the interest of any Slovenian citizen, but such an interest of the individual is not legally protected. On the other hand, such a position could exist if the challenged act creates a situation regulated under Article 92 of the Constitution. However, the petitioner does not assert this situation existed and the Constitutional Court itself did not find any facts to which the mentioned constitutional provision could apply. Accordingly, the Constitutional Court rejected the petition for lack of standing.

Concurring opinion of a Constitutional Court judge.

Cross-references:

In the reasoning of its decision the Constitutional Court refers to its cases no. U-I-29/94, dated 12.05.1994 (DecCC III,48) and no. U-I-155/94, dated 09.11.1994 (DecCC III, 121).

Legal norms referred to:

- Articles 4, 72, 124, 153 of the Constitution;
- Article 3 of the Chicago Convention on the International Civil Air Traffic;
- Articles 2, 4, 9, 22, 23 of the Constitutional Statute for the Implementation of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (UZITUL);
- Article 63 of the Foreign Affairs Act (ZZZ);
- Article 21 of the Government of the Republic of Slovenia Act (ZVRS);

- Articles 51, 52 of the Rules of Procedure of the Government of the Republic of Slovenia;
- Articles 1, 15, 27 of the Environmental Protection Act (ZVO);
- Articles 21, 24, 25 of the Constitutional Court Act (ZUstS).

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-1999-M-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 15.07.1999 / **e)** U-I-54/96 / **f)** / **g)** *Uradni list RS* (Official Digest), VIII, 192 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

Keywords of the alphabetical index:

Insured person, work ability / Retirement, old-age, age limit / Wage, compensation for loss of salary / Gap, legal / Social security, legal gap / Legality, in the activities of public administration bodies, principle.

Headnotes:

In order to respect the age limit set out in Article 39.1 of the Pension and Disability Insurance Act (hereinafter “ZPIZ”), the insured persons with remaining work ability who claim their right to work shorter hours are not treated less favourably than the insured persons who reach the age determined in Article 39.3 and 4 of ZPIZ, since the matter objectively concerns different states of affairs.

The regulation which, given a gap in the law, developed due to the failure to mention the said group of persons in one of the articles of the Act, enables the executant of the Act to decide by

appropriate interpretation on the rights of these persons in accordance with the purpose of the Act. This is not inconsistent with the Constitution.

Limiting compensation for the loss of salary due to shorter work hours of up to 50 % of the highest pension basis, which affects only part of the insured persons, does not entail an unequal treatment of the insured persons in violation of the Constitution, since the legislature has had sound reasons to make such a differentiation. Reducing the rights already enforced does not mean that the regulation is retroactive when the rights are reduced for the period of time after the introduction of the regulation (statute).

Cross-references:

Legal norms referred to:

- Articles 2, 14.2, 50, 120.2, 153.4 of the Constitution (URS);
- Articles 21, 24.2, 25, 26.2 of the Constitutional Court Act (ZUstS).

Languages:

English (translation by the Court).



Identification: SLO-2001-M-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.03.2001 / **e)** U-I-416/98 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 28/01, *Odločbe in sklepi ustavnega sodišča* (Official Digest of RS), X, 55 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Roma, community, special rights / Minority, ethnic, Roma, community / Gap, legal / Constitutional Court, law, gap, unconstitutional / Election, local, Roma community representative / Local self-government, rights of Roma community / Minority, ethnic, protection, positive discrimination / Election, voting right / Minority, ethnic, indigenous.

Headnotes:

The duty of the legislature is not only to determine the special rights of the Roma community, but also to regulate their exercise in a manner which would ensure the Roma community living in Slovenia actually exercise them.

Since the provision of Article 39.5 of the Local Self-Government Act (hereinafter "ZLS") is incomplete (a gap in the law) the Act is inconsistent with the Constitution (Indent 1 of the disposition).

Summary:

Considering that the indigenous character of the Roma community on the territory of Novo Mesto Urban Municipality is established beyond doubt, the Constitutional Court holds that Novo Mesto Urban Municipality could have implemented its statutory obligation under Article 39.5 of ZLS already on the basis of the present regulation and made it possible for the Roma community to elect a representative to the municipal council in the Fall 1998 local elections. For the mentioned reason, the Constitutional Court established that the challenged charter is inconsistent with ZLS, since it does not determine that the Roma community, as an indigenous community settled on the territory of Novo Mesto Urban Municipality, has the right to a representative on the municipal council (Indent 2 of the disposition).

Cross-references:

Legal norms referred to:

- Articles 14.1, 64, 65 of the Constitution (URS);
- Articles 6, 48 of the Constitutional Court Act (ZUstS).

Languages:

English (translation by the Court).

*Identification:* SLO-2001-M-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.05.2001 / **e)** U-I-8/00 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 35/2002, 43/2001, *Odločbe in sklepi ustavnega sodišča* (Official Digest of RS), X, 84 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

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.

Keywords of the alphabetical index:

Constitutional Court, determination of a time limit for legislature to adjust its legislation with the Constitution / Constitutional Court, decision, application / Property, right, land register entry (unencumbered) / Property, protection of claims, lien / Property, land register entry / Injunction / Constitutional Court, review of mutual conformity of statutes / Gap, legal, unconstitutional.

Headnotes:

The Constitutional Court is not empowered to review the mutual consistency of statutes or statutory norms. It has, however, the power to review whether internal contradictions within the legal system violate the principle of a State governed by the rule of law (Article 2 of the Constitution). The case at issue does not concern such a contradiction.

Summary:

The intention of the challenged provision is to allow a land-register entry for cases in which the owners of flats do not hold the appropriate documents in accordance with the Land Register Act (hereinafter "ZZK"). The Constitutional Court has no doubt that such cases exist. If these owners are the first buyers, who bought the parts of the buildings from the investors, then the real estate cannot be encumbered by a lien pursuant to Article 254 of the Execution and Insurance Act, since the condition for such insurance is the submission of an appropriate document. However, the legislature did not determine that the owners of flats must submit the original contract if

they have it. The fact is that even if the statute included such a provision, the question of its effectiveness would be raised. The legislature also did not determine the reasonable application of the individual provisions of Articles 109 to 123 of ZZK, as it did, for instance, in cases determined in Article 135 of ZZK. Thus, in case a new mortgage is instituted, pursuant to the Basic Property Law Relations Act, on the real estate entered into the land register under the conditions of the challenged provision, an uncertainty could arise with respect to the order of precedence for the payment of the claim.

The determination of two regulations of liens on real estate requires the taking effect of a legal system that must be coherent and without contradictions. Only such a system can ensure constitutionality and legality on the basis of a legal hierarchy and operate as an integral whole composed of structures that interlink, depend on each other and do not contradict one another.

Since the land register is an original database on the rights to real estate, it is presumed that an entered legal state is accurate so that no one who relies on this state must suffer detrimental consequences (Article 5 of ZZK). Thus, on the basis of the challenged regulation, a conflict of the rights of equal value may occur concerning the order of precedence of pawnees.

Furthermore, the general security of legal transactions guaranteed by the aforementioned principle of trust in the land register entries of rights is thus endangered.

The provision that makes it possible to enter real estate into the land register without encumbrances established in conformity with the valid legal system is inconsistent with the principle of legal certainty, which is one of the principles of a State governed by the rule of law (Article 2 of the Constitution). In order to rectify an established unconstitutionality, the legislature is required to regulate both the questions of the "land register entry" of a lien on a real estate and the questions of possible "non-entry" in cases in which the lien ceased to exist.

Regarding the fact that the case at issue concerns a gap in the law, which is contrary to the principle of legal certainty, it was also necessary to determine a manner of implementing the decision until the established unconstitutionality was rectified (Indent 3 of the reasoning).

Thus, the Constitutional Court determined that, until the remedying of the established unconstitutionality, the court may allow an entry of the ownership right in

cases determined in Article 7 of the Act on Special Conditions for Entering the Ownership Right to Single Parts of Buildings into the Land Register only if the real estate was not subject to attachment for reason of securing a claim in money with a lien. In a land register proceeding the court must find on its own the data on the (non) existence of the lien on the real estate, by requesting information from the competent execution court.

Cross-references:

Legal norms referred to:

- Articles 2, 33 of the Constitution (URS);
- Articles 40.2, 48 of the Constitutional Court Act (ZUstS).

Languages:

English (translation by the Court).



Identification: SLO-2002-3-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.11.2002 / **e)** U-I-245/02 / **f)** / **g)** *Uradni list RS* (Official Gazette), 105/02 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
- 3.13 **General Principles** – Legality.
- 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
- 4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.
- 4.9.6 **Institutions** – Elections and instruments of direct democracy – Representation of minorities.
- 5.3.41 **Fundamental Rights** – Civil and political rights – Electoral rights.
- 5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Local self-government body, election / Roma, representation / Roma, community, autochthonous.

Headnotes:

The Charters of municipalities where an autochthonous Roma community lives have to include provisions on the composition of a municipal council enabling the Roma community to exercise the right to elect its representative to a municipal council.

Summary:

The Government of the Republic of Slovenia challenged the charters of the municipalities named above for allegedly being inconsistent with Article 65 of the Constitution and Articles 39 and 101.a of the Local Self-Government Act (hereinafter "the ZLS"). They did not ensure that the Roma community settled in those municipalities had the right to a representative in the municipal councils. The Government argued that, based on Article 65 of the Constitution, the legislature laid down in Article 39 of the ZLS a special right for the Roma community: the right to have a representative in the municipal councils of those municipalities where an autochthonous Roma community lives. Article 101.a of the ZLS named the municipalities in which an autochthonous Roma community lives and which were, therefore, obliged to ensure that the Roma community elected its representative to the municipal council in the 2002 local elections. For that right to be exercised, the municipalities named in Article 101.a had to adjust their charters accordingly. In particular, they should have redetermined the number of the members of the municipal council, and, while doing so, should have taken into account that at least one member of the council had to be a Roma community representative. Since the challenged charters did not contain provisions for the election of a Roma community representative, they were allegedly inconsistent with Articles 39 and 101.a of the ZLS, thereby preventing the Roma community from exercising its special right.

A request was sent for reply to all the municipalities concerned. Four municipalities replied to that request (Krsko, Grosuplje, Beltinci and Semic) within the time limit. The Municipality of Krsko stated that an amendment to the Charter to comply with Articles 39 and 101.a of the ZLS had been proposed to the Municipal Council but had not been adopted (for lack of quorum). The Municipalities of Grosuplje and Semic asserted that they were certain that the Roma living in their territory did not fulfil the minimum conditions of an autochthonous community or the

criterion of historical or traditional settlement, that their number was low and that they were not organised. The Municipality of Beltinci stated that by the implementation of the ZLS, the Roma would be in a privileged position compared to other inhabitants, and the Municipality of Semic asserted that it could not accept the fact that the Roma community had a double right to vote.

The Constitutional Court noted that Article 39.4 of the ZLS laid down that in territories where an autochthonous settled Roma community lived, the Roma had the right to have at least one representative in the municipal council. The Court also noted that Article 101.a of the ZLS named the municipalities which were obliged to ensure the right of the Roma community settled in the municipality to have one representative in the municipal council for the regular local elections in 2002. The Court found that a clear obligation followed from those statutory provisions for those municipalities to ensure that the Roma community could exercise that right. The content of Article 101.a of the ZLS (adopted as an amendment to the ZLS, Official Gazette RS, no. 51/02) is a continuation or supplement of Article 39 of the ZLS. Article 39 of the ZLS provided for, on the basis of Article 65 of the Constitution, the special right of the Roma community; Article 101.a of the ZLS determined the municipalities which were obliged to ensure this right.

Moreover, the Constitutional Court held that the municipalities listed in Article 101.a of the ZLS (*inter alia*, the municipalities whose charters are reviewed in this case) were obliged to include in their charters provisions on the composition of a municipal council that would enable the Roma community to exercise its right to elect a Roma community representative to a municipal council. They did not do so. Therefore, the challenged charters were inconsistent with the ZLS; there was an unlawful gap in the law. The Court reasoned that Article 153.3 of the Constitution laid down that regulations and other general actions undertaken must be in compliance with the Constitution and laws (the compliance with legislation, the principle of legality). That also applied to the general actions undertaken by municipalities (see Constitutional Court Decision no. U-I-348/96, dated 27 February 1997, Official Gazette RS, no. 17/97 and DecCC VI, 25).

Finally, the Court held that the challenged charters were inconsistent with the statute as they did not regulate the issues that they should have regulated (Article 48.1 of the Constitutional Court Act – hereinafter "the ZUstS"). Thus the Constitutional Court could not but make a finding of unconstitutionality and order the municipal councils to remedy that

unconstitutionality within a set time limit. As the ZLS required the municipalities named in Article 101.a to ensure that the Roma living in their territory could elect their representative to municipal councils in the 2002 local elections, the Constitutional Court, on the basis of Article 40.2 of the ZUstS, ordered the municipal councils to call elections for a Roma community representative within a set time limit. The municipal councils are required to set out in their charters the number of members of municipal councils that are to be members of Roma communities. The elections are to be carried out according to the rules that apply to early elections. In this way, the Roma will be able to exercise their right during the 2002-2006 term of office in those municipalities which have not yet respected the clear provisions of the ZLS. If in any of the municipalities mentioned above, a Roma community representative was elected during the 2002 regular elections on the basis of Article 101.a of the ZLS, and that municipality has not yet amended its charter, it is not obliged to call new elections unless the charter provides for a greater number of Roma community representatives than were actually elected. Moreover, the Constitutional Court added that the obligation to respect the ZLS (more exactly, the obligation to amend the charters and carry out the election of a Roma community representative) follows from Article 153.3 of the Constitution; therefore, the Constitutional Court need not intervene to create such an obligation. For these reasons in particular, the Constitutional Court found that the municipalities named above did not respect the Constitution and the ZLS.

The Constitutional Court had to set a time limit in which the illegality had to be remedied and a time limit in which the election of Roma community representatives had to be called.

The Constitutional Court ordered those municipalities to remedy the illegality within forty-five days of the first session of the newly elected municipal councils. The Court also decided that if municipal councils did not ensure that representatives were elected as determined by the charters in the regular elections of 2002, then the municipal councils of the municipalities concerned must call an election of members of the municipal councils and the representatives of the Roma community according to the provisions of the Local Self-Government Act relating to early elections within thirty days after the promulgation of the charters in the Official Gazette of the Republic of Slovenia.

Cross-references:

- Decision no. U-I-348/96 of 27.02.1997 (Official Gazette RS, no. 17/97);
- Decision no. U-I-315/02 of 03.10.2002 (Official Gazette RS, no. 87/02).

Legal norms referred to:

- Articles 2, 3, 15, 138, 140 and 153 of the Constitution;
- Articles 39 and 101.a of the Local Self-Government Act;
- Articles 40.2 and 48 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2003-M-001

a) Slovenia / b) Constitutional Court / c) / d) 03.04.2003 / e) U-I-246/02 / f) / g) *Uradni list RS* (Official Gazette RS), 36/2003, *Odločbe in sklepi ustavnega sodišča* (Official Digest of RS), XII, 24 / h) *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect (*ex tunc*).
 3.9 **General Principles** – Rule of law.
 3.10 **General Principles** – Certainty of the law.
 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Residence, permanent, recognised retrospectively /
 Residence, permanent, need for criteria.

Headnotes:

The principles of a State governed by the rule of law require special regulation of the position of citizens of other Republics for whom the measure of the forcible removal of a foreigner from the State was pronounced due to their unregulated legal position.

Summary:

The Constitutional Court established that the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia (Official Gazette RS, nos. 61/99, 54/2000 and 64/01 –

hereinafter "ZUSDDD") did not enable citizens of other successor States to the former SFRY (hereinafter "citizens of other Republics") to also acquire a permit for permanent residence retroactively, i.e. from 26 February 1992, when they lost their permanent residence in the Republic of Slovenia through the revocation of their permanent resident status and their transfer to the register of foreigners. As the principles of a State governed by the rule of law, in particular the principle of legal certainty, require that the position of citizens of other Republics must not remain legally unregulated, the Constitutional Court, in Paragraph 1 of the operative provisions, decided that ZUSDDD is inconsistent with the Constitution, as it does not recognise to citizens of other Republics, who were removed on 26 February 1992 from the register of permanent residents, permanent residence status from the mentioned date.

The Constitutional Court established that, due to the special legal position of citizens of other Republics, the legislature should not define the established unconstitutional gap in the law in a different manner than to determine that the mentioned persons who have already acquired a permit for permanent residence are to be recognised permanent residence retroactively. Therefore, the Constitutional Court decided to determine the manner of the implementation of its decision under Paragraph 1 of the operative provisions such that by the permits for permanent residence that have already been issued to citizens of other Republics, permanent residence status be established retroactively, i.e. from 26 February 1992, being the date of their removal from the register of permanent residents. Furthermore, it imposed on the Ministry of the Interior the obligation to issue, as an official duty, supplementary decisions on the establishment of permanent residence from 26 February 1992 onwards to all those citizens of other Republics who had been removed from the register of residents on 26 February 1992 and who have already acquired permits for permanent residence (Paragraph 8 of the operative provisions).

The Constitutional Court decided that the principles of a State governed by the rule of law require special regulation of the position of citizens of other Republics for whom the measure of the forcible removal of a foreigner from the State was pronounced due to their unregulated legal position. Therefore, it established, in Paragraph 2 of the operative provisions, that there is an inconsistency between the ZUSDDD and the Constitution also for failing to regulate the acquisition of a permit for permanent residence by citizens of other Republics who were removed from the register of permanent residents and for whom the measure of the forcible removal of a foreigner from the State was

pronounced due to their unregulated legal position under Article 28 of the Foreigners Act (Official Gazette RS, no. 1/91-I and 44/97).

From the view of the principles of a State governed by the rule of law (Article 2 of the Constitution) and the principle of administrative bodies being bound by the framework of the Constitution and statutes (Article 120.2 of the Constitution), and in view of the special position of citizens of other Republics, the Act should define what actual presence means according to ZUSDDD. Due to the loss of permanent residence in the Republic of Slovenia and their legal position being unregulated for a longer time, the citizens of other Republics faced a variety of circumstances, thus it is necessary to prescribe criteria (a framework) for establishing the fulfilment of the condition of actual presence in order to acquire a permit for permanent residence. Therefore, the Constitutional Court decided that Article 1 of ZUSDDD is in this part inconsistent with the Constitution (Paragraph 3 of the operative provisions).

As the legislature did not have a justified reason for determining a short (preclusive) time period for filing an application for issuing a permit for permanent residence, the Constitutional Court annulled the challenged Article 2.1 and 2.2, in the part in which a time limit of three months was determined (Paragraph 4 of the operative provisions).

Cross-references:

Legal norms referred to:

- Articles 2, 22 of the Constitution (URS);
- Articles 25, 26.2, 43, 40.2, 48 of the Constitutional Court Act (ZUstS).

Languages:

English (translation by the Court).



Identification: SLO-2004-M-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.02.2004 / **e)** U-I-297/02 / **f)** / **g)** / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

3.13 **General Principles** – Legality.

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

Keywords of the alphabetical index:

Gap, legal, filling through interpretation / Statute, application / *Exceptio illegalis*.

Headnotes:

The Constitutional Court cannot determine whether courts have applied the law correctly only due to the fact that administrative authorities have already done so. Judges are allowed not to apply executive regulations if they deem them to be inconsistent with the Constitution or laws. The Constitution authorises and imposes the obligation on judges to exclude executive regulations themselves (i.e. *exceptio illegalis*) when deciding on rights and obligations. However, if a judge, when deciding on some matter, deems that regarding the manner of determining which share of the value of a nationalised property amounts to the valorised value of paid damages, there exists a gap in the law which cannot be filled by methods of interpretation, he or she must stay the proceedings and initiate proceedings before the Constitutional Court (Article 156 of the Constitution). Gaps in the law are unconstitutional if they cannot be filled by methods of interpretation.

The application of statutory provisions in individual cases when courts decide alone and outside the scope of constitutional complaint proceedings, cannot be the subject of a review of the constitutionality of a particular regulation. Affected persons may claim that there has been a possible erroneous application of the law in individual proceedings, in legal remedies, and, in cases involving violations of human rights, also in constitutional complaints.

Cross-references:

Legal norms referred to:

- Article 26.2 of the Constitutional Court Act (ZUstS).

Languages:

English (translation by the Court).

**Identification:** SLO-2005-M-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 17.02.2005 / **e)** U-I-217/02 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 24/05 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

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

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

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

5.3.41 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Referendum, initiative, procedure / Election, vote, right, citizen residing abroad / Gap, legal.

Headnotes:

The Constitutional Court held that the unconstitutionality of certain provisions of Section 2 of Chapter II of the Referendum and People's Initiative Act (RPIA), in the part relating to preliminary procedures, in particular, Articles 13.3, 13.5 and 18, led to such an inconsistency of the entire regulation of

preliminary procedures that the striking out of only certain provisions or the mere declaration of the unconstitutionality of gaps in the law was not possible. The striking out of the whole section regulating preliminary referendums was necessary.

The Constitutional Court held that Article 13.3 of the RPIA did not regulate with sufficient precision and clarity the powers of the President of the National Assembly, the legal position of an initiator, and the judicial protection against decisions of the President of the National Assembly. Filling the gap in the law by *mutatis mutandis* application of the Rules of Procedure of the National Assembly did not suffice on its own. The powers of the President of the National Assembly regarding the filing of an initiative and judicial protection against his or her decisions would still be insufficiently regulated, thereby necessitating the adoption of a special regulation.

The Constitutional Court also held the RPIA to be inconsistent with Article 38 of the Constitution (protection of personal data), as the personal data of voters who support an initiative to lodge a request for calling a referendum should not be part of documents used in the subsequent referendum procedure or the protection of that personal data should be ensured in some other manner.

The Constitutional Court did not find a constitutionally admissible, i.e. legitimate, aim in the statutory regulation setting out that voters who cannot personally come to an administrative division due to illness, medical treatment or disability cannot support a request for calling a referendum. The manner in which voters support such a request should be more precisely determined and should not depend on instructions and directions given by the competent authority or the minister.

The Constitutional Court found the impugned regulation to be inconsistent with Article 44 of the Constitution (participation in the management of public affairs) in conjunction with Article 90.3 of the Constitution (legislative referendum), since there was no substantiated reason for limiting the constitutional right to support a request for calling a referendum of those voters who do not permanently reside in Slovenia, and are entered in the electoral register of citizens who do not permanently reside in Slovenia.

Furthermore, the Constitutional Court did not find a sound reason in support of the regulation laying down that Slovenian citizens, temporarily residing abroad or who are abroad during the time signatures are collected to support a request for calling a referendum, and who for that reason cannot give their personal

support before the authority in charge of the electoral register, cannot exercise their right to a referendum in a preliminary procedure. The Constitutional Court therefore held that the impugned regulation was inconsistent with Article 44 of the Constitution, in conjunction with Article 90.3 of the Constitution.

In accordance with the requirement that the statutory regulation of a referendum must ensure an effective exercise of the right to a referendum, the Constitutional Court held that the regulation in Article 18 of the RPIA was incomplete and thus inconsistent with the principle of determinacy of legal norms, as one of the principles of a state governed by the rule of law laid down by Article 2 of the Constitution. The Act should contain at least the crucial rules concerning the manner of submitting referendum questions, in particular, in cases where a referendum question proposes how a certain issue should be regulated.

The RPIA should contain provisions preventing a referendum from being called where repeated initiatives make it possible to establish the existence of unconstitutional intentions on the part of the persons submitting those initiatives.

Summary:

The Constitutional Court considered a petition for the review of the constitutionality of Article 13.3 and 13.5 of the Referendum and People's Initiative Act (hereinafter "RPIA"). These two provisions determined the form and contents of an initiative for calling a referendum, the manner in which initiators must inform the President of the National Assembly of such an initiative, and the form of the support (signatures) that may be given by people to such an initiative.

The petitioners argued that the preliminary phase of the procedure for calling a referendum was vague. They also pointed out the inadequate regulation of powers vested in the President of the National Assembly regarding an initiative once it has been filed, as well as the possible abuse of personal data contained in the list of voters whose signatures appear in support of an initiative to file a request for calling a referendum. The petitioners further raised the issue of whether Slovenian citizens who permanently reside abroad should also be granted the right to participate in the procedure of the collection of signatures to support a request calling a referendum, and not only the right to vote at the referendum.

The Constitutional Court did not limit itself to only reviewing the impugned provisions, but also addressed (by applying the principle of linking issues, which it has authority to do under Article 30 of the Constitutional Court Act) the issue of the constitutionality of other RPIA provisions. It found that other RPIA provisions were mutually connected with the impugned provisions in such a manner that the mere finding of the unconstitutionality of the impugned provisions could entail the inconsistency of the Act as a whole, which could entail its inconsistency with Article 2 of the Constitution (the principle of a state governed by the rule of law).

The Constitutional Court decided to strike out the entire Section 2 of Chapter II of the RPIA, in the part relating to a preliminary legislative referendum. However, it postponed the entering into effect of its decision for one year, thus giving the National Assembly time to amend the unconstitutional part of RPIA. After the expiry of that time limit, the unconstitutional part of RPIA would be automatically "erased" from the legal system of Slovenia.

Among the reasons for its decision, the Constitutional Court held that the unconstitutionality of certain provisions of Section 2 of Chapter II of the RPIA, in the part relating to preliminary procedures, in particular Articles 13.3, 13.5 and 18, led to the inconsistency of the entire regulation of preliminary procedures. More specifically, the Constitutional Court established that Article 13.3 of the RPIA did not regulate with sufficient precision and clarity the powers of the President of the National Assembly, the legal position of an initiator, and judicial protection against decisions of the President of the National Assembly in such matters.

Cross-references:

Legal norms referred to:

- Articles 2, 38, 44 and 90 of the Constitution (URS);
- Article 43 of the Constitutional Court Act (CCA).

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2005-3-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.10.2005 / **e)** CCT 55/04 / **f)** Phillips and Others v. National Director of Public Prosecutions / **g)** <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT20-02> / **h)** 2006 (1) *South African Law Reports* 505 (CC); 2006 (2) *Butterworths Constitutional Law Reports* 274 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.1.1.1 **Constitutional Justice** – Constitutional jurisdiction – Statute and organisation – Sources.

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

4.7.7 **Institutions** – Judicial bodies – Supreme Court.

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

Keywords of the alphabetical index:

Appeal, decision of Supreme Court / Appeal, leave to appeal / Asset, freezing, order, limitation to vary / Constitution, interpretation, jurisdiction / Crime prevention, permissible means.

Headnotes:

Any issue as to the nature and ambit of the powers of the superior courts necessarily raises a constitutional issue.

A restraint order in terms of Section 26 of the Prevention of Organised Crime Act 121 of 1998 can only be varied or rescinded on the grounds specified in Section 26.10 of that Act.

Where a matter is neither expressly pleaded nor argued as a constitutional matter in the lower courts, it is not generally in the interests of justice for an

application for leave to appeal to be granted, although there may be exceptional circumstances which would warrant this.

It appears that the inherent power of the courts to protect and regulate their own process in the interests of justice arises only in an extraordinary procedural situation where there is a legislative lacuna in the process of the courts.

Summary:

I. The applicant had been charged with various criminal activities relating to the operation of a brothel. The respondent had applied for a restraint order against the applicant's assets pending the outcome of criminal proceedings. The applicant appealed to the Constitutional Court against the decision of the lower court, claiming that a restraint order made in terms of Section 26 of the Prevention of Organised Crime Act 121 of 1998 can only be varied on the grounds provided for in that section. The applicant argued that the Court has an inherent power in terms of Section 173 of the Constitution to vary an order made in terms of Section 26 on grounds other than those in Section 26.10.

II. Skweyiya J, writing for the Court, stated that an issue relating to the nature and ambit of the powers of a superior court necessarily raises a constitutional issue. He held further that the grounds in Section 26.10 constitutes a closed list and that a high court is not empowered to rescind or vary a restraint order on grounds other than those specified in the Act.

The Court also found it impermissible that there was no previous challenge to the constitutionality of Section 26.10. The case was neither expressly pleaded nor argued as a constitutional matter before the Supreme Court of Appeal. Thus, the respondent had no opportunity to deal with the allegations now raised by the applicant. Accuracy in pleadings where parties place reliance on the Constitution in asserting their rights is of utmost importance. According to Skweyiya J this does not mean that circumstances can never exist where the interests of justice allows for a constitutional matter to be raised for the first time on appeal before this Court. However, such circumstances would be rare and exceptional.

The inherent power of the courts to protect and regulate their own process in the interests of justice arises only to meet an extraordinary procedural situation where there is a legislative lacuna in the process of the courts. An Act of Parliament cannot simply be ignored and reliance placed on a provision of the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law.

The application for leave to appeal was accordingly dismissed.

Cross-references:

- *Prince v. President, Cape Law Society, and Others*, 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC);
- *Bannatyne v. Bannatyne* (Commission for Gender Equality, as *Amicus Curiae*), 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC);
- *Shaik v. Minister of Justice and Constitutional Development and Others*, 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC);
- *S v. Pennington and Another*, 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC);
- *Parbhoo and Others v. Getz NO and Another*, 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC).

Languages:

English.



Identification: RSA-2005-3-013

a) South Africa / b) Constitutional Court / c) / d) 29.11.2005 / e) CCT 73/03 / f) Zondi v. Member of the Executive Council for Traditional and Local Government Affairs and Others / g) <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT73-03> / h) 2006 (3) *Butterworths Constitutional Law Reports* 423 (CC); CODICES (English).

Keywords of the systematic thesaurus:

- 1.4.6.1 **Constitutional Justice** – Procedure – Grounds – Time-limits.
- 1.5.4.5 **Constitutional Justice** – Decisions – Types – Suspension.
- 3.18 **General Principles** – General interest.
- 3.23 **General Principles** – Equity.
- 4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.

Keywords of the alphabetical index:

Order, final, Constitutional Court's power to vary / Constitutional practice, finality in litigation / Legislature, amendment, failure / Constitutional Court, decision, binding force / Constitutional Court, decision, disregard / Time limit, suspension, extension / Time limit extension / Suspension of enforcement, conditions for grant.

Headnotes:

Where a Court finds legislation to be unconstitutional and strikes it down as invalid, but suspends the order of invalidity for a certain period in order to allow the relevant legislative bodies to remedy the defects, that Court retains the power, under the common law and the Constitution, to extend the period of suspension on application. The Court will only do so where it is just and equitable to do so.

Summary:

On 15 October 2004 in the matter of *Zondi v. MEC for Traditional and Local Government Affairs and Others*, the Constitutional Court declared invalid certain provisions of the Pound Ordinance, KwaZulu-Natal. The Ordinance created a mechanism for dealing with trespassing and straying animals, but certain sections of the Ordinance were struck down as unconstitutional as they infringed rights to equality and of access to court. In that judgment, the Court suspended the order of invalidity for a period of twelve months in order to allow the provincial legislature of KwaZulu-Natal to correct the constitutional defects in the Pound Ordinance. The period of invalidity was to expire on 15 October 2005. On 23 September 2005 the MEC, the respondent to the original case, applied to the Court for an extension of the period of suspension. The process of remedying the defects in the legislation had been delayed and would not be ready to take effect before the end of the period of suspension.

The Court had to consider whether it has the power to extend the period of suspension. Writing for a unanimous Court, Justice Ngcobo held that the Court has the power to do so under the common law and the Constitution, as well as in terms of the original order. A period of suspension may be extended in these circumstances whenever it is just and equitable to do so.

The Court held further that a combination of factors had produced an unforeseeable delay. These factors included the appointment of a new MEC for Traditional and Local Government Affairs, and

restructuring of the Department of Traditional and Local Government Affairs. In addition, the draft Bill that had been in existence when the original court order was made, and which the Court had taken into account when suspending the order of invalidity for a period of twelve months, had to be rejected and re-drafted. An important consideration in the Court's reasoning was the fact that the public would suffer considerable prejudice if the period of suspension was not extended. There would be no mechanism for dealing effectively with trespassing and straying animals.

In these circumstances, and having held that the Court does have the power to extend the period of suspension ordered in the original order, the Court found that it was just and equitable for the period of suspension to be extended for a further twelve months.

Cross-references:

- *Zondi v. MEC for Traditional and Local Government Affairs and Others*, 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC);
- *Zondi v. Member of the Executive Council for Traditional and Local Government Affairs and Others*, 2004 (5) BCLR 547 (N);
- *Minister of Justice v. Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC), *Bulletin* 1997/2 [RSA-1997-2-006];
- *S v. Steyn*, 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC), *Bulletin* 2000/3 [RSA-2000-3-018];
- *Firestone South Africa (Pty) Ltd v. Genticuro A.G.*, 1977 (4) SA 298 (A).

Languages:

English.



Spain

Constitutional Court



Important decisions

Identification: ESP-1994-1-002

a) Spain / **b)** Constitutional Court / **c)** / **d)** 31.01.1994 / **e)** 31/1994 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 52, 02.03.1994 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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, cable television / Public utility / Concession, administrative / Omission, legislative.

Summary:

The Court ordered the appellant company to cease broadcasting cable television programmes locally, on the grounds that it did not have the prior administrative authorisation required, the Law considering television as a public utility belonging to the State.

However, at the time, the legislator had still not drawn up the rules governing the indirect management of cable television. Such an omission in the legal rules results in a *de facto* prohibition of this activity and therefore violates the freedom of communication guaranteed by Articles 201.a and 201.d of the Constitution.

Languages:

Spanish.

Identification: ESP-1998-1-003

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 17.02.1998 / **e)** 37/1998 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 65, 17.03.1998, 31-39 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.

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

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

5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.

5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Strike, filming a picket line / Strike, identification of the participants.

Headnotes:

The right to strike recognised in Article 28.2 of the Constitution includes the right to disseminate information on the strike. In essence, therefore, it also comprises the right to publicise the strike, provided that it is publicised in a peaceful way, without any coercion, intimidation, threats or acts of violence of any kind, and respects the right of workers to choose not to exercise their right to strike.

Any measure which restricts a fundamental right has to be assessed from the angle of proportionality. For this purpose, it is first necessary to determine whether the measure is capable of achieving the desired result (assessment as to appropriateness); second, it has to be established whether the measure is necessary, i.e. whether there is any more moderate alternative measure which could achieve the aim pursued just as effectively (assessment as to necessity); last, it has to be determined whether the measure is a balanced one, i.e. whether it is more beneficial to the general interest than it is prejudicial to other interests or values involved (assessment as to proportionality in the strict sense).

Summary:

This judgment concerns a trade union's application for constitutional protection in connection with a case of violation of the right to trade union freedom (Article 28.1 of the Constitution) and of the right to strike (Article 28.2 of the Constitution), following an intervention by the police of an Autonomous Community during which a picket line was photographed and filmed with a video camera.

With reference to the facts declared proven in the judicial decisions handed down in the course of the preliminary judicial proceedings, the Constitutional Court observed that the members of the picket line in question performed their task without causing any disruption to public order and that their picketing proceeded quite normally, without any act that could in any way be construed as an offence. Moreover, it had been proved, under the terms of the judicial decisions referred to above, that the police of the Autonomous Community concerned, despite requests from several members of the picket line, had not agreed to stop filming and taking photos and had refused to identify the strikers.

The Constitutional Court pointed out first of all that the right to strike included the right to call for solidarity from third parties. With regard to the filming of the picket line by the police, the Court confined its analysis to three key aspects of the question: whether this act restricted or limited, if only superficially, the exercise of the right to strike; whether there was any constitutionally important right, or legal interest justifying such a restriction; and last, whether the restrictive measure was justified or proportionate in this specific case, regard being had, chiefly, to whether or not equally effective alternative measures existed and to the proportionality of the sacrifice of the fundamental right in question.

The Constitutional Court stated first that in filming the picket line, the police had sought to discourage or obstruct the free exercise of the right to strike. It could therefore be argued that the police had impaired the effectiveness of this right to the extent that it was impossible to overlook either the possible dissuasive effects on those participating peacefully in a picket line of being filmed continuously without any explanation and without knowing how the film would be used, or the effects which such a measure might have on the people at whom the information disseminated by the picket line was aimed.

However, the Constitutional Court could not rule out the possibility that, under some circumstances and subject to observance of the required guarantees, monitoring measures such as those challenged in this

application could be used to prevent disruptions of public order and to protect the free exercise of rights and freedoms. In this specific case, despite the possible existence of a constitutionally legitimate interest, namely the protection of citizens' rights and freedoms and the maintenance of public order – an interest which might therefore justify the adoption of a preventive monitoring measure – the Constitutional Court considered, having regard to the circumstances of this case, that the police measure had been disproportionate. In this connection, it pointed out that the activity of disseminating information and publicising the strike had been conducted in a positive and lawful manner at all times, without any act that could be construed as an offence. Furthermore, it emphasised that the police officers had refused to explain to the strikers the reasons for such a measure, even though the members of the picket line had specifically requested them to do so. In addition, the police had not agreed, as a possible alternative measure, to personally identify the members of the picket line.

Finally, it must also be pointed out that at the time of the facts there was a gap in the law with regard to the circumstances of such filming and the procedures to be observed, particularly as regards the keeping of recordings made in such circumstances, their availability for inspection by the courts, rights of access to them, and their destruction.

Languages:

Spanish.



Switzerland

Federal Court



Important decisions

Identification: SUI-1992-M-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 14.04.1992 / **e)** 1P.832/1991 / **f)** National Radioactive Waste Storage Co-operative (NAGRA) v. Canton and Constitutional Court of Nidwald / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 118 la 124 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.

1.3.2.2 **Constitutional Justice** – Jurisdiction – Type of review – Abstract / concrete review.

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

Keywords of the alphabetical index:

Constitution, cantonal, amendment.

Headnotes:

Article 6 (obligation of the cantons to have their constitutions guaranteed), Article 85.7 (competence of the Federal Assembly) and Article 113 of the Federal Constitution (obligation for the Federal Court to enforce the federal laws); admissibility of a public law appeal; examination of cantonal constitutional provisions?

Amendments to cantonal constitutions cannot be challenged by a public law appeal involving abstract review of provisions. They are subject exclusively to the guarantee procedure by the Federal Assembly (recital 3).

Languages:

German.

Identification: SUI-1996-C-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 11.12.1996 / **e)** 2A.288/1995 / **f)** C. v. Tax Authority and Tax Appeals Board of the Canton of Basel-Land / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 123 II 9 / **h)** *Archives de droit fiscal suisse* 66 563; *Revue de droit administratif et de droit fiscal* 1997 2 457; *Revue fiscale* 52 1997 190; *Der Steuerentscheid* 1997 A 21.11 41.

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.

2.2.2.2 **Sources** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.

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

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

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

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

Keywords of the alphabetical index:

Federal law, constitutionality / Tax, direct, collection.

Headnotes:

Article 4 of the Federal Constitution and Article 23 of the decree on the collection of direct federal taxes (AIFD); individual income.

Under Article 23 AIFD, rent on a flat cannot be deducted from net income. Constitutionality of this provision.

Summary:

Under the AIFD (as under cantonal tax law) income tax is payable in respect of owner occupation of a house or flat. Treating the use value of a dwelling as income of the owner-occupier offsets the financial advantage to the owner-occupier of being able to deduct, for tax purposes, mortgage interest and

upkeep expenses on the property. In contrast, a tenant cannot, for tax purposes, deduct rent from income.

The appellant contended that this system was contrary to the Constitution because it led to unequal treatment of tenants and owner-occupiers in that for tax purposes the tenant was not allowed to deduct the rent he/she paid whereas the owner-occupier of a house or flat was liable for tax only on the difference between the rental value on the one hand and the costs resulting from mortgage interest and upkeep and management of the property on the other. In his view this was unequal treatment contrary to Article 4 of the Federal Constitution.

The Federal Court found that a complaint alleging breach of a constitutional right was in principle admissible in an administrative-law appeal. However, Article 114bis.3 of the Federal Constitution had to be complied with.

Under Article 114bis.3 the Federal Court could not refuse to apply a federal law on the ground that it was inconsistent with the Constitution. However, interpretation of that law by generally recognised methods, such as interpretation in a manner consistent with the Constitution, was not disallowed – Article 114bis.3 required that the legislation be applied but did not prohibit scrutinising it. Interpretation in a manner consistent with the Constitution was nevertheless constrained by the wording and actual meaning of the piece of legislation, even if the latter was plainly unconstitutional.

The AIFD formed part of the legislation binding on the Federal Court under Article 114bis.3. Under Article 23 AIFD upkeep expenses of the taxpayer and family in respect of their flat could not be deducted from income for tax purposes, and nor could the rent which the taxpayer paid on the flat. The letter and meaning of that provision were clear. Under Article 114bis.3 deductibility of rent for tax purposes as requested by the appellant was impossible. On that ground alone, the appeal must be dismissed.

Nor could taxation of rental value, as criticised by the appellant, be considered unconstitutional. The principle of equal treatment laid down in Article 4 of the Federal Constitution required that similar situations be treated similarly according to the degree of similarity and that different situations be treated differently according to the degree of dissimilarity.

The principle of equal treatment was breached if two similar states of affairs were treated differently for no objective reason. First and foremost was the question of equal treatment, in terms of tax justice, of owner-

occupier and tenant. Under the Swiss system, the owner-occupier was allowed to deduct, for tax purposes, a large proportion of his/her expenses in respect of the house or flat (mortgage interest and upkeep and management expenses). A tenant, in contrast, was in no circumstances allowed to make such deductions in respect of housing expenses even though he/she did actually have the expense of rent on accommodation. Income and deductions being equal, a tenant would be taxed on a larger amount of income than the owner-occupier of a flat or house. This was incompatible with equal treatment of taxpayers and must be corrected by taxing that part of the owner-occupier's income which was equal to the rental value, as assessed according to local rent levels. Taxing the owner-occupier on the rental value of the house or flat was intended to repair the imbalance, as required by the Constitution.

From the standpoint of Article 4 of the Federal Constitution, other arrangements would be consistent with equal treatment of tenants and owner-occupiers. The Federal Court had never ruled them out. What it had said was that it was contrary to the Constitution simply not to tax rental value without any offsetting measure. Which arrangement was chosen depended, among other things, on political and administrative considerations.

Languages:

German.



Identification: SUI-1997-2-005

a) Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 16.04.1997 / **e)** 1P.354/1996 / **f)** Rolf Himmelberger v. the Council of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 123 I 112 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.2.2 **Constitutional Justice** – Jurisdiction – Type of review – Abstract / concrete review.

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

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

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

3.13 **General Principles** – Legality.

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

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

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

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

Keywords of the alphabetical index:

Transplantation, organ, consent presumed / Presumed consent, need to inform public / Human body / Organ, shortage, trafficking / Death, determination.

Headnotes:

Review *in abstracto* of Genevan law on the removal and transplantation of organs and tissues; personal freedom, Article 4 of the Federal Constitution and Article 2 of the transitional provisions of the Federal Constitution.

Locus standi (recital 1b).

With no federal regulation in this domain, the law does not violate Article 2 of the transitional provisions of the Federal Constitution (exceptional force of federal law; recital 3).

Extent of personal freedom in the domain of organ transplantation; relevance of international law (recital 4).

The law, which prescribes presumption of consent where organ transplantation is concerned and gives the patient or next of kin the right to object, is a clear enough legal basis; reference to the directives of the Swiss Academy of Medical Science in order to determine the moment of death is admissible (recitals 6 and 7).

The regulations are based on the existence of a sufficient public interest (recital 8); they respect the proportionality principle insofar as the policy of informing the public has been implemented and the duty to inform the next of kin is respected (recital 9).

The law does not infringe the principle of equal treatment (recital 10).

Summary:

In 1996, the Council of the Canton of Geneva adopted the law on removal and transplantation of organs and tissues. This law provides in particular that removal of organs with a view to transplantation and transplantation of organs from human beings or human corpses shall take place only in authorised medical establishments. Any person may, in his or her lifetime, object to the removal of organs or tissues from his or her body after death. The next of kin of the deceased may also object to their removal within a short period of time after the death. Hence the system of explicit consent has been replaced with that of presumed consent to organ or tissue removal.

In a public-law appeal, Rolf Himmelberger asked the Federal Court firstly to set aside the cantonal law or, additionally, to set aside a number of its provisions. He relied in particular on the fact that the principle of presumed consent violated personal freedom. The Federal Court dismissed the public-law appeal in pursuance of the recitals.

As a resident of the Canton of Geneva, the appellant may be affected by the contested provisions; he was therefore in a position to file a public-law appeal to ask for a review *in abstracto* of the cantonal law. The Federal Court considered whether the contested rule could be interpreted in such a way that it would appear to be in keeping with the Constitution.

In particular, personal freedom, an unwritten constitutional right, also guaranteed by international law, confers upon the individual the right to protection from bodily injury. This guarantee is not limited to the individual's lifetime, but extends beyond death. Hence every person has the right to decide what happens to his or her remains after death; if the deceased has not indicated his or her wishes, the next of kin can decide, within certain limits, what should be done with the body.

Personal freedom can be limited by State controls insofar as such controls have a legal basis, serve the public interest and respect the proportionality principle. As far as the legal basis is concerned, the claim that the rule is imprecise is ill-founded: the person concerned can, during his or her lifetime, object either formally or informally to the removal of an organ or tissue and hence overturn the presumption of consent laid down by the law; if the deceased has not indicated his or her wishes, the next of kin can object to such an operation. The law's reference to the directives of the Swiss Academy of Medical Science, particularly in connection with diagnosis of death, is admissible in this case. The contested law serves the public interest: it

encourages organ donation and prevents any abuse which might result from organ shortages and trafficking. As far as proportionality is concerned, the Federal Court took into account the opportunity of the deceased, in his or her lifetime, to object to the removal of an organ or tissue, and the interests of people waiting for a transplant. It also found that the public and next of kin needed to be fully and appropriately informed about the system of presumed consent. Bearing in mind all these elements, the contested law could be applied in a way consistent with constitutional law.

Languages:

French.



Identification: SUI-1999-2-006

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.07.1999 / **e)** 1A.178/1998, 1A.208/1998 / **f)** A. v. Federal Prosecutor, Federal Department of Justice and Police and Federal Council / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 II 147 / **h)** *Pratique juridique actuelle* 1999 1491; *La Semaine judiciaire* 2000 I 202; *Europäische Grundrechte-Zeitschrift* 1999 475; *Revue de droit administratif et de droit fiscal* 2000 1 589; CODICES (German).

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.

1.4.1 **Constitutional Justice** – Procedure – General characteristics.

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

2.1.1.4.4 **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.

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

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.

3.13 **General Principles** – Legality.

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

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

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

5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

5.3.21 **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:

International law, pre-eminence / Propaganda, material, confiscation / Security, external and internal / Security, national.

Headnotes:

Article 98a and Article 100.1a of the Federal Judicature Act (OJ); Article 6.1 ECHR; admissibility of an administrative-law appeal against confiscation of propaganda material belonging to the Kurdistan Workers Party.

Once a confiscation order has been made, there ceases to be any interest in contesting a seizure which preceded the order (recital 2).

Confiscation of propaganda material for reasons of external or internal security affects civil rights and obligations within the meaning of Article 6.1 ECHR (recital 4b).

In conflicts of law, international law in principle takes precedence over national law, in particular where the international rules seek to protect human rights. Thus, despite the letter of Article 98a and 100.1.a OJ and by virtue of Article 6.1 ECHR, an administrative-law appeal to the Federal Court against a confiscation order of the Federal Council is admissible (recital 4c-e).

Article 55 of the Federal Constitution (freedom of the press) and Article 10 ECHR; Article 102.8, 102.9 and 102.10 of the Federal Constitution; Article 1.2 of the Federal Council decree on subversive propaganda; confiscation of propaganda material for reasons of internal or external security.

The Federal Council decree on subversive propaganda constitutes, when taken together with Article 102.8, 102.9 and 102.10 of the Federal Constitution, a sufficient legal basis for a serious interference with freedom of expression and freedom of the press (recital 6).

In the circumstances of the case, the confiscation of written material belonging to the Kurdistan Workers Party (PKK) was consistent with the proportionality principle in that, in furtherance of the PKK's cause, the material incited violence and exerted pressure on emigrants living in Switzerland (recital 7).

Summary:

In 1997, the customs authorities intercepted 88 kg of propaganda material which the PKK had sent to A., who was resident in Switzerland. The federal prosecutor seized the material on grounds of internal and external security. A. appealed to the Federal Department of Justice and Police, which treated the appeal as a report to the surveillance authority and dismissed it. Under the 1948 decree on subversive propaganda the Federal Council then ordered the confiscation and destruction of the material.

A. lodged administrative-law appeals with the Federal Court to have the seizure decision and confiscation order set aside. He also requested that the material be returned to him. He relied, in particular, on Article 6.1 ECHR.

As the seizure decision had become devoid of purpose, the Federal Court decided not to go into the first appeal. It did, however, consider the appeal against the confiscation order, dismissing it on substantive grounds.

Under the Federal Judicature Act, decisions of the Federal Council cannot, in principle, be referred to the Federal Court, with one exception which did not apply in the present case.

The issue was whether the confiscation order fell under Article 6.1 ECHR. Confiscation is a serious interference with the appellant's property rights. According to legal theory, government measures taken on grounds of internal or external security do not fall within the ambit of the Convention. The European Court of Human Rights has never taken a clear position on the subject. In view of the seriousness of the interference, there could be no denial that Article 6.1 ECHR was applicable. The appellant's further reliance on Articles 10 and 13 ECHR did not have a decisive bearing.

In the present case, the provisions of the Federal Judicature Act could not be interpreted in a manner consistent with the European Convention on Human Rights. Swiss law here clashed with the Convention's requirements, and Articles 114bis.3 and 113.3 of the Federal Constitution did not resolve the matter. General principles of international law and the Vienna Convention on the Law of Treaties require that states honour their international undertakings. The federal authorities thus had a duty to set up judicial authorities that met the requirements of Article 6 ECHR, and the Federal Court was required to deal with A.'s appeal against the Federal Council decision.

The 1948 decree on subversive propaganda was an independent decree of the Federal Council directly based on Article 102.8, 102.9 and 102.10 of the Federal Constitution. It was thus a sufficient legal basis to justify interfering with freedom of expression and freedom of the press, notwithstanding that the international situation had altered appreciably in recent years, and that, with the entry into force of a new federal law introducing internal security measures, the decree had been repealed.

The confiscated material contained PKK propaganda openly calling for armed resistance to the Turkish state; it went well beyond mere propaganda for the Kurdish movement. The material inciting violence was capable of endangering the peaceful co-existence of different groups living in Switzerland and seriously interfering with Switzerland's neutrality and external relations. These dangers justified confiscating the propaganda material.

Languages:

German.



Identification: SUI-2004-M-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 27.10.2004 / **e)** 1P.406/2004 / **f)** The "Greens", Argau and associates v. Grand Council canton of Argau / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 I 74 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.

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

4.9.4 **Institutions** – Elections and instruments of direct democracy – Constituencies.

5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.

5.3.41 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Decision prompting legislative amendment / Election, constituency / Election, quorum, natural / Election, threshold / Election, proportional representation.

Headnotes:

Equal treatment in elections under the proportional system, definition of constituencies for the election of the Grand Council, decision prompting legislative amendment; Article 8.1 of the Federal Constitution (equality), Article 34 of the Federal Constitution (guarantee for political rights) and Article 39.1 of the Federal Constitution (exercise of political rights); Argau cantonal Constitution.

Requirements of federal law regarding the details of the cantonal electoral procedure (recital 3). Rules for interpreting the Constitution (recital 4.1); § 77 of the Argau cantonal Constitution requires the legislator to group the constituencies together by creating groupings of constituencies where this is necessary to avoid high quorums that would infringe the rules of proportional representation (recitals 4.2 and 4.3).

The Grand Council's membership has been reduced from 200 to 140 representatives and, where grouping of constituencies is not proceeded with, this results in natural quorums (number of party votes, in percentage, required to obtain a seat) that may reach the threshold of 14.29 % (recital 5.1), without there being any objective grounds prescribed by the cantonal constitution to warrant this (recital 5.2). The permissible upper limit is 10 % both for direct quorums and for natural quorums. This limit is absolute for the former, but for the latter it is to be construed as an objective in the event of reorganisation of the electoral system (recitals 5.3 and 5.4).

In this case, the impugned electoral regulations, without the creation of groupings of constituencies or without other provisions to prevent natural quorums of over 10 %, were unconstitutional (recital 5.5).

Since a situation in keeping with the Constitution could not be restored simply by allowing the appeal, it was expedient to deliver a decision prompting legislative amendment (*Appellentscheidung*), inviting the competent cantonal authorities to devise an electoral system in accordance with the Constitution for the re-election of the parliament on the expiry of the next legislature's term (recital 6.1).

Languages:

German.

*Identification:* SUI-2005-M-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 06.07.2005 / **e)** 2A.105/2005 / **f)** X. SA v. Federal Gaming Houses Control Board and Federal Tax Appeals Board / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 II 562 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.

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

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

2.3.6 **Sources** – Techniques of review – Historical interpretation.

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

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

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

Keywords of the alphabetical index:

Law, deficiency / Taxation law, interpretation.

Headnotes:

Interpretation of the taxation laws, particularly when a deficiency is present.

Summary:

Excerpt from the recitals:

Court practice is to interpret the law primarily according to the letter thereof (literal interpretation). If the text is not absolutely clear, if several interpretations of it are possible, the true effect of the provision should be ascertained by divorcing it from all related considerations such as drafting history (historical interpretation), purpose of the rule, its spirit, its underlying values, and especially from the interest safeguarded (teleological interpretation) or its relationship with other statutory provisions (systematic interpretation). If more than one interpretation is admissible, the one in keeping with the Constitution should be chosen. Indeed, even if unable to determine the constitutionality of federal laws (Article 191 of the Constitution), the Federal Court presumes that the federal legislator does not propose any solution incompatible with the Constitution, unless the contrary is plainly apparent from the letter or the spirit of the law.

Interpretation of the law may lead to the finding of a deficiency. An actual deficiency (or deficiency in strict parlance) implies that the legislator has refrained from dealing with an issue that should have been addressed, and neither the text nor the interpretation of the law affords a solution. If the legislator has deliberately refrained from codifying a situation which did not necessarily require its intervention, its inaction is tantamount to a meaningful silence. As to a “loophole”, in loose parlance, this is typified by the fact that the law does indeed offer an answer but this is inadequate. According to precedent, only the existence of an actual deficiency requires the court to intervene, whereas in principle, according to the traditional conception, it may not rectify loopholes, unless a right would be misused or the Constitution infringed by invoking what is deemed to be the conclusive meaning of the provision. The same applies in taxation law, where only actual deficiencies can be made good, provided that there are cases of misuse of rights, and these include situations of tax evasion in particular.

Languages:

French.

Identification: SUI-2005-M-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 26.10.2005 / **e)** 2A.471/2004 / **f)** Saint Gall Tax Office v. Ms A. and Administrative Court of the canton of Saint Gall / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 II 697 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.

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

4.5.10.3 **Institutions** – Legislative bodies – Political parties – Role.

5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.

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

Keywords of the alphabetical index:

Tax, contributory capacity / Tax, unequal treatment / Law, unconstitutional, application.

Summary:

Article 191 of the Federal Constitution (access to the Federal Court), Federal Law of 14 December 1990 on harmonisation of direct taxes of the cantons and municipalities (LHID); equal treatment in respect of tax rates between single-parent and two-parent families; limitations to interpretation in accordance with the Constitution.

Constitutionality and applicability of Section 11.1 LHID: the stipulation that single-parent families and taxpayers responsible for the maintenance of dependants be granted the same reduction in rates as married couples infringed the principle of taxation according to contributory capacity, and encroached on the cantons' power to set rates (recital 4). The situation could not be rectified through an interpretation in accordance with the Constitution, having regard to the clear wording of the provision and to the historical legislator's unequivocal intention. Despite its unconstitutionality, the provision must be applied (recital 5).

Languages:

German.

*Identification:* SUI-2006-M-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 18.04.2006 / **e)** 2P.89/2005 / **f)** X. v. Fleurier municipality and Council of State of the canton of Neuchâtel / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 132 I 97 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
 5.2 **Fundamental Rights** – Equality.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Property, public, use / Property, public, increased collective use.

Headnotes:

Article 27 of the Federal Constitution (economic freedom) and Article 36 of the Federal Constitution (restriction of fundamental rights), Section 3 of the Federal Law on the domestic market; constitutionality of a municipal regulation concerning a fair, and specifically of the provision concerning increased use of public property.

Criteria for choosing between applicants for permission to make increased use of public property for commercial purposes, where the available space is insufficient to meet all demands (recital 2).

Article 2.2 of the Regulations, laying down an order of priority according to the geographical origin of those concerned, infringes economic freedom and the Federal Law on the domestic market in introducing machinery that systematically favours the same groups of applicants and consequently distorts competition (recital 3).

Summary:

X. was a travelling trader resident in the canton of Fribourg. The municipality of Fleurier (the canton of Neuchâtel) had adopted new regulations for the “*Abbaye de Fleurier*” fair, approved by decree of the Council of State and governing in particular the conditions of allocation of spaces for stalls; the regulations gave priority to local societies and dealers. X. appealed against the regulations to the Federal Court.

Summary of recital 3:

Fleurier municipality makes a square and a street available for its annual fair. The municipality pleads cogent grounds of public safety and order for not further extending the fair’s perimeter. Nonetheless, these boundaries do not necessarily allow the satisfaction of all requests for spaces to set up a trading or catering stall. Article 2.2 of the Regulations lays down the order in which these requests are to be met, giving preference chiefly to local societies. During the “*Abbaye de Fleurier*” fair, the local societies’ activity consists in keeping stalls for the sale of goods; in so far as the goods sold on these stalls are similar to those of the appellant, these societies can be termed “direct competitors” of the appellant, whereas that would not be so if the local societies sold different goods from the appellants. The order established by Article 2.2 of the Regulations allows positions to be allocated for stalls selling goods similar to those of the appellant, when there are not enough places for all dealers. Article 2.2 of the Regulations thus provides for an intervention contrary to economic freedom and to the principles laid down by the Federal Law on the domestic market, in-so-far as it introduces machinery that systematically favours the same groups of applicants; not being economically innocuous, it distorts competition. This assessment is at all events valid as regards the preference given, in that order, to societies and dealers from the Val-de-Travers district, from the canton of Neuchâtel, from French-speaking Switzerland and, lastly, from the other Swiss cantons. Still, it might arguably be possible to give a certain preference to “village societies and dealers”, notwithstanding economic freedom and the principles underlying the Federal Law on the domestic market. Such preference appears admissible, to a certain extent, for a local event of the “*Abbaye de Fleurier*” type. Indeed, the presence of “village societies and dealers” may be in the public interest in ensuring the fair’s success and good attendance. Regard may also be had to the fact that it would be difficult for the local societies to participate in other similar events. It is nevertheless expedient to establish a system from which “non-local” traders are not systematically excluded without a chance of eventually obtaining stall space.

In these circumstances, Article 2.2 of the Regulations was unconstitutional. However, it did not rest with the Court, which recalled the general principles as stated above, to direct the municipality of Fleurier how to deal with the question raised.

Languages:

French.



Identification: SUI-2007-1-004

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 14.12.2006 / **e)** 1P.358/2006 / **f)** Diggelmann v. Town of Saint-Gallen, Department of Health and Administrative Court of the Canton of Saint-Gallen / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 I 77 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

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

Keywords of the alphabetical index:

Recording, video, period of conservation / Video surveillance, period of conservation.

Headnotes:

Duration of conservation of recordings of videosurveillance of public places and highways; regulation on the police of the town of Saint-Gallen.

The recording of surveillance images taken in public places or highways, and the keeping of those recordings, are acts which come within the scope of the protection of Article 13.2 of the Federal Constitution (protection of the privacy) and Article 8.1 ECHR.

Types of surveillance and data-gathering (recital 4).

Proportionality of the practice of keeping recordings for 100 days, by reference to the aim of the surveillance, the gravity of the interference with fundamental rights and data protection (recital 5).

Summary:

I. The town of Saint-Gallen adopted new regulations on the police force, which were confirmed by popular vote. One provision envisaged the video surveillance of public places and highways. Specifically, it provided that limited video surveillance might be authorised in places at risk. This would allow the identification of persons on condition that public safety and public order so required and that passers-by were informed by notice. Those recordings were kept for 100 days and afterwards destroyed, unless they were used in criminal proceedings.

A resident of the town of Saint-Gallen challenged the duration of the period for which the recordings were kept. The competent cantonal department upheld his appeal and reduced the period to thirty days. Upon appeal by the town of Saint-Gallen, the Administrative Court reinstated the period of 100 days, as had been envisaged when the regulation on the police was adopted.

The resident concerned lodged a public law appeal and requested the Federal Court to set aside the decision of the Administrative Court. He relied on the guarantees of protection of privacy within the meaning of Article 13.2 of the Federal Constitution and Article 8.1 ECHR, claiming that a period of 100 days was not proportionate.

II. The Federal Court dismissed the appeal.

When dealing with an appeal in the context of the abstract review of norms, the Federal Court will annul a cantonal or municipal provision only if it cannot be applied or interpreted in accordance with the Constitution or the Convention. That does not apply to appeals against an act implementing the contested norm. In this case, it was not disputed that the video surveillance and the keeping of the recordings came within the scope of the protection afforded by Articles 13.2 of the Federal Constitution and Article 8.1 ECHR.

The surveillance of public places may be carried out in two different ways. Firstly, it is possible to monitor on a screen what is happening in public places so that the police can intervene where necessary. Secondly, it is possible to record the events and to keep the recordings as evidence in the event of a criminal complaint. The latter mode of surveillance was at issue here.

The public interest in that surveillance consisted in the prevention of disorder and the maintenance of public safety. Surveillance was intended to prevent offences because the recordings could be used as evidence and enable criminal proceedings to be brought. For the system to be effective, the recordings had to be made available to victims and kept for a certain time. Because a complaint is frequently not immediately lodged with the Court, especially in cases of sexual assault or offences against young persons, there was good reason to keep the recordings for more than 30 days. Furthermore, the municipal authorities were under an obligation to comply with the provisions on data protection as laid down in cantonal law and to prevent any misuse of the recordings in question. Those recordings could be used only for the purposes of criminal proceedings. In the light of all those guarantees, the fact that the recordings were kept for 100 days was compatible with constitutional and Convention law.

Languages:

German.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-1999-1-003

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 10.03.1999 / e) U.br.120/98 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 18/99) / h).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
- 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
- 5.3.33.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.
- 5.3.38 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.
- 5.3.39.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Compensation / Denationalisation, rectifying injustice / Discrimination, indirect / Property, transformation / Property, protection, procedure / *Jus utendi*.

Headnotes:

The new constitutional order and the society that arises from it are based and built upon the principle of private ownership. The right to ownership of property is one of the essential economic human rights. Denationalisation is a process of recovery of ownership of property or allowance of compensation for property of which a person was deprived in the interests of the State. The legislature considers the property within the framework of social property transformation, i.e. privatisation, thus protecting the rights of former owners, directly or indirectly. In passing the Law on Denationalisation, the State has

fulfilled its constitutional obligation to endorse the right of ownership of former owners.

Summary:

The Association for the Protection of the Interests of Owners of Confiscated Property lodged a petition with the Court challenging the Law on Denationalisation as being in conflict with the constitutional provisions that lay down the principle of equality, the right to ownership and the prohibition of retroactive effect. The Court has rejected several statutory provisions as discordant with the constitutional principle of legal protection of property and equality of citizens before the Constitution and laws.

In particular, the law states that the subject of denationalisation would be property confiscated after 2 August 1944 pursuant to several (but not all) so-called “compulsory regulations”. Such a selective definition of “compulsory regulations” on the basis of which the confiscation occurred, the Court found, could put citizens in unequal positions by classifying them into two groups: those who get the property back, and those who do not.

As regards the statutory provision according to which the property given by the State in concession and property used by public health institutions and institutions for social and child care and public education (hospitals, ambulances and schools) will not be returned, but compensation will be given in lieu, the Court found that it does not include the requirement of a prior determination of the public interest; or that it defines the public interest widely, thus exceeding its constitutionally established dimensions. The public interest is closely connected with the general interest and it assumes a clear determination of the corpus of objects over which such a relation could be constituted, as well as the grounds on which a matter may be considered to affect the public interest.

The stipulation according to which a request for denationalisation can be submitted not only by the former owner, but also by persons who on the day of entry into force of the law are the inheritors of the former owner, excludes those inheritors who acquire such a status after the law has entered into force, which violates the right of inheritance.

According to Article 22.2 of the Law, when the subject of denationalisation is agricultural land, forests, forest land, pastures or fallow fields, the former owner acquires joint ownership over the land with the State. This stipulation means the creation of a category of joint ownership without obtaining the consent of the owner and without prior determination of the public

interest, which could restrict the rights derived from the ownership.

The law also introduces a category of persons holding the *ius utendi* (right of use) in a residential building or owned flat as a new right including obligation elements but not civil ones. A precondition for the existence of the right of use or right of lease is the existence of the right of ownership. By the newly created right of use, as a remnant of the rights of tenants, a right arises that damages the right of ownership and that protects the interests of persons who used that property on different bases.

According to Article 28 of the Law, when the transformation of a socially owned enterprise has not been completed, real estate or other property for which a request for denationalisation has been lodged will be returned to the former owner if this does not infringe the structural, technical and technological integrity of the enterprise. The Court found that this definition implicitly establishes this integrity as a public interest that may entail the deprivation or restriction of ownership rights.

A refusal to return confiscated property that belongs to a bankrupt company or property that was deemed to have belonged to a company which had gone bankrupt, although the company did not in fact own the property and could not enter into a bankrupt estate, would restrict ownership rights and introduce a retroactive effect, disadvantaging citizens.

The Law prescribes that bonds are calculated in German marks, on which interest is not calculated. Furthermore, if the payment is in class “B” bonds, the compensation will be calculated as 60 % of the specified amount, not exceeding the amount of 100.00 German marks in denar counter-value. Taking into consideration that interest is an accessory right in the obligations and as a capital price it is a financial instrument for fulfilment of the principal, i.e. ownership relation, the Court found that it cannot be excluded from this amount. Limitation of the compensation in percentage terms and to a maximum amount puts citizens interested in the return of confiscated property in a disadvantaged position compared with those to whom the compensation has been paid or would be paid without limitations.

Languages:

Macedonian.



Identification: MKD-2006-M-001

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.12.2006 / **e)** U.br.49/2006 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

4.6.2 **Institutions** – Executive bodies – Powers.

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

4.10.8 **Institutions** – Public finances – State assets.

Keywords of the alphabetical index:

Public finance / Legislator, omission / Legislative power, non-delegation.

Headnotes:

In the Law on Public Debt, the legislator had not defined clearly and precisely the obligation for payment of commission. Neither had it determined criteria for determination of the amount of commission. Instead, it had delegated all these issues to the Minister of Finance. This contravened the constitutional principles of rule of law and separation of powers.

The by-law enacted under this delegation also contravened the Constitution and the law.

Summary:

The petitioner requested an assessment of the constitutionality of Article 22.6 of the Law on Public Debt ("Official Gazette of the Republic of Macedonia", no. 62/2005) and the Book of Tariffs for Commission on the Issue of State Guarantees (Official Gazette of the Republic of Macedonia", no. 30/2006), adopted by the Minister of Finances of the Republic of Macedonia.

The provision under scrutiny authorised the Minister of Finance to enact the Book of Tariffs for commission for the issuance of state guarantees. According to the petitioner, this violated the

constitutional principle of separation of powers, since the Law on Public Debt contains no criteria for the determination of the commission for state guarantees.

Having examined the Law on Public Debt and the Book of Tariffs, the Court observed that the Law dealt, *inter alia*, with the procedure, issue, servicing, right to collection and termination of state guarantees. The legislator also stated that the issue of a state guarantee is within the competence of the Ministry of Finances. Thus, the Minister will sign an agreement for the issue of a state guarantee or a letter of guarantee to foreign or domestic creditors based on a previously adopted law on the issue of a state guarantee, depending on whether it concerns a foreign or a domestic creditor.

The Court found a mention of commission for the issue of a state guarantee in only one provision and that is in the provision under dispute. Accordingly, he or she had not simply failed to define what was meant by this concept. They had also neglected to stipulate that commission is charged for the issue of a state guarantee from the holders of the public debt. Arrangements for collection were left to the Book of Tariffs. Under the challenged provision, the Ministry of Finance is authorised to adopt this Book. Moreover, the Law contained no mechanism for determining the amount of the commission. Again, this was left to the Minister of Finance and the Book of Tariffs, effectively giving him (or her) an unlimited, or so-called discretionary right.

In view of the above, and the contents of the provision, the Court ruled that the authority the Minister of Finance enjoyed to define a book of tariffs for the commission for the issue of a state guarantee did not fall within the category of "legislation in progress". This would include further explanation, further specification or further regulation for enforcement purposes. Rather, it consisted of concrete determination of an obligation for the holders of public debt in the sense of this legislation to pay a commission for the issue of a state guarantee. This is not permissible. To compound matters, the legislator here did not define the obligation for charging commission in a clear and precise manner, neither did they set out the criteria and standards for the determination of its amount and other matters. Instead, they delegated all these matters to the Minister of Finances.

In so doing, the legislator has permitted interference by the executive into legislative power. The provision in point is not, therefore, in line with Article 8.1.3 and 8.1.4, Articles 51 and 96 of the Constitution.

The Court had pronounced the Minister’s enactment of the Book of Tariffs to be in contravention of the Constitution. For the same reasons, the Court deemed the Book of Tariffs to be out of line with Articles 56 and 61 of the Law on the Organisation and Work of Bodies of State Administration.

Languages:

Macedonian.



Identification: MKD-2006-M-002

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 20.12.2006 / e) U.br.209/2006 / f) / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Enforcement of judgment, law / Bailiff / Legislator, omission.

Headnotes:

The Constitutional Court is competent to review the constitutionality of what is contained in the law, but it does not have the competence to decide on what the law did not contain, but should have contained in the opinion of petitioner.

Summary:

The petitioner requested an assessment of the constitutionality of Law on Enforcement as a whole (“Official Gazette of the Republic of Macedonia”, nos. 35/2005, 50/2006 and 129/2006). He argued that the above Law does not provide for a double degree of jurisdiction in enforcement proceedings. This failure on the legislator’s part left citizens without legal protection against individual acts by enforcement agents (bailiffs).

The Court dismissed the petition explaining that the Constitutional Court of the Republic of Macedonia, within the frameworks of its constitutionally defined competences decides on the constitutionality and legality of regulations within the legal order. Within these frameworks, it may assess the constitutionality of the provisions of the law on enforcement that are set forth and contained in the Law, but it does not have the competence to decide on what this law did not contain, and should contain.

The petitioner had challenged the constitutionality of the Law on Enforcement on the basis that it did not contain the provisions the petitioner believed were necessary. The petitioner argued that this rendered it in breach of the Constitution. The Court held that the petition should be dismissed.

Languages:

Macedonian.



Identification: MKD-2007-1-001

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 10.01.2007 / e) U.br.99/2006 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 7/2007, 22.01.2007 / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.5 **General Principles** – Social State.
3.13 **General Principles** – Legality.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social assistance / Legislator, powers, delegation to government, excessive.

Headnotes:

The identification of those entitled to social financial assistance, the amounts to be paid and the framework under which this should be done are essential elements of the right to social assistance. Parliament alone can make such definition; this cannot be done by governmental act.

Summary:

I. The petitioner requested an assessment of the constitutionality of that part of Article 29.2 of the Law on Social Welfare dealing with "amount and criteria". See "Official Gazette of the Republic of Macedonia", nos. 50/1997, 16/2000, 17/2003, 65/2004, 62/2005 and 111/2005.

The petitioner argued that the controversial part of the article enabled the Government and the Minister of Labour and Social Politics to regulate, by by-law, certain elements of the right to social assistance which should only be regulated by Parliament. This was incompatible with the principles of the rule of law and the separation of powers. These are fundamental values of the constitutional order of the Republic of Macedonia and are guaranteed by Article 8 of the Constitution.

The above provision of the Law on Social Welfare bestows the right to social pecuniary relief on those who are fit for work but not entitled to social security and, under other regulations, have no means of providing for themselves. Detailed conditions, sums, criteria and the way in which the right to social pecuniary relief can be exercised are defined by Government in by-laws.

II. Having examined the Law on Social Welfare, the Constitutional Court observed that the legislator had defined the right to social relief as one of the measures for the social security and care of citizens. The various forms of social care available are set out in the Act. These include long-term financial support for persons unfit for work and without social security; financial support for relief and care; right to health care; compensation for those who need to work shorter hours (and hence draw a smaller salary) as they are caring for a handicapped child; one-off assistance, whether financial or in kind; the right to housing and financial support for somebody under eighteen but without parental care. The legislation defines those who are entitled to social relief in each instance, as well as the amount and the procedure for the exercise of the rights.

The Court found that the legislator had also defined the right to financial support for those who are fit for work but without social security, who have no other way of funding their existence. The legislation defined the group, but made no provision for the way in which the right could be exercised or how much they might receive. It was left to the government to fill this gap. This raised the possibility of an encroachment by the executive powers upon those of the legislature.

The Macedonian Constitution gives a clear and precise definition of the holders of legislative, executive and judicial power. Under the doctrine of separation of powers, one power must not encroach upon the sphere of another. Therefore, it was for Parliament, not Government, (as is envisaged in the article in question) to establish the criteria for the exercise of social pecuniary relief and the amounts payable.

Rights for those citizens who are fit for work but without other forms of social security or means to provide for themselves can only be guaranteed if the amounts and procedures are set out in legislation by Parliament. This is especially important because the right to social security, by the provision of social relief, is one of the fundamental rights and freedoms expounded in the Constitution. Without these definitions, the necessary conditions for the exercise of the right do not exist. This might jeopardise citizens' constitutionally guaranteed rights to social security.

The Court held that the authority of the Government of the Republic of Macedonia under Article 29.2 of the law, to define the criteria and the amount of the social pecuniary relief, in the absence of any legal framework for the exercise of this right, is an encroachment by the executive power upon the legislative power. As such, it is not compatible with the Constitution.

Languages:

Macedonian, English.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-1999-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 25.11.1998 / **e)** 15-rp/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.

4.6.2 **Institutions** – Executive bodies – Powers.

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

Keywords of the alphabetical index:

Medical care, voluntary, payment / Health, protection, voluntary payment.

Headnotes:

The constitutional right to health protection, medical care and medical insurance guarantees that medical care will be provided free of charge in state and municipal medical facilities (Article 49 of the Constitution).

The term “medical care” is not defined in the Constitution, in the laws governing medical care nor in any other legislative or regulatory texts.

However, “medical care” in medical terms covers treatment and preventive measures applied in cases of illness, injury and childbirth and in the course of medical examinations and other medical work. The term “medical service”, which is similar in meaning to “medical care”, is not currently defined by law or medical literature.

In the current critical state of public health-care funding, the solution is not a restrictive list of medical services which must be paid for, but a new approach to the problem of safeguarding the constitutional right to medical care. This would involve drawing up, approving and implementing a series of national programmes, with a list of medical services which the

state undertakes to provide free of charge for all citizens in state and municipal medical facilities.

Summary:

The parliament (*Verkhovna Rada*) is responsible for planning, implementing and monitoring social and other programmes at national level in accordance with the Constitution. The provision of the disputed government decree that allows medical facilities to provide care and preventive treatment to sick patients for goodwill payments in return for their services is unconstitutional.

Without ruling out or denying the utility of voluntary donations in the interests of the protection of health, the fact remains that charitable activity must take place within the bounds laid down by the Law on charity and charitable organisations.

The principles of health protection and taxation are determined exclusively by statute, while the implementation of social policy, including that of health protection, is the government’s responsibility.

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 Ministers the obligation within a month period to bring the Decree of the Cabinet of Ministers as of 17 September 1996 no. 1138 with amendments introduced by the Decree of the Cabinet of Ministers as of 12 May 1997 no. 449 in conformity with Article 49 of the Constitution and this decision of the Constitutional Court”.

Languages:

Ukrainian, French (translation by the Court).



Identification: UKR-1999-2-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 24.06.1999 / **e)** 6-rp/99 / **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;
- Paragraphs 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-2000-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.12.1999 / **e)** 11-rp/99 / **f)** Constitutionality of Articles 24, 58, 59, 60, 93, 190-1 of the Criminal Code (capital punishment) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 4/2000 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.1.4 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.1.4.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Death penalty, abolition / Punishment, purpose / Death penalty, miscarriage of justice.

Headnotes:

The inalienable right to life is an integral part of a person's right to human dignity. As fundamental rights of the person, they predetermine the possibility of realising other rights and liberties and may be neither restricted nor abolished. Provisions of articles of the Criminal Code which provide for capital punishment as a type of punishment are unconstitutional.

Summary:

The people's deputies applied to the Constitutional Court regarding the constitutionality of the provisions of Article 24 of the Criminal Code on capital punishment as an exceptional sanction applied in cases of serious offences which are stipulated in the Special Part of the Code. The people's deputies maintained that the right to life provided by the Constitution is absolute, and, while interpreting the Constitution, a profound and clearly outlined respect for the value of human life as one of the fundamental principles of building a democratic society ruled by law should be taken into consideration. Therefore, in the context of the Constitution, imposing the death penalty as an exceptional sanction should be regarded as an "arbitrary deprivation of a human being's right to life".

The Constitution defines a human being, its life and health, honour and dignity, immunity and safety as the supreme social value (Article 3.1 of the Constitution), and provides that the establishment and protection of human rights and liberties is the main duty of the state (Article 3.2 of the Constitution).

The key constitutional provision recognising the right to life is the provision stipulating that this right is an integral (Article 27.2 of the Constitution), inalienable and inviolable (Article 21 of the Constitution) right. The right to life belongs to human beings from birth and is protected by the state.

The Constitution declares that constitutional rights and liberties, in particular the right to life, are guaranteed and may not be abolished (Article 22.2 of the Constitution). It also states that it is prohibited to introduce any changes or alterations which abolish the rights and liberties of human beings and citizens (Article 157.1 of the Constitution). It is prohibited to narrow the scope and content of existing rights and liberties when new laws are passed or changes are introduced to existing laws (Article 22.3 of the Constitution).

The provisions of Article 22.2 of the Constitution place a duty upon the state to guarantee constitutional rights and liberties, the right to life in the first place, and the duty to refrain from adopting any acts which may lead to the abolition of constitutional rights and liberties, including the right to life. Depriving a human being of life by the state through execution as a sanction even within the provisions stipulated by law is regarded as abolishing the integral right to life and is thus contrary to the Constitution.

Each person has the right to freely develop his or her personality as long as this does not violate the rights and liberties of others. The Constitution attributes an integral right to life to each human being (Article 27.1 of the Constitution) and guarantees protection of this right from abolition. At the same time, it establishes the provision that each person has the right to defend his or her life and health, and the lives and health of other people, from illegal encroachments (Article 27.3 of the Constitution). The Criminal Code has established provisions related to the acts of a person in a situation of necessary self-defence in order to protect his or her life and health or the lives and health of other persons if dictated by urgent necessity to prevent or terminate socially dangerous encroachments.

Constitutional support for an integral right to life as well as for other rights and liberties is based on the following fundamental principle: all exceptions related to rights and liberties of human beings and citizens shall be established by the Constitution rather than by laws or other normative acts. In accordance with Article 64.1 of the Constitution, "constitutional rights and liberties of human beings and citizens may not be restricted except in the cases provided for in the Constitution".

The Constitution does not contain any provision whatsoever stating that the death penalty is an exception to the provisions of the Constitution on an integral right to life.

The inconsistency of the death penalty with the purposes of punishment as well as the possibility of judicial error should also be considered. This does not comply with constitutional guarantees of protection of human rights and liberties (Article 58 of the Constitution).

The death penalty also contradicts Article 28 of the Constitution, which states that "no one may be exposed to torture, cruel, inhuman or degrading treatment or punishment", which reflects Article 3 ECHR.

Item 3 of the resolution part of the decision reads:

"For the parliament (*Verkhovna Rada*) to bring the Criminal Code in conformity with this Decision of the Constitutional Court".

Languages:

Ukrainian.



Identification: UKR-2001-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.02.2001 / **e)** 1-rp/2001 / **f)** Constitutionality of provision of the Regulations of the Supreme Council of the Autonomous Republic of Crimea, Regulation on the Accounting Chamber of the Supreme Council of the Autonomous Republic of Crimea, the Regulation of Procedures of management of the property in possession of the Autonomous Republic of Crimea or transferred under its management, approved by relevant resolutions of the Supreme Council of the Autonomous Republic of Crimea, and the Resolution of the Supreme Council of the Autonomous Republic of Crimea on Measures of Improvement of Work with Personnel in the Autonomous Republic of Crimea" (the case of legal acts passed by the Supreme Council of the Autonomous Republic of Crimea) / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.1 **General Principles** – Sovereignty.

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

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.

Keywords of the alphabetical index:

Autonomy, status / Autonomous authority, decision, procedure of approval, quorum / Ownership, legal regime / Autonomous, authority, budget, expenses, financial control / Accountability, determination.

Headnotes:

According to Article 92.1.8 of the Constitution, Ukrainian law exclusively determines the legal fundamentals and guarantees of business activity; and the rules of competition and standards of anti-trust regulation. According to Article 92.1.7 of the Constitution, Ukrainian law also exclusively determines the legal regime of ownership. Articles 7 and 92.1.15 of the Constitution provide for a single system of local self-administration in the entire territory of the Ukraine. The regulation of these issues have not been delegated to the Autonomous Authority.

Summary:

The President of Ukraine petitioned the Constitutional Court for a declaration that certain provisions passed by the Supreme Council of the Autonomous Republic of Crimea were unconstitutional.

The Constitutional Court recognised as unconstitutional provisions of Regulations of the Supreme Council of the Autonomous Republic of Crimea of 30 June 1998. These concerned procedures for the conduct of plenary sessions of the Supreme Council of the Autonomy and approval of resolutions by them; and the Resolution of the Supreme Council of the Autonomous Republic of Crimea on Measures of Improvement of Work with Personnel in the Autonomous Republic of Crimea" of 20 January 1999, (as amended).

The Court also recognised as unconstitutional those provisions of the Resolution which contain directives in accordance with the Regulation of procedures of management of the property in possession of the Autonomous Republic of Crimea or transferred under its management of 21 April 1999. This provided for the delegation of the performance of executive functions in management of the property in possession of the Autonomous Republic of Crimea, to the Supreme Council of the Autonomous Republic of Crimea and its Presidium; and the regulation on the Accounting Chamber of the Supreme Council of the Autonomous Republic of Crimea as of 17 March 1999.

In accordance with Article 5.2 of the Constitution, the people of Ukraine are the bearers of sovereignty and the single source of power in Ukraine. The sovereignty of Ukraine applies to its entire territory (Article 2.1 of the Constitution), including the Autonomous Republic of Crimea, which forms an integral part of its territory (Article 134 of the Constitution).

Article 136.4 of the Constitution establishes that the powers, procedures of formation and activity of the Supreme Council of the Autonomous Republic of Crimea and the Council of Ministers of the Autonomous Republic of Crimea are governed by the Constitution and Ukrainian law, and legal provisions of the Supreme Council of the Autonomous Republic of Crimea concerning issues within its competence. At the same time, provisions of the Supreme Council of the Autonomous Republic of Crimea and decisions of the Council of Ministers of the Autonomous Republic of Crimea must not conflict with the Constitution and Ukrainian law, according to Article 135.2 of the Constitution.

The organisation and activities of the Supreme Council and the Council of Ministers of the Autonomous Republic of Crimea are based on sharing powers (Article 1.3 and 1.4 of the Constitution of the Autonomous Republic of Crimea and the Law on the Supreme Council of the Autonomous Republic of Crimea).

The provisions of the Supreme Council of the Autonomous Republic of Crimea challenged by the President of Ukraine were found to be inconsistent with the aforementioned provisions of the Constitution.

Item 6 of the resolution part of the decision reads:

“For the parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea, within two months from the day of the adoption of this decision, to bring in conformity with the Constitution and the laws of Ukraine the provisions of legal acts of the Parliament of the Autonomous Republic of Crimea that are recognised unconstitutional”.

Languages:

Ukrainian.



Identification: UKR-2001-3-012

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.12.2001 / **e)** 18-rp/2001 / **f)** Compliance with the Constitution of Ukraine of Articles 2.4, 6.2, 10.1 and 10.2 of the Law on youth and children's non governmental organisations (case on youth organisations) / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

3.5 **General Principles** – Social State.

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

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

Keywords of the alphabetical index:

Association, state funding / Organisation, non governmental, merger, imposed by law / Organisation, youth and children / Public life, diversification, principle.

Headnotes:

A legislative provision providing for the association of the majority of the existing youth and children's non governmental organisations is contrary to the constitutionally guaranteed freedom of association. The association of the majority of such organisations may only be decided on the basis of the free declaration of intent expressed by the members of such non governmental organisations themselves.

Recognising the right of youth and children's non governmental organisations to receive financial support for their activities paid for by the State Budget but only for those “unions, whose members are the majority of the registered all-Ukrainian youth and children's non governmental organisations” (Article 10.1 and 10.2 of the Law) violates the constitutionally guaranteed human right to freedom of association.

Summary:

The right to freedom of association is one of the main political rights. The principle of diversity of society provides the foundation for the exercise of constitutional rights and establishment of the civil institutions.

Article 1 of the Constitution proclaims Ukraine as a democratic and social state based on the rule of law. The social state is to provide for the development and support of society and of public institutions, including through target spending for the costs of “social needs” (Article 95.2 of the Constitution). A State based on the rule of law does not interfere in an individual's right to freedom of association, and in the activities of such associations.

It was submitted that the provisions of Article 2.4 of the Law that determine the specific union combining the majority of youth and children's non governmental organisations, violate the constitutional principles of diversification of public life, since they assign a trust status to only one of the relevant civic associations.

Article 6.2 of the Law stipulates that the youth movement in Ukraine is co-ordinated by the Ukrainian National Committee of Youth Organisations, which enjoys the status of an all-Ukrainian union of youth

and children's non governmental organisations. The state has appointed the Committee to be the youth movement coordinator in Ukraine and has established the statutory objectives of their civic associations. Such an action of the state contradicts the principle of diversification of public life and violates the right to freedom of association, in particular the possibility of freely deciding upon valid objectives of different organisations and activities by the participants of civic associations themselves, in conformity with Article 36.1 of the Constitution.

The Constitutional Court has concluded that Articles 2.4, 6.2, 10.1 and 10.2 of the Law on Youths' and Children's Non Governmental Organisations ("the Law") are unconstitutional and charged the parliament to modify the Law so that it complies with this decision.

Item 3 of the resolution part of the decision reads:

"To place the bringing of the Law on youth and children's non governmental organisations into conformity with this decision on the parliament (*Verkhovna Rada*)".

Languages:

Ukrainian.



Identification: UKR-2002-2-015

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 09.07.2002 / **e)** 15-rp/2002 / **f)** Official interpretation of Article 124.2 of the Constitution (case on pre-judicial settlement of disputes) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 28/2002 / **h)**.

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:

Dispute, settlement, out-of-court, compulsory / Judicial protection, right.

Headnotes:

The right of individuals of access to courts for the settlement of disputes cannot be limited by the law or other enactments. The establishment by law, on the one hand, of an out-of-court procedure for the settlement of disputes or, on the other hand, of a contract for the declaration of intent of the subjects of legal relations, is not a limitation of the jurisdiction of courts and the right to judicial protection.

Summary:

In financial and civil proceedings, courts of general jurisdiction apply procedural rules that provide for the compulsory out-of-court settlement of disputes. Compulsory out-of-court settlement of disputes, in the opinion of the applicant, violated his right to judicial protection.

Article 124.2 of the Constitution provides that "the jurisdiction of the courts extends to all legal relations that arise in the State". It therefore follows that everyone that is a party to a dispute may enjoy access to the courts. The above article and other provisions of the Constitution contain no clause providing that disputes will be admissible in the courts only following out-of-court settlement procedures. Access to judicial protection cannot be made dependent by the law or other legal acts on the prior recourse by the subject of legal relations to other means of legal protection, including out-of-court settlement of disputes.

Requiring the compulsory out-of-court settlement of disputes rules out the possibility of the claim being accepted for examination and adjudication by the courts. This violates the right of the individual to judicial protection. The possibility of recourse to out-of-court settlement of a dispute may, however, be an additional means of legal protection. This does not contradict the principle of the administration of justice exclusively by the courts. Proceeding from the need to improve the level of judicial protection, the state may encourage the settlement of legal disputes in out-of-court procedures; however, such practices are the right rather than the obligation of the individual demanding judicial protection. The right to judicial protection does not deprive the subjects of legal relations of the opportunity of having recourse to out-of-court settlement of disputes. Such settlements may be made both on the basis of civil law agreements and in accordance with the declaration of intent of the parties.

The choice of a given means of legal protection, including out-of-court settlement of disputes, is the

right rather than the obligation of the individual, who proceeds voluntarily, according to his or her own interests.

Item 2 of the resolution part of the decision reads:

“For the parliament (*Verkhovna Rada*), the Cabinet of Ministers to bring legal acts into conformity with the requirements of Article 124 of the Constitution and its interpretation in this decision”.

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 judgment 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:

Legal provisions referred to by the 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.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2004-2-005

a) European Union / b) Court of Justice of the European Communities / c) Fifth Chamber / d) 10.05.2001 / e) C-144/99 / f) European Commission v. Kingdom of the Netherlands / g) *European Court Reports* I-03541 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

2.2.1.6.4 **Sources** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.

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

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

Keywords of the alphabetical index:

European Community, directive, implementation by the Member States / European Community, directive, transposition, without legislative action, conditions / EU, national from other Member States, rights / Consumer, protection / Contract, clause, abusive.

Headnotes:

Whilst legislative action on the part of each Member State is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts. The last-mentioned condition is of particular importance where the directive in question is intended to accord rights to

nationals of other Member States. That is the case of Directive no. 93/13 on unfair terms in consumer contracts, which aims, in particular, according to the sixth recital in its preamble, to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own.

Even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty (see paragraphs 17-18, 21).

Summary:

Considering that Directive no. 93/13 of 5 April 1993 on unfair terms in consumer contracts had not been fully transposed into Netherlands law within the prescribed time, the Commission, relying on Article 169 of the EC Treaty (now Article 226 EC), brought an action complaining of non-compliance before the Court of Justice of the European Communities. The Commission complained that the Netherlands had made the assumption, erroneously in its opinion, that express transposition of Directive no. 93/13 was unnecessary since the national legal system already comprised provisions in keeping with the Directive.

After recalling the principle that legislative action on the part of each Member State is not necessarily required in order to implement a directive, the Court stressed, however, that it was essential for national law to guarantee that the national authorities would effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals be made fully aware of their rights and, where appropriate, could rely on them before the national courts. In point of fact, the Court observed, the Kingdom of the Netherlands had evidently been unable to show that its legal system contained provisions equivalent to those of the Directive at issue. In that respect, settled case-law of a Member State interpreting the provisions of national law in a manner deemed to satisfy the requirements of a directive could not meet the requirement of legal certainty. Therefore the Court could only find that the Netherlands had failed to fulfil its obligations under Directive no. 93/13.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-2-021

a) European Union / **b)** Court of First Instance / **c)** / **d)** 17.09.2003 / **e)** T-137/01 / **f)** Stadtsportverband Neuss eV v. Commission of the European Communities / **g)** *European Court Reports* II-03103 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

3.26 **General Principles** – Principles of Community law.

Keywords of the alphabetical index:

Time-bar, delay, fixed / Time-bar, application by analogy.

Headnotes:

In order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance by the Community legislature within whose powers the fixing of their duration and the detailed rules for their application come. Moreover, as regards limitation periods, legislative provisions unconnected with the case in point cannot be applied by analogy (see paragraph 123).

Summary:

In February 1994 the group of sporting associations of the German municipality of Neuss, whose purpose is the promotion of sport in the public interest, requested a subsidy from the Commission to finance an international sporting event, called "ISO 94". The Commission granted the group, under the Eurathlon programme, which comes under the general budget of the Communities, financial assistance of ECU 20,000. The financial assistance was paid in January 1995. By a debit note of 6 April 1999, however, the Commission demanded repayment of the assistance in full, on the ground that it had had no response to its request for all the documents relating to expenditure and income in connection with ISO 94 and that, in addition, it was in possession of information that the group had made a profit from the event, which was

incompatible with the rules on financial assistance. After the group brought an action, however, the Commission withdrew its decision.

Approximately one year later, the Commission's representatives carried out an audit of the ISO 94 accounts at the office of the group's lawyer. There followed an audit report, after which a new debit note was drawn up by the Commission, ordering partial repayment of financial assistance granted under the Eurathlon programme. It was against the latter decision that the group of sporting associations of the German municipality of Neuss brought the action for annulment which gave rise to the present case.

The applicant relied, *inter alia*, on limitation of the Commission's rights of action. It observed that, even if a right to repayment arose during 1994, when ISO 94 took place, the contested decision was dated 9 April 2001, in other words more than six years after the alleged claim arose. The applicant, which accepted that Community law does not expressly provide for a limitation period for repayment of subsidies, none the less submitted that the Court of First Instance had upheld the application of provisions laying down shorter limitation periods than those which might apply in the present case. The applicant cited paragraph 48 *et seq.* of the German law on administrative procedure, according to which the administration's power to annul a positive measure is time-barred one year after the administration becomes aware of circumstances justifying repayment.

The Court of First Instance held that, in order to fulfil their function of ensuring legal certainty, limitation periods must be fixed in advance by the Community legislature, which has power to fix their duration and the detailed rules for their application, and that legislative provisions unconnected with the case in point cannot be applied by analogy.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2005-2-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 26.07.2005 / **e)** 73316/01 / **f)** Siliadin v. France / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.1.2 **Fundamental Rights** – General questions – Horizontal effects.

5.3.5.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Prohibition of forced or compulsory labour.

Keywords of the alphabetical index:

Servitude, obligation to penalise / Obligation, positive / Labour, forced or compulsory, prohibition / Servitude, nature / Slavery, nature.

Headnotes:

States have a positive obligation to criminalise slavery, servitude and forced or compulsory labour punishable offences. That obligation extends to the acts of private individuals.

Summary:

The applicant is a Togolese national who, after being brought to France by a relative of her father before she had reached the age of sixteen, was made to work as an unpaid servant. As an impecunious illegal immigrant in France, whose passport had been confiscated, she was forced against her will and without respite to work for Mr and Mrs B., doing housework and looking after their three, and later four, young children. The applicant worked from 7 a.m. until 10 p.m. every day and had to share the children's bedroom. The exploitation continued for several years, during which time Mr and Mrs B. led the applicant to believe that her immigration status

would soon be regularised. Finally, after being alerted by a neighbour, the Committee against Modern Slavery reported the matter to the prosecuting authorities. Criminal proceedings were brought against the couple, who were acquitted of the criminal charges. Proceedings continued in respect of the civil aspect of the case and resulted in the couple's being convicted and ordered to pay compensation in respect of non-pecuniary damage to the applicant for having taken advantage of her vulnerability and dependent situation by making her work without pay.

In the application lodged with the Court, the applicant claimed that the provisions of French law had not provided her with sufficient protection against being kept in servitude or at least obliged to perform forced or compulsory labour. She relied on Article 4 ECHR.

The Court considered that Article 4 ECHR imposed positive obligations on States, consisting in the adoption and effective implementation of criminal law provisions making the practices set out in Article 4 ECHR a punishable offence. In accordance with modern standards and trends in relation to the protection of human beings from slavery, servitude and forced or compulsory labour, States were under an obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Article 4 ECHR.

In the instant case the applicant had worked for years for Mr and Mrs B., without respite, against her will and without being paid. She had been a minor at the relevant time, unlawfully present in a foreign country and afraid of being arrested by the police. Indeed, Mr and Mrs B. had maintained that fear and led her to believe that her status would be regularised. Hence the applicant had, at the least, been subjected to forced labour within the meaning of Article 4 ECHR. The Court had then to determine whether the applicant had also been held in slavery or servitude within the meaning of Article 4 ECHR.

With regard to slavery, although the applicant had been deprived of her personal autonomy, the evidence did not suggest that she had been held in slavery in the proper sense, in other words that Mr and Mrs B. had exercised a genuine right of ownership over her, thus reducing her to the status of an object. Accordingly, it could not be considered that the applicant had been held in slavery in the traditional sense of that concept. As to servitude, that was to be regarded as an obligation to provide one's services under coercion, and was to be linked to the concept of slavery. The forced labour imposed on the applicant lasted almost 15 hours a day, seven days a week. Brought to France by a relative of her father, she had not chosen to work for Mr and Mrs B. As a

minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B., where she shared the children's bedroom. The applicant was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which never happened. Nor did the applicant, who was afraid of being arrested by the police, have any freedom of movement or free time. In addition, as she had not been sent to school, despite the promises made to her father, the applicant had no prospect of seeing any improvement in her situation and was completely dependent on Mr and Mrs B. In those circumstances, the Court considered that the applicant, a minor at the relevant time, had been held in servitude within the meaning of Article 4 ECHR.

Slavery and servitude were not as such classified as criminal offences in French criminal law. Mr and Mrs B. had been prosecuted under Articles of the Criminal Code which did not make specific reference to the rights secured by Article 4 ECHR. Having been acquitted, they had not been convicted under criminal law. Hence, despite having been subjected to treatment contrary to Article 4 ECHR and having been held in servitude, the applicant had not seen the perpetrators of those acts convicted under criminal law. In the circumstances, the Court considered that the criminal law legislation in force at the material time had not afforded the applicant specific and effective protection against the actions of which she had been a victim. Consequently, the French State had not fulfilled its positive obligations under Article 4 ECHR and there had been a violation of that provision.

Cross-references:

- *Ireland v. the United Kingdom*, Judgment of 18.01.1978, Series A, no. 25; *Special Bulletin ECHR* [ECH-1978-S-001];
- *Marckx v. Belgium*, Judgment of 13.06.1979, Series A, no. 31; *Special Bulletin ECHR* [ECH-1979-S-002];
- *Van Droogenbroeck v. Belgium*, Commission report of 09.07.1980, Series B, vol. 44;
- *X. v. the Netherlands*, no. 9327/81, Commission decision of 03.05.1983, *Decisions and Reports* 32, p. 180;
- *Van der Mussele v. Belgium*, Judgment of 23.11.1983, Series A, no. 70; *Special Bulletin ECHR* [ECH-1983-S-004];
- *X and Y v. the Netherlands*, Judgment of 26.03.1985, Series A, no. 91;
- *Soering v. the United Kingdom*, Judgment of 07.07.1989, Series A, no. 161; *Special Bulletin ECHR* [ECH-1989-S-003];

- *Stubbings and others v. the United Kingdom*, Judgment of 22.10.1996, *Reports of Judgments and Decisions* 1996-IV; *Bulletin* 1996/3 [ECH-1996-3-014];
- *Chahal v. the United Kingdom*, Judgment of 15.11.1996, *Reports of Judgments and Decisions* 1996-V; *Bulletin* 1996/3 [ECH-1996-3-015];
- *A. v. the United Kingdom*, Judgment of 23.09.1998, *Reports of Judgments and Decisions* 1998-VI;
- *Selmouni v. France*, no. 25803/94, *Reports of Judgments and Decisions* 1999-V; *Bulletin* 1999/2 [ECH-1999-2-008];
- *Seguin v. France* (dec.), no. 42400/98, 07.03.2000;
- *Z. and others v. the United Kingdom* [GC], no. 29392/95, *Reports of Judgments and Decisions* 2001-V;
- *E. and others v. the United Kingdom*, no. 33218/96, 26.11.2002;
- *August v. the United Kingdom* (déc.), no. 36505/02, 21.01.2003;
- *M.C. v. Bulgaria*, no. 39272/98, *Reports of Judgments and Decisions* 2003-XII.

Languages:

English, French.



Systematic thesaurus (V19) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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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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³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

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⁴⁵ Principle according to which 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 the principle of primacy of Community law, see 2.2.1.6.

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.

⁶² Representative/imperative mandates.

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⁶³ Presidency, bureau, sections, committees, etc.

⁶⁴ Including the convening, duration, publicity and agenda of sessions.

⁶⁵ Including their creation, composition and terms of reference.

⁶⁶ State budgetary contribution, other sources, etc.

⁶⁷ For the publication of laws, see 3.15.

⁶⁸ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁹ For local authorities, see 4.8.

⁷⁰ Derived directly from the Constitution.

⁷¹ See also 4.8.

⁷² 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.

⁷³ Civil servants, administrators, etc.

⁷⁴ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

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⁷⁵ Other than the body delivering the decision summarised here.

⁷⁶ Positive and negative conflicts.

⁷⁷ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁸ For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

⁷⁹ Comprises the Court of Auditors in so far as it exercises judicial power.

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⁸⁰ See also 3.6.

⁸¹ And other units of local self-government.

⁸² See also keywords 5.3.41 and 5.2.1.4.

⁸³ Organs of control and supervision.

⁸⁴ Including other consultations.

⁸⁵ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁶ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁷ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁸ For aspects related to fundamental rights, see 5.3.41.2.

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⁸⁹ For the creation of political parties, see 4.5.10.1.

⁹⁰ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹¹ Tracts, letters, press, radio and television, posters, nominations, etc.

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 For example, Auditor-General.

⁹⁶ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁷ For example, Court of Auditors.

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⁹⁸ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹⁹ *Staatszielbestimmungen*.

¹⁰⁰ Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰¹ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰² Positive and negative aspects.

¹⁰³ For rights of the child, see 5.3.44.

¹⁰⁴ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

¹⁰⁵ Includes questions of the suspension of rights. See also 4.18.

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¹⁰⁶ Taxes and other duties towards the state.

¹⁰⁷ Universal and equal suffrage.

¹⁰⁸ 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).

¹⁰⁹ For example, discrimination between married and single persons.

¹¹⁰ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹¹ Detention by police.

¹¹² Including questions related to the granting of passports or other travel documents.

¹¹³ May include questions of expulsion and extradition.

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¹¹⁴ 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.

¹¹⁵ This keyword covers the right of appeal to a court.

¹¹⁶ Including the right to be present at hearing.

¹¹⁷ Including challenging of a judge.

¹¹⁸ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹¹⁹ This keyword also includes the right to freely communicate information.

¹²⁰ Militia, conscientious objection, etc.

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¹²¹ Aspects of the use of names are included either here or under "Right to private life".

¹²² Including compensation issues.

¹²³ This keyword also covers "Freedom of work".

¹²⁴ Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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Keywords of the alphabetical index *

* The précis presented in this *Bulletin* are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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