

# THE BULLETIN

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*The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four months period (volumes numbered 1 to 3). The last two volumes of the series concerning the same year are actually published and delivered in the following year, i.e. volume 1 of the 2000 Edition in 2000, volumes 2 and 3 in 2001.*

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

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*The decisions are presented in the following way:*

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

**G. Buquicchio**

*Secretary of the European Commission for Democracy through Law*

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- to reinforce existing democratic structures;
- to promote and strengthen principles and institutions which represent the bases of true democracy.

The activities of the Venice Commission comprise, *inter alia*, research, seminars and legal opinions on issues of constitutional reform, electoral laws and the protection of minorities, as well as the collection and dissemination of case-law in matters of constitutional law from Constitutional Courts and other courts.

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# Albania

## Constitutional Court

### Statistical data

1 January 2000 – 31 December 2000

Types of decisions:

- final, published decisions: 31
- decisions as to admissibility: 65
  - decisions by panel: 59
  - decisions of meeting of all judges: 6

Constitutional review:

- preliminary review: --
- *ex post facto* review: 26
  - abstract review: 1
  - concrete review: 25

Decisions as to interpretation: 5

Types of provisions reviewed:

- statutory provisions: 5
- acts issued by the Council of Ministers: 6
- judicial decisions: 15

Proceedings initiated by:

- President of the Republic: 1
- Prime Minister: --
- Group of deputies: 3
- High State Control: --
- People's Advocate: 1
- Ordinary courts: 2
- Organs of local government: 6
- Organs of religious communities: --
- Political parties and other organisations: 2
- Individuals: 16

### Important decisions

*Identification:* ALB-2000-3-005

a) Albania / b) Constitutional Court / c) / d) 31.07.2000 / e) 49 / f) Interpretation / g) *Fletorja Zyrtare* (Official Gazette), 23, 1221 / h) CODICES (French).

*Keywords of the systematic thesaurus:*

1.2.1.8 Constitutional Justice – Types of claim – Claim by a public body – Ombudsman.

2.3.5 Sources of Constitutional Law – Techniques of review – Logical interpretation.

4.12.8 Institutions – Ombudsman – Relations with the courts.

*Keywords of the alphabetical index:*

People's Advocate, powers / Public services, action, lawfulness / Public services, failure to act, lawfulness.

*Headnotes:*

The People's Advocate may seek a decision from the Constitutional Court in respect of a case relating to his duty to protect the rights, freedoms and legitimate interests of individuals, when he sees that the latter have been violated by the unlawful and/or irregular action or failure to act of public services and when there has been a breach of the constitutional rules governing the organisation and functioning of his own office.

*Summary:*

The 1998 Constitution introduced the institution of the People's Advocate. The person appointed began work after the adoption of Law no. 8454 of 4 February 1999 on the People's Advocate. Shortly after taking up office the People's Advocate requested the Constitutional Court to interpret Article 134.2 of the Constitution. This article lists all the people who may refer a case to the Constitutional Court, dividing them into two categories. For the first category there are no prerequisites, but the second are allowed to exercise the right "only for issues related to their interests", and the People's Advocate belongs to the second category. The distinction is made in Article 134.2 of the Constitution. Since the People's Advocate belongs to the second category he may only refer cases to the Constitutional Court under certain conditions. Article 134.2 of the Constitution reads as follows: "The subjects contemplated in subparagraphs f, g, h, i, and j of paragraph 1 of this article may make a request only for issues related to their interests."

The Court interprets issues related to the interests of the People's Advocate to mean those that are linked with the performance of his duties. When, during the discharge of his functions and having examined the complaints, requests and evidence sent to his office, the Advocate concludes that there has been a violation of the rights, freedoms or legitimate interests

of individuals as a result of the action or failure to act of public services, in accordance with and in the application of a law or regulation, he may refer the case to the Constitutional Court for it to examine whether the law or regulation is in conformity with the Constitution.

Articles 60.2, 60.3, 61 and 62 of the Constitution set out the rules concerning the organisation and functioning of the institution of People's Advocate. In respect of Article 134.2 of the Constitution, the Court also interprets issues related to the applicant's interests to mean any violation of the constitutional rules covering the organisation and functioning of the office of the People's Advocate, irrespective of whether their consequences have been ascertained, and such violations entitle the People's Advocate to refer the case to the Court.

The Court finds that the People's Advocate may refer a case to the Constitutional Court if it relates to his duty to protect the rights, freedoms and legitimate interests of individuals and if the latter have been violated by an unlawful and/or irregular action or failure to act on the part of public services identified by the People's Advocate or, alternatively, if there has been a violation of the constitutional rules governing the organisation and functioning of the office of People's Advocate.

*Languages:*

Albanian.



## Andorra Constitutional Tribunal

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Summaries of important decisions of the reference period 1 September 2000 – 31 December 2000 will be published in the next edition, *Bulletin* 2001/1.



# Argentina

## Supreme Court of Justice of the Nation

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### Important decisions

*Identification:* ARG-2000-3-007

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 04.05.2000 / **e)** A.556.XXXIII / **f)** Amadeo de Roth, Angélica Lía s/ lesiones culposas / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 323, 982 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

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

2.3.9 Sources of Constitutional Law – Techniques of review – Teleological interpretation.

4.7.2 Institutions – Courts and tribunals – Procedure.

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

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

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

*Keywords of the alphabetical index:*

Prosecution, time-limit / “Further proceedings”, concept.

*Headnotes:*

For a defendant, linking the “reasonable length of proceedings” requirement with the time-limit for bringing a prosecution means that the latter may protect his/her right to termination of the situation of uncertainty inherent in being charged with a criminal offence.

To determine how steps in proceedings affect the limitation period in criminal cases, it is necessary to take account of their nature.

*Summary:*

A provincial court had dismissed an application seeking a ruling that the prosecution of the applicant for alleged deliberate bodily harm was time-barred. It held that evidence in the case-file post-dating a decision to cancel the applicant's release (12 March 1987) made it impossible to conclude that the two-year time-limit for bringing a prosecution had expired, since, during that time, the judicial authorities and the prosecutor had both issued documents indicating that they intended to continue the proceedings. The applicant lodged an extraordinary appeal with the Supreme Court.

The Supreme Court stated that the rules on moving ahead with proceedings and being out of time were procedural instruments designed to prevent proceedings from lasting indefinitely. Their purpose was to give everyone the right to clear himself/herself of the suspicion resulting from a criminal charge by obtaining a decision which clarified his/her situation in criminal law – thereby satisfying the requirement of respect for his/her human dignity.

That right was protected by the guarantee of a fair trial contained in Article 18 of the Constitution and Article 14.3.c of the International Covenant on Civil and Political Rights of 1966, which ranked as constitutional law.

The Court also held that reviewing a court's refusal to declare prosecution time-barred, on the ground that procedural steps interrupting the limitation period had been taken, was a federal matter, and so within its jurisdiction – provided that the failure to bring the proceedings to a conclusion violated a constitutional right.

It noted that, aside from what may have occurred in the proceedings prior to the decision of 12 March 1987 cancelling the appellant's release and ordering her arrest, it could not be denied that the only measures taken since that date had simply repeated earlier measures, which was clear proof that the relevant limitation period had expired.

The concept of “further proceedings” in Article 67 of the Criminal Code could not be construed so broadly that its substance was distorted and the rules on limitation rendered inoperable. The Court pointed out that the following the criteria used by the trial court in the present case would mean – provided the procedural formalities were respected – that

prosecution would never be time-barred in practice, regardless of the nature of the offence concerned.

The argument that the defendant had shown negligence in failing to appear, thereby delaying the proceedings, did not invalidate this decision. The defendant had no interest in continuance of the proceedings against her, and her conduct could not affect the objective application of the rules on limitation.

Given the nature of the substantive defects noted in the decision complained of, there was no justification for referring it to a trial court, which would further prolong the present inconclusive situation. In view of the time which had passed since the offence – over twenty years – and which had elapsed since 12 March 1987, the proceedings must be concluded by a decision that prosecution was time-barred. This was the appropriate legal means of establishing that the state's authority to punish the defendant had expired, hence safeguarding the constitutional right to judgment within a reasonable time.

Three judges delivered concurring opinions, two jointly.

#### Languages:

Spanish.



#### Identification: ARG-2000-3-008

a) Argentina / b) Supreme Court of Justice of the Nation / c) / d) 01.06.2000 / e) A.186.XXXIV / f) Asociación Benghalensis y otros c/ Ministerio de Salud y Acción Social, Estado Nacional s/ amparo / g) *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 323, 1339 / h) CODICES (Spanish).

#### Keywords of the systematic thesaurus:

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

1.3.2.3 Constitutional Justice – Jurisdiction – Type of review – Abstract review.

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

1.4.9.2 Constitutional Justice – Procedure – Parties – Interest.

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

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

2.1.1.4.9 Sources of Constitutional Law – Categories – Written rules – International instruments – American Convention on Human Rights of 1969.

3.6 General Principles – Federal State.

4.6.9.1.1 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

4.8.4 Institutions – Federalism and regionalism – Budgetary and financial aspects.

4.10.2 Institutions – Public finances – Budget.

5.1.2.1 Fundamental Rights – General questions – Effects – Vertical effects.

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

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

#### Keywords of the alphabetical index:

*Acción de amparo* / Personal autonomy, exercise / Disease, care, prevention, rehabilitation / HIV (AIDS).

#### Headnotes:

The Constitution expressly recognises that parties other than those suffering direct damage – including associations – may be entitled to bring an *acción de amparo* in respect of blatantly arbitrary or unlawful acts or failures to act which may, at the time or in the near future, infringe, restrict, alter or jeopardise rights recognised in the Constitution, a treaty or a law.

The lives and protection of individuals – particularly the right to health – constitute an intrinsically fundamental asset, which is also essential to the exercise of personal autonomy.

The state must not only refrain from interfering with the exercise of individual rights, but is also duty-bound to take the positive steps necessary to ensure that their exercise does not become illusory.

#### Summary:

A group of associations (NGOs), active in the fight against AIDS, had brought an *acción de amparo* for the purpose of obliging the state to take charge of the



care, treatment and rehabilitation of AIDS patients, and supply them with the necessary medication, in accordance with the Argentine Constitution and Act no. 23.798, which had declared the fight against this disease to be in the national interest. Their application was granted at first and second instance, and the state therefore filed an extraordinary appeal with the Supreme Court, which it also lost.

Referring to the applicants' status, the Court pointed out that the constitutional reform of 1994 had introduced new rules for the protection of users and consumers, and had accordingly extended the range of parties entitled to bring proceedings, previously confined to the holders of a subjective individual right (Article 43 of the Constitution).

The applicant associations' purpose was to combat AIDS, and they were accordingly entitled to bring an *acción de amparo* in the event of the state's failing to implement the relevant legislation. To this extent, they possessed a collective right to health protection.

The fact that constitutional protection had been extended to general or collective interests did not, however, dispense the applicants from having to explain how the rights concerned had been violated. The reform had not changed the courts' mode of action, which, as previously, consisted solely in hearing and deciding cases involving specific determination of a right at issue between opposing parties. This requirement was satisfied in the present instance, as the damage caused by failure to supply medication was material, existed at the time and would continue in the near future.

The Court secondly pointed out that the lives of individuals and their protection – in particular the right to health – constituted an intrinsically fundamental asset, which was also essential to the exercise of personal autonomy (Article 19 of the Constitution). A seriously ill person was not in a condition to choose his/her own way of life (the principle of autonomy). The Court added that the right to health was also recognised by international treaties which had the status of constitutional law, including Article 12.c of the International Covenant on Economic, Social and Cultural Rights of 1966, Articles 4 and 5 of the American Convention on Human Rights of 1969 and Article 6.1 of the International Covenant on Civil and Political Rights of 1966.

Concerning the state's positive obligations, the Court also noted that, in passing the law that declared the fight against AIDS to be in the national interest, parliament had had in mind, *inter alia*, the treatment and prevention of the disease, as well as the care and rehabilitation of patients. This law expressly

recognised the right of persons carrying or infected with the AIDS virus, or suffering from the disease, to receive the necessary care.

The Court went on to consider whether the obligation in question was incumbent solely on the national government, or on the provinces as well. It decided that, under the applicable legislation, although the expenses resulting from compliance with the law were to be borne by the national government and by the local authorities concerned, since medication was distributed by the latter, it was the state which was responsible vis-à-vis third parties for implementation of the law, without prejudice to the responsibility incumbent on local authorities, among others, vis-à-vis the state.

The Court lastly rejected the state's argument that the judgments given at first and second instance entailed judicial supervision of the state budget and its implementation, since the courts concerned had merely requested the national government to take the action specified in law.

Three judges gave concurring opinions – two of them jointly – and three others dissented, maintaining that the appeal was inadmissible.

#### Languages:

Spanish.



#### Identification: ARG-2000-3-009

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 17.08.2000 / **e)** T.632.XXXII / **f)** Tortorelli, Mario Nicolás c/ Buenos Aires, Provincia de y otros s/ daños y perjuicios / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 323, 2114 / **h)** CODICES (Spanish).

#### Keywords of the systematic thesaurus:

4.7.4.1.6 Institutions – Courts and tribunals – Organisation – Members – Discipline.

4.7.5 Institutions – Courts and tribunals – Supreme Judicial Council or equivalent body.

4.7.16.2 Institutions – Courts and tribunals – Liability – Liability of judges.

5.2.2 Fundamental Rights – Equality – Criteria of distinction.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.16 Fundamental Rights – Civil and political rights – Right to compensation for damage caused by the State.

*Keywords of the alphabetical index:*

Duty, improper performance.

*Headnotes:*

A judge of the national courts may not be subjected to civil or criminal proceedings before an ordinary court in respect of acts performed in the exercise of his/her judicial duties without first being impeached and removed from office.

*Summary:*

A claim for damages had been lodged against a judge for failure to perform his judicial duties properly. He had raised an objection of lack of standing, arguing that the acts had been committed in the performance of his judicial duties, and thus that the claim was admissible only if he was first removed from office.

The Supreme Court held that the legal principle set out in the headnotes was not intended to prevent the courts from hearing cases concerning judges, since, once the formalities of the impeachment process had been completed, there was nothing to prevent a judge's being made subject to other legal proceedings.

The Court added that this exemption was not intended to create a privilege contrary to the principle of equality established in Article 16 of the Constitution. It was in fact founded on public policy considerations relating to the proper functioning of government organs. The immunity in question was not a personal privilege, but one attaching to an office, and to free exercise of the powers that went with that office.

*Supplementary information:*

In this case, the Court applied Articles 45, 51 and 52 of the Constitution, as it existed before the 1994 reform, which provided that initiating impeachment and preferring charges were matters for the Chamber of Deputies, while the trial was conducted by the Senate. The revised Constitution kept these rules for Supreme Court judges, but charges against judges in

the lower courts are now brought by the Judicial Council, and the decision is taken by a jury (Articles 114.5 and 115 of the Constitution).

The constitutional reform seems to have had no effect on the legal doctrine applied in such cases.

*Languages:*

Spanish.



*Identification:* ARG-2000-3-010

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 19.09.2000 / **e)** G.653.XXXIII / **f)** González de Delgado, Cristina y otros c/ Universidad Nacional de Córdoba s/ amparo / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 323, 2659 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

2.1.1.1.2 Sources of Constitutional Law – Categories – Written rules – National rules – Quasi-constitutional enactments.

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

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

2.1.1.4.9 Sources of Constitutional Law – Categories – Written rules – International instruments – American Convention on Human Rights of 1969.

2.1.1.4.12 Sources of Constitutional Law – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.

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

2.1.3.3 Sources of Constitutional Law – Categories – Case-law – Foreign case-law.

4.6.10.1 Institutions – Executive bodies – Sectoral decentralisation – Universities.

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

5.3.42 Fundamental Rights – Civil and political rights – Rights of the child.

#### 5.4.2 Fundamental Rights – Economic, social and cultural rights – Right to education.

##### *Keywords of the alphabetical index:*

Education, policy / School, choice.

##### *Headnotes:*

The right to learn recognised by the Argentine Constitution does not entitle parents to demand the continued provision of separate schools for male and female pupils.

##### *Summary:*

A group of parents of regular pupils at a secondary school attached to a national university brought an *acción de amparo*, seeking to stop the board from turning the school, which traditionally admitted boys only, into a co-educational establishment. Among other arguments, they claimed that teaching geared to boys was the kind best suited to their sons' natures and personalities, and that the contested change would radically alter this situation. The application was rejected at first and second instance, and the parents finally brought an extraordinary appeal in the Supreme Court, which also dismissed it.

The Supreme Court found, first, that there was nothing in the relevant legislation to prevent the authorities from taking what they regarded as legitimate decisions on education policy, even where these affected a school's internal regime. It then pointed out that, under Article 75.19 of the Constitution, the universities were self-governing.

Second, it was not for the courts to consider the expediency or merits of administrative decisions which lay with the government and the self-governing universities; they could merely review the lawfulness of such decisions.

Parents had a natural and primary role in their children's education, and so had a legal right to choose a school consistent with their philosophical, ethical or religious beliefs; as members of the educational community, they were also entitled to participate in that school's activities. However, they were not entitled to determine the educational policy of schools, which was solely a matter for those responsible for running them.

Nor did the constitutional right to learn cover the pupils' interest in having an unchangeable curriculum.

Five judges gave separate concurring opinions, in which they referred to the principle of equality and to the status of women, and also to the Universal Declaration of Human Rights of 1948, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights of 1969, the International Covenant on Civil and Political Rights of 1966, the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child of 1989. One of these opinions referred to Article 14 ECHR, the judgment given by the European Court of Human Rights in the *Abdulaziz, Cabales and Balkandali* case on 28 May 1985 (*Special Bulletin ECHR* [ECH-1985-S-002]) and leading cases of the Supreme Court of the United States.

##### *Supplementary information:*

An *acción de amparo* is an application for judicial protection in respect of blatantly arbitrary or unlawful acts or failures to act which may, at the time or in the near future, infringe, restrict, alter or jeopardise rights recognised in the Constitution, a treaty or a law (see also *Asociación Benghalensis y otros c/ Ministerio de Salud y Acción Social, Estado Nacional s/ amparo*, [ARG-2000-3-008]).

##### *Languages:*

Spanish.



## Armenia

### Constitutional Court

#### Statistical data

1 September 2000 – 31 December 2000

19 referrals, 19 cases heard and 19 decisions delivered, including:

- 18 decisions concerning the conformity of international treaties with the Constitution. All the treaties examined were declared compatible with the Constitution;
- 1 decision concerning the conformity of the Resolution of the National Assembly of the Republic of Armenia “On the Resignation of the National Assembly’s President” with the Constitution.

#### Note:

The International Seminar “Universality and national particularities in the sphere of Protection of Human Rights: European Convention on Protection of Human Rights” organised by the Directorate on Human Rights of the Council of Europe and Constitutional Court of the Republic of Armenia took place in Yerevan, on 8-9 September 2000. The main task of the International Seminar was to find ways to combine universal and national particularities reasonably in the sphere of the protection of human rights.

On 6-7 October 2000 the Constitutional Court of the Republic of Armenia and the European Commission for Democracy through Law (Venice Commission) organised the Fifth Yerevan International Seminar entitled, “The Efficiency of Constitutional Justice in societies in transition (functional, institutional and procedural aspects)”. The reports during the Seminar comprehensively took up the functional, institutional and procedural aspects of Constitutional Justice in societies in transition. The round table discussion on “The Role and Perspectives of International Cooperation in the sphere of Constitutional Justice” was held on 7 October 2000.

## Important decisions

*Identification:* ARM-2000-3-002

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 17.10.2000 / **e)** DCC-263 / **f)** On the conformity with the Constitution of the Resolution of the National Assembly of the Republic of Armenia “On the Resignation of the National Assembly’s President” / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

4.5.2 Institutions – Legislative bodies – Powers.

4.5.4.1 Institutions – Legislative bodies – Organisation – Rules of procedure.

4.5.4.2 Institutions – Legislative bodies – Organisation – President/Speaker.

4.5.12 Institutions – Legislative bodies – Status of members of legislative bodies.

*Keywords of the alphabetical index:*

Parliament, President, resignation / Parliament, session, agenda, draft, amendment / Parliament, vacant position, assignment.

*Headnotes:*

According to Article 62 of the Constitution, the National Assembly shall operate in accordance with its Rules of Procedure. Consequently, the National Assembly cannot adopt resolutions where violations of its Rules of Procedure occur.

*Summary:*

The President of the Republic petitioned the Constitutional Court in a challenge to the constitutionality of the National Assembly’s Resolution on the Resignation of the National Assembly’s President. According to the petitioner, the challenged Resolution contradicted Article 62 of the Constitution, as the process by which the Resolution was adopted by the National Assembly had not been conducted pursuant to its Rules of Procedure and its Articles 1, 51, 87, 110 and 48.

Examining the Resolution, the process of its adoption and the protocol of the sitting, the Constitutional Court stated that the Resolution contradicted Articles 6 and 62 of the Constitution, in that it had been adopted with violations of several requirements of the Rules of Procedure of the National Assembly. The Constitutional Court reasoned its approach on the following grounds.

The Rules specify that the three-day sittings of the National Assembly begin with the approval of the sitting agenda and the amendments to the session agenda. The latter is approved on the first sitting of the session and can be amended during the session. Compulsory discussion issues are also included in the draft of the session agenda. An exhaustive list of the compulsory discussion issues is provided for in Article 85.6 and 85.7 of the Rules of Procedure.

According to Article 87 of the Rules of Procedure it is only permitted to include in the agenda of the three-day sittings issues which are included in the session agenda and issues provided for in the Article (issues discussed but not finished during the previous three-day sittings, extraordinary issues provided for in the Constitution and the Rules of Procedure which have time-limits for discussion, as well as issues concerning elections or the assignment of vacant positions).

The National Assembly cannot discuss an issue without its inclusion on the agenda. The sitting where the challenged Resolution was adopted was in violation of the above-mentioned provisions' requirements. Despite the fact the issue was not included in the approved agenda, and following the registration of disputes, the Chairman of the sitting made a declaration and then allowed the unscheduled discussion.

According to the provisions of the National Assembly's Rules of Procedure, the Assembly can only discuss issues and adopt resolutions if there is a draft resolution. In violation of this requirement, the draft of the challenged Resolution was not prepared previously or introduced to the deputies.

Article 51 of the Rules of Procedure does not provide for the abstract possibility of the resignation of the National Assembly's President, Deputy Presidents and Heads of Commissions, but it determines that their powers can be terminated early by a National Assembly resolution pursuant to their request and only in case of the existence of two concrete grounds: illness or the impossibility to carry out responsibilities.

Articles 62 and 71 of the Constitution and Articles 1, 52 and 105 of the Rules of Procedure provide that the National Assembly President's powers can be terminated by a National Assembly resolution adopted by the majority of the deputies sitting.

The Chairman of the sitting violated the Rules of Procedure in his formulation and introduction of the issue for voting. Article 110 of the Rules of Procedure demands that, "Before the start of voting, the Chairman repeats all the suggestions which are put for voting, clarifies their formulations, and reminds the

Assembly of the number of votes necessary for the adoption of the resolution." In violation of this demand the Chairman did not remind the deputies of the number of votes necessary to adopt the Resolution.

According to Article 62 of the Constitution, the National Assembly shall operate in accordance with its Rules of Procedure. National Assembly resolutions cannot be adopted where violations of the Rules of Procedure occur.

#### *Languages:*

Armenian.



# Austria

## Constitutional Court

### Statistical data

Sessions of the Constitutional Court during September/October 2000

- Financial claims (Article 137 B-VG): 11
- Conflicts of jurisdiction (Article 138.1 B-VG): 1
- Review of regulations (Article 139 B-VG): 30
- Review of laws (Article 140 B-VG): 33
- Challenge of elections (Article 141 B-VG): 2
- Complaints against administrative decrees (Article 144 B-VG): 460  
(231 declared inadmissible)

and during November/December 2000

- Financial claims (Article 137 B-VG): 11
- Conflicts of jurisdiction (Article 138.1 B-VG): -
- Review of regulations (Article 139 B-VG): 24
- Review of laws (Article 140 B-VG): 27
- Challenge of elections (Article 141 B-VG): 8
- Complaints against administrative decrees (Article 144 B-VG): 426  
(304 declared inadmissible)

### Important decisions

*Identification:* AUT-2000-3-006

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 04.10.2000 / **e)** V 91/99 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – Extension.

2.1.1.1.2 Sources of Constitutional Law – Categories – Written rules – National rules – Quasi-constitutional enactments.

2.1.1.1.4 Sources of Constitutional Law – Categories – Written rules – International instruments.

2.2.1.3 Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and other domestic legal instruments.

4.3.1 Institutions – Languages – Official language(s).

4.3.4 Institutions – Languages – Minority language(s).

5.3.38 Fundamental Rights – Civil and political rights – Linguistic freedom.

5.3.43 Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

*Keywords of the alphabetical index:*

District, mixed population.

*Headnotes:*

A regulation admitting the use of the Slovenian language, in addition to German, as the official language before communal authorities and other offices which was explicitly limited to only one local community contradicts Article 7.3 (first sentence) of the Vienna State Treaty 1955 and § 2 of the Law on Ethnic Groups (*Volksgruppengesetz*). This was because the regulation excluded other mixed population local communities with a Slovenian minority of 10%.

*Summary:*

A citizen of the Eberndorf community (in the district of Völkermarkt, Carinthia) was denied the right to use the Slovenian language in an administrative procedure. He lodged a complaint with the Court alleging there had been an infringement of his constitutionally guaranteed right and an application of unconstitutional provisions.

The Court carried out an *ex officio* review of the Federal Government's regulation on the use by courts, administrative authorities and other offices of the Slovenian language, in addition to German, as the official language (*Amtssprachen-Verordnung 1977*). The review was restricted to the word "Sittersdorf" in § 2.2.3 of the regulation, by which the use of the Slovenian language was granted to this community (also in the district of Völkermarkt, Carinthia) only.

The Court recalled its precedents (VfSlg. 11.585/1987, 12.836/1991) in which it had already held the following essential views:

- Article 7.3 (first sentence; with the rank of constitutional law) of the Vienna State Treaty 1955 must be seen as a separate settlement in favour of minorities which guarantees Austrian citizens of the Slovenian minority the use of their language before authorities.

- It is a state treaty provision which is directly applicable.
- The term “administrative and judicial district...of mixed population” in Article 7.3 must not be related to a political district but to a community as the smallest territorial unit.
- This is a territory in which a higher number of the population belong to a minority. For the identification of their number it is sufficient to look at the statistical data taken at a census.

On the basis of its precedent, the Court came to the conclusion that a community like Eberndorf, which had a Slovenian-speaking population of 10.4% recorded in the census of 1991, comes within the meaning of “administrative district...of mixed population” (Article 7.3 of the State Treaty). The reviewed part of the relevant regulation therefore contradicted Article 7.3 of the State Treaty and § 2 of the Law on Ethnic Groups according to which international law obligations must be respected.

#### *Supplementary information:*

In addition the Court concluded that after the annulment of the impugned provision, Article 7.3 is as such directly applicable. However, the Federal Government may also issue a new regulation. Due to the need to take organisational measures the judgment will enter into force on 1 May 2001.

#### *Languages:*

German.



#### *Identification:* AUT-2000-3-007

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 02.12.2000 / **e)** W I-5/00 / **f)** / **g)** / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

4.9.6.4 Institutions – Elections and instruments of direct democracy – Preliminary procedures – Ballot papers.

4.9.8.2 Institutions – Elections and instruments of direct democracy – Voting procedures – Polling booths.

5.3.39.4 Fundamental Rights – Civil and political rights – Electoral rights – Secret ballot.

#### *Keywords of the alphabetical index:*

Vote, obligation / Ballot paper, availability.

#### *Headnotes:*

An electoral law (§ 15.1 Community Electoral Law of the Vorarlberg *Land – Gemeindegewahlgesetz*) stipulating that official ballot sheets are to be forwarded to voters and received by them at least 4 days before election day interferes with the principle of a secret ballot.

However, other provisions of the relevant law, stipulating that official ballot sheets must be available in polling booths (§ 28.4), that voters have to receive the (empty and not transparent) envelope in the polling station just before entering the polling booth (§ 32.2) and that voters have to use the polling booth for voting (§ 32.3), mean that the above mentioned law (§ 15.1) is not unconstitutional.

#### *Summary:*

On 2 April 2000 there were elections of the representatives of all communities in the Vorarlberg *Land*. A group standing for election to the body of community representatives of the City of Feldkirch challenged this election. They maintained that the legal obligation to vote would be inconsistent with the Federal Constitution and that the forwarding of official ballot sheets before election day would be contrary to the *Land* Constitution. Moreover, the election would have been illegal itself because there were no additional ballot sheets available in any of the voting booths of the City of Feldkirch.

The Court could not find the impugned provisions unconstitutional. However, the election of community representatives to the City of Feldkirch was unlawful and consequently annulled by the Court on the basis of the fact that the communal electoral board had failed to meet its legal duty to provide for additional ballot sheets in the voting booths. This fact infringed every voter's right and might therefore have influenced the election result.

Because of this outcome, the Court did not have to consider another argument raised in the challenge, that most of the voters would not even have used the polling booths for casting their vote. The Court

nevertheless held that if this were true, it would be unlawful.

*Supplementary information:*

The election of the community representatives of the City of Feldkirch was repeated on 28 January 2001.

*Languages:*

German.



*Identification:* AUT-2000-3-008

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 02.12.2000 / **e)** W 1-6/00 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

4.9.8.3 Institutions – Elections and instruments of direct democracy – Voting procedures – Voting.

4.9.8.10 Institutions – Elections and instruments of direct democracy – Voting procedures – Announcement of results.

*Keywords of the alphabetical index:*

Election, file, sealed / Election, electoral commission / Vote, procedure, protocol / Ballot paper, storage, city hall.

*Headnotes:*

Pursuant to § 43.1 of the Community Electoral Law of the Vorarlberg Land – *Gemeindewahlgesetz* the electoral board of each voting area (*Sprengelwahlbehörde*) has to certify the voting process by drawing up a protocol. The protocol has to contain the total number of votes – valid and invalid – as well as the total number of valid votes cast for the different electoral groups. This protocol, signed by all members of the board, and the attached valid, invalid and unused ballot sheets constitute the election file (*Wahlakt*). This file has to be packed and sealed up and submitted to the communal electoral board (*Gemeindewahlbehörde*) which has to verify the file and to declare the results of the poll.

According to the Court's relevant precedents, election files may be at the disposal of electoral boards only as a collegium (with the co-operation of all board members and always under mutual supervision) and only for the time necessary to perform the tasks they are legally authorised to perform. Every official involved in revising or correcting election files may only work under the permanent supervision of all the other board members.

*Summary:*

An electoral party challenged the election of the community representatives of the City of Bludenz which had taken place on 2 April 2000.

The challenge, a protocol of the communal electoral board's meeting of 4 April, and the interrogation of two officials involved produced evidence that the electoral boards of certain voting areas had not only submitted unsealed election files to the communal electoral board on election day, but that the (open) files had been stored in the rooms of the city hall till the next morning. Further, at the hall two officials revised and corrected some election files in the absence of the communal electoral board and without its authorisation.

The Court ruled that this unlawfulness affected the whole election of the City of Bludenz as none of the authorities having jurisdiction – including the Court itself – could objectively scrutinise and obtain a reliable result of votes.

*Supplementary information:*

The election of the community representatives of the City of Bludenz was repeated on 28 January 2001.

*Languages:*

German.



*Identification:* AUT-2000-3-009

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 12.12.2000 / **e)** KR 1-6, 8/00 / **f)** / **g)** / **h)** CODICES (German).



*Keywords of the systematic thesaurus:*

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of jurisdictional conflict.

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – Constitution.

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

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

2.2.1.6.3 Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and constitutions.

3.25.2 General Principles – Principles of Community law – Direct effect.

4.10.6 Institutions – Public finances – Auditing bodies.

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

*Keywords of the alphabetical index:*

Community law, interpretation / Preliminary ruling / Audit, measure / European Union, Charter of Fundamental Rights / Official, salary, data, collection.

*Headnotes:*

The Court referred to the European Court of Justice (ECJ) the question whether Community law, especially on personal data protection, conflicts with national constitutional law according to which a state organ is obliged to collect and transmit data on the salary of officials of territorial entities (Federation, *Länder*, communities) and public institutions (e.g. legal interest groups, foundations, enterprises in which the state has either a holding or influence) for the purpose of making the names and salaries of all those officials public.

If so, the Court asked, in addition, whether such provisions of Community law were directly applicable so that persons subject to this national obligation could invoke these provisions in order to prevent the relevant national (constitutional) law from being applied.

*Summary:*

Pursuant to § 8 of the Constitutional Law on the Restriction of Civil Servants' Salaries (*Bezügebegrenzungs BVG 1997*), all persons who draw a salary or retirement pension of two or more legal entities

over which the Court of Audit has jurisdiction, are obliged to notify this to the respective legal entities. All legal entities subject to the Court of Audit's jurisdiction are obliged to inform the Court of Audit of salaries exceeding a certain amount (ATS 80 000 gross) and/or if a person draws an additional salary (no matter what the amount). If a legal entity does not fulfil this obligation the Court of Audit has to gain the information by inspection of the legal entity's relevant documents. The Court of Audit has then to prepare a report which names all persons receiving such a salary or retirement pension. This report must be handed over to the parliaments of the Federation (both chambers) and the *Länder*, and should be made available to the general public.

Differences of opinion arose between the Court of Audit and some entities, such as the Niederösterreich *Land*, some larger communities, the Austrian Central Bank, the Austrian Broadcasting Corporation (*ÖRF*), Austrian Airlines (*AUA*) and a regional Economic Chamber (*Wirtschaftskammer*) about the interpretation of § 8 *Bezügebegrenzungs BVG*.

Most of these entities fulfilled their obligation only insofar as they informed the Court of Audit with data in anonymous form. Some did not fulfil the obligation at all. None of them permitted audit measures (inspection of documents).

Therefore the Court of Audit asked the Court to settle this conflict of jurisdiction (first 8 cases out of around 250), while the entities involved asked the Court not to allow the applications, as in their view the provision in question (§ 8 *Bezügebegrenzungs BVG*) would be incompatible with Community law.

The Court as a court within the meaning of Article 234.3 EC decided to request the European Court of Justice to give a ruling on the interpretation of some provisions of Directive 95/46/EC (Official Journal L 281) as such and also within the context of Article 8 ECHR as well as Article 8 of the Charter of Fundamental Rights of the European Union.

*Supplementary information:*

This is the second time that the Court has asked the ECJ for a preliminary ruling.

*Languages:*

German.



# Azerbaijan Constitutional Court

## Important decisions

*Identification:* AZE-2000-3-008

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 08.09.2000 / **e)** 1/11 / **f)** / **g)** *Azerbaycan* (Official Gazette), *Azerbaycan Respublikasinin Konstitusiyasi Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

3.12 General Principles – Legality.

4.10.7.1 Institutions – Public finances – Taxation – Principles.

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

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

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

*Keywords of the alphabetical index:*

Tax, Tax Service, law / Margin, profit / Licence, lack, sanction.

*Headnotes:*

Article 6.1.3 of the Law on State Tax Service of Azerbaijan provides for the extraction of income realised from activity requiring special permission (licence), an official warning, and a levying of sanctions on the income of this activity at specified rates if this activity is exercised without licence. The item must be interpreted consistently with another part of the same Article (Article 6.1.9 of the Law on State Tax Service).

*Summary:*

The Cabinet of Ministers asked for interpretation of Article 6.1.3. of the Law on State Tax Service.

Article 59 of the Constitution states that:

“Everyone may, using his/her possibilities, abilities and property, according to existing legislation, individually or together with other citizens carry out business activity or other kinds of economic activity not prohibited by the law.”

Article 15.2 of the Constitution provides for the State to create conditions for the development of economy and guarantee free business activity.

Under Article 12.1 of the Law on Enterprise Activity, the state guarantees the protection of rights and legal interests of businessmen carrying out activity in accordance with the legislation.

Certain duties are fixed on businessmen. Article 7 of the Law on Enterprise Activity makes it the duty of a businessman to hold a special sanction (licence) for activity in the spheres which are subject to licensing according to the present legislation. Article 6.1.3 of the Law on State Tax Service provides for certain financial sanctions for activity requiring a special sanction (licence) without the licence. Article 6.1.9 of the Law on State Tax Service indicates that the financial sanctions will be applied at specified rates of the incomes derived from the illegal activity of enterprises and citizens. The item provides that enterprises and citizens carrying out licensed activity without licence, or where registration for a licence has been delayed, shall be taxed with financial sanctions at a rate of the income received during the activity.

The sanctions applied in Article 6.1.3 and 6.1.9 of the Law are directed at the prevention of illegal activities by physical and legal persons. However, Article 6.1.9 includes the words “for a deduction of the costs made for receiving this income”. The absence of these words in Article 6.1.3 causes difficulties when applying the present norms in practice.

Thus, different items of the same Article of the Law on State Tax Service (Article 6.1.3 and Article 6.1.9) apply different sanctions for the receiving of income from illegal activity. This does not conform to the principle fixed in Article 149 of the Constitution according to which normative legal acts must be based on law and justice (an equal attitude to equal interests). Besides this, the application of sanctions in the first case with respect to whole income, and in the second case, deducting expenses, also contradicts the right to equality specified by Article 25 of the Constitution.

The Constitutional Court considers that the words “profit margin” specified in Article 6.1.3 of the Law on State Tax Service must be realised as the income remaining after the deduction of the charges made for receiving this income.

*Languages:*

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



*Identification:* AZE-2000-3-009

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 30.10.2000 / **e)** 1/13 / **f)** / **g)** *Azərbaycan* (Official Gazette), *Azərbaycan Respublikasının Konstitusiyası* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.24 General Principles – Market economy.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.2 Fundamental Rights – Equality.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

5.4.11 Fundamental Rights – Economic, social and cultural rights – Right to housing.

*Keywords of the alphabetical index:*

Privatisation, procedure / Housing, resources.

*Headnotes:*

Articles 29 and 59 of the Constitution promote the development and establishment of various forms of property and free enterprise. The State, along with granting the right for privatisation, should also create the conditions for citizens to implement this right and ensure the protection of norms and principles envisaged in the Constitution.

*Summary:*

By its petition, the Supreme Court sought to examine the conformity of the Law on Privatisation of Housing Resources, which provides for the privatisation of living quarters with limited public utilities by consent of other tenants, with Articles 25, 29 and 71.2 of the Constitution.

Citizens of the Azerbaijan Republic, as well as stateless persons with agreements regarding living quarters with the owners of state or public housing resources, shall have the right to convert without indemnity the living quarters occupied by him/her to private property under the conditions and via the procedure prescribed by Law (Article 1 of the Law on Privatisation of Housing Resources).

However, in accordance with Article 5.2 of the same Law, the privatisation of communal living quarters with limited public conditions and occupied by several tenants is only allowed with the consent of each of the tenants and adult members of their family.

Thus, privatisation of communal apartments with limited public utilities occupied by several tenants depends on the subjective opinions of other tenants. This leads to groundless difficulties in privatisation. As a result, Article 71.2 of the Constitution, which provides that no one may restrict the implementation of the rights and liberties of a human being and citizen, is violated.

The procedure for privatisation of apartments with limited public utilities envisaged in Article 5.2 of the above-mentioned Law impedes the right for judicial protection of rights and freedoms provided by Article 60.1 of the Constitution. This ban puts the tenants in an unequal position as regards to tenants of isolated apartments, thus violating the right for equality envisaged in Article 25 of the Constitution.

The granting to citizens of quarters in communal apartments by housing authorities does not differ in legal basis from the granting of isolated apartments. In both cases the apartments are given on a single basis and have a common legal regime. Thus, the application of any restriction regarding the privatisation of quarters in communal apartments provides for inequality of citizens' rights depending on their living conditions.

The Constitutional Court decided to recognise as null and void Article 5.2 of the Law on Privatisation of Housing Resources due to its non-conformity with Article 25, Article 60.1 and Article 71.2 of the Constitution.

*Languages:*

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



**Identification:** AZE-2000-3-010

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 22.11.2000 / **e)** 1/15 / **f)** / **g)** *Azərbaycan* (Official Gazette), *Azərbaycan Respublikasının Konstitusiyası Mehkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

**Keywords of the systematic thesaurus:**

1.3.4.5.2 Constitutional Justice – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.

4.5.3.1 Institutions – Legislative bodies – Composition – Election of members.

4.9.8 Institutions – Elections and instruments of direct democracy – Voting procedures.

**Keywords of the alphabetical index:**

Election, result, confirmation / Election, electoral law, infringement.

**Headnotes:**

On 15 November 2000, in order to verify and confirm the results of elections to Parliament (*Milli Majlis*), the Central Election Commission (CEC) submitted to the Constitutional Court (according to Article 86 of the Constitution and Article 75.2 of the Law on the Elections to Parliament) protocols N1 and N2 of the district election commissions with enclosed relevant documents, and its resolution concerning the determination of the results of elections in the single multi-mandate electoral district.

**Summary:**

The documents presented to the Constitutional Court showed that on 5 November the elections to Parliament were held in 99 electoral districts. In 95 districts the elections were recognised as having taken place and on each of them the candidates for the deputies were confirmed.

By the resolutions of the Central Election Commission (CEC) of 6 November 2000 (N42/171), 8 November 2000 (N43/172), 9 November 2000 (N44/173), and 13 November 2000 (N46/175) the results of elections in the electoral districts of Khatai N10, Sumgayit 1 N38, Akhsu-Kurdamir N51 and Imishli N68 were recognised as void.

By the protocol of the CEC of 14 November 2000 on elections in the single multi-mandate electoral district

and the allocation of deputy mandates among political parties, the following has been determined:

Total number of voters on electoral rolls of constituencies of electoral districts: 4 212 915

- Number of ballots distributed among voters on elections day: 3 000 198
- Number of eliminated ballots: 1 140 341
- Number of valid ballots: 2 897 864
- Number of void ballots: 100 434
- Number of votes given for the list of single candidates of political parties: 2 883 819

Total number of votes given for each list of single candidates of political parties taking part in the allocation of deputy mandates:

- New Azerbaijan Party: 1 809 801
- Party of Popular Front of Azerbaijan: 313 059
- Party of the Civil Solidarity: 182 777
- The Communist Party of Azerbaijan: 182 029

Examination of the materials, other documents and references of experts showed that in 88 of 95 electoral districts protocols N1 and N2, extra documents enclosed to them and the protocol of the CEC conform to the Law on Elections to Parliament. In connection with the infringement of the Law, the protocols N1 and N2 of the remaining seven electoral districts: (Yasamal 2 N7, Khatai 1 N9, Astara N53, Barda city N56, Gusari N65, Hajigabul-Salyan N94, Shamkir urban N99) cannot be recognised as conforming to the Law.

The Constitutional Court decided to confirm the results of the elections of deputies to Parliament held on 5 November 2000 in 88 electoral districts, not to confirm the results of elections in 7 electoral districts and taking into account item 2 of the present decision, to confirm the results of elections determined by the CEC in the single multi-mandate electoral district.

**Languages:**

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



*Identification: AZE-2000-3-011*

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 29.11.2000 / **e)** 1/14 / **f)** / **g)** *Azərbaycan* (Official Gazette); *Azərbaycan Respublikasının Konstitusiyası* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

5.2.1.3 Fundamental Rights – Equality – Scope of application – Social security.

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

*Keywords of the alphabetical index:*

Vacation, right / Leave, additional, right, seniority accumulated with different employers / Labour law.

*Headnotes:*

All people are equal with respect to the law and law courts. Men and women possess equal rights and liberties. (Article 25.1 and 25.2 of the Constitution). Normative legal acts should be based on law and justice (the same attitude to equal interests – Article 148.1 of the Constitution).

A provision of the Labour Code which grants additional leave only to workers who had worked at one enterprise during the period provided by law but not to workers employed under the same conditions who had accumulated seniority at several enterprises contradicts the principle of equality.

*Summary:*

The Supreme Court asked for interpretation of Article 116.2 of the Labour Code regarding the granting of additional vacation (leave).

Article 37 of the Constitution provides for the right to rest and paid leave. In accordance with the Labour Code for normal rest, recovery of ability to work, and the protection and strengthening of health, a person working on the basis of a labour contract shall be granted leave via the procedure determined by law. Besides basic leave, depending on the nature of labour and the seniority of the person, additional leave is provided for.

Depending on seniority, the worker shall be given the following additional leave: work experience from 5 to 10 years – 2 calendar days; from 10 to 15 years –

4 calendar days; and more than 15 years – 6 calendar days (Article 116.1 of the Labour Code). Additional leave for seniority shall be determined from the period spent by the worker at one enterprise (Article 116.2). The equal basis and the procedure for the conclusion of labour contracts, and the regulation of work time, rest time etc. shall be established for the same categories of workers. In spite of this, Article 116.2 of the Labour Code, without any legal motivation, grants additional leave only to those workers who have worked at one enterprise during the period provided by law. But the worker employed under the same basis, performing the same work at the same conditions as the above-stated workers, who had accumulated seniority not at one but at several enterprises was deprived of his/her right to additional leave.

In accordance with labour legislation in cases regarding the elimination of enterprises, the reduction of the number or staff, and the dismissal of workers for reasons of health and ability to work, the labour contract shall be cancelled irrespective of the will of worker. That makes him/her continue his/her labour activity at other enterprises. The above-mentioned workers are in an unequal position as compared with those who accumulated seniority at one enterprise.

Thus, the Constitutional Court decided that the provisions of Article 116.2 of the Labour Code “at one enterprise”, which limit the additional leave by seniority shall be considered as null and void due to their non-conformity with Articles 25.1 and 149.1 of the Constitution.

*Languages:*

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



# Belgium

## Court of Arbitration

### Statistical data

1 January 2000 – 31 December 2000

- 141 judgments
- 216 cases dealt with (taking into account the joinder of cases and excluding judgments on applications for suspension)
- 246 new cases
- Average length of proceedings: 359 days
- 54 judgments concerning applications to set aside
- 79 judgments concerning preliminary points of law
- 10 judgments concerning an application for suspension
- 1 interlocutory judgment
- out of 141 judgments, 15 were delivered in application of preliminary proceedings

### Important decisions

*Identification:* BEL-2000-3-009

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 04.10.2000 / **e)** 100/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 26.10.2000 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

1.3.4.5.2 Constitutional Justice – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – Constitution.

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

1.6.5.4 Constitutional Justice – Effects – Temporal effect – Postponement of temporal effect.

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

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

3.19 General Principles – Reasonableness.

4.7.6 Institutions – Courts and tribunals – Relations with bodies of international jurisdiction.

4.9.4 Institutions – Elections and instruments of direct democracy – Eligibility.

4.9.8.4 Institutions – Elections and instruments of direct democracy – Voting procedures – Identity checks on voters.

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

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – Nationals living abroad.

5.2.1.4 Fundamental Rights – Equality – Scope of application – Elections.

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

5.3.39.2 Fundamental Rights – Civil and political rights – Electoral rights – Right to stand for election.

*Keywords of the alphabetical index:*

Vote, by proxy / Voter, non-resident / Preliminary ruling, Court of Justice of the European Communities.

*Headnotes:*

It is not contrary to the principle of equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution to subject voting by proxy on behalf of voters residing abroad to certain conditions which are not required for voting by proxy on behalf of voters residing in the country, at least where such conditions are reasonably justified.

The Court has no authority to rule on the matter of Belgians resident abroad being unable to stand for election, as this prohibition is based on the Constitution itself. Nor does the Court have the power to annul elections.

There is no need to act on a request to submit a preliminary question when the question concerned does not fall into the categories that can be put to the Court of Justice of the European Communities under the terms of Article 234 EC (formerly Article 177).

The Court upheld the effects of the annulled measures, taking into account the limited scope of the annulment.

*Summary:*

Three private individuals, two of whom were resident abroad, applied to the Court of Arbitration to annul the legislative elections held on 13 June 1999 and certain provisions of the Law of 18 December 1998 amending

the electoral code in respect of the election of the federal legislative Chambers. Their interest in the application was not disputed.

According to the applicants, Belgian voters residing abroad are discriminated against in comparison with Belgian voters resident in Belgium.

The Court recalled that it is for the constituent authority and the legislature to decide whether and under what conditions Belgians settled abroad may exercise their right to vote and to stand for election. It referred in this respect to Article 25 of the International Covenant on Civil and Political Rights.

The Court accepted that the fact that a voter does not have his or her main place of residence in Belgium necessitates verifications which would not be justified for voters whose names are on the population registers kept by the municipalities in Belgium. Resident voters generally go in person to the polling station, with their identity cards, making it easy to verify whether they are on the list deposited in the polling station and meet the requisite conditions to be allowed to vote.

The Court noted that for voters settled abroad the law has abandoned the system of voting by correspondence used in the European elections in 1994, which raised numerous practical problems at the time. Instead, it has introduced a system of voting by proxy. The choice between the two systems is a matter for the legislature and it does not behove the Court to overrule the legislature's decision when there is no reason to believe it is manifestly wrong. The question nevertheless remains whether the way in which voting by proxy is organised does not impose constraints which are not reasonably justified.

The Court accepted that verifications may be imposed on people residing abroad and voting by proxy that would not be justified for voters residing in Belgium, whose particulars can be verified in the registers kept in the municipalities. The measures embodied in the law were accepted by the Court, with the exception of that restricting the power of proxy to the spouse, parents or relatives of the voter and that requiring the proxy to produce a certificate, issued by the diplomatic or consular authority, certifying that the voter represented is still alive.

The Court annulled the provisions imposing these additional formalities. It did not have the power, however, to annul the elections held on 13 June 1999. (The Court's jurisdiction is limited to reviewing legal provisions.) However, it maintained the effects of the annulled provisions because of the limited effect of their annulment.

The applicants also challenged the fact that Belgian voters residing abroad cannot stand for election. As this is the direct result of a provision of the Constitution, the Court had no authority to deliberate.

The applicants also requested that the Court of Justice of the European Communities be asked for a preliminary ruling concerning "the democratic rights of Belgian nationals residing abroad". The Court rejected the request as it did not fall within the scope of the types of question admissible under Article 234 EC (former Article 177).

#### *Supplementary information:*

The Court of Arbitration asked the Court of Justice for a preliminary ruling by decision no. 6/97 of 19 February 1997.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2000-3-010

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 29.11.2000 / **e)** 124/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 15.12.2000 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.3 Sources of Constitutional Law – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
4.8.1 Institutions – Federalism and regionalism – Basic principles.  
4.8.3.3 Institutions – Federalism and regionalism – Institutional aspects – Courts.  
4.8.3.4 Institutions – Federalism and regionalism – Institutional aspects – Administrative authorities.  
4.8.5.2.1 Institutions – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.  
5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – Minors.  
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:*

Child, protection against pornographic or violent programmes.

*Headnotes:*

The communities (see Supplementary information 1), which have powers in the field of radio and television broadcasting, also have the power to establish an institution responsible for supervising the content of television programmes in order to protect young viewers.

Freedom of expression is not unduly affected by the establishment of an administrative body with the power to impose penalties on broadcasting organisations which disregard the ban on programmes likely seriously to impair the physical, mental or moral development of minors.

*Summary:*

The Court had to examine a decree of the Flemish Community dated 30 March 1999 prohibiting broadcasting corporations from broadcasting programmes likely to seriously impair the physical, mental or moral development of minors, including programmes containing pornographic scenes or gratuitous violence. The same decree (see Supplementary information 1) also set up a “Flemish Radio and Television Council” empowered to determine, acting on its own initiative or on complaints from private individuals, whether this ban has been observed and, where appropriate, to inflict penalties or, in exceptional cases, take preventive action.

The public limited company “*Vlaamse Media-maatschappij*” applied to the Court of Arbitration to annul these provisions, arguing that the decree effectively regulated freedom of expression and freedom of the press and set up an administrative tribunal, which the authorities concerned were not empowered to do.

After examining the nature and mission of the supervisory body set up by the impugned provisions, the Court concluded that the Flemish Radio and Television Council is not an administrative tribunal but an administrative body (see Supplementary information 2). The Court also rejected the argument that the federal legislature alone was authorised to pass laws regulating fundamental rights: “It is for each legislative authority to guarantee that fundamen-

tal rights are respected by giving them concrete form in the areas within its sphere of competence”.

The applicant also alleged violation of the principle of equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution, taken together with Article 10 ECHR (see Supplementary information 3). The Court ruled that the freedom of expression guaranteed under Article 10 ECHR is not absolute. The Flemish Community sought to limit freedom of expression only insofar as it could have a harmful effect on young viewers, in compliance with Article 22 of Council Directive 89/552/EEC of 3 October 1989. The membership of the Flemish Radio and Television Council, which comprises experts in different fields, guarantees subtlety of interpretation. In principle the penalties are imposed *ex post facto* and may be adapted to the gravity of the offence. The possibility of preventive action is exceptional and limited only to cases where an evident, significant and serious violation of the ban on the broadcasting of programmes harmful to minors would otherwise be committed. The Court finds that the impugned regulation is motivated by concern to protect a fragile social category and has no disproportionate effect on the freedom of expression of the broadcasting organisations concerned.

*Supplementary information:*

1. In the Belgian Federation the French, Flemish and German-speaking communities have the power to pass regulations having statutory force concerning cultural matters such as radio and television broadcasting. The laws passed by these entities of the Belgian Federation are called “decrees”.

2. The powers of the courts in Belgium (which used to be a unitary state) are still regulated at the federal level and the communities are not empowered to establish new courts. The “federal” courts apply the laws and regulations of the federal state, the three communities (French, Flemish and German-speaking) and the three regions (Flemish, Walloon and Brussels-Capital). If necessary the Court of Arbitration hands down a preliminary ruling, at the request of the courts, as to which level of authority had the power to pass the legislation the court is required to enforce. The very name of the constitutional court is a reminder of this arbitration role.

3. The Court of Arbitration does not have supervisory authority over all the provisions of the Constitution but only over Articles 10 and 11 of the Constitution (the principle of equality and non-discrimination) and Article 24 of the Constitution (rights, freedoms and fundamental rules concerning education) and over the rules that determine the respective powers of the



federal government, the communities and the regions. In connection with Articles 10 and 11 of the Constitution, the Court can also take into account the fundamental rights guaranteed by other constitutional provisions and by international treaties (in this case a combination of Articles 10 and 11 of the Constitution and Article 10 ECHR): discrimination affecting fundamental rights guaranteed by the Constitution or by international treaties can be considered as a violation of Articles 10 and 11 of the Constitution.

#### Languages:

French, Dutch, German.



**Identification:** BEL-2000-3-011

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 06.12.2000 / **e)** 127/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 23.12.2000 / **h)** CODICES (French, Dutch, German).

#### Keywords of the systematic thesaurus:

1.4.6 Constitutional Justice – Procedure – Grounds.

1.4.6.3 Constitutional Justice – Procedure – Grounds – Ex-officio grounds.

1.4.10.1 Constitutional Justice – Procedure – Interlocutory proceedings – Intervention.

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

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

2.1.2.2 Sources of Constitutional Law – Categories – Unwritten rules – General principles of law.

4.8.5.2.1 Institutions – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.14 Fundamental Rights – Civil and political rights – *Ne bis in idem*.

#### Keywords of the alphabetical index:

Road, rut / Road, surface, damage / Motor vehicle, weight / Penalty, criminal law / Penalty, administrative, fine / Mitigating circumstance / Evidence, new / Penalty, minimum.

#### Headnotes:

Based on the powers vested in them in the fields of public works and transport, the regions have the power to pass laws aimed at protecting the road infrastructure, for example to protect the road surface against the formation of ruts, and to impose penalties for the infringement of such laws. They may, for example, refer to the maximum authorised weight of motor vehicles fixed by the federal authorities for road safety purposes.

The fact that exceeding the maximum authorised weight and the gross axle weight rating constitutes a violation of federal law as well as regional law does not mean that the offender can be punished twice for the same offence. It is for the judge responsible for determining whether the charges are established to ensure that the *ne bis in idem* principle is respected.

A number of authorities, such as the Cabinet, are legally authorised to intervene in Court proceedings to put forward new evidence in initial pleadings.

The possibility of providing for public officials to impose administrative fines does not violate Articles 10 and 11 of the Constitution, taken jointly with Article 6 ECHR, Article 14 of the International Covenant on Civil and Political Rights and the general principles of criminal law: these administrative decisions are subject to appeal in courts which have the power to review them, *de facto* and *de jure*, and which satisfy the requirements of the aforesaid treaty provisions.

#### Summary:

The Royal Federation of Belgian Transporters and a private transport firm lodged an appeal against several provisions of two decrees issued by the Flemish Region introducing a general ban on damage to road surfaces by vehicles exceeding the maximum authorised gross vehicle weight and gross axle weight. Violations of the provisions concerned are punishable by imprisonment and/or progressive fines. Administrative fines may also be imposed for these offences.

The applicants argued *inter alia* that the impugned provisions interfere with the powers of the federal

authorities. The Court noted that in Federal Belgium the regions have powers in the fields of public works and transport, but the federal government is responsible for technical regulations governing means of transport and communication. The federal government has accordingly, for example, introduced maximum authorised gross vehicle weights and gross axle weights for motor vehicles, and made it an offence to exceed those weights. In order to prevent the formation of ruts in its road surfaces, the Flemish region has also introduced penalties for driving vehicles which exceed the maximum authorised weights set by the federal government. The Court considered that the region was not overstepping its powers in using the criteria set at the federal level.

Violations of the regional measures are punishable but, if no action is taken, fines can be imposed by the administration. The applicants argued that this amounts to discrimination, as there is no allowance for mitigating circumstances in the case of an administrative fine as there is the case of criminal sentences. The Court ruled that the possibility of imposing administrative fines is governed by so many guarantees and restrictions that the mere fact that no allowance is made for mitigating circumstances cannot be considered incompatible with Articles 10 and 11 of the Constitution.

The applicants also claimed that the criminal law principle *ne bis in idem* is violated when the same offence (driving a vehicle in excess of the authorised weight) is an offence under both regional and federal laws. The Court noted that it is not a question of the same offence being punished twice but of two different offences which are the consequence of the same behaviour, where the judge hands down only the harsher sentence.

The Cabinet, which also intervened in the proceedings, submitted a new argument, namely that the decision to impose an administrative fine must be subject to appeal before a court having full power to deal with all aspects of the case, which it alleged was not the case here. The Court held that administrative decisions are subject to appeal in courts which have the power to review them, *de facto* and *de jure*, and which satisfy the requirements of Article 6 ECHR and Article 14 of the International Covenant on Civil and Political Rights.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2000-3-012

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 06.12.2000 / **e)** 128/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 23.12.2000 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

3.4 General Principles – Separation of powers.

3.10 General Principles – Certainty of the law.

4.5.9 Institutions – Legislative bodies – Relations with the courts.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.3.36 Fundamental Rights – Civil and political rights – Non-retrospective effect of law.

#### *Keywords of the alphabetical index:*

Judicial guarantee, violation / Retroactivity, exceptional circumstance, condition / Legislative validation.

#### *Headnotes:*

The constitutional principle of equality and non-discrimination contained in Articles 10 and 11 of the Constitution is not violated by a retroactive law whose purpose or effect is not to interfere in proceedings pending before a judge or to prevent the courts, in particular the Court of Cassation, from deciding a point of law raised in the course of proceedings.

#### *Summary:*

The Law of 25 January 1999 concerning social measures contains a provision on whether or not compulsory health insurance should cover the cost of medicines administered by hospitals to self-employed out-patients. The National Union of Free Mutual Benefit Societies applied to the Court of Arbitration to annul Article 105 of this law, which sets the date of its entry into force at 1 July 1996, thereby giving it retroactive effect. The applicant alleged that the retroactive effect was discriminatory and accused the legislature of interfering in proceedings pending before the courts whose purpose is precisely to determine whether or not the cost of medicines should be covered by the compulsory insurance scheme.

The Court held first that the retroactivity of legal provisions, which may give rise to uncertainty of the law, may be justified only by special circumstances. If it is proven, furthermore, that the retroactive effect of the legal provisions is likely in any way to affect the outcome of one or more court cases or to prevent the courts from passing judgment, the nature of the principle at issue demands that such action by the legislature be justified by exceptional circumstances.

The Court considered, however, that there was no evidence that the retroactive effect of the impugned law resulted, intentionally or otherwise, in interference in judicial proceedings in progress, or prevented the courts – in particular the Court of Cassation, with which the appeal was lodged – from passing judgment on the legal issue raised by such proceedings. The Court further noted that a decision of the Labour Tribunal referred to by the applicant was set aside by the Court of Cassation subsequent to the enactment of the impugned law, but without any reference being made in the decision to that law, which was not applicable to the subject matter of the appeal.

The Court sought to identify the aims of the law: these were to guarantee the certainty of the law by confirming, both for the future and for the past, a rule which already existed, and to make allowance for budgetary considerations. The Court considered that these aims justified the retroactive nature of the measure.

The Court accordingly rejected the appeal for annulment.

#### *Cross-references:*

See Judgment no. 64/97 of 06.11.1997, *Bulletin* 1997/3 [BEL-1997-3-011];

See Judgment of the European Court of Human Rights, *Zielinski and others v. France*, 28.10.1999.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2000-3-013

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.12.2000 / **e)** 137/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

3.15 General Principles – Proportionality.

3.19 General Principles – Reasonableness.

5.2.1.3 Fundamental Rights – Equality – Scope of application – Social security.

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

5.4.12 Fundamental Rights – Economic, social and cultural rights – Right to social security.

#### *Keywords of the alphabetical index:*

Cohabitation, surviving partner, annuity / Accident, industrial, compensation, rights holders / Accident, industrial, surviving spouse, life annuity.

#### *Headnotes:*

The fact that the life annuity awarded following a fatal industrial accident is paid to the victim's surviving spouse in the case of a married couple but not to the victim's surviving co-habiting partner in the case of an unmarried couple does not violate the principle of equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution.

#### *Summary:*

The Law on industrial accidents of 10 April 1971 provides for a system of compensation for the close relatives of workers killed in industrial accidents. In the event of a fatal industrial accident, Article 12 of this law awards a life annuity (30% of basic salary) to the victim's spouse provided that they were neither divorced nor separated at the time of the accident. This annuity was refused to the companion of a fatal industrial accident victim who was also the mother of the victim's child. The victim's companion submitted a claim for the annuity to the Labour Tribunal in Namur, alleging that Article 12 of the law violates Articles 10 and 11 of the Constitution (equality and non-discrimination) insofar as it awards a right to the married spouse but not to the unmarried partner. This court decided to submit the matter to the Court of Arbitration for a preliminary ruling.

The Court noted that the question concerned the distinction between surviving spouses and unmarried co-habiting partners of the opposite sex made for the

purposes of compensation in the event of a fatal industrial accident.

It referred first of all to the principle enshrined in Articles 10 and 11 of the Constitution concerning equality and non-discrimination and how it carries out its supervisory function on this basis and stated that (B.3):

“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 when it is established that there is no reasonable proportionality between the means employed and the aim.”

After establishing that married couples and unmarried couples who live together form categories of people which are comparable for social security purposes, the Court considered that the differential treatment concerned is based on an objective criterion, namely the fact that the legal situation of married and unmarried couples differs in terms both of their mutual obligations and of their economic rights. The Court listed the respective rights and obligations of married couples under the Civil Code and noted that these rights and obligations do not apply as such to persons who live together but have not entered into the same legal commitments towards one another. It should be taken into account that people decide whether to marry or to live together without getting married knowing the advantages and disadvantages of both options.

Furthermore, it is for the law to determine whether and to what extent people who live together as couples should be treated as married couples in respect of industrial accidents. Even in the light of recent changes providing for unmarried cohabitants to be legally treated as married couples, the Court could not overrule the law in an area subject to such change.

The Court concluded that the law at issue in this case could not be considered unreasonable and was therefore not in contradiction with the constitutional principle of equality and non-discrimination.

### *Languages:*

French, Dutch, German.



### *Identification:* BEL-2000-3-014

a) Belgium / b) Court of Arbitration / c) / d) 21.12.2000 / e) 138/2000 / f) / g) *Moniteur belge* (Official Gazette) / h) CODICES (French, Dutch, German).

### *Keywords of the systematic thesaurus:*

2.1.1.4.12 Sources of Constitutional Law – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.

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

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

5.3.42 Fundamental Rights – Civil and political rights – Rights of the child.

### *Keywords of the alphabetical index:*

Child, born in wedlock / Paternity, disputed, by husband / Paternity, disputed, time limit / Descent, interest of the child / Paternity, biological father / Family, “peace of the family”.

### *Headnotes:*

A law stipulating that if the husband of the mother of a child born in wedlock wishes to deny paternity of the child he must bring an action within one year of the birth of the child or of his learning of the birth does not violate the principle of equality and non-discrimination enshrined in Articles 10 and 11 of the Constitution.

### *Summary:*

According to the Civil Code the father of the child of a married woman is the mother’s husband (*pater is est quem nuptiae demonstrant*). Article 332 of the Civil Code stipulates who may dispute paternity and within what time limits. Only the mother, her husband and the child can take such action. “The mother must act within a year of the birth and the husband, or previous

husband, within a year of the birth or of his learning of it.” (Article 332.4 of the Civil Code).

The father of a child born in wedlock commenced proceedings before the Regional Court in Antwerp denying paternity of his two young children after discovering that his wife had been having an extramarital affair. This action succeeded in the case of the second child, as the one-year time limit had not expired. The court found in the case of the elder child, however, that the husband had acted out of time, and asked the Court of Arbitration to give a preliminary ruling on whether the Civil Code was not at variance with the constitutional principles of equality and non-discrimination insofar as the time limit for mother and father alike started at the time of the child’s birth (or of learning of it), whereas the mother is always aware of or able to ascertain the circumstances in which the child was conceived and can therefore take action in good time, while the same cannot be said of the husband, who sometimes does not learn that his paternity may be questionable until after the one-year limit has expired.

To verify this, the Court first considered the purpose of the Law of 31 March 1987 amending the provisions concerning descent. While one of the aims had been to ascertain the truth as closely as possible, i.e. who the biological father was, the law had also been intended to take into account and protect the “peace of the family”, by limiting the search for the “biological truth” if necessary. On the more specific question of action to dispute paternity, the law had placed the child’s interests first, and accordingly limited the time for action to the period during which the child was not yet aware of the meaning of paternity.

In the Court’s opinion, it may have been the legislator’s view that a man, by getting married, agreed to be considered, in principle, as the father of any children his wife might have. In view of the concerns at the origin of the law and the values it was intended to reconcile, it does not seem unreasonable, in principle, that the husband should be given only a short time in which to deny paternity.

Cases may arise, however, where the husband does not learn of facts demonstrating the lack of any genetic link between him and a child born of his wife until after the time limit stipulated in Article 332.4 of the Civil Code has lapsed. The situation of the husband differs in this respect from that of the mother, who is always aware of or able to ascertain the circumstances in which the child was conceived.

The Court acknowledged that expiry of the time limit prevents the husband from denying paternity, but considered that it is for the law to decide whether and

to what extent, particularly in the interest of the child, action to dispute paternity should be subjected to strict time limits.

In its reasoning the Court took into account Article 3.1 of the Convention on the Rights of the Child, which stipulates that in all actions concerning children the best interests of the child shall be a primary consideration.

Accordingly, it considered that it is not unreasonable to give priority to legal paternity over biological paternity and make action to deny paternity impossible, in the interest of the child, when the child is able to grasp the meaning of paternity and it can reasonably be accepted that the father is generally acknowledged as such, with the consent of the mother, who has not exercised her own right to dispute his paternity.

#### *Languages:*

French, Dutch, German.



# Bosnia and Herzegovina Constitutional Court

## Important decisions

*Identification:* BIH-2000-3-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 01.07.2000 / **e)** U 5/98 / **f)** / **g)** *Službeni List Fed. BiH* (Official Gazette of the Federation of Bosnia and Herzegovina) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – Constitution.

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – Rules issued by federal or regional entities.

2.1.1.1.1 Sources of Constitutional Law – Categories – Written rules – National rules – Constitution.

2.1.1.4 Sources of Constitutional Law – Categories – Written rules – International instruments.

2.1.1.4.8 Sources of Constitutional Law – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.

3.1 General Principles – Sovereignty.

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – National or ethnic origin.

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

5.3.9 Fundamental Rights – Civil and political rights – Right of residence.

5.3.19 Fundamental Rights – Civil and political rights – Freedom of worship.

5.3.37 Fundamental Rights – Civil and political rights – Right to property.

5.3.43 Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

*Keywords of the alphabetical index:*

People, constituent / Constitution, entity / Self-determination, right / Preamble, character / Citizenship / Statehood.

*Headnotes:*

According to Article VI.3.a of the Constitution of Bosnia and Herzegovina, the Constitutional Court has exclusive jurisdiction to decide whether any provision of an Entity's Constitution or law is consistent with the State's Constitution.

*Summary:*

On 12 February 1998, Mr Alija Izetbegovic, then Chair of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court for the purpose of evaluating the consistency of some provisions of the Federation Constitution and the Republika Srpska Constitution with the Constitution of Bosnia and Herzegovina.

The Court adopted two partial decisions on the case: the first on 29 and 30 January 2000 (Official Gazette of Bosnia and Herzegovina, no.11/00, Official Gazette of the Republika Srpska, no.12/00, and *Bulletin* 2000/1 [BIH-2000-1-002]), and the second on 18 and 19 February 2000 (Official Gazette of Bosnia and Herzegovina, no. 17/00, Official Gazette of the Federation of Bosnia and Herzegovina, no. 26/00 and Official Gazette of the Republika Srpska). In its third partial decision, adopted on 30 June and 1 July 2000, the Constitutional Court declared the following provisions unconstitutional: paragraphs 1, 2, 3, and 5 of the Preamble of the Republika Srpska Constitution and some provisions of Article 1, and part of Article I.1.1 of the Federation Constitution.

As far as the Republika Srpska Constitution is concerned, the applicant requested the Court evaluate the compatibility of its Preamble with the Preamble of the State Constitution, and with Articles II.4, II.6 and III.3.b of the Constitution of Bosnia and Herzegovina, insofar as the Republika Srpska Preamble refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people. Moreover, the applicant argued that Article 1, which provides that Republika Srpska is "the State of the Serb people and of all its citizens", was not compatible with Article I.3 of the Constitution of Bosnia and Herzegovina, which refers to the Federation and the Republika Srpska as "Entities" and not national states.

The Court was asked to evaluate the conformity of Article I.1 of the Federation Constitution, insofar as it refers to Bosniacs and Croats as constituent peoples, with the last paragraph of the Preamble, and

Articles II.4 and II.6 of the Constitution of Bosnia and Herzegovina.

The first legal issue the Constitutional Court had to decide was whether or not the Preamble of the State Constitution and the Constitution of Republika Srpska had a normative character. The Court pointed out that it was not within its competence to adjudicate legal opinions *in abstracto* concerning the normative character of preambles of constitutional provisions as such.

According to Article 31 of the Vienna Convention of the Law on Treaties, an international agreement has to be interpreted taking into consideration all its parts. Therefore, as the Preamble of the Constitution of Bosnia and Herzegovina was part of an international agreement (The General Framework Agreement for Peace in Bosnia and Herzegovina), it was considered by the Court as an integral part of the text of the same Constitution. As a result, the Constitutional Court concluded that any provision of an Entity's Constitution had to be consistent with the Constitution of Bosnia and Herzegovina, including its Preamble, as long as the latter contained "constitutional principles" that were not merely descriptive, but were also invested with a normative powerful force, and could, thereby, serve as a sound standard of judicial review for the Constitutional Court.

The same holds true for the Preamble of the Republika Srpska Constitution, as modified by Amendment XXVI and LIV, but for different reasons, since it states *expressis verbis* that "these amendments form an integral part of the Constitution of Republika Srpska".

The Court observed that, since the Preamble of the Republika Srpska Constitution spoke in express terms of a "right of the Serb people", and of "state status" and "independence" of Republika Srpska, it could not be seen as having a merely descriptive character. In fact, these constitutional provisions, if read in conjunction with Article 1 of the Republika Srpska Constitution, obviously determined collective rights and the legal political status of Republika Srpska.

Accordingly, the Constitutional Court declared paragraphs 1, 2, 3 and 5 of the Preamble of the Republika Srpska Constitution unconstitutional, insofar as their provisions violated Article I.1 and I.3, in conjunction with Article III.2.a and III.5 of the Constitution of Bosnia and Herzegovina, which provide for the sovereignty, territorial integrity, political independence, and international personality of the State.

The Court did not find it necessary to review the other contested provisions of the Preamble of the Republika Srpska Constitution in light of the text of the Preamble of the State Constitution, in particular its paragraph referring to Bosniacs, Croats and Serbs as "constituent peoples".

As far as the challenged provision of Article 1 of the Republika Srpska Constitution is concerned, which defines Republika Srpska as "the State of the Serb people and all its citizens", the applicant argued that the said provision was not in line with the last paragraph of the Preamble and with Articles II.4 and II.6 of the State Constitution, according to which all the three peoples (Bosniacs, Croats and Serbs) are constituent peoples of the whole territory of the State. The applicant also alleged that the privileged position given to the Serb people by Article 1 of the Republika Srpska Constitution, which distinguishes between the Serb people and citizens, would "reserve" certain rights for the Serb people only: the right to self determination, cooperation with Serb people outside the Republika Srpska, the privileged position of the Serb language and of the Orthodox Church, etc.

In its final analysis of the case, based on the text of the Preamble of the State Constitution in connection with the institutional provisions of the Dayton Constitution, the Constitutional Court found that the provision of Article 1 of the Republika Srpska Constitution violated the constitutional status of Bosniacs and Croats designated to them through the last line of the above mentioned Preamble, as well as the positive obligations of the Republika Srpska, which follow from Article II.3 and II.5 of the Constitution of Bosnia and Herzegovina. In the Court's opinion, the regulation of Article 1 of the Republika Srpska Constitution, in particular in connection with other provisions, such as the rules on the official language (Article 7 of the Republika Srpska Constitution) and the fact that the Serb Orthodox Church is the Church of the Serb people (Article 28.3 of the Republika Srpska Constitution), which both lead to a constitutional formula of identification of Serb "state", people and church, put the Serb people in a privileged position which cannot be justified and therefore violates the express designation of "constituent peoples" made in the Constitution of Bosnia and Herzegovina.

Therefore, the Court stated that the wording "State of the Serb people" of Article 1 of the Republika Srpska Constitution violated the right to liberty of movement and residence, the right to property and the freedom of religion in a discriminatory way, on the grounds of national origin and religion, as guaranteed by Article II.3 and II.4 in connection with II.5 of the Constitution of Bosnia and Herzegovina.

As far as Article I.1.1 of the Federation Constitution is concerned, the applicant claimed that it was not in conformity with the last paragraph of the Preamble and Article II.4 and II.6 of the Constitution of Bosnia and Herzegovina, insofar as these provisions define all the three groups as “constituent peoples” of the entire territory of the State.

The Constitutional Court declared the wording “Bosniacs and Croats as constituent people along with the Others”, as well as “in the exercise of their sovereign rights” of Article I.1.1 of the Federation Constitution, unconstitutional. In its decision the Court emphasised that the designation of Bosniacs and Croats as “constituent peoples” in Article I.1.1 of the Federation Constitution not only had a discriminatory effect, but also violated the right to liberty of movement and residence, and the right to property, as guaranteed by Article II.3 and II.4, in connection with Article II.5 of the Constitution of Bosnia and Herzegovina. Moreover, the aforementioned provision of the Federation Constitution violated Article 5.c of the Convention on the Elimination of All Forms of Racial Discrimination and the right to collective equality, provisions which are applicable in Bosnia and Herzegovina according to Annex I of the State Constitution.

#### *Supplementary information:*

Some aspects of the case have been decided in the forth partial decision which was adopted on 18 and 19 August 2000 and will be published in the next *Bulletin*.

#### *Languages:*

Bosnian, Serbian, Croat, English, French.



#### *Identification:* BIH-2000-3-004

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 03.11.2000 / **e)** U 9/00 / **f)** / **g)** *Službeni Glasnik BiH* (Official Gazette of Bosnia and Herzegovina), 01/2001 / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

1.3.4.9 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of the formal validity of enactments.

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

4.4 Institutions – Head of State.

4.5.6 Institutions – Legislative bodies – Law-making procedure.

4.6.2 Institutions – Executive bodies – Powers.

4.6.3.1 Institutions – Executive bodies – Application of laws – Autonomous rule-making powers.

4.6.7 Institutions – Executive bodies – Relations with the legislative bodies.

#### *Keywords of the alphabetical index:*

High Representative for Bosnia and Herzegovina / Law, enactment / Council of Europe, Parliamentary Assembly.

#### *Headnotes:*

The competence of the Constitutional Court to examine the conformity with the Constitution of laws enacted by the High Representative acting as an institution of Bosnia and Herzegovina is based on Article VI.3.a of the Constitution of Bosnia and Herzegovina.

#### *Summary:*

The High Representative enacted the Law on State Border Service on 13 January 2000 (published in the Official Gazette of Bosnia and Herzegovina no. 2/2000) following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina on 24 November 2000.

On 7 September 2000, eleven members of the House of Representatives of the Parliamentary Assembly initiated proceedings before the Constitutional Court against the Law on State Border Service of Bosnia and Herzegovina. They claimed, on the one hand, that the High Representative did not have normative powers to impose a law in the absence of a vote by the Parliamentary Assembly. On the other hand, they contested the constitutionality of the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the above-mentioned law, particularly with regards to Articles III.4, III.5.a and V.3 of the Constitution of Bosnia and Herzegovina, as well as the conformity of the Law on State



Border Service with Articles III.2.c and III.3.a of the Constitution.

The Constitutional Court declared the case admissible since the High Representative intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina. Besides, the Constitutional Court emphasised that, according to Article VI.3.a, VI.3.b and VI.3.c of the Constitution read in conjunction with Article I.2 of the Constitution, it has the power to control the conformity with the Constitution of all acts, regardless of the author, as long as this control is based on one of the competences enumerated in Article VI.3 of the Constitution.

As far as the second claim is concerned, the Constitutional Court found the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the Law on the State Border Service not to be in conflict with Article IV.4.a of the Constitution, since this Article does not require the consent of the Entities whenever the Parliamentary Assembly has to enact a law necessary to implement decisions of the Presidency. Indeed, the Constitutional Court found that the applicants were not justified in claiming a breach of Article III.5.a of the Constitution since, given the peculiar circumstances of the case, only Article IV.5.a of the Constitution needed to be considered.

With regard to the conformity of the Law on State Border Service with the provisions of Article III.2.c of the Constitution, the Constitutional Court established that this Article cannot be interpreted as establishing an exclusive responsibility of the Entities for the control of the international State borders, since this Article simply authorises the Entities to assume tasks of law enforcement in their respective jurisdictions. Moreover, the Law on State Border Service upholds this responsibility of the Entities and provides for a policy of co-operation and assistance between the State Border Service and the Entities' police forces, which should improve the guarantee of public order in their respective jurisdictions.

Therefore, the Constitutional Court found the Law on State Border Service, which ensures the right of the institutions of Bosnia and Herzegovina to carry out their responsibilities with regard to the fundamental right of the State to self-protection, not in contradiction with Article III.2 of the Constitution, and in conformity with the responsibilities laid down in Article III.1 of the Constitution and supplemented in Article III.5 of the Constitution.

### *Languages:*

Bosnian, Croatian, Serb, English, French.



*Identification:* BIH-2000-3-005

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 15.12.2000 / **e)** U 15/99 / **f)** / **g)** / **h)** CODICES (English).

### *Keywords of the systematic thesaurus:*

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

3.17 General Principles – General interest.

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – National or ethnic origin.

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

5.3.33 Fundamental Rights – Civil and political rights – Inviolability of the home.

5.3.37 Fundamental Rights – Civil and political rights – Right to property.

5.4.11 Fundamental Rights – Economic, social and cultural rights – Right to housing.

### *Keywords of the alphabetical index:*

Duress / Measure, temporary / Ethnic cleansing, combat.

### *Headnotes:*

As a general rule, the owner of a real estate who decides to sell or exchange his property, normally cannot claim any protection of his right to that house as his home or his property, unless it can be assessed that the sale was not a “voluntary transaction” whose validity is recognised by the law.

### *Summary:*

On 10 August 1995, the applicant, Ms S. Z., concluded in Prijedor a contract of exchange of property with Mr B.V. According to this contract, Mr B.V. transferred his property, registered unit no. 2308/1 with a surface of 202 square metres

situated on the island of Brać in Croatia, in exchange for the applicant's property, register unit no. 10/118 with a surface of 459 square metres situated in Prijedor.

On 8 March 1996, the applicant instituted proceedings before the Municipal Court of Prijedor to request the cancellation of the contract of exchange of real property. She argued that the contract had been concluded by threats and had not been a voluntary act on her part. On 27 December 1996, the Municipal Court decided to reject the applicant's claim and ordered her to move out of the house in Prijedor with her family and to deliver it to Mr B.V. within 15 days under the threat of forced eviction.

The applicant appealed against this judgment to the Higher Court of Banja Luka which, in its Judgment of 25 September 1997, found that the contract of exchange was valid under the Law of Obligations and rejected Ms S. Z.'s appeal.

The applicant lodged a further appeal to the Supreme Court of the Republika Srpska which, by its Judgment of 26 May 1999, rejected the appeal.

On 21 October 1999, the applicant filed an appeal before the Constitutional Court of Bosnia and Herzegovina against the judgment of the Supreme Court of the Republika Srpska. The applicant claimed that the challenged judgment, as well as the judgments of first and second instance, was based on a wrong application of substantive law, due to the fact that the war conditions in which she had concluded the contract of exchange, as well as the difficulties she had then to face as a member of the Croat minority in Prijedor, had not been taken into account. Furthermore, she claimed a violation of some provisions of the European Convention on Human Rights by the aforementioned judgments, which had confirmed the validity of the contract.

On 15 November 1999, the applicant requested the Constitutional Court temporarily suspend the execution of the judgment of the Municipal Court. On 3 December 1999, the Court, pursuant to Article 75 of its Rules of Procedure, adopted a ruling suspending the execution of the contested judgment on the ground that it could have irremediable detrimental consequences for the applicant.

The Constitutional Court found that the judgments of the Supreme Court of the Republika Srpska, the Higher Court of Banja Luka and the Municipal Court of Prijedor raised issues under Article II of the Constitution of Bosnia and Herzegovina and under Article 8 ECHR and Article 1 Protocol 1 ECHR which, according to Article II.2 of the Constitution of Bosnia

and Herzegovina, are part of the law of Bosnia and Herzegovina and shall have priority over all other laws.

The Constitutional Court emphasised that the protection of someone's right to his home or to his property is lost only when there has been a sale of real property that can be considered as a "voluntary transaction" and whose validity is recognised by the law. According to the reasoning of the Court, the voluntary character of a sale might be questioned in a number of situations: if it occurred in an emergency or if the seller was under strong pressure or in serious danger. In the present case, it has not been alleged that Mr B.V. exposed the applicant to threats, or that he forced her in any other way to conclude the contract of exchange with him, however, there were other circumstances that had to be taken into consideration by the Constitutional Court in evaluating the transaction between Mr B.V. and the applicant.

The Court noticed that the house the applicant exchanged was where she had lived during her whole life, that she must have had a special attachment to it and there were no reasons to believe that she would have been willing, under normal circumstances, to leave it in order to go and live in a place far away with which she had no particular links. Moreover, it looked as if the house in Brać had a significantly lower value than the house in Prijedor, and that the exchange contract was, from an economic point of view, unfavourable to the applicant. All these factors made the contract appear as an abnormal transaction that would not have been effected in normal circumstances. Moreover, since the transaction took place in war conditions, the Court had no doubt that Mr B. V. was aware of the applicant's vulnerable and difficult situation, and that he must have understood that this was the reason why she was prepared to exchange her flat with him.

The Court emphasised that one of the basic purposes of the General Framework Agreement for Peace in Bosnia and Herzegovina and of the Constitution of Bosnia and Herzegovina, which is Annex 4 to that Agreement, was to combat ethnic cleansing that had taken place during the war. Therefore, one important aim, reflected *inter alia* in Article II.5 of the Constitution of Bosnia and Herzegovina, was the return of refugees and displaced persons to their places of origin and to their previous homes.

After careful consideration of the case, the Constitutional Court found it established that the applicant concluded the exchange contract under the influence of her vulnerable position as a member of an ethnic minority at a time when a policy of ethnic cleansing

was being pursued in large parts of Bosnia and Herzegovina. Therefore, under these circumstances, the Court decided that the enforcement of the exchange contract would not be in conformity with the applicant's right to respect for her home under Article 8 ECHR and Article II.3.f of the Constitution of Bosnia and Herzegovina, and her right to respect for her property under Article 1 Protocol 1 ECHR and Article III.3.k of the Constitution of Bosnia and Herzegovina.

*Languages:*

Bosnian, Croatian, Serb, English, French.



## Bulgaria

### Constitutional court

#### Statistical data

1 September 2000 – 31 December 2000

Number of decisions: 9

There was no relevant constitutional case-law during the reference period 1 September 2000 – 31 December 2000.



# Canada

## Supreme Court

### Important decisions

*Identification:* CAN-2000-3-002

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 12.10.2000 / **e)** 26564 / **f)** R. v. Darrach / **g)** *Canada Supreme Court Reports*, [2000] 2 S.C.R. 443; 2000 SCC 46 / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; 191 *Dominion Law Reports* (4th) 539; 36 *Criminal Reports* (5th) 223; 148 *Canadian Criminal Cases* (3d) 97; [2000] S.C.J. no. 46 (*QuickLaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate oneself.

*Keywords of the alphabetical index:*

Assault, sexual / Sexual activity, past, evidence, admission / Value, significant, probative / Affidavit.

*Headnotes:*

Legislation preventing a complainant's past sexual activity from being used for improper purposes does not violate the accused's right to make full answer and defence, his right to a fair trial or his right not to be compelled to be a witness in proceedings against him as guaranteed in the Constitution.

*Summary:*

The accused was charged with sexual assault and, at his trial, attempted to introduce evidence of the complainant's sexual history. He unsuccessfully challenged the constitutionality of the provisions in the Criminal Code governing the admissibility of sexual conduct evidence. Following a *voir dire*, the

trial judge refused to allow the accused to adduce the evidence. The accused was subsequently convicted. The Court of Appeal dismissed the accused's appeal, concluding that the impugned provisions did not violate the accused's right to make full answer and defence, his right not to be compelled to testify against himself or his right to a fair trial as protected by Sections 7, 11.c and 11.d of the Canadian Charter of Rights and Freedoms. In a unanimous judgment, the Supreme Court of Canada upheld that decision.

Section 276 of the Criminal Code contains both a substantive part that prevents a complainant's past sexual activity from being used for improper purposes and a procedural part that enforces this rule. Section 276 is carefully crafted to comport with the principles of fundamental justice. It protects the integrity of the judicial process while at the same time respecting the rights of the people involved.

The substantive aspect of Section 276 does not infringe the accused's Section 7 right to make full answer and defence or his Section 11.d right to a fair trial. Far from being a "blanket exclusion", Section 276.1 only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences, namely, that a complainant is more likely to have consented to the alleged assault and that she is less credible as a witness by virtue of her prior sexual experience. These "twin myths" are simply not relevant at trial. They are not probative of consent or credibility and can severely distort the trial process. Because Section 276.1 is an evidentiary rule that only excludes material that is not relevant, it cannot infringe an accused's right to make full answer and defence. An accused has never had a right to adduce irrelevant or misleading evidence. Further, the fact that Section 276.2.c requires that the evidence tendered to support a permitted inference has "significant probative value" does not raise the threshold for the admissibility of evidence to the point that it is unfair to the accused. The word "significant", on a textual level, is reasonably capable of being read in accordance with Sections 7 and 11.d of the Canadian Charter of Rights and Freedoms and the fair trial they protect. The requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice".

With respect to the procedural aspect of Section 276, the requirement that an accused present an affidavit and establish on a *voir dire* that the evidence is admissible in accordance with established criteria does not infringe his right not to be compelled to be a witness in proceedings against him, nor a right not to

reveal his defence. It is a basic rule of evidence that the party seeking to introduce evidence must be prepared to satisfy the court that it is relevant and admissible. Therefore, if the defence seeks to adduce evidence of sexual activity, it must establish that it supports at least some relevant inference. Further, the particular *voir dire* required by Section 276 does not offend the principle against self-incrimination because the requirement that the accused establish a legitimate use for evidence of sexual activity does not compel him to testify. In applications under Section 276, there is free and informed consent when the accused participates in order to exculpate himself. Where there is neither a legal obligation nor an evidentiary burden on the accused, the mere tactical pressure on the accused to participate in the trial does not offend the principle against self-incrimination or the right to a fair trial. Lastly, Section 276 does not offend the presumption of innocence because nothing in Section 276 obviates the Crown's basic duty to establish all the elements of a sexual offence beyond a reasonable doubt.

Section 276.1.2.a of the Code requires the defence to enter an affidavit with "detailed particulars" of the evidence it seeks to adduce. The affidavit requirement does not infringe the accused's right to silence. If the trial judge is satisfied that the affidavit meets the requirements of Section 276.1, the accused has the right under Section 276.2 of the Code to an *in camera* hearing to decide whether the evidence is admissible. The non-compellability of the complainant at the *voir dire* and the requirement to submit to cross-examination on the affidavit do not infringe the accused's right not to be compelled to testify at his own trial.

#### Languages:

English, French (translation by the Court).



#### Identification: CAN-2000-3-003

a) Canada / b) Supreme Court / c) / d) 13.10.2000 / e) 26779 / f) Winnipeg Child and Family Services v. K.L.W. / g) *Canada Supreme Court Reports*, [2000] 2 S.C.R. 519, 2000 SCC 48 / h) Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; 191 *Dominion Law Reports* (4th) 1; [2000] S.C.J. no. 48 (*QuickLaw*); CODICES (English, French).

#### Keywords of the systematic thesaurus:

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

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

3.16 General Principles – Weighing of interests.

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

5.3.12 Fundamental Rights – Civil and political rights – Security of the person.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

5.3.42 Fundamental Rights – Civil and political rights – Rights of the child.

#### Keywords of the alphabetical index:

Family law / Child, protection / Child, apprehension / Judicial authorisation, prior.

#### Headnotes:

Legislation providing the state with the power to apprehend a child without prior judicial authorisation in a non-emergency situation based on reasonable and probable grounds that the child is in need of protection does not infringe the principles of fundamental justice guaranteed in the Constitution.

#### Summary:

The appellant's two oldest children were apprehended by the respondent agency on several occasions on the basis that she was intoxicated, neglecting her children or in contact with former abusive partners. One day after the appellant gave birth to her third child, the agency apprehended the infant, pursuant to Section 21.1 of the Manitoba Child and Family Services Act. The appellant immediately sought an injunction to restrain the agency from apprehending the child and a declaration that Part III of the Act is unconstitutional. The appellant claimed that the warrantless apprehension of her child in a non-emergency situation infringed her rights under Section 7 of the Canadian Charter of Rights and Freedoms in a manner that was not in accordance with the principles of fundamental justice. After a number of adjournments and pre-trial conferences, the child protection hearing was held approximately six months after the child's apprehension. The trial judge dismissed the constitutional challenge and ordered that the agency be appointed permanent guardian of all three children. The Court of Appeal upheld the trial judge's decision.

The majority of the Supreme Court of Canada held that the “emergency” threshold is not the appropriate minimum threshold of Section 7 of the Canadian Charter of Rights and Freedoms for apprehension without prior judicial authorisation. Rather, where a statute provides that apprehension may occur without prior judicial authorisation in situations of serious harm or risk of serious harm to the child, the statute will not necessarily offend the principles of fundamental justice. Determining whether a specific statute establishes such a minimum threshold will require an examination of the relevant provisions in their legislative context.

Since Section 21.1 of The Child and Family Services Act provides for the apprehension of a child from parental care, it contemplates an infringement of the right to security of the person which can only be carried out in accordance with the principles of fundamental justice. In determining what the principles of fundamental justice require with respect to the threshold for apprehension without prior judicial authorisation, it is necessary to balance the following factors:

1. the seriousness of the interests at stake;
2. the difficulties associated with distinguishing emergency from non-emergency child protection situations; and
3. an assessment of the risks to children associated with adopting an “emergency” threshold, as opposed to the benefits of prior judicial authorisation.

The state must be able to take preventive action to protect children and should not always be required to wait until a child has been seriously harmed before being able to intervene. Requiring prior judicial authorisation in “non-emergency” situations, assuming that they can be distinguished from “emergency” situations, may impede pro-active intervention by placing the burden on the state to justify intervention in situations of arguably “non-imminent”, yet serious, danger to the child. These factors point to serious harm or risk of serious harm as an appropriate threshold for apprehension without prior judicial authorisation. Adopting an “emergency” threshold as the constitutional minimum for apprehension without prior judicial authorisation would risk allowing significant danger to children’s lives and health.

While the infringement of a parent’s right to security of the person caused by the interim removal of his or her child through apprehension in situations of harm or risk of serious harm to the child does not require

prior judicial authorisation, the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimised as much as possible by a fair and prompt post-apprehension hearing. This is the minimum procedural protection mandated by the principles of fundamental justice in the child protection context.

The majority of the Court concluded that Section 21.1 of The Child and Family Services Act, evaluated in its social and legislative context, is constitutional. When read as a whole, the Act provides for apprehension as a measure of last resort in cases where child protection authorities have reasonable and probable grounds to believe that the child is at risk of serious harm. The Act’s provisions also conform to the requirement for a fair and prompt post-apprehension hearing. Finally, the delays in the post-apprehension child protection hearing did not violate the appellant’s Section 7 Charter rights.

Two dissenting judges found that the appellant’s security of the person was infringed by the warrantless apprehension of her infant and that the apprehension was not carried out in accordance with the principles of fundamental justice. In their view prior judicial authorisation for the non-emergency apprehension of children in need of protection is constitutionally necessary, in order to protect both parents and children from unreasonable state interference with their security of the person.

#### *Languages:*

English, French (translation by the Court).



# Croatia

## Constitutional Court

### Important decisions

*Identification:* CRO-2000-3-014

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 13.09.2000 / **e)** U-I-843/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 94/2000 / **h)**.

*Keywords of the systematic thesaurus:*

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

4.6.10.1 Institutions – Executive bodies – Sectoral decentralisation – Universities.

5.1.1 Fundamental Rights – General questions – Entitlement to rights.

5.4.2 Fundamental Rights – Economic, social and cultural rights – Right to education.

5.4.19 Fundamental Rights – Economic, social and cultural rights – Scientific freedom.

*Keywords of the alphabetical index:*

University, autonomy / University, professor, tenure, security.

*Headnotes:*

Legal provisions which prescribe the re-election of university full professors, who have on grounds of previously valid legislation acquired their positions as permanent ones, violate the constitutionally guaranteed autonomy of universities. A university can act autonomously only if the legal system provides for, guarantees, and protects the individual autonomy of full professors, securing permanence and stability of their scientific and teaching profession.

*Summary:*

The disputed provisions of the Law on High Institutions of Learning prescribed the re-election of all members of teaching staff of universities, even of those members who had already acquired their positions as permanent, as was the case with full professors. With respect to full professors, previous

legislation prescribed an evaluation of their work every five years, but not obligatory re-election.

The Court held that an existent state of affairs aimed at the realisation of autonomy of universities and the promotion of the development of sciences, (and insofar as it is not irrational or contrary to other constitutionally protected values) has to be protected in new legislation. The Court regarded the right to permanency of the scientific and teaching positions of full professors, and the right to permanency of their employment, as not mere individual human rights, belonging only to individual persons. Rather, the Court held that the security of an individual university professor's position is more important for the autonomy of universities and for the possibility of their development, than the eventual gains which could be achieved by their obligatory re-election whenever the laws on universities are changed.

In the disputed provisions of the Law on High Institutions of Learning, the Court repealed those parts (of Article 163) which concerned full professors.

*Supplementary information:*

The same Article 163 of the Law had already been reviewed, but only partly, by the Court (Case U-I-902/1999, the decision of which was published in *Narodne novine*, 12/00, *Bulletin* 2000/1 [CRO-2000-1-002]) with the result that the proposal to repeal the provisions was not accepted. But, according to Article 52 of the Constitutional Act of the Constitutional Court, the Court may review the constitutionality of the law, and the constitutionality and legality of other regulations, even when the same law or regulation has already been reviewed by the Court.

*Languages:*

Croatian.



*Identification:* CRO-2000-3-015

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20.09.2000 / **e)** U-I-880/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 95/2000 / **h)**.

*Keywords of the systematic thesaurus:*

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

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

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

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

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

*Keywords of the alphabetical index:*

Medical officer, replacement / Medical equipment, privately owned, removal.

*Headnotes:*

Removal of physicians and other medical officers by an act of the Minister of Health violates the constitutional provision on the right to work and freedom of work (Article 54 of the Constitution) and the right to property (Article 48 of the Constitution).

*Summary:*

The subject of review was the provision of Article 107 of the Law on Protection of Health (*Narodne novine*, 1/97 – amended text). According to Article 107, when the implementation of health protection measures is jeopardised, the Minister of Health can order the temporary removal of medical officers of all levels for a period of six months, having in view their professional qualifications, to places where the need for them is greater, and can order the removal of medical equipment.

The Court held that such a restriction of constitutional freedoms and rights is not covered by those constitutional provisions that allow for restrictions (Articles 16 and 17 of the Constitution) because the restrictions on the grounds of these constitutional provisions were already elaborated in Articles 106 and 135 of the disputed Law.

The Court also found a violation of the right to property in the temporary removal of privately owned medical equipment to places where it is needed.

The provision of Article 107 of the Law was repealed.

*Languages:*

Croatian.

*Identification: CRO-2000-3-016*

a) Croatia / b) Constitutional Court / c) / d) 04.10.2000 / e) U-III-297/2000 / f) / g) *Narodne novine* (Official Gazette), 101/2000 / h).

*Keywords of the systematic thesaurus:*

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

*Keywords of the alphabetical index:*

Evidence, costs / Civil procedure / Expert, costs.

*Headnotes:*

The courts are obliged to protect the equal position of parties in legal proceedings.

*Summary:*

A legal action of a married couple against the bank in which they saved money originated from the fact that the bank did not pay the claimants interest for deposited foreign currency although the law regulating contractual obligations prescribes payment of that interest as obligatory. The ordinary courts ascertained that interest was due to the claimants, but a dispute arose concerning the amount that belonged to them. Before its final decision, the municipal court held that the opinion of financial experts was needed, and the claimants were obliged to pay the costs for their financial expertise. Since the claimants did not pay these costs their claim in the final decision was refused, as the municipal and county court held that their claim was not proved.

Seeking constitutional protection, the claimants argued that the court had not considered the fact that they were the economically weaker party in comparison to the bank, and that their economic position, which prevented them from being able to afford to pay the costs of the opinion of financial experts, led to them losing the case.



The Court found a violation of the right to a fair trial because the courts disregarded the provisions of law on civil procedure according to which not only the claimants but both parties are obliged to pay the costs of evidence in equal parts and according to which, when the court decides which evidence is to be obtained, the court itself pays the costs. Since it was legally clear that the bank was obliged to pay interest, these provisions had to be taken into account.

The constitutional action was accepted and the case was returned for a renewal of the proceedings.

#### *Languages:*

Croatian.



#### *Identification:* CRO-2000-3-017

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 08.11.2000 / **e)** U-I-745/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 112/2000 / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

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

2.2.1.2 Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

4.7.9 Institutions – Courts and tribunals – Administrative courts.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Public hearings.

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Public judgments.

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

5.3.37.1 Fundamental Rights – Civil and political rights – Right to property – Expropriation.

#### *Keywords of the alphabetical index:*

Tribunal, quality / Civil right.

#### *Headnotes:*

The Administrative Court, which in the structure of the Croatian courts reviews the administrative acts involved in the process of expropriation (i.e. acts determining the expropriation and acts determining the level of compensation for the expropriated real estate) and thus determines civil rights and obligations, is not a court of full jurisdiction in the sense of Article 6 ECHR.

#### *Summary:*

Three provisions of the Law on Expropriation were repealed with the effect that they shall lose their legal force on 31 December 2001.

Although they were not the subject of review in this case, the Court analysed provisions of the Law on Administrative Lawsuits, which regulate the procedure before the Administrative Court, having in view issues concerning expropriation. The Court found that the Administrative Court does not have the authority to establish the facts of a case independently or to present and assess evidence independently, and that therefore it lacks the quality of an independent and impartial tribunal established by law. In addition, the procedure before that court, as a rule, does not provide for any oral hearing for complaints against an administrative act in which a civil right or obligation is being decided; nor does it provide for any public hearing and public pronouncements of the judgment, or for a right for the ruling to be made within a reasonable time.

The relevant provisions of the Law on Expropriation were thus repealed.

The grounds for the decision were not only based on violations of the provisions of Article 3 of the Constitution (rule of law), Article 5 of the Constitution (laws shall conform with the Constitution, other regulations with the Constitution and laws), and of Article 134 of the Constitution (concluded and ratified international agreements shall be part of the domestic legal order and shall have legal force superior to law), but also Article 6 ECHR (right to a fair trial).

#### *Languages:*

Croatian, English.



*Identification:* CRO-2000-3-018

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20.12.2000 / **e)** U-I-774/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 1/2001 / **h)**.

*Keywords of the systematic thesaurus:*

4.4.1.4 Institutions – Head of State – Powers – Promulgation of laws.

4.5.6.4 Institutions – Legislative bodies – Law-making procedure – Relations between houses.

*Keywords of the alphabetical index:*

Constitutional law, quality / Organic law, quality.

*Headnotes:*

The Constitutional Law on Human Rights and Freedoms and on the Rights of Ethnic and National Communities and Minorities in the Republic of Croatia (“the disputed Law”) is, by its legal nature, an organic law and it did not have to be adopted or amended in the same way in which the Constitution is amended.

*Summary:*

The House of Counties of the Parliament disputed the constitutionality of the procedure by which the disputed Law was passed, claiming that proceedings for its amendments could not be performed without two preliminary opinions of the House of Counties, the first concerning the decision whether or not to start proceedings for amendments, and the second concerning the content of amendments.

The Court found an opinion on the first preliminary issue was not necessary because the disputed Law was constitutional only by name, not by its true legal nature. The procedure by which organic laws are passed or amended does not include a preliminary stage to determine whether to start proceedings.

The disputed Law, as a law that regulates national rights, had to be passed by the House of Representatives by a two-thirds majority vote of all members, and it was passed by such a majority.

The House of Counties also gives its preliminary opinion on laws regulating national rights, and it was

given a chance to give such an opinion in this case. The Court did not accept the claim of the House of Counties that without the opinion of that House, the House of Representatives could not decide and pass the Law.

The essential fact was, according to the Court’s decision, that the House of Counties was given a chance to give its opinion and that it was the decision of the House of Counties to put the issue of that opinion on the agenda or not. The interpretation of the law-making procedure advanced by the House of Counties would mean that that House could make legislation by the House of Representatives impossible. That would lead to the House of Counties having an absolute veto, and such a situation has no basis in the Constitution.

In accordance with these conclusions the demand of the House of Counties for the disputed Law to be repealed was refused.

The Court also held that the procedure adopted by the House of Representatives did not provide for the correct constitutional manner of promulgation of the disputed Law. According to the Constitution the House of Representatives is obliged to let the President of the Republic promulgate a constitutional law. As to whether the fact of such promulgation made the disputed Law unconstitutional, the Court held that the act of promulgation is not an act of legislative nature, but an act that is executive in nature. However, the Court warned the House of Representatives of the inadequacy of the promulgation in this case.

*Languages:*

Croatian.



# Cyprus

## Supreme Court

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### Important decisions

*Identification:* CYP-2000-3-003

**a)** Cyprus / **b)** Supreme Court / **c)** / **d)** 21.11.2000 / **e)** 2/99 / **f)** / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)**.

*Keywords of the systematic thesaurus:*

4.7.15.1.5 Institutions – Courts and tribunals – Legal assistance and representation of parties – The Bar – Discipline.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to be informed about the charges.

5.3.14 Fundamental Rights – Civil and political rights – *Ne bis in idem*.

*Keywords of the alphabetical index:*

Disciplinary proceedings / Double jeopardy, rule against.

*Headnotes:*

A person who has been convicted or acquitted of an offence shall not be tried again for the same offence. A person charged with a disciplinary offence has the same minimum rights that are guaranteed to an accused charged with a criminal offence.

*Summary:*

Under Article 12.2 of the Constitution a person who has been acquitted or convicted of an offence shall not be tried again for the same offence; and no person shall be punished twice for the same act or omission except where death ensues from such act or omission. Further Article 12.5 of the Constitution safeguards the following minimum rights to every person charged with an offence:

- a. to be informed promptly and in a language which he understands and in detail of the nature and grounds of the charge preferred against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through a lawyer of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The appellant, a practising advocate, was declared bankrupt on 11 December 1990. He was prosecuted on disciplinary grounds, before the Disciplinary Board of the Bar Council, for the offence of exhibiting disgraceful conduct, founded on the fact of his bankruptcy. The Disciplinary Board imposed on him the punishment of disqualification or suspension of his licence to practise as an advocate until the end of January 1992.

By means of a letter dated 23 September 1998 the Registrar of the District Court of Paphos informed the Chief Registrar of the Supreme Court that the appellant was declared bankrupt as from December 1990. The Chief Registrar, by means of a letter dated 5 October 1998, forwarded the above letter to the Attorney-General of the Republic, in his capacity as Chairman of the Disciplinary Board “for any action he might deem necessary”.

On 19 November 1998 the Disciplinary Board decided to invite the appellant before the Board on 14 December 1998, “in view of the letter of the Chief Registrar dated 5 October 1998”. After a number of adjournments the case was considered by the Disciplinary Board on 4 March 1999. On that date the Disciplinary Board informed the appellant that he had been declared bankrupt as from 11 December 1990 and that this very fact constituted a disciplinary offence. No charge was preferred against him nor was a charge sheet served on him.

The appellant explained that in respect of the same offence he was tried by the Disciplinary Board which imposed on him the punishment of disqualification from practising as an advocate until 31 January 1992. After he had served his punishment he started practising law again. He submitted that the imposition of any additional punishment would offend against the rule of natural justice which prohibits the trial and

punishment of an offender for the same offence more than once. The Disciplinary Board was of the view that the state of bankruptcy, which is the cause of the disgraceful conduct, is of a continuous nature and continued after the expiration of the disciplinary punishment. Thus no question of conviction twice for the same offence arises. After hearing the appellant's plea in mitigation, the Disciplinary Board imposed on him suspension of his licence to practise law for an indefinite time.

Upon appeal to the Supreme Court it was held that the process which led to the punishment of the appellant was wholly illegal. It is established by the case-law of the Supreme Court that a person charged with a disciplinary offence enjoys the rights which are safeguarded by Article 12.5 of the Constitution to an accused in a criminal trial. The first guarantee for the accused is to be informed of the charge preferred against him and of the facts constituting the charge. In this case the elements of the charge were not given to the accused nor was a charge preferred against him. He was punished without being charged and tried. He was subjected to a summary process unknown to the legal provisions. This was illegal and a violation of human rights. He was also punished twice for the same offence contrary to Article 12.2 of the Constitution.

#### *Languages:*

Greek.



## Czech Republic Constitutional Court

### Statistical data

1 September 2000 – 31 December 2000

- Judgments of the Plenum: 1
- Judgments of panels: 61
- Other decisions of the Plenum: 10
- Other decisions of panels: 788
- Other procedural decisions: 40
- Total: 900

### Important decisions

*Identification:* CZE-2000-3-016

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 04.09.2000 / **e)** IV. ÚS 146/99 / **f)** Deadline for terminating a service relationship / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

4.7.2 Institutions – Courts and tribunals – Procedure.

4.7.9 Institutions – Courts and tribunals – Administrative courts.

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

*Keywords of the alphabetical index:*

Administrative act, judicial review.

*Headnotes:*

If a special act expressly provides for a certain circumstance to be taken into account then even if it is not specifically raised in proceedings the duty to take that circumstance into account not only falls on an administrative body, but also an administrative court.

If circumstances subsequently come to light which the claimant demonstrably could not have known, and

thus could not have applied by the deadline for filing an administrative complaint, and if these circumstances are fundamentally significant for the legality of the decision, the administrative court must take them into account in its decision.

### *Summary:*

The complainant filed a constitutional complaint against a verdict which denied an action to annul the decision of the director of the Security Information Service (*Bezpečnostní informacní služba, BIS*) to dismiss a BIS officer from service. He also filed a motion to annul part of § 250h of the Civil Procedure Code, which the Constitutional Court, *en banc*, by Decision file no. Pl. ÚS 12/99, of 27 June 2000, denied.

The complainant criticised the administrative court for its method of evaluating findings of fact made in the original proceedings before BIS bodies, for not conducting the proposed questioning and for not observing the statutory deadline for terminating a service relationship. The complainant's lawyer stated that a substantial part of the BIS file material was subject to secrecy and, as a rule, a claimant cannot obtain all the important information necessary for the purposes of formulating the grounds of complaint until the defending party submits the file material to the court.

It cannot be determined from the contested decision when the service body learned about the proceedings, and thus, when the deadline set by the Act on the BIS began to run. Therefore, the complaint is justified.

The expiration of a right because it was not applied by a specified deadline is taken into account, in specified cases, even if it was not raised in the proceedings. The specified cases include the reason for which the complainant was dismissed from service. The dismissal was to be decided within two months from the day when the service body learned of the grounds for dismissal, but no later than one year from the day when the grounds arose.

The Constitutional Court basically agrees with the conclusions contained in the Position of the Supreme Court, S 269/99. This position applies to the interpretation of the Act on the Police of the Czech Republic, but the provision specifies a subjective deadline for dismissal from a service relationship, basically analogously to the Act on the BIS. The Constitutional Court is of the opinion that only a decision by the service body of the first level must be made by such a deadline, or the legislature would have expressly stated otherwise.

The fact that it did not do so is logical, as otherwise all other provisions of the Act on the BIS governing deadlines for appeals and decisions would automatically be in conflict with the purpose and meaning of these deadlines, i.e. leaving adequate time for a comprehensive and fair evaluation of a matter. It is clear that if those deadlines were observed the decision on appeal would, as a rule, be made after the subjective two-month deadline. Also, the provision that filing an appeal has no suspensory effect in the case of dismissal would lose its meaning, as would the express requirement that the service body's decision must be delivered by that deadline.

The Constitutional Court considers it proved that the relevant decision that is important for the evaluation of observance of the deadline was made by the BIS director of personnel on 17 April 1997 and delivered to the petitioner on 21 April 1997. However, whether the latter date does or does not fall within the two-month subjective deadline, i.e. whether rights were precluded or not, cannot be determined from the decision of either the first instance or the appeals body, just as it cannot be determined whether the appeal was decided after discussion in an advisory commission (§ 136 of the Act on the BIS). In this regard both decisions are not reviewable.

If a special act expressly states that a certain fact will be taken into account even without necessarily being raised, the court must consider that fact, or it agrees with how the question was evaluated in the first instance decision. It cannot be determined from the decisions submitted whether the administrative bodies deciding in the matter considered that fact; and the court then did not itself consider it.

In view of the existing single-instance decision making in administrative courts and the inadmissibility of renewing proceedings, an administrative court must take into account all circumstances which come to light later that are fundamentally significant for the legality of the decision.

The Constitutional Court concluded that the dismissal from the service relationship was decided in a manner that arouses doubts about observance of the preclusive deadline for such a decision. It is sufficient that the information about the moment when the service body learned about the violation of work discipline be sufficiently specific and credible that it can be grounds for a decision. The service body means not only the BIS director, but also the heads of the service's organisational departments.

### *Languages:*

Czech.



*Identification:* CZE-2000-3-017

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 05.09.2000 / **e)** I. ÚS 136/99 / **f)** Postponed hearing / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

*Keywords of the alphabetical index:*

Hearing, postponement / Lawyer, presence at hearing, impossibility.

*Headnotes:*

A hearing may only be postponed for important reasons which must be stated. Evaluation of these reasons is within the jurisdiction of the court. In doing so, the court considers the seriousness of the reasons. It takes into account the rights of parties in the proceedings, which undoubtedly include the right to have the matter addressed in their presence or in the presence of their chosen lawyer.

A court should postpone an appeal hearing if the court knows in advance of serious reasons for the absence of the complainants' legal representatives, difficulties in arranging a substitute, and where the complainants themselves were not summoned to the hearing. If only the respondent's lawyer took part in the appeal, the principle of equality of the parties in [trial] proceedings may be violated. If the court has concluded that it is necessary to order a hearing in the matter, it should respect the constitutionally protected rights of the complainants.

*Summary:*

The complainants pleaded that the court's procedures denied them the right to a fair trial. The complainants' lawyer received a summons to a hearing before the appeals court and sent a request to postpone the hearing until February of the following year for health reasons. She enclosed a copy of a confirmation of work disability. The court did not grant this request as, in its opinion, the reason stated in the request was a personal obstacle that did not prevent the proceedings, and in a private law practice a substitute could have been arranged.

The Constitutional Court ascertained that the proceedings were initiated on the basis of the complainants' complaint filed in 1993 and there were delays in the course of the proceedings. The first hearing took place in January 1997 and the verdict was pronounced in June 1998. The complainants filed an appeal through their lawyer and a hearing was ordered for 24 November 1998. The dispute has not yet been finished.

Neither the complainants' lawyer, for health reasons, nor the complainants, who were not even summoned to the hearing, took part in the hearing before the appeals court. At the hearing, the court passed a resolution that did not grant the lawyer's request to postpone the hearing, but stated that it was necessary to clarify certain procedural questions that were important for further proceedings and therefore it was necessary for the complainants' lawyer to work with the court. The appeal hearing took place.

This matter is a long-running court dispute, complicated in view of both the number of parties and the amount of evidence and legal issues involved. In the course of the proceeding there were such delays in the matter by the court that the intervention of the Constitutional Court was necessary, on the basis of which the courts finally began to act. From this point of view, the appeals court arguments justifying the denial of the request to postpone the proceedings seem unjustified.

The ability to postpone a hearing is governed by the Civil Procedure Code. However, the court must take into account the rights of parties.

The lawyer's request to postpone the ordered hearing was justified by her state of health. We agree with the court's opinion that pregnancy is a personal obstacle to participation in proceedings, but in the circumstances the argument about the ability to arrange a substitute is inappropriate. The court dispute, conducted since 1993, is sufficiently complicated that the involvement of a substitute at the appeal hearing

would obviously not clarify the matter. The complainants' lawyer asked for a postponement until February 1999, i.e. not quite three months, which, in the overall length of the dispute could not have played such an important role. The court should have postponed the appeal hearing for a longer period as they knew in advance of the absence of the complainants' lawyer and the complainants themselves had not been summoned to the hearing. Thus, only the respondent's lawyer took part in the appeal, which was a violation of the principle of equality of the parties in [trial] proceedings. The court's argument that the hearing did not have to be ordered at all will not hold up. The appeals court ordered the hearing and questions that were decisive for further steps in the proceedings were addressed at it. Thus, if the court concluded that it was necessary to order a hearing in the matter, it was proper to proceed in it with respect for the petitioners' constitutionally guaranteed rights.

The Constitutional Court upheld the complaint, as a fair and open hearing of a matter requires the right of a party and its lawyer to take part in the hearing.

#### *Languages:*

Czech.



#### *Identification:* CZE-2000-3-018

**a)** Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 04.10.2000 / **e)** II. ÚS 243/2000 / **f)** Legal evidence / **g)** / **h)**.

#### *Keywords of the systematic thesaurus:*

3.12 General Principles – Legality.

5.3.13 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial.

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

#### *Keywords of the alphabetical index:*

Questioning, testimony / Evidence, hearsay / Witness, questioning outside main trial proceedings.

#### *Headnotes:*

The right to a fair trial is only violated if the court precluded the realistic ability to repeat an original investigating action (the questioning of a witness in preparatory proceedings without the presence of defence counsel) or did not respond to an objection raised by defence counsel.

Testimony obtained by questioning a witness “outside the main trial proceedings” is evidence if the court does not consider it necessary to question the witness in person in the main proceedings and both the public prosecutor and the defendant consent to having the witness statement read. This is the case provided the questioning was done in accordance with the Criminal Procedure Code and a statement was made.

#### *Summary:*

The Regional Court in Ostrava denied an appeal against a decision by the District Court, by which the complainant and other co-defendants were convicted of the crime of extortion. The petitioner objected that his right to a fair trial was violated.

In July 1998 the investigator first notified the complainants' co-defendants of an accusation and the injured party and witnesses were then questioned. The petitioner was notified of the accusation when the investigation was finished, on 14 October 1998.

The Constitutional Court ascertained that in two cases evidence was admitted in conflict with the Criminal Procedure Code, i.e. before the complainant had been informed of the accusation. However, the complainant had not objected to the admissibility of the evidence by means of reading the witness statement of P. M. in the main trial. This was also the case with reading the witness statement of J.K., who testified for the complainant. The complainant had an opportunity to object that both pieces of evidence were illegal, but did not do so. As a result of this, although there was a violation of the law, it was not a defect of a constitutional level.

Interrogation of a witness “outside the main trial” is not expressly regulated and is used by the general courts if it is necessary for certain reasons to postpone the main proceedings, at which the witness was duly present. In the interests of procedural economy the witness is questioned outside the main proceedings. The court thus secures the evidence which is, as a rule, presented by reading the witness statement during the subsequent resumed main

proceedings, if the court wants to take it into account when deciding about the matter.

Questioning in person will not be necessary in cases where, in view of the issue and the person questioned, a specific exception can be permitted to the principle of conducting the main proceedings orally without it being at the expense of determining the facts of the case beyond a reasonable doubt. However, it is necessary for the previous questioning to be done in accordance with the Criminal Procedure Code.

In this case the witness travelled to the court from a distant place and the proceedings had to be adjourned because of an absence of lay judges and the failure to summon the co-defendants before the court. The questioning took place in accordance with the law. Both the public prosecutor and the complainant's lawyer consented to questioning outside the main trial and to the reading of the statement.

It is also not a violation of the right to a public hearing of the case in connection with the right to respond to all evidence presented if the questioning of the witness is read in the main trial proceedings. This is provided the questioning was done in a manner consistent with the law, the court does not consider questioning in person to be necessary, and both the public prosecutor and the defendant consent (Decision no. I. ÚS 32/95).

In the case of the questioning of R.S., the witness was questioned twice before the accusation was announced. The witness was questioned a third time in the main trial proceedings in the presence of both the complainant and his lawyer, and they had an opportunity to respond to it.

As far as the objection about the confrontation of the injured party is concerned, the Constitutional Court ascertained that the conclusions concerning the complainant's guilt were not based on the statements about the confrontation.

In the case of rejecting the proposal to examine the mental state of R.S., the court relied on documentary evidence and the behaviour of the injured party before the court. Therefore it refused to admit the evidence.

The Constitutional Court nevertheless posed the question whether it was necessary to "support" the credibility of R.S. with the testimony of other witnesses, and concluded that it was not necessary. To the extent that was done, this was purely supporting/corroborative evidence. That is why the

criminal procedure rules for handling indirect evidence were not applied.

The Constitutional Court also addressed the question of "hearsay testimony". In a situation of "one person's word against another's," if the Court is to favour one or the other of them, it must have reasons for doing so. Therefore, it is required to admit further evidence. If this does not remove any reasonable doubts concerning the facts of the matter, the court must observe the principle of *in dubio pro reo*.

The general court solved this basic evidentiary problem, i.e. "one person's word against another's" by favouring the testimony of the injured party, as direct and primary evidence.

If the complainant objects that the court, in the reasoning of the conviction, referred to the witnesses testimony from the preparatory proceedings, this is evidence that the complainant did not challenge the procedural defects of at the main trial. Nor did he do so in his appeal.

The Constitutional Court did not find any errors in the actions of the general court and therefore denied the constitutional complaint.

#### *Languages:*

Czech.



#### *Identification: CZE-2000-3-019*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 10.10.2000 / **e)** IV. ÚS 420/2000 / **f)** Election to a municipal body / **g)** / **h)**.

#### *Keywords of the systematic thesaurus:*

1.4.4 Constitutional Justice – Procedure – Exhaustion of remedies.

3.10 General Principles – Certainty of the law.

4.6.9.2.2 Institutions – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.

5.3.10 Fundamental Rights – Civil and political rights – Rights of domicile and establishment.



5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.29 Fundamental Rights – Civil and political rights – Right to participate in political activity.

5.3.39.2 Fundamental Rights – Civil and political rights – Electoral rights – Right to stand for election.

*Keywords of the alphabetical index:*

Election, municipality / Residence, permanent / Municipal council, member, residence, change / Municipal council, member, end of office / Residence, *de facto*.

*Headnotes:*

If a law contains a condition that permanent residence is necessary for eligibility for election to a municipal body, representatives must treat it as such. It is not possible to be a citizen of one municipality for one sphere of public law and a citizen of another municipality for another sphere of public law.

*Summary:*

The complainants state that, in the 1998 municipal elections, Ing. arch. R was elected as a substitute to the city council and became the member of the council as of 3 November 1999. He registered for permanent residence in municipality B. in the period from 14 December 1999 to 3 January 2000. The head of the Regional Office notified the City Council of this fact. However, the City Council did not declare the mandate terminated. The head of the Regional Office then declared the mandate terminated. The complainants consider this decision incorrect and in conflict with the law.

The Constitutional Court primarily considered the question whether a constitutional complaint is the only means of protecting the complainants' rights. It was argued that current law lacks the special proceedings that would permit judicial review of the termination of a mandate. Although no such express provisions exist, the Constitutional Court does not believe that this rules out challenging a decision by a district office head through a general administrative complaint. This is because of the validity of the "general clause" in administrative law that if a specific matter is not excluded from judicial review, such review is possible. The significance and character of this matter exceeded the complainants' own interests, and therefore the Court did not refuse to accept the constitutional complaint. The same complaint was simultaneously filed by Humpolec city council, that the actions of the Regional Office head was an illegal

interference by the state in the activities of local government bodies.

Permanent residence can be considered a standard condition for acquiring and exercising election rights. Thus, if the law specifies that every elector who has permanent residence in a municipality, i.e. is entitled to vote in the municipality, can be elected to the municipal representative body, that condition cannot be considered unconstitutional. One can conclude from the condition for eligibility thus formulated that only persons who belong to a community are to participate in the local government of that community. However logical and economical the petitioners' argument may seem, that *de facto* permanent residence is sufficient, it cannot be overlooked that if it succeeded, the condition of eligibility for election and the related evaluation of the question of whether or not a mandate exists would lack any order. In a state based on the rule of law every specific action must have foreseeable legal consequences. Therefore, the Constitutional Court holds the opinion that the loss of eligibility for election and the termination of a mandate is caused by the fact of a change of permanent residence. This legal fact cannot be remedied or annulled, and it is thus not decisive that the termination in law does not occur until the declaration of the fact and a decision by the representative body itself or another body. Any other interpretation would create a situation which would be quite unclear, and to a certain extent even illogical. If eligibility for election is lost and a mandate subsequently terminates, the mandate thus terminated cannot be acquired again otherwise than by a new election. The decision by the head of the Regional Office only declares that the circumstance leading to the termination of a mandate has arisen. However, the mandate does not actually terminate until the date of the decision. The previous law contained "loss" and "termination" of a mandate. In practice this often led to situations where a city council did not know, or did not want to know, about the loss of a mandate, and so a representative continued to vote and the local government body's decisions made at that time could subsequently have been cast into doubt. Therefore, the new law abandoned loss of a mandate by law and included only termination of a mandate.

When amending the Act on Community Elections, the Constitutional Court pointed to the need to ensure the right to judicial protection in possible conflicts between state administration and local government analogously as in the Act on Elections to Regional Representative Bodies, i.e. by a complaint to the Regional Court, which shall make a decision in a short period. It is ineffective and pointless for a constitutional complaint to be the only recourse in

cases of disagreement with the termination of a mandate in a municipal representative body.

*Languages:*

Czech.



*Identification:* CZE-2000-3-020

**a)** Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 15.11.2000 / **e)** II. ÚS 305/99 / **f)** Restitution – 116/1994 / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

5.3.32.2 Fundamental Rights – Civil and political rights – Right to family life – Succession.

5.3.37.1 Fundamental Rights – Civil and political rights – Right to property – Expropriation.

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

*Keywords of the alphabetical index:*

Restitution / Retroactivity / Property, claim, protection / Persecution, racial, invalidity of property acts / *Res iudicata*.

*Headnotes:*

If the Regional Court lawfully gave a verdict according to the laws in effect at the time the verdict cannot be reversed later because the laws have since changed.

It is in conflict with the Charter of Fundamental Rights and Freedoms for courts to not take into account the fact that a confiscation decision was not signed by the appropriate minister and includes land that passed to the complainants' legal predecessor in inheritance proceedings on the basis of a deed of conveyance/surrender.

*Summary:*

The complainants filed a constitutional complaint concerning the failure to conclude an agreement on the conveyance/surrender of real property. They object that they are the heirs of their father, V.F., who

was the heir of the original owners, who were forced to sell their property to a "Treuhand" [an administrator of property, who, however, did not use the property to the owner's benefit and was required to sell the property], Thomas Flassate, during a time when the country was not free, and who died in concentration camps in 1943 with other family members. The inheritance proceedings were stopped in January 1950. Both the District and the Regional Court denied the complaint, and the Appellate Court rejected an appeal.

As far as the restitution proceedings are concerned, the complainants claim interference in their property rights. According to the settled case law of the Constitutional Court, the Charter of Fundamental Rights and Freedoms protects existing ownership rights not merely the asserted claim to them (Decision no. III. ÚS 23/93). These provisions do not protect someone who is yet to take part in proceedings that are to result in the acquisition of ownership. This is also true under the Additional Protocol to the Convention for the protection of Human Rights and Basic Freedoms.

Judges are bound by the law in their decision-making. The Regional Court could judge the matter according to the laws in effect as of the date of its decision, 24 January 1994, i.e. before the passage of Act no. 116/1994 Coll., which went into effect on 1 July 1994.

The Act on Extra-judicial Rehabilitation originally applied to property that was transferred to the state or other legal entities in the period from 25 February 1948 to 1 January 1990. It was not until the amendment of this Act that the sphere of entitled persons was expanded and a period for them to make claims was established.

However, at the time of the courts' decisions this provision was not yet part of the legal order. The Act was amended because the general courts did not have adequate means to solve the restitution claims of natural persons whose rights were infringed as early as World War II, who had never lost Czechoslovak citizenship and were excluded from the restitution process under the laws previously in effect.

In the proceedings before the general courts the complainants asserted rights other than property rights and that part of the constitutional complaint was denied.

The Constitutional Court is bound by the statement of claim in the complaint but it is not bound by its reasoning. Therefore, the public authority's decision can also be reviewed from other aspects. Under

Constitutional Court Decisions no. III. ÚS 114/93 and no. IV. ÚS 259/95, the nationalisation process of the Thomas Flassak company was completed in conflict with then valid legal regulations, as the confiscation decision in question was not signed by the minister who was responsible for that act and at the same time application of regulations governing administrative proceedings was completely ruled out.

The complainants raised this objection subsequently, in proceedings before the Constitutional Court, but the courts had the confiscation decision at their disposal as part of the submitted evidentiary materials. The Constitutional Court concluded that this circumstance could not have affected the result of proceedings in this case, as a decision was being made concerning the nationalisation of property belonging to someone other than the complainants. Only the new state of the law, established by Act no. 116/1994, permitted the assertion of restitution claims by newly established deadlines by persons who had claims to a thing under the Decree of the President of the Republic no. 5/1945 (on the Invalidity of Some Property Law Actions from the Time of Lack of Freedom and on the National Administration of Property of Germans, Hungarians, Traitors and Collaborators and Organisations and Institutions) or under Act no. 128/1946 (on the Invalidity of Some Property Law Actions from the Time of Lack of Freedom and on Claims Arising from this Invalidity and from Other Interference with Property) if the transfer of the ownership rights, which were declared invalid under these special legal regulations occurred due to racial persecution and the claim was not fully satisfied after 25 February 1948.

The conclusions of the courts in the part related to evaluation of the rightfulness of restitution claims for the issuance of land are in obvious conflict with the deed of conveyance/surrender of the Regional Court in Uherské Brod, file no. D 388/46. The inheritance proceedings were finished by this decision, and an entry in the land register was permitted. Although the Supreme Court analysed the substance of the inheritance proceedings up to 1950, it did not draw the appropriate conclusions from this analysis. The land parcels were nationalised together with the rest of the property, however, not as the property of the Thomas Flassak company but as the property of the complainants' legal predecessor. The petitioners expressly stated that they also assert the nationalisation performed in conflict with then valid legal regulations as grounds for restitution.

Both the fact that the confiscation decree was not signed by the minister and that something was nationalised as belonging to Tomas Flassak although under the valid deed of conveyance/surrender, due to

its constitutive nature, it belonged to his legal predecessor, must be understood to be in conflict with legal regulations. The Supreme Court did not adequately explain this conflict in its decision, in terms of analysis the constitutive and declarative nature of the deed of conveyance/surrender in the inheritance proceedings.

In relation to applying restitution claims to the land the complainants' right to judicial protection was violated, and therefore the Constitutional Court granted this part of the proposal.

*Languages:*

Czech.



## Denmark Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 2000 – 31 December 2000.



## Estonia Supreme Court

### Important decisions

*Identification:* EST-2000-3-007

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 05.10.2000 / **e)** 3-4-1-8-2000 / **f)** Review of Section 18.1.3 of the Competition Act / **g)** *Riigi Teataja III* (Official Gazette), 2000, 21, Article 232 / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

1.2.3 Constitutional Justice – Types of claim – Referral by a court.

1.3.2.3 Constitutional Justice – Jurisdiction – Type of review – Abstract review.

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

3.9 General Principles – Rule of law.

3.10 General Principles – Certainty of the law.

4.6.2 Institutions – Executive bodies – Powers.

*Keywords of the alphabetical index:*

Competition, public procurement, monopoly.

*Headnotes:*

An executive agency's statutory right to exercise supervision does not mean that the agency has competence to perform specific acts with regard to private law bodies. Ambiguity of legislation as to which agency is authorised to exercise supervision over a certain matter is incompatible with the principle of certainty of the law.

*Summary:*

According to a directive of the Competition Board, AS Eesti Telefon (a provider of telecommunication services) failed to comply with Section 18.1.3 of the Competition Act. Under this provision a company in the position of a natural monopoly or having exclusive rights in the market had to purchase items and order services according to the procedure provided for by the Public Procurement Act. Section 18.1.3 of the

Competition Act also applied to companies that were not legal entities under public law (AS Eesti Telefon was a private law entity).

AS Eesti Telefon filed a complaint against the directive with Tallinn Administrative Court, claiming that the directive was illegal and Section 18.1.3 of the Competition Act was in conflict with Articles 3, 10, 11, 13, 31 and 32 of the Constitution. The Administrative Court annulled the directive of the Competition Board but did not initiate constitutional review proceedings. This was done by Tallinn Circuit Court which reviewed the decision of the Administrative Court by way of appeal. The Court found that under the Public Procurement Act to which Section 18.1.3 of the Competition Act referred, a natural monopoly had to apply for permission or approval of the Public Procurement Office in several cases. The latter, however, had no competence to exercise control over a private law entity. Therefore, the Court concluded, it was unclear to a private law legal entity which provisions of the Public Procurement Act it should observe. This was found to be incompatible with the principle of the rule of law (Article 10 of the Constitution).

The Constitutional Review Chamber of the Supreme Court was of the opinion that under the Public Procurement Act issues concerning public procurement were within the competence of the Public Procurement Office. It was not up to the Public Procurement Office to protect competition. The Public Procurement Office had no authority to carry out supervisory activities with regard to subjects specified in Section 18.1.3 of the Competition Act (i.e. private law entities).

It was within the competence of the Competition Board to take measures to promote competition under the Competition Act (Sections 34.1 and 35.1 of the Act). According to the Supreme Court, the supervision of the Competition Board included supervision over whether subjects specified in Section 18.1.3 of the Competition Act observed the procedure for public procurement. The Court observed, however, that a statutory right to exercise supervision did not mean that the Competition Board had the competence to give permission, receive declarations, cancel tendering procedures and carry out other supervisory activities provided for by the Public Procurement Act. The Competition Act did not impose an obligation on the Competition Board to perform acts proceeding from the Public Procurement Act.

The Court concluded that neither the Public Procurement Office nor the Competition Board had competence to perform acts specified in the Public

Procurement Act with regard to subjects specified in Section 18.1.3 of the Competition Act. The subjects specified in this provision were left in uncertainty, since it was unclear what behaviour was lawful. Thus, Section 18.1.3 of the Competition Act was ambiguous and not in conformity with the principle of certainty of the law, derived from Article 13.2 of the Constitution. The Court declared Section 18.1.3 of the Competition Act null and void.

Chief Justice Uno Lõhmus delivered a dissenting opinion. According to Mr Lõhmus the petition of the Tallinn Circuit Court to review the constitutionality of Section 18.1.3 of the Competition Act was inadmissible. In the view of Mr Lõhmus, the Circuit Court had exercised abstract, not concrete, review of constitutionality, since the outcome of the original administrative law case did not depend on the constitutionality of the disputed provision. The directive of the Competition Board was invalidated due to a violation of formal requirements. Under Article 15.1 of the Constitution and Section 5 of the Constitutional Review Court Procedure Act an ordinary court may only initiate concrete review of constitutionality.

Mr Lõhmus observed that Section 18.1.3 of the Competition Act made a direct reference to the Public Procurement Act. Thus, the provisions of the latter formed a binding part of the Competition Act. With reference to the decision in *Sunday Times v. the United Kingdom* of the European Court of Human Rights, Mr Lõhmus found that Section 18.1.3 of the Competition Act as a reference provision and the Public Procurement Act as the provision referred to, form a sufficiently clear basis for solving the matter without any need to declare the referring provision invalid.

#### Cross-references:

Decision 3-4-1-1-99 of 17.03.1999, *Bulletin* 1999/1 [EST-1999-1-001]; *Sunday Times v. the United Kingdom* of 26.04.1979, *Special Bulletin ECHR* [ECH-1979-S-001].

#### Languages:

Estonian, English (translation by the Court).



*Identification:* EST-2000-3-008

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 06.10.2000 / **e)** 3-4-1-9-2000 / **f)** Review of the constitutionality of the Weapons Act / **g)** *Riigi Teataja III* (Official Gazette), 2000, 21, Article 233 / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

3.10 General Principles – Certainty of the law.

3.15 General Principles – Proportionality.

3.16 General Principles – Weighing of interests.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

*Keywords of the alphabetical index:*

Weapon, permit, refusal following conviction / Penalty, permanent.

*Headnotes:*

With regard to provisional rules a person must bear in mind that the rules may change. A restriction which results from the criminal punishment of a person, and which accompanies him for life, irrespective of the crime, may prove to be disproportional to the purpose of protecting the life and health of others.

*Summary:*

Tartu Administrative Court initiated constitutional review proceedings, asking the Supreme Court to declare Section 28.1.6 of the Weapons Act invalid. According to that provision a weapons permit should not be issued to a person who had been punished under criminal procedure for an intentional crime, irrespective of whether his criminal record had expired or had been expunged. The administrative court pointed out that persons whose criminal record for an intentional crime had expired had been entitled to a weapons permit under the provisional rules, applicable before enactment of the Weapons Act. Under the Weapons Act those persons were not entitled to a weapons permit anymore. The court found that in this way an earlier conviction of a person might – without any time limit – restrict a person's rights and freedoms. That was found to be in conflict with the principle of certainty of the law, derived from Article 10 of the Constitution.

The Constitutional Review Chamber of the Supreme Court did not agree with the viewpoint of the administrative court. According to the Supreme Court, a person could not have a legitimate expectation that his weapons permit would be extended after its expiry

under the provisional rules that had been declared invalid. With regard to provisional rules a person had to bear in mind that the rules might change.

The Supreme Court observed, however, that a restriction which was related to punishment under criminal procedure and accompanied a person for the whole of his life, disregarding the nature and gravity of the crime committed, might prove to be disproportional to the purpose of protecting the life and health of others. Thus, the legislature had to give the executive an opportunity to consider the personality of an applicant for a weapons permit and the circumstances of the committed crime. Despite the imperative restriction of the Weapons Act, a court had to take into account all the circumstances and balance them under Article 11 of the Constitution to determine whether the restriction was necessary in a democratic society and did not distort the nature of the rights and freedoms of a person. The Supreme Court did not satisfy the petition of the Tartu Administrative Court.

*Languages:*

Estonian, English (translation by the Court).

*Identification:* EST-2000-3-009

**a)** Estonia / **b)** Supreme Court / **c)** *en banc* / **d)** 22.12.2000 / **e)** 3-4-1-10-2000 / **f)** Review of the constitutionality of the Procedure for Privatisation of Land by Auction / **g)** *Riigi Teataja III* (Official Gazette), 2001, 1, Article 1 / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

1.1.2.6 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – Subdivision into chambers or sections.

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – Extension.

1.4.1 Constitutional Justice – Procedure – General characteristics.

1.6.5.3 Constitutional Justice – Effects – Temporal effect – *Ex nunc* effect.

3.12 General Principles – Legality.

4.6.2 Institutions – Executive bodies – Powers.

4.10.7 Institutions – Public finances – Taxation.4.10.8.1 Institutions – Public finances – State assets – Privatisation.*Keywords of the alphabetical index:*

Land, privatisation / Auction / Tax.

*Headnotes:*

If the petition for review of constitutionality has been submitted by a Chamber of the Supreme Court, the Supreme Court *en banc* is competent to exercise constitutional review. The Supreme Court does not have to limit its review of constitutionality to the provisions of the Constitution the petitioner referred to.

All financial obligations of public law, irrespective of what they are called in different pieces of legislation, are within the sphere of protection of Article 113 of the Constitution.

The authority of law is required for the exercise of executive power.

Constitutional review decisions have no retroactive force.

*Summary:*

According to the Procedure for the Privatisation of Land by Auction (enacted by a regulation of the Government) the participants of an auction of land had to pay a participation fee of 1000 kroons. The participation fee should not be refunded. It could be used for covering the expenses related to the preparation of privatisation and the organisation of an auction of this or other plots.

A limited partnership that did not win in an auction claimed a refund of the participation fee. Having been refused, it contested the refusal and the relevant provisions of the governmental regulation with an administrative court. The case reached the Administrative Law Chamber of the Supreme Court. The latter initiated constitutional review proceedings with the Supreme Court *en banc*.

At the court session the representative of the Government disputed the competence of the Supreme Court *en banc* to review the petition of the Administrative Law Chamber. He claimed that according to Section 9.3 of the Constitutional Review Court Procedure Act the Supreme Court *en banc* was competent to review a petition only if at least one of the justices of the Constitutional Review Chamber

had a dissenting opinion. The disputed petition had been transferred directly to the Supreme Court *en banc*.

The Supreme Court *en banc* declared itself to be competent to review that petition. According to Article 149.3 of the Constitution the Supreme Court is the court of constitutional review. The Constitution does not prescribe how constitutional review is exercised in the Supreme Court. If the constitutional review proceedings are initiated by a Chamber of the Supreme Court, it is essential for the authority of the decision that all justices of the Supreme Court take part in the decision-making.

The Supreme Court also stated that it was not allowed to review the constitutionality of legislation or provisions if they had not been petitioned. However, to review the constitutionality of the petitioned provisions, taking into consideration all the provisions and the spirit of the Constitution does not amount to extending the limits of the petition. Although the Administrative Law Chamber contested the conformity of certain provisions of the governmental regulation with Articles 3 and 87.6 of the Constitution, the Supreme Court *en banc* also reviewed the conformity of these provisions with Article 113 of the Constitution.

The purpose of Article 113 of the Constitution is to achieve a situation where all public financial obligations shall be imposed by legislation adopted by Parliament in the form of parliamentary laws. This applies irrespective of how a public financial obligation is named in a piece of legislation. In essence, the disputed participation fee is a tax which is imposed in the interests of land reform on persons who wish to take part in the privatisation of land by auction. As the participation fee imposed by the governmental regulation is in essence a tax, the imposition thereof by a regulation is in conflict with Article 113 of the Constitution.

The Supreme Court observed that imposition of the participation fee was also in conflict with Articles 3.1 and 87.6 of the Constitution. Under Article 87.6 of the Constitution the Government may issue a regulation only on the basis of a delegation provision in a law. The Government must not exceed the authority delegated by a provision and must not impose by its regulation what it has not been empowered to by the delegation provision. According to Article 3.1 of the Constitution the exercise of executive power must be based on authority granted by law.

The Land Reform Act authorised the Government to establish by its regulation the procedure for privatisation of land by auction. The Government was

not authorised to impose a participation fee – this was not necessary for making a decision on privatisation. The procedure for the privatisation of land, by nature, does not contain a requirement to pay a participation fee. Thus, the Government exceeded the competence given to it by the legislature.

The Supreme Court also observed that the decisions made by way of constitutional review procedure enter into force on the day of pronouncement. Thus, the decisions have no retroactive force.

*Cross-references:*

Decision 3-4-1-2-98 of 23.03.1998, *Bulletin* 1998/1 [EST-1998-1-002].

*Languages:*

Estonian, English (translation by the Court).



## Finland

### Supreme Court

### Supreme Administrative Court

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There was no relevant constitutional case-law during the reference period 1 September 2000 – 31 December 2000.





# France

## Constitutional Council

### Important decisions

*Identification:* FRA-2000-3-012

**a)** France / **b)** Constitutional Council / **c)** / **d)** 06.09.2000 / **e)** / **f)** Decision on an application by Mr Charles Pasqua / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.09.2000, 14165 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

3.3.3 General Principles – Democracy – Pluralist democracy.

4.5.11 Institutions – Legislative bodies – Political parties.

4.9.7 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material.

5.2.1.4 Fundamental Rights – Equality – Scope of application – Elections.

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

*Keywords of the alphabetical index:*

Referendum, radio and television campaigning / Media, political party, airtime.

*Headnotes:*

By requiring that, in order to be entitled to time on air, political parties or groups had to have at least five seats in the parliament or have gained, alone or as part of a coalition, at least 5% of the votes cast in the last elections, the authors of the impugned decree had applied objective criteria which, especially in view of the limited amount of airtime available on radio and television for official campaigns, did not contravene the principle of equality between political parties or groups and infringed neither the principle of the free expression of thoughts and opinions. The criteria used to assess whether political parties or groups were entitled to take part in the referendum campaign

made it possible to inform the voters of the various points of view on the matter, thereby satisfying the constitutional requirement of pluralism of ideas and opinions.

*Summary:*

Mr Charles Pasqua, the leader of a marginal body of opinion on the referendum on the amendment of the term of office of the President of the Republic, contested the means of allocating speaking time to political groups (calculated, *inter alia*, on the basis of the parties' number of seats in parliament). The ground for Mr Pasqua's appeal was that there was an imbalance between the proponents of a "yes" vote and those who advocated a "no" vote. He therefore suggested that, in order to strike a balance, speaking time should be divided up among proponents of a "yes" and "no" vote rather than among the political parties.

*Cross-references:*

Confirmation of recent case-law (see *Bulletin* 2000/2 [FRA-2000-2-010], Decision on an application by Mr Stéphane Hauchemaille of 25.07.2000) on the Constitutional Council's power to supervise referendum procedures.

Confirmation, also, that when it is acting as an electoral judge, the Constitutional Council shall check whether the laws that it applies are in accordance with international conventions (Decision no. 88-1082/1117 of 21.10.1988, A.N. Val d'Oise, constituency no. 5).

*Languages:*

French.



*Identification:* FRA-2000-3-013

**a)** France / **b)** Constitutional Council / **c)** / **d)** 07.12.2000 / **e)** 2000-435 DC / **f)** Outline law on overseas *départements* / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 14.12.2000, 19830 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.8.1 General Principles – Territorial principles – Indivisibility of the territory.

4.8.3.1 Institutions – Federalism and regionalism – Institutional aspects – Deliberative assembly.

4.8.5.5.1 Institutions – Federalism and regionalism – Distribution of powers – International relations – Conclusion of treaties.

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

*Keywords of the alphabetical index:*

Consultation, public / Executive, order / Evolution of statute law, proposals.

*Headnotes:*

The overseas *départements* and Saint Pierre et Miquelon are regional authorities which form an integral part of the French Republic. Any “pact” between the Republic and the overseas *départements* amounts to an infringement of the principle of the indivisibility of the Republic.

By virtue of the same principle, the status of an overseas *département* is the same as that of the mainland *départements*. The adjustment measures required because of their specific situation should not entail conferring on them the “particular form of organisation” which the constitution reserves specifically for overseas territories.

Provided that the authorities of the Republic have granted them appropriate, revocable powers in accordance with the conditions and procedures laid down, the presidents of *département* or regional councils may be authorised to negotiate and sign agreements which are normally the responsibility of central government with neighbouring states, territories or regional bodies. However, these councillors are not permitted to join, on their own initiative, French delegations appointed to sign other treaties since power to do so rests exclusively with the relevant authorities of the Republic.

If an assembly is set up bringing together elected representatives of the *départements* and the region (in a Congress) and having only the power to make proposals regarding changes of status, this is not tantamount to establishing an elected council (a third assembly) and does not contravene any of the provisions of the constitution. However, it is contrary to the constitution for the legislator to attempt to force the Prime Minister to reply to proposals for legislative

amendments from local or regional assemblies by a fixed deadline.

For the same reasons, a provision compelling the government to table a bill on domestic transport is also at variance with the constitution.

Though legislation may introduce restrictions on free enterprise which are warranted in the public interest or related to constitutional requirements, it may do so only on condition that the said restrictions do not completely alter the scope of this freedom and are clearly and accurately expressed.

*Supplementary information:*

The issues discussed in connection with the outline law on overseas *départements* and Saint Pierre et Miquelon must be considered in the light of the debate on the constitutional future of the *département* of Corsica.

*Languages:*

French.

*Identification:* FRA-2000-3-014

**a)** France / **b)** Constitutional Council / **c)** / **d)** 07.12.2000 / **e)** 2000-436 DC / **f)** Law on urban solidarity and renewal / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 14.12.2000, 19840 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

3.15 General Principles – Proportionality.

4.6.9.1.1 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

4.6.9.1.2 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Supervision.

4.6.9.2.2 Institutions – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.

**4.8.4 Institutions** – Federalism and regionalism – Budgetary and financial aspects.

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

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

*Keywords of the alphabetical index:*

Local government, freedom of administration / Freedom of contract / Housing, social / Housing, decent / Housing, social mix / Housing, sanction, automatic / Town planning.

*Headnotes:*

Legislation may subject local and regional authorities to obligations or duties provided that these are intended to meet constitutional requirements or serve the public interest, that they do not undermine the authorities' own powers, that they do not hinder their freedom to conduct their own affairs, and that their aim and scope are described in a sufficiently precise manner.

The provisions of Section 1 of the law should not be interpreted as requiring local authorities to achieve certain results but merely, as it emerges from the work of the parliament as setting objectives for local town planners.

The introduction of legislation under which administrative authorisation was required, with a view to ensuring that each neighbourhood has a diverse range of shops and businesses for any change in shops or business premises entailing a modification in the nature of their activity, constitutes a breach of the right of ownership and free enterprise which is disproportionate to the aim being pursued.

It is acceptable for legislation to introduce a levy on the tax revenue of municipalities in which social housing accounts for less than 20% of people's main places of residence over a total period of twenty years. On the other hand, the automatic penalties provided for by the law for municipalities which have not reached their objectives, irrespective of the nature or the validity of the reasons for the delay, are at variance with the principle that local authorities should be free to conduct their own affairs.

Though legislation may be introduced to make changes to contracts still in force in the public interest, such legislation should not undermine the arrangements of the contract to such a degree that they are in clear breach of freedom of contract. This was the case with the law requiring property

companies with majority funding from the deposit and consignment office to "perpetuate" the conditions of leases, even after the expiry of a housing subsidy agreement.

*Summary:*

The law on urban solidarity and renewal covered extremely diverse subjects (town planning, social housing, relations between landlords and tenants, transport, noise pollution, the need for a social and commercial mix, preserving the diversity of neighbourhoods). It was the subject of heated debate in parliament, especially in connection with municipalities' social housing obligations, and gave rise to two appeals (from deputies and senators).

*Cross-references:*

Cf., on breaches of contract, Decision no. 99-416 DC of 23.07.1999, *Bulletin* 1999/2 [FRA-1999-2-007]; Decision no. 99-423 DC of 13.01.2000, *Bulletin* 2000/1 [FRA-2000-1-001];

Cf., on reviewing proportionality in the name of public interest in relation to the right to property and free enterprise, decision no. 2000-433 DC, *Bulletin* 2000/2 [FRA-2000-2-011];

Cf., on decent housing, Decision no. 94-359 DC of 19.01.1995, *Bulletin* 1995/1 [FRA-1995-1-007].

*Languages:*

French.



*Identification:* FRA-2000-3-015

**a)** France / **b)** Constitutional Council / **c)** / **d)** 19.12.2000 / **e)** 2000-437 DC / **f)** Law on the financing of social security for 2001 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.12.2000, 20576 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

5.4.12 Fundamental Rights – Economic, social and cultural rights – Right to social security.

*Keywords of the alphabetical index:*

Asbestos / Welfare rider / Victim, compensation / Tax, proportional contribution / Tax, progressive contribution.

*Headnotes:*

Legislation may change a direct tax base so as to ease the burden on taxpayers with low incomes but only provided that this does not result in a clear breach of equality between taxpayers.

The right to appeal is not infringed by the rule providing that acceptance of an offer from a compensation fund is tantamount to abandoning all court actions for damages in progress and renders inadmissible any future legal proceedings for compensation for the same loss or damage, provided that the role of the fund in question is to compensate in full for the loss or damage, that there is a legal right to appeal against its findings, and that inadmissibility only applies if a court has ruled on full compensation for the damage.

*Summary:*

The reduction in the CSG (the universal supplementary social security contribution) and the CRDS (contribution to the repayment of the social security deficit) for low wage-earners was a measure proposed by the government, in connection with a cut in income tax, which was to apply to households with the lowest incomes, which do not pay income tax. However the Constitutional Council held that the introduction of an allowance for one wage bracket would turn a proportional contribution into a progressive contribution. That being the case, the law could not disregard those items which determine a taxpayer's ability to pay contributions, namely the total income of his or her household and his or her family expenses, without infringing the principle of equal apportionment of public burdens.

Section 53 of the law referred to the Constitutional Council set up a compensation fund to pay full damages for losses sustained by asbestos victims as quickly as possible instead of the single, limited lump-sum payment made until that point to persons

covered by the employment injury and occupational disease insurance scheme of the social security system.

*Languages:*

French.



*Identification:* FRA-2000-3-016

**a)** France / **b)** Constitutional Council / **c)** / **d)** 28.12.2000 / **e)** 2000-441 DC / **f)** Act rectifying the Finance Act for 2000 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2000, 21204 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.17 General Principles – General interest.

4.10.7.1 Institutions – Public finances – Taxation – Principles.

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

*Keywords of the alphabetical index:*

Pollution, polluting activity, taxation / Public domain / Public safety / Public service / Public order, constraints / Telecommunication / Discharge, debts / Social security, employers' contributions / Telephone tapping, costs.

*Headnotes:*

The principle of equality does not prevent the law from setting specific requirements aimed at encouraging companies to adopt behaviour in keeping with the public interest, provided that the rules it sets in this regard are directly related to these aims.

Though the law may require telecommunications companies to install and operate technical devices for the interception of calls in the interests of public safety, the contribution thus made to maintaining public order is not the business of the telecommunications operators. Therefore the cost cannot be charged to them without undermining the principle of equal apportionment of public burdens.

Neither does the principle of equality preclude legislation applying different remedies in different situations or derogating from the principle of equality in the public interest provided that the resultant difference in treatment is directly linked to the aim of the law that introduced it.

### Summary:

The law referred to the Constitutional Council extended the “general tax on polluting activities” to fossil fuels and electricity with a view to stepping up the fight against greenhouse gases and encouraging companies to limit their energy consumption.

The Constitutional Council held that the method for calculating the tax could result in unfairness and that, in view of the sources from which electricity was produced in France and its minor contribution to carbon dioxide emissions, it could not be said that taxing electricity consumption was in the public interest.

Under the law referred to the Constitutional Council telecommunications operators were expected to cover the investment costs and a part of the operating costs for telephone tapping devices. The Constitutional Council agreed with the applicants’ argument that telephone tapping was carried out in the interest of the entire nation. Though private operators could provide technical support as parties occupying the public domain, the overall investment costs and a part of the operating costs could not be charged directly to them. The cost of a task that was so obviously a national responsibility as maintaining public order could not be charged to private operators without undermining the principle of equal apportionment of public burdens.

The law provided that, under certain conditions, farmers based in Corsica could be discharged of any employers’ contributions they owed under the social security scheme. The Constitutional Council held that no valid reason had been provided as to why only Corsican farmers were to be granted this benefit and that no public interest had been cited which could have provided a ground for this preferential treatment.

### Languages:

French.



### Identification: FRA-2000-3-017

a) France / b) Constitutional Council / c) / d) 28.12.2000 / e) 2000-442 DC / f) Finance Act for 2001 / g) *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2000, 21194 / h) CODICES (French).

### Keywords of the systematic thesaurus:

4.6.9.1.1 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

4.8.4.3 Institutions – Federalism and regionalism – Budgetary and financial aspects – Budget.

4.10.1 Institutions – Public finances – Principles.

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

### Keywords of the alphabetical index:

Tax, concession / Budget rider / Tax, tax paying potential, assessment / Tax, incentives.

### Headnotes:

Provided it abides by constitutional principles and takes account of the specific characteristics of each tax, legislation may be introduced which sets the rules according to which taxpayers’ tax-paying potential is assessed. However, this assessment must not result in a clear breach of the principle of equal apportionment of public burdens. The principle of equal apportionment does not preclude legislation which creates incentives by means of tax concessions. However, any such measure must be introduced either in the public interest (doing away with the tax rebate on certain forms of income from movable assets) or on the basis of an objective and rational criterion delimiting a uniform category within which taxpayers are all treated in the same manner (exemption from vehicle registration fees for craft workers and traders working as individuals).

Legislation may be introduced to do away with a local tax (in this case vehicle registration fees) provided that this does not reduce the overall income of local or regional authorities or restrict their own resources to the degree that their freedom to conduct their own affairs is undermined.

### Summary:

Having censured a government proposal to alter the basis for assessment of the universal supplementary social security contribution, the CSG, in the name of the equality of tax-payers (cf. Decision no. 2000-437

DC [FRA-2000-3-015]), the Constitutional Council applied the same rule here, though this time to confirm the constitutionality of the contested statutory provision.

The decision also confirmed the recent case-law (Decision no. 2000-432 DC, *Bulletin* 2000/2 [FRA-2000-2-008]) according to which respect for the principle that local authorities must be able to conduct their own affairs implies that they must have sufficient income of their own.

*Languages:*

French.



## Georgia Constitutional Court

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Summaries of important decisions of the reference period 1 September 2000 – 31 December 2000 will be published in the next edition, *Bulletin* 2001/1.



# Germany

## Federal Constitutional Court

### Important decisions

*Identification:* GER-2000-3-034

a) Germany / b) Federal Constitutional Court / c) Second Chamber of the Second Panel / d) 29.02.2000 / e) 2 BvR 347/00 / f) / g) / h) CODICES (German).

*Keywords of the systematic thesaurus:*

3.9 General Principles – Rule of law.

3.15 General Principles – Proportionality.

3.16 General Principles – Weighing of interests.

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

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

*Keywords of the alphabetical index:*

Deportation, custody, continuation / Deportation, enforceability / Deportation, custody / Deportation, impediment / Obligation to leave the country.

*Headnotes:*

A court maintaining an order of pre-deportation custody violates Article 2.2.2 of the Basic Law and the principle of the rule of law if it fails to take into account a bar to deportation that conflicts with the obligation to leave the country.

*Summary:*

I. In an order dated 25 January 1994, the Federal Office for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) turned down the complainant's application for asylum. The complainant, a Turkish citizen, appealed against this order by bringing an action before the responsible Administrative Court.

Before a judgement was issued in the pending action for the grant of asylum, the Aliens Authority in the

federal state (*Bundesland*) Lower Saxony made an order to expel the complainant from Germany on account of a conviction for offences in violation of the German Narcotics Law (*Betäubungsmittelgesetz*). The Authority ordered the complainant to be deported to Turkey at the time of his discharge from the prison sentence he received for these offences.

The complainant applied to the Administrative Court (*Verwaltungsgericht*) for temporary relief against the order requiring the immediate enforcement of his expulsion and deportation. In December 1999, the complainant was taken into pre-deportation custody, as the responsible court was of the opinion that there were reasonable grounds to suspect he would evade his deportation by disappearing after serving his prison sentence.

In July 1999, the Administrative Court made an order to hear evidence in the asylum proceedings to determine whether the complainant was threatened by political persecution for the very reasons that served as the basis for the institution of criminal proceedings against him.

The complainant immediately appealed to the Regional Court (*Landgericht*) against the order of pre-deportation custody, and in this context, he informed the Regional Court about the following matters:

1. his appeal against the rejection of his application for asylum;
2. his application for temporary relief against the expulsion and deportation order and the objection against this order; and
3. the order to hear evidence in the asylum proceedings.

When the Regional Court dismissed the complainant's immediate appeal in its order of 26 January 2000, the complainant appealed to the responsible Higher Regional Court (*Oberlandesgericht*).

On 16 February 2000, the Higher Administrative Court (*Oberverwaltungsgericht*) of Lower Saxony held that the complainant's objection to the expulsion order should have the effect of suspending the order to deport the complainant to Turkey, until a judgement was issued in the objection proceedings. The Higher Administrative Court justified its decision by stating that, according to the present state of knowledge, the person seeking asylum was under the definite threat of being interrogated and tortured by Turkish security authorities upon his return to Turkey, as he was suspected of having supported the PKK. The court further held that no evidence had yet been produced pursuant to the order to hear evidence, and that an Administrative Court judgement had not been

issued yet. As such evidence and the judgement of the Administrative Court were to be taken into account in the judgement on the complainant's objection to his expulsion, the court stated that at that time, no final decision about a deportation could be taken.

The complainant informed the Higher Regional Court responsible for issuing the judgement maintaining his pre-deportation custody about the Higher Administrative Court's judgement. Nevertheless, on 21 February 2000, the Higher Regional Court dismissed another objection to the continuation of the complainant's pre-deportation custody because they found that the order of pre-deportation custody to ensure deportation pursuant to § 57.2.5 of the German Aliens Act (*Ausländergesetz*) did not presuppose the obligation to leave the country was already enforceable.

In his constitutional complaint, the complainant challenged the continuation of his custody for the purpose of ensuring his deportation, alleging that, because his expulsion was impeded, pre-deportation custody was impermissible and constituted a violation of Article 2.2.2 of the Basic Law.

II. The Second Chamber of the Second Panel, for the following reasons, reversed and remanded the Higher Regional Court decision because of a violation of the fundamental rights and freedoms of the person:

In conjunction with the principle of the rule of law, Article 2.2.2 of the Basic Law obliges the courts to comprehensively examine the prerequisites for ordering pre-deportation custody. In particular, during the appellate proceedings it must be examined whether the prerequisites for maintaining custody are still valid. As a general rule, it can be stated that these prerequisites are no longer met if an Administrative Court decision has eliminated the detainee's obligation to leave the country or if the detainee's deportation cannot be effected without the lapse of a prolonged period of time. If the deprivation of liberty is not necessary, because deportation is impeded, the principle of proportionality precludes the ordering (in the first instance) or maintenance of previously ordered pre-deportation custody.

When weighing the public interest in ensuring deportation against the personal liberty rights of the person who is to be deported, right to personal liberty will, with the increasing length of detention, gain importance as against the public interest. Apart from constitutional law, the principle of proportionality finds its expression in § 57.2.4 of the German Aliens Act, according to which pre-deportation custody to ensure deportation is impermissible if it is certain that for reasons beyond the concerned foreigner's control,

deportation cannot take place within the next three months.

The Higher Regional Court did not take these constitutional criteria into consideration; in particular, it completely failed to consider § 57.2.4 of the Aliens Act.

Nor is there any evidence that the Higher Regional Court examined, as required by the Basic Law, whether and to what extent the Higher Administrative Court's decision to establish the suspensory effect of the objection conflicts, permanently or at least for a prolonged period of time, with deportation.

In the case of such a decision by an Administrative Court, which is only provisional, the court that is competent for ordering detention can nevertheless state that it has not been established that the deportation is impeded. Such a statement, however, presupposes that there is concrete evidence to indicate that the deportation, which was precluded on account of the grant of temporary relief by the Administrative Courts, could be possible again within the three-month period provided in § 57.2.4 of the Aliens Act.

In view of the facts of the case, which the Higher Regional Court could have ascertained without any problem (as required by the Basic Law), the Basic Law prohibits the Higher Regional Court from representing in this case that it was not certain the deportation would be impeded.

Moreover, as the Higher Regional Court did not take the question of proportionality into consideration, the case was to be remanded.

#### *Languages:*

German.



*Identification:* GER-2000-3-035

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 24.11.2000 / **e)** 2 BvR 813/99 / **f)** **g)** **h)** CODICES (German).



*Keywords of the systematic thesaurus:*

3.9 General Principles – Rule of law.

3.16 General Principles – Weighing of interests.

3.19 General Principles – Reasonableness.

4.7.15.1.3 Institutions – Courts and tribunals – Legal assistance and representation of parties – The Bar – Role of members of the Bar.

5.2.1 Fundamental Rights – Equality – Scope of application.

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

5.4.4 Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.

*Keywords of the alphabetical index:*

Travel, expenses, reimbursement / Defence counsel, officially assigned / Defence counsel, criminal proceedings / Lawyer, fees, scale / Criminal proceedings.

*Headnotes:*

The denial of reimbursement for travelling expenses for a lawyer who is appointed as counsel for the defence by a court in a different court location constitutes a violation of the lawyer's freedom to practice an occupation or profession.

*Summary:*

I. Early in 1994, the complainant, a lawyer from Hamburg, acted as counsel for the defence for a suspect who was in pre-trial detention in Hamburg. The suspect chose the lawyer himself.

In its decision of 26 April 1994, the responsible court appointed the lawyer, upon his application, as counsel for the defence. After the charge was brought, the lawyer's client was transferred to a pre-trial detention centre in Hanau. The presiding judge of the criminal division approved the lawyer's visit to his client for information purposes and permitted the use of an interpreter for the visit, provided that the accruing costs were to be advanced from public funds.

The trial took place in Hanau over two days, and the complainant travelled between Hamburg and Hanau on each of these days. After the conclusion of the trial, the clerk of the Regional Court (*Landgericht*) at Hanau, in the decision fixing costs, refused to pay the lawyer's travelling expenses and denied the lawyer compensation for the time away from his office while travelling in relation to the case. The court clerk

argued that pursuant to the established practice of the Higher Regional Court (*Oberlandesgericht*), travelling expenses are not reimbursable for a lawyer appointed as counsel for the defence by a court in a different location where he had been acting as counsel for the defence at the request of the client himself. The lawyer's complaint and appeal against the decision were unsuccessful.

The lawyer lodged a constitutional complaint against the denial of the reimbursement of his travelling expenses, alleging that the denial violated Article 2.1 of the Basic Law in conjunction with the principle of the rule of law.

II. The Third Chamber of the Second Panel, for the following reasons, reversed and remanded the lower court decisions that had denied a reimbursement of the lawyer's travelling expenses.

The challenged decisions violated the lawyer's right to freely practice an occupation or profession. The courts' appointment of defence counsel is a special form of engaging private individuals for public purposes. Such an appointment is made in the public interest of providing legally qualified assistance to a person charged with a criminal offence in cases in which defence is necessary to guarantee due process. For the lawyer, appointment as defence counsel, in some respects, bears additional obligations as compared to those of a counsel for the defence who is chosen by the client. In particular, a court-appointed defence counsel must personally take part in the trial without interruption. Pursuant to § 97 of the German scale of fees for lawyers (*Bundesrechtsanwaltsgebührenordnung*), a court-appointed defence counsel is entitled to remuneration for his or her work and to reimbursement of his or her expenses. The provision of the applicable regulation, which (in legal aided cases) denies reimbursement for the counsel's costs when his or her domicile or office are not located in the same place as the court, does not apply to defence counsel appointed pursuant to § 97 of the German scale of fees for lawyers.

No other legal reason which would justify the denial of the reimbursement of necessary expenses could be found. Nor would such a reason carry weight in an overall consideration of the remuneration regulations, as the remuneration to which a court-appointed defence counsel is entitled is considerably below the scale of fees which is regarded as reasonable for a counsel for the defence chosen by the client. The difference in fees is justified by the public interest in limiting the risk associated with assuming the costs of representation. This, however, only applies if the limits of what is reasonable are respected. These

limits are transgressed if the fees the lawyer receives for his or her work as a counsel for the defence are completely consumed (and not later reimbursed) by the costs of necessary travel.

Were the challenged decisions of the lower courts to continue in force, this would mean in this case that the complainant would have to tolerate economic loss for his work as a court-appointed defence counsel. This goes beyond the limits of what is reasonable. Nor would such a result be compatible with the principle of equality before the law. The question whether a court should appoint a lawyer from a different location as counsel for the defence (thus giving rise to such travel expenses) is examined when the counsel for the defence is chosen and appointed by the court. This means that, if the court decides to appoint a lawyer from a different location as counsel for the defence, additional costs that accrue due to the fact that the lawyer's domicile or office is not located at the same place as the court are, in principle, reimbursable.

#### *Languages:*

German.



*Identification:* GER-2000-3-036

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 12.12.2000 / **e)** 1 BvR 1762/95, 1 BvR 1787/95 / **f)** / **g)** / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

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

**3.17 General Principles – General interest.**

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

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

**5.3.13.16 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Reasoning.**

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

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

#### *Keywords of the alphabetical index:*

Press freedom, scope of protection / Advertising, annoying effect / Interpretation, ambiguity / Competition, unfair / Value judgement / Image, expressive, press freedom / Misery of the world, public conscience, burdened.

#### *Headnotes:*

A magazine publisher's right to press freedom can be violated if the publisher is prohibited from publishing advertisements with regard to which the advertiser enjoys the protection of freedom of expression. Image-building advertising that raised themes critical of society could attract constitutional protection under provisions guaranteeing freedom of expression.

#### *Summary:*

I. Benetton, a company which sells clothing worldwide, commissioned the publication of double-page photographs with the motifs "oil-covered duck", "child labour" and "H.I.V. Positive" in different issues of the magazine "S.", which is published by the complainant. In the lower left corner of each photograph, there was the note "United Colors of Benetton" in a green square.

Shortly after the publication of the advertisements, they became the subject of a legal action that claimed them to be anti-competitive. It was argued that Benetton, in order to increase the sales of its goods, intended to shock the consumers at whom the published photographs were directed by playing upon a whole range of feelings, like horror and pity. The claimant argued that the advertisements violated human dignity and disregarded the personal privacy of the persons shown. It was further argued that the complainant press publisher, by printing the advertisements, promoted Benetton's competitive position in an impermissible manner.

In the action brought against Benetton, which sought an order requiring the company to refrain from publishing the criticised advertisements, the Federal Court of Justice (*Bundesgerichtshof*), in essence, concurred with this line of argument. The Federal Court of Justice classified the advertising campaign as anti-competitive finding that it exploited the consumers' feelings of pity for commercial purposes. The Federal Court of Justice, in its function as the court of last instance, banned the publication of the so-called shock advertisements.

The complainant publisher, on the contrary, regards the ban on the publication of shocking advertisements

as a violation of its freedom of expression and press freedom.

II. Upon the constitutional complaint lodged by the publisher, the First Panel gave the following reasons for reversing and remanding the previous court decisions in the case, finding that the ban imposed by those decisions constituted a violation of Article 5.1 of the Basic Law.

The publication of a third party's opinion – even for commercial purposes or in the case of pure business advertising – falls under the scope of protection of the freedom of the press. This also includes expressive images. The courts correctly interpreted the Benetton advertisements as expressions of opinion.

The ban on publishing these advertisements restricted the complainant's press freedom. An organ of the press must not be prohibited from publishing a third party's opinion if the original holder of the opinion is to be permitted to express and propagate it.

However, the Federal Constitutional Court, did not agree with the complainant's argument that § 1 of the German Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*), on which the Federal Court of Justice based its ban, is not specific enough or does not lend itself to application in cases of this type. The general clause contained in § 1 of the Unfair Competition Act, which prohibits competitive acts that are contrary to public policy, is unobjectionable from the constitutional point of view. In its assessment of the advertisements under competition law, however, the Federal Court of Justice misjudged the meaning and scope of freedom of expression. The prerequisite for restricting freedom of expression is that such restriction is justified either by sufficient reasons of public interest or by the rights of third parties. Such justification was not found by the Federal Court of Justice and is not otherwise apparent.

The lower courts regarded the Benetton advertisements as being contrary to public policy as, by depicting great suffering of humans and animals, they provoke pity and, without any factual reasons for doing so, exploit this feeling for competitive purposes. Such competitive behaviour is probably rejected by large parts of the population. This, however, does not, in itself, constitute a statement as to whether such behaviour violates sufficiently important interests of third parties or of the general public. The fact that the photographs confront those who look at them with unpleasant images or images that provoke pity does not constitute an annoyance strong enough to justify a restriction of fundamental rights. To assure that citizens' minds are not burdened by the misery of the world is not an interest for the protection of which the

state is allowed to restrict fundamental rights. The assessment may be different if the pictures shown are disgusting, terrifying or liable to corrupt the young.

Nor can the fact that there is no connection between the images, which have suggestive power, and the advertised products lead to the conclusion that the images constitute an annoyance that is strong enough to justify a restriction of fundamental rights. The lack of such a connection is a characteristic feature of many of today's image-building advertising campaigns, images are used that appeal to lewd wishes and yearnings. The fact that consumers are probably more used to such "positive" images than they are to appeals to their feelings of pity does not, alone, substantiate the claim that annoying effects can be attributed to the latter.

Nor is the public interest concerned in this case. It cannot be found that advertising that denounces inhuman conditions and the pollution of the environment at the same time promotes tendencies towards brutalisation and towards the dulling of sensitivity as regards these issues.

On the other hand, the ban constituted a serious encroachment upon freedom of expression. The decisive question in this context is not whether the Benetton advertisements make any substantial contribution to the debate on the deplorable situations that they depict. The mere denouncement of these situations is also protected by Article 5.1 of the Basic Law, and the denouncement is not called into question by the fact that it is made in an advertising context. As the bans on the motifs "child labour" and "oil-covered duck" exclusively relied on the described interpretation of § 1 of the Unfair Competition Act, the Federal Constitutional Court ruled that they are to be reversed.

One of the reasons the Federal Court of Justice regarded the "H.I.V. Positive" motif as anti-competitive was that this advertisement, in the opinion of the court, grossly violated the principles of safeguarding human dignity by presenting persons suffering from AIDS as "stamped" and thus as excluded from human society. The Federal Constitutional Court regards it as constitutionally unobjectionable to interpret § 1 of the Unfair Competition Act in such a way that pictorial advertising that violates the human dignity of the persons depicted is found to be contrary to public policy. However, it is not at all certain that the "H.I.V. Positive" advertisement is to be interpreted in this sense. The interpretation that the advertisement intends to denounce the exclusion of HIV-infected people (whether such is exclusion is suspected or factual) is no less plausible. In order to live up to the principles of Article 5.1 of the Basic

Law, the Federal Court of Justice should therefore have dealt with the different possible interpretations and should have given reasons explaining the interpretation upon which it settled.

*Languages:*

German.



## Greece

### Council of State

#### Important decisions

*Identification:* GRE-2000-3-002

a) Greece / b) Council of State / c) 3<sup>rd</sup> Section / d) 31.03.2000 / e) 1333/2000 / f) / g) / h).

*Keywords of the systematic thesaurus:*

1.4.11.1 Constitutional Justice – Procedure – Hearing – Composition of the bench.

3.18 General Principles – Margin of appreciation.

3.20 General Principles – Equality.

4.6.9.1.1 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

4.6.9.2 Institutions – Executive bodies – Territorial administrative decentralisation – Structure.

4.6.9.2.2 Institutions – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.

4.8.2 Institutions – Federalism and regionalism – Definition of geographical boundaries.

4.8.4.1 Institutions – Federalism and regionalism – Budgetary and financial aspects – Finance.

*Keywords of the alphabetical index:*

Local authority / Local authority, merger, dissolution / Government, efficiency.

*Headnotes:*

Under the Articles 101 and 102 of the Constitution, the administrative affairs of the State are organised according to the principle of decentralisation, and the administrative division of the country is based on geographical, economic, and social considerations. Furthermore, decentralisation, in the sense of administrative management of local affairs by bodies elected by universal suffrage, is the responsibility of local government, the first tier of which is composed of the municipalities and communities (*demos*). The other tiers are prescribed by law. Local authorities enjoy administrative independence, but the law may provide for compulsory or voluntary associations of local government agencies to execute works or

provide services. The State has a responsibility to ensure that local authorities have all the resources they need to perform their role.

These provisions are interpreted in light of their purpose and historic background to mean that territorial decentralisation is guaranteed by the Constitution. However, the Constitution fails to define the first tier of local government. Nor does it establish criteria for distinguishing between the municipalities and communes. According to past legislation, the distinction between the municipalities and the communes varies and depends mainly on criteria relating to the local population concerned. The present Constitution describes the bodies making up the first tier of local government as they existed when the Constitution was adopted, namely the local authorities provided for under ordinary law. However, it does not establish all the existing local authorities and nor does it establish the commune as a mandatory organisational structure. Consequently, there is nothing to prevent the abolition of one or more of the existing local authorities, although the Constitution does not allow Parliament to abolish one or more local authorities and at the same time transfer the management of local affairs to central government bodies. Nor does it allow the establishment of first-tier local authorities with very broad territorial powers.

A law which provides for the abolition and merger of existing municipalities and communes to form larger local authorities according to geographical, economic and social criteria and which at the same time transfers the local affairs governed by the municipalities and communes being abolished to the new larger authorities is not contrary to the Constitution. In order to be compatible with the Constitution, reform of the first tier of local government must be carried out with a view to increasing its efficiency in order to ensure that local authorities comply with the principle of equal provision of public services to citizens. Furthermore, the fact that a local authority is financially independent does not mean it cannot be abolished and incorporated into a larger authority. Finally, the abolition or merger of local authorities is not a local matter. A law which abolishes or merges local authorities without the consent of the local population, voters or bodies affected by the law is not contrary to the Constitution. In the event of a dispute, the court that examines the constitutionality of legislation ordering the abolition or merger of local authorities in the context of a structural reform of decentralised government bodies may only find against abolition when the case file reveals that the law manifestly fails to take into account the appropriate criteria.

### *Summary:*

By virtue of Law no. 2539/1997 on the organisation of the first tier of local government, known as the "Kapodistrias" Bill after the first governor of Greece, the first tier of local government had undergone complete structural reform. The previous system, based on a very large number of small communes and regarded by Parliament as inefficient, was replaced by a system that established municipalities as the main local authority and abolished virtually all of the communes. The constitutionality of this law had been challenged in a number of applications for judicial review. In preliminary rulings handed down by the 5<sup>th</sup> Section of the Council of State, three different opinions had been expressed. According to the first, restructuring of the decentralised bodies was not prohibited under the Constitution even if it resulted in the disappearance of most of the existing communes. According to the second, the existence of the communes, which were left over from the period prior to the Greek Constitution, was guaranteed under the Constitution, and Parliament was authorised to abolish the existing structures only in exceptional cases. According to an intermediate opinion, the Constitution established the commune as an important organisational structure, and the abolition of existing communes must not assume immoderate proportions and must not result in the merger of virtually all the communes.

Given the important implications of the issue, the 5<sup>th</sup> Section had referred it to the Assembly of the Council of State which had declared by a large majority that the applications were inadmissible on the ground that the impugned documents (circulars pertaining to how the law was to be interpreted and applied) were not enforceable. However, in other cases relating to electoral litigation involving local authorities following the 1998 elections, the question was raised again before the 3<sup>rd</sup> Section of the Council of State which has jurisdiction to hear such cases as a court of cassation. Based on its interpretation of the Constitution, the Section unanimously ruled in favour of the constitutionality of Law no. 2539/1997 and found that the abolition of the communes and their integration with municipalities, as larger first-tier local government bodies, did not violate the Constitution for the following reasons: restructuring of the first tier of local government was carried out according to acceptable criteria with a view to increasing the efficiency of local government for the benefit of the populations concerned. Moreover, the constitutional right of social groups to have local affairs managed by local authorities is not put at risk by either the Law or its accompanying introductory reports as a consequence of the size of the local authorities set up under the Law.

Languages:

Greek.



## Hungary Constitutional Court

### Statistical data

1 September 2000 – 31 December 2000

- Decisions by the plenary Court published in the Official Gazette: 15
- Decisions by chambers published in the Official Gazette: 15
- Number of other decisions by the plenary Court: 18
- Number of other decisions by chambers: 16
- Number of other (procedural) orders: 37
- Total number of decisions: 101

Note:

Since Dr. Peter Paczolay left the Court to be the Deputy Director of the Office of the President of the Republic, the plenary Court elected a new Secretary-General to the Constitutional Court on 29 August 2000. The new Secretary-General of the Court is Dr. Ilona Pálffy.

### Important decisions

*Identification:* HUN-2000-3-005

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 27.10.2000 / **e)** 36/2000 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 105/2000/ **h)**.

*Keywords of the systematic thesaurus:*

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

3.15 General Principles – Proportionality.

3.21 General Principles – Prohibition of arbitrariness.

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

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

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

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

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

*Keywords of the alphabetical index:*

Patient, psychiatric hospital, rights / Legal capacity, limited / Autonomy, restricted / Mental retardation, disability.

*Headnotes:*

It is contrary to the principle of personal autonomy embodied in the right to human dignity (Article 54.1 of the Constitution) to restrict the right to consent to medical services and the right to refuse medical treatment in the case of an incompetent patient and a patient whose legal competency is limited.

In addition, the Constitutional Court held that Parliament created an unconstitutional situation by failing to regulate the statutory conditions for the application of methods and procedures that strictly restrict the psychiatric patients' right to liberty. As a consequence, there is no sufficient legal guarantee for the right to be free from degrading and inhuman treatment.

*Summary:*

A group of petitioners sought to challenge the constitutionality of some provisions of the Health Act concerning the rights of patients, specifically psychiatric patients. The petitioners contended that the provisions infringed the constitutional right to human dignity, the patients' right to liberty, and thus their right to personal autonomy.

Under the Health Act, incompetent patients and patients with limited legal competence cannot exercise their rights to consent to medical services or refuse specific kinds of treatment. The Constitutional Court held that this rule limited the right to personal autonomy of patients with limited legal competency in a disproportionate and, consequently, unconstitutional way.

According to the Court, methods and procedures which limit patients' rights to personal liberty in a psychiatric hospital, cannot be justified if they lead to degrading and inhuman treatment. In addition, the limitation of the right to personal liberty should comply

with the constitutional test applied by the Court. Under this test the restriction of a fundamental right must be necessary and proportionate with the aim to be achieved. The Health Act does not comply with this constitutional requirement, since when regulating the use of coercive measures the Act does not list the main methods that can be applied in the case of psychiatric patients. Nor does it specify the reasons that can justify the use of coercive measures. Therefore the Health Act does not exclude the possibility of an arbitrary application of the law.

The Court did not hold unconstitutional the provision of the Health Act, according to which there is no need for the consent of the patient if the medical service is needed to avert serious danger to the life or health of others. The Court also upheld the provision of the Act, under which incompetent patient and patients with limited legal competence have the right to consent to medical service only in the case of invasive treatments. Finally, the Court did not find unconstitutional the additional rules contained in the Health Act that only apply to psychiatric patients.

*Supplementary information:*

Five Justices attached separate opinions to the decision.

*Languages:*

Hungarian.



*Identification:* HUN-2000-3-006

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 31.10.2000 / **e)** 37/2000 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 107/2000 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

**3.18 General Principles – Margin of appreciation.**

## **5 Fundamental Rights.**

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

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

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

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

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

### **5.3.43 Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.**

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

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

#### *Keywords of the alphabetical index:*

Advertising, commercial / Tobacco, products / Advertising, ban / Commercial speech.

#### *Headnotes:*

The failure of the Act on Commercial Advertising to require a complete ban on cigarette advertising is not contrary to the right to a healthy environment (Article 18 of the Constitution) and the right to health in Article 70D of the Constitution.

#### *Summary:*

The petitioner challenged the constitutionality of Article 12.1 of the Act on Commercial Advertising, under which advertising of tobacco products or alcoholic beverages is prohibited:

- a. in printed materials mainly aimed at children or juveniles;
- b. on the front cover of printed materials;
- c. in theatres or cinemas before 8pm, as well as immediately preceding programmes for children or juveniles, during the full duration thereof, and immediately afterwards;
- d. on toys and the packaging thereof;
- e. in institutions of public education, health institutions and within 200 meters from the entrance thereof.

In the petitioner's view, the Act's failure to prohibit tobacco advertising infringed the constitutional right to health and to a healthy environment.

The Court in its Decision 1270/B/1997 (*Bulletin* 2000/2 [HUN-2000-2-003]) held that commercial speech is

protected by the Constitution's freedom of expression clause. However, taking into account the well known detrimental health effects caused by tobacco consumption, the Court emphasised that it is permissible in the case of tobacco advertising that commercial speech be subject to greater state regulation than non-commercial speech. The public should be properly informed about the health hazards that flow from the consumption of tobacco and the state is obliged to protect the interests of children (Article 16 of the Constitution).

Under Article 18 of the Constitution, the Republic shall recognise and enforce everyone's right to a healthy environment. Article 70D of the Constitution contains the right to the highest possible level of physical and mental health.

The Court, in its Decision 28/1994 (*Bulletin* 1994/2 [HUN-1994-2-009]) emphasised that the right to a healthy environment under Article 18 of the Constitution was neither an individual fundamental right nor merely a constitutional duty or state goal for which the State might freely choose any means of implementation. Nor did it amount to a social right but rather to a distinct fundamental right dominated and determined by objective institutional protection. The right raised guarantees for the implementation of state duties in the area of environmental protection, including the conditions under which the degree of protection already achieved might be restricted, to the level of a fundamental right. In fact the right to a healthy environment was a part of the objective, institutional aspect of the right to life. Similarly, the right to health under Article 70D of the Constitution is not a fundamental right. Article 70D.2 of the Constitution declares the duty of the state to organise and maintain health care institutions and medical care. Thus, it does not follow that the state should have completely banned cigarette advertising merely on the basis of these two articles of the Constitution.

The constitutional basis of state regulation in the case of tobacco advertising is the obligation of the state to protect life under Article 54 of the Constitution. By applying a partial ban on tobacco advertising, the state fulfilled its duty to protect human life and health. A complete ban on cigarette advertising does not directly follow from the Constitution. Moreover, the ban on a form of expression should be reasonable and justified by the obligation of the state to protect the life and the interests of children. The state could not be held responsible for protecting Hungarians from health risks associated with tobacco use. The duty of the state is to inform people about the possible health risks so that, properly informed, they can decide on the use of tobacco products. In



addition, the state has the duty to protect the non-smoking public.

The Court referred to the decision of the European Commission of Human Rights in *Wöckel v. Germany*. In that case, the Commission held that, bearing in mind the competing interests of the applicant non-smoker, the interests of other individuals to continue smoking, and the margin of appreciation left to national authorities, the absence of a general prohibition on tobacco advertising and on smoking did not amount to a violation of the applicant's rights under Articles 2 and 8 ECHR. The Constitutional Court also considered the relevant directives of the European Union and the Judgment of the Court of Justice delivered on 5 October 2000 on the advertising and sponsorship of tobacco products.

#### *Supplementary information:*

Article 8 of Act I of 2001, amending Act LVIII of 1997, on Commercial Advertising enacted by the Parliament on 19 December 2000 requires a complete ban of tobacco advertisement. The Hungarian Association of Commercial Advertising announced that they will apply to the Constitutional Court asking for constitutional review of the provision in question.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-2000-3-007

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 08.11.2000 / **e)** 42/2000 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 109/2000 / **h)**.

#### *Keywords of the systematic thesaurus:*

**3.18 General Principles – Margin of appreciation.**

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

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

**5.4.11 Fundamental Rights – Economic, social and cultural rights – Right to housing.**

**5.4.12 Fundamental Rights – Economic, social and cultural rights – Right to social security.**

#### *Keywords of the alphabetical index:*

Housing, right / Obligation, state / Subsistence, minimum, right / Shelter, obligation to provide.

#### *Headnotes:*

The constitutional right to social security stipulated in Article 70E of the Constitution obliges the state to organise and operate a system of social security. This provision does not establish subjective rights, thus a fundamental constitutional right to housing cannot be derived from this guarantee.

The basic right to human life and dignity together with the right to social security only obliges the state to provide accommodation for the homeless if human life is in imminent danger.

#### *Summary:*

The parliamentary commissioner for civil rights and the ombudsman for national and ethnic minority rights submitted a petition to the Constitutional Court asking the Court to interpret Article 70E of the Constitution on the right to social security and to decide whether the right to housing forms a part of the right to social security. According to Article 70E.1 of the Constitution, citizens of the Republic of Hungary have the right to social security. In the case of old age, sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own, they are entitled to assistance necessary for their subsistence. Article 70E.2 of the Constitution requires the Republic to implement the right to assistance through the social security system and the system of social institutions.

The Constitutional Court's jurisprudence has made it clear that the legislature has a relatively wide discretion in determining the methods and degrees by which it enforces constitutionally mandated state goals and social rights. A violation of the Constitution may arise only in borderline cases when the enforcement of a state goal or a protected institution or right are clearly rendered impossible by either interference by the State or, more frequently, by its omission. Above that minimal requirement, however, there are no constitutional criteria – except for the violation of another fundamental right – to determine whether legislation providing for a state goal or a social right is constitutional or not. In its Decision 43/1995 (*Bulletin* 1995/2 [HUN-1995-2-004]) the Constitutional Court pointed out that the State meets its obligation specified in Article 70E of the Constitution if it organises and operates a system of social insurance and welfare benefits. Within this, the

legislature can itself determine the means whereby it wishes to achieve the objectives of social policy. It is important, however, that social assistance as a whole may not be reduced to below a minimum level which may be required according to Article 70E of the Constitution.

The Court held that the constitutional right to social security includes the duty of the state to guarantee minimum conditions of subsistence, therefore the state is obliged to provide accommodation for the homeless if human life is in imminent danger. The obligation to provide shelter, however, is not identical with ensuring the right to housing in a broader sense, because the state is only required to provide a roof if human life is directly threatened by lack of accommodation.

To realise the citizen's right to minimum subsistence, the state is obliged to operate and maintain a social security system. The protection of human life and dignity (Article 54 of the Constitution) is a fundamental principle to be upheld when creating this system of social provisions.

#### *Supplementary information:*

Two of the Justices attached concurring opinions to the decision in which they emphasised the state's duty to protect the life of human beings. Two other Justices attached dissenting opinions to the judgment. According to one of these Justices, when holding that the state is obliged to provide accommodation for the homeless, the Court acted outside of its competence concerning the interpretation of the Constitution given by the Act on the Constitutional Court. The other dissenting Justice argued that the right to housing did not emerge directly from the right to social security.

#### *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.

3.17 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 / Specific legislation, 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 70A 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 70A.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-2000-3-009

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 14.12.2000 / **e)** 46/2000 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 123/2000 / **h)**.

#### *Keywords of the systematic thesaurus:*

3.15 General Principles – Proportionality.

5.2 Fundamental Rights – Equality.

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

5.3.16 Fundamental Rights – Civil and political rights – Right to compensation for damage caused by the State.

#### *Keywords of the alphabetical index:*

Compensation / Damage, personal injury / Damage, loss of life / Victim, equal treatment.

#### *Headnotes:*

Since the most important constitutional consideration in the implementation of personal compensation was equal treatment together with respect for the equal dignity of persons, a provision which allocated HUF 30,000 to relatives of victims of state terror as compensation was unconstitutional because the sum was lower than compensation paid for false imprisonment.

#### *Summary:*

The petitioners requested the Court annul the rule which allocated HUF 30,000 to relatives of victims of state terror as compensation for loss of life, arguing it was humiliating and discriminatory compared to another stipulation which approves HUF 1 million for those imprisoned in the years of terror. Compensation for loss of life is paid to the next-of-kin and relatives of those who died during deportation or forced labour in the years of state terror.

In its previous decisions on compensation, the Court held that the legislature was not bound to grant compensation to those who had been deprived of life and liberty. The legislature has discretion both as to whether or not to give such compensation, and on how much money to set aside for this purpose. However, when regulating the question of compensation, the law should take into account the equal dignity of each person, and those affected by the law should be considered with equal care and fairness.

It is not unconstitutional if the legislature defines the amount of money to be used for compensation in harmony with the financial situation of the country and other financial responsibilities and tasks. The Constitution requires, however, that there should be no differences without rational reasons where compensation is granted for the same injuries. The

sum of the compensation paid by the state should be proportionate with the damage caused by state terror.

Since the sum given to the relatives of victims of state terror was lower than compensation paid for imprisonment, the Court annulled the challenged provision of the 1999 Budget Act. It further ordered the legislature to revise the stipulation and apply a new sum retroactively including to those who have already been paid HUF 30,000.

*Cross-references:*

Decision 1/1995, *Bulletin* 1995/1 [HUN-1995-1-001].

*Languages:*

Hungarian.



*Identification:* HUN-2000-3-010

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 19.12.2000 / **e)** 47/2000 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 123/2000 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

**3.14.2 General Principles – Publication of laws – Linguistic aspects.**

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

*Keywords of the alphabetical index:*

Law, wording, unclear, ambiguous.

*Headnotes:*

The ambiguity and vagueness of the challenged provision offended the principle of legal certainty and was accordingly unconstitutional.

*Summary:*

According to the jurisprudence of the Court, the rule of law is an independent constitutional norm, the

violation of which is itself a ground for declaring a law unconstitutional. In its Decision 11/1992, the Court pointed out that legal certainty requires of the legislature that the law as a whole, its specific parts and its provisions, including the Criminal Code, be clear and unambiguous. Their impact must be predictable and their consequences foreseeable for those whom the law is addressed.

Under Article 283/B.1 of the Criminal Code, any person who produces, manufactures, acquires, possesses, imports into or exports performance-improving substances from Hungary, or transports such through the territory of Hungary for the purpose of increasing the performance of athletes, in violation of the provisions set forth in international treaties, by international organisations, or in legal regulations and in ordinances, commits a misdemeanour offence. According to the Court, the wording of this provision is unclear and ambiguous, since the provisions set forth by international organisations are not laws and are therefore without binding force. The expression “legal regulation” is not sufficiently definite, since it embraces all laws including even legal rules of local governments. The Constitutional Court also found the word “ordinances” problematic because an ordinance is not a law and therefore cannot be binding on everyone.

According Article 283/B.1 of the Criminal Code, any person who subjects himself to a procedure intended to stimulate performance for the purpose of sporting activities in violation of the provisions set forth in international treaties, by international organisations, or in legal regulations and in ordinances shall also be punishable. In the Court’s view, the expression “sporting activities” defines the scope of behaviour subject to criminal sanctions too broadly. Under this provision even sporting activities done within the private sphere were included.

The Court held that the provision was unconstitutional and annulled it because of its unclear, vague and ambiguous wording. The Court ordered the revision of criminal proceedings concluded by a final decision on the basis of the unconstitutional legal rule if the convict has not yet been relieved of the detrimental consequences.

*Languages:*

Hungarian.



# Israel

## Supreme Court

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### Introduction

The Israeli Supreme Court convened for the first time on 15 September 1948. Since that time, the Supreme Court has been at the apex of the court system in the State, the highest judicial instance. It sits in Jerusalem and has jurisdiction over the entire state.

Israel's three-tiered court system – Magistrates' Courts, District Courts and the Supreme Court – was established during the British Mandate period (1917-48). With independence in 1948, Israel passed the "Law and Administration Ordinance, 5708-1948" Section 17, stipulating that laws prevailing in the country prior to statehood would remain in force insofar as they did not contradict the principles embodied in the Declaration of Independence or would not conflict with laws to be enacted by the Knesset (Parliament). Thus, the legal system includes remnants of Ottoman law (in force until 1917), British Mandate laws (which incorporate a large body of English common law), elements of Jewish religious law and some aspects of other systems. However, the prevailing characteristic of the legal system is the large corpus of independent statutory and case law which has been evolving since 1948.

### I. Basic Texts

The "Courts Law, 5717-1957", left the existing British court structure in place (with minor modifications), delineated the courts' powers and made specific provisions for them. In 1984, the "Basic Law: The Judiciary and the Courts Law (Consolidated Version), 5744-1984", was enacted to replace the earlier version. It provides that judicial authority in Israel is vested in courts and tribunals. The courts have general judicial authority in criminal, civil and administrative matters, while the tribunals have specific authority in certain specific matters.

## II. Composition and Organisation

### 1. Composition

The number of Supreme Court justices is determined by a resolution of the Knesset. Usually, twelve justices serve on the Supreme Court. At the present time there are fourteen Supreme Court Justices. Twelve are permanent members and two are District Court judges temporarily appointed to the Supreme Court for a period of nine months to one year. The President of the Supreme Court is the head of the Court and serves as the head of the judicial system as a whole. The President is assisted by the Deputy President.

The "Judges' Law, 5713-1953", lays down the procedure for making judicial appointments: the qualifications required for the appointment of judges, the steps involved in appointing judges (by the President of the State, upon the proposal of an Appointments Committee) and provisions for the independence of judges and the operation of the Judges' Disciplinary Tribunal.

A judge's term begins with the declaration of allegiance and ends with the mandatory retirement age of 70, the judge's resignation or death or his or her election or appointment to a position which forbids one from being a Knesset member. A judge may also be removed from office by resolution of the Judges' Nominations Committee or by a decision of the Judges' Disciplinary Tribunal.

### 2. Procedure

The Court is in session year round except for a recess from 15 July until 1 September. During this recess period, the Court will reconvene for urgent cases, criminal appeals and sentencing.

The Court normally consists of a panel of three Justices. A single Supreme Court Justice may rule on interim orders, temporary orders or petitions for an order *nisi*, and on appeals on interim rulings of District Courts, or on judgments given by a single District Court judge on appeal. The Supreme Court sits as a panel of five Justices or more in a "further hearing" on a matter in which the Court previously sat as a panel of three Justices. In matters that involve fundamental legal questions and constitutional issues of particular importance, the Court may sit as an expanded, odd-numbered panel of more than three Justices.

In a case in which the President of the Supreme Court sits, the President is the presiding judge; in a case in which the Deputy President sits and the President does not sit, the Deputy President is the

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presiding judge; in any other case, the judge with the greatest seniority is the presiding judge. Seniority is calculated from the date of the Justice's appointment to the Supreme Court.

### 3. Organisation

Justices have staff consisting of one secretary, two law clerks and one legal aide. The current President of the Supreme Court has four administrative assistants, two clerks, two legal aides and two foreign clerks.

The salary of judges and their pensions are determined by law or by resolution of the Knesset or one of its committees. However, the law does not permit a resolution specifically intended to lower the salary of judges. Similarly, the budget of the judiciary is set by the Knesset.

### III. Powers

The Supreme Court is an appellate court as well as the High Court of Justice. As an appellate court, the Supreme Court considers both criminal and civil cases and other decisions of the District Courts. It also considers appeals on judicial and quasi-judicial decisions of various kinds such as matters relating to the legality of Knesset elections, disciplinary rulings of the Bar Association, prisoners' petitions and administrative detention.

As the High Court of Justice, the Supreme Court rules as a court of first and last instance, primarily in matters regarding the legality of decisions of State authorities: government decisions, those of local authorities and other bodies and persons performing public functions under the law. It rules on matters which the High Court of Justice deems necessary to grant relief in the interest of justice and which are not within the jurisdiction of another court or tribunal.

In 1992 the Knesset enacted the "Basic Law: Freedom of Occupation" (which deals with the right to follow the vocation of one's choosing) and the "Basic Law: Human Dignity and Liberty" (which addresses protections against violation of a person's life, body or dignity). These Basic Laws have constitutional status and therefore give the Court the power to overturn Knesset legislation which conflict with their principles. Thus, in recent years, the Israeli Supreme Court began to use these and other Basic Laws to conduct judicial review of Knesset legislation.

### IV. Nature and effects of decisions

The Supreme Court of Israel is the highest judicial authority in Israel; its precedents are binding on all lower courts as well as on all persons and State institutions. They are not binding on the Supreme Court itself.

Supreme Court opinions are published by Nevo Publishing Company in a series called *Piskei Din*. Official printed versions are available soon after a final judgment is delivered. Decisions are also available on the Internet immediately after pronouncement. A number of past judgments which have been translated into English have been published in a series entitled *Selected Judgments of the Supreme Court of Israel*.



# Italy

## Constitutional Court

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### Important decisions

*Identification:* ITA-2000-3-007

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 15.11.2000 / **e)** 531/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 49/29.11.2000 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

3.15 General Principles – Proportionality.  
4.2.1 Institutions – State Symbols – Flag.  
4.11.1 Institutions – Armed forces, police forces and secret services – Armed forces.  
5.1.1.3.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – Military personnel.  
5.2 Fundamental Rights – Equality.  
5.3.20 Fundamental Rights – Civil and political rights – Freedom of expression.

*Keywords of the alphabetical index:*

Insult, national flag / Dissent, freedom of expression / Penalty, excessive.

*Headnotes:*

The question of constitutionality as to whether article of the Military Code applicable in peace time that punishes insult to the national flag or any other emblem of the state by members of the armed forces was at variance with the principle of equality enshrined in Article 3 of the Constitution even though the penalty provided for (from three to seven years' imprisonment) is harsher than that provided for in the ordinary Criminal Code for the same offence committed by a civilian (from one to three years' imprisonment), was unfounded.

The interest protected by the provision concerned is the dignity of the state symbol as an expression of the dignity of the state itself, a symbol displayed and used with particular frequency and solemnity in military institutions and activities, where it is the object of special attention and respect. The Court

ruled (in the case of insult to the Republic, the constitutional organs and the armed forces) that the criminal offence in such cases did not encompass the expression of criticism, however sharp, but applied only to offensive demonstrations depriving the object under protection of all value and all respect and thereby inciting bystanders "to show contempt for the institutions or directly to commit unjustified acts of disobedience" (Judgment no. 20 of 1974; see also Judgment no. 199 of 1972).

Individual expressions of dissent, aversion or contempt are not offences if they have no practical offensive effect. It is for the judge "through careful, *in concreto* evaluation of the act giving rise to the case, to prevent the arbitrary and illegitimate extension of the acts constituting the offence" (Judgment no. 263 of 2000).

*Summary:*

The referring court does not challenge the constitutionality of punishing insult committed by a serving member of the armed forces more severely under military law than the same offence committed by a civilian under ordinary law. It considers that the greater severity is justified by the greater intensity of the debt of loyalty owed by military personnel. The referring court confines itself to querying the harshness of the penalty for insulting the flag under military law compared with punishment of other types of offence under the same law or under the ordinary Criminal Code.

Thus, leaving aside the wide variety of elements submitted to the Court (penalties for insulting the Nation and offending the honour and prestige of the President of the Republic provided for under the Military Code and under the Criminal Code), the criticisms voiced against the impugned provision amount to what is essentially a matter of legislative policy, to an objection to the allegedly excessive severity of the Military Code. However, as the patent unreasonableness (*manifesta irragionevolezza*) of the provision has not been demonstrated, which alone would have justified the Court's stepping in to annul the provision (*intervento demolitorio*) or to impose an interpretation in keeping with the Constitution (*intervento manipolativo*), it is for the legislature, not the Court, to re-examine the system of offences and penalties laid down in the Military Code applicable in peacetime.

*Languages:*

Italian.

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**Identification:** ITA-2000-3-008

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 13.11.2000 / **e)** 509/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 49/29.11.2000 / **h)** CODICES (Italian).

**Keywords of the systematic thesaurus:**

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

3.16 General Principles – Weighing of interests.

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

**Keywords of the alphabetical index:**

Medical treatment, authorisation, urgency / Health system, direct assistance / Medical expenses, reimbursement, conditions, verification.

**Headnotes:**

Measures taken by the Region of Lombardy are at variance with Article 32 of the Constitution, which protects the right to health, insofar as they preclude the region's helping to meet the cost of in-patient treatment in public or private hospitals in cases of confirmed gravity or urgency, or the region's helping to meet the cost of specialist medical treatment, also in confirmed grave or urgent situations, when the region's prior permission is not obtained, even if all the other conditions for reimbursement are fulfilled.

In accordance with the principle derived from constitutional case-law, the right to the medical treatment necessary to protect health is "guaranteed to all persons as a constitutional right provided that the law reconciles the interest thus protected with all other interests protected by the Constitution" (see, *inter alia*, Judgments no. 267 of 1998, *Bulletin* 1998/2 [ITA-1998-2-005], no. 304 of 1994 and no. 218 of 1994). This means, *inter alia*, that the law must take into account the practical limits imposed by the financial and organisational resources available, though the right to health in all cases retains intact the "core content protected by the Constitution as an inviolable part of human dignity" (Judgments no. 309 of 1999, *Bulletin* 1999/2 [ITA-1999-2-007], no. 267 of 1998 and no. 247 of 1992), as it is essential to avert

situations where people are deprived of all protection, undermining effective enjoyment of this right.

**Summary:**

Provision for an authorisation system in the present legal context helps to strike a fair balance between, on the one hand, the need to guarantee full, effective protection of the right to health in cases where the health facilities officially responsible for direct assistance are unable to dispense the necessary care and, on the other, the organisational and financial demands inherent in the exceptional nature of an indirect assistance scheme.

The Court nevertheless held, as in a similar case (Judgment no. 267 of 1998), that a total, blanket refusal to pay any of the cost of treatment in any case where the patient had not requested prior authorisation to use indirect assistance – with no provision for any exceptions, even in serious, urgent cases that cannot be treated in any other manner – "does not provide effective protection of health and violates both Articles 32 and 3 of the Constitution as it results in a situation which is intrinsically unfair".

The Court handed down a judgment imposing an interpretation in conformity with the Constitution (*pronuncia manipolativa*), declaring the impugned provisions unconstitutional insofar as they did not provide for administering treatment first and completing the formalities for reimbursement later in those cases where the seriousness and urgency that made the treatment necessary in the first place also made it impossible to apply for authorisation in advance.

**Cross-references:**

For a similar case, see Judgment no. 267 of 1998 (*Bulletin* 1998/2 [ITA-1998-2-005]). Also in the field of protection of the right to health, see Judgment no. 309 of 1999 (*Bulletin* 1999/2 [ITA-1999-2-007]).

**Languages:**

Italian.





*Identification:* ITA-2000-3-009

**a)** Italy / **b)** Constitutional Court / **c) / d)** 21/11/2000 / **e)** 518/2000 / **f) / g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 49/29.11.2000 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

3.16 General Principles – Weighing of interests.

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

*Keywords of the alphabetical index:*

Kinship, direct line / Penalty, educational function / Incest / Lineage, integrity / Family, protection / Public scandal.

*Headnotes:*

The provision of the Criminal Code penalising incest – in the sense of sexual relations between persons bound by kinship or related through marriage when they are a source of public scandal – is not intended to protect the family against sexual abuse; incest must be taken to mean an act between consenting persons, violence being associated with other offences but not with incest. Nor is the purpose of the provision to protect conjugal fidelity.

The argument that the basis for this provision was the protection of a eugenic heritage – such as “integrity of the family lineage”, to use the language of the time when the impugned provision was passed – cannot be justified, given the inclusion of sexual relations between relatives by marriage, between whom there is no blood tie. Nor can it be justified in the light of any actual or potential failure to procreate.

The provision of the Criminal Code concerning incest must be deemed to have been introduced to protect the family, as demonstrated by its inclusion under the heading “Crimes against the family”, rather than the heading “Crimes against the integrity and health of offspring”, which has now been repealed. There is no reason why the legislation should not contain provisions to protect the family which are not based solely on a moral or religious approach to the notion of the family. However, it is within the discretionary powers of the legislature to define the scope of the family circle within which the criminal offence is applicable; accordingly, there can be no doubt that it is within the lawmaker’s discretionary power to include direct relatives by marriage among the family members between whom sexual relations constitute incest, and the Constitutional Court must respect that discretion.

The requirement of public scandal for incest to be a punishable offence helps to strike a proper balance between the need to punish an unlawful act and protecting domestic peace from interference, such as investigations by the public authorities in search of evidence of offences. Once public scandal arises, however, there is no longer any reason to hinder law-enforcement action by the state.

The constitutionality question raised as to the need to strike a proper balance between protecting an interest and protecting personal freedom is without foundation: having refuted the argument of the referring court that as the impugned provision included public scandal in the ingredients of the offence of incest, it sought to protect a genuine conception of the family institution, the Constitutional Court saw no need to examine the question of proportionality in respect of personal freedom.

The argument of the referring court that where affective and sexual relations are concerned imprisonment does not have the educational effect all punishment should have according to the letter and spirit of the Constitution is inadmissible. The referring court seems to see education as the only purpose of punishment, introducing a correlation between a certain type of offence and a certain type of punishment which, taken to the extreme, could lead to the absurd conclusion, with a criminal offence such as incest, for example, that there is no suitable punishment that would teach the offender a lesson.

*Summary:*

The Court held that the question concerning Article 564 of the Criminal Code, under which incest is a criminal offence, was unfounded. The referring court had challenged the constitutionality of the provision, *inter alia* because it included incestuous relations between direct relatives by marriage, in this case a father-in-law and daughter-in-law, in the punishable crime of incest if they gave rise to a public scandal. The Court rejected the appeal for the reasons given in the headnotes above.

*Languages:*

Italian.



*Identification:* ITA-2000-3-010

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 14/11/2000 / **e)** 496/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 48/22.11.2000 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

3.3.1 General Principles – Democracy – Representative democracy.

3.3.2 General Principles – Democracy – Direct democracy.

4.1.1 Institutions – Constituent assembly or equivalent body – Procedure.

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – Right to initiate legislation.

4.8.3.1 Institutions – Federalism and regionalism – Institutional aspects – Deliberative assembly.

4.9.1 Institutions – Elections and instruments of direct democracy – Instruments of direct democracy.

*Keywords of the alphabetical index:*

Self-government, particular forms and conditions / Constitutional law, draft, presentation / Referendum, for repeal of legislation / Referendum, consultative / Referendum, statutory, constitutional amendment procedure.

*Headnotes:*

Participation by local populations in important decisions concerning them, by referendum, is a general principle of pluralist democracy enshrined in the Italian Constitution and in the autonomous status granted to the regions in Title V Part II of the Constitution. Giving citizens a say in decisions concerning them strengthens the legitimacy of the representative bodies. One form of popular participation is the consultative referendum; alongside the mandatory cases provided for in the Constitution – in the event of changes to local authority boundaries, for example – provision is made in numerous regional laws and statutes for optional forms of popular consultation, to enable people to express their views on matters of local or regional interest or to seek the opinion of the public affected by specific measures.

The Constitutional Court has already acknowledged the power of the regional council to make legislative proposals, including amendments to the Constitution, to parliament.

In Italy the regions are recognised as having a particular interest in reforms concerning their own

institutional status and their relations with central government.

The repeal referendum provided for in Article 75 of the Constitution may be used to repeal laws or measures having force of law, but it may not affect provisions of the Constitution, as this would compromise the principle that the revision procedure provided for in the Constitution must be strictly adhered to.

The repeal referendum, which, unlike the consultative referendum, concerns legislation currently in force, places the nation's fundamental constitutional choices in the hands of the political representatives; the people cannot participate in such matters except in accordance with the conditions set forth in Article 138 of the Constitution.

Article 138 of the Constitution provides for popular referendums on proposed amendments to the Constitution when a referendum is requested by 500,000 electors, five regional councils or one fifth of the members of either House. In order not to dissociate the popular consultation from the parliamentary procedure, Article 138 of the Constitution sets a strict deadline for the referendum, which must be held within three months of the publication of the law – as approved by parliament – in the *Gazzetta Ufficiale*. Article 138.3 of the Constitution subjects the referendum to the following proviso: A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members, confirming that amendments to the Constitution are above all a matter for the two Houses.

Of course, discussion of amendments to the provisions most important to the life of the national community must not be confined to the political institutions alone; on the contrary, public opinion should be consulted. Clearly, however, decisions concerning amendments to the Constitution lie first and foremost with the political representatives in parliament.

The popular referendum as a means of expressing the will of the people is not treated by the Constitution as the driving force behind constitutional reform, and its use is restricted: it must obey certain rules within a process that privileges maximum rationality, reducing the risk of decisions being influenced by irrelevancies.

*Summary:*

The Court declared unconstitutional the draft law of the Veneto Region, approved for the second time by the Regional Council on 8 October 1998, concerning

a consultative referendum on submission of a draft constitutional law to grant the Veneto Region particular forms and conditions of self-government.

The Court was asked to verify whether, at the regional initiative stage of the constitutional amendment procedure, the people's power to propose regulations was subject to systemic limits inherent in the people's constitutional position; the Court had to determine whether the people, even in its limited form as a regional electorate and under its least binding form of participation, namely the consultative referendum, could be called upon to decide on measures aimed at reforming the constitutional order. The Court held that the impugned draft law was not divisible and that it was open to censure by the state which the Court itself considered justified in the light of the definition of the role of the referendum in general and its place in the constitutional system.

Clearly, while the people as a whole can take part in the constitutional amendment process as a decision-making body, only a fraction of that body is involved in the impugned draft regional law, as if, for the purposes of reforming the Constitution, the political oneness of the nation were composed not of one people but of several peoples; and more specifically, as if the regional electorate could be given the opportunity to express its views twice on the same proposed reform: once preventively, as a fraction of the electorate, at the consultative stage, and a second time as a component of the full national electorate at the constitutional decision stage.

In this case, according to the Court, the fact that the consultative referendum concerned has no legally binding effect does not alter the fact, in the realm of constitutional reform, that the regional representative body would in any event be bound to a political course of action whose effect might be to disturb the purely formal scheme of powers within the region. In the present case the improper use of a procedure established in order to strengthen the bonds between the people and their representatives means that the regional initiative to revise the Constitution appears to be a mere envelope in which the will of the electorate is collected and directed against the Constitution, challenging the very foundations of the constitutional consensus. This the regional electorate must not be allowed to do.

#### *Cross-references:*

On regional councils' power to make legislative proposals to the Houses even when they concern amendments to the Constitution, the Court referred to its Judgments no. 256 of 1989 and no. 470 of 1992,

the latter with reference, *inter alia*, to regions' acknowledged powers in matters of constitutional reform, as in the case of the legislative decision overruled by the Constitutional Court in respect of the region's constitutional powers and its relations with central government.

The well-known Judgment no. 16 of 1978, placing restrictions on referendums aimed at repealing laws in addition to those already provided for in the Constitution, was also referred to in respect of ordinary laws having constitutional force. These are excluded from the scope of repeal by referendum in order to ensure that popular decision cannot overturn constitutional standards, which can only be applied through the ordinary laws.

#### *Languages:*

Italian.



# Kazakhstan

## Constitutional Council

### Important decisions

*Identification:* KAZ-2000-3-001

**a)** Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 16.06.2000 / **e)** 6/2 / **f)** / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

4.6.3 Institutions – Executive bodies – Application of laws.

5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

*Keywords of the alphabetical index:*

Fine, administrative sanction / Property, right, character / Damage, compensation.

*Headnotes:*

The right to property is not absolute. Limitations of property rights other than those established by law are only possible if they are imposed by a court decision. This principle applies both in civil and public law.

*Summary:*

On 17 May 2000 a group of members of the parliament lodged an application with the Constitutional Council regarding the official interpretation of Article 26.3 of the Constitution on the limitation of property rights such as the requisition of property (through the imposition of a fine) by administrative act without a court decision.

The Council ruled that any requisition of property in cases other than those provided for by law could only be carried out in execution of a court decision. The right to property is not absolute by virtue of Arti-

cle 39.3 of the Constitution and relevant provisions of criminal, civil and administrative law.

The requirements to be met by requisitions of property are set forth in Articles 249, 253 and 254 of the Civil Code. Moreover, such deprivation of property is provided for in Article 249 in cases of compensation for damage caused or when items do not belong to the individual according to legislation – for example, contraband goods.

A fine is a purely administrative sanction, which can be imposed for administrative offences as provided by law. The sum paid goes to the state budget. The presumed offender can make an appeal against this administrative decision to a court. In such cases its execution is postponed until the competent jurisdiction has handed down its decision.

Nevertheless, the constitutional provision that no one can be deprived of their property except by a court decision is not absolute and does not mean that a court should sanction a fine.

The Constitutional Council ruled that the imposition of a fine by an administrative body without a court decision does not violate Article 26.3 of the Constitution.

*Languages:*

Kazakh.



*Identification:* KAZ-2000-3-002

**a)** Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 11.10.2000 / **e)** / **f)** / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

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

2.1.1.4 Sources of Constitutional Law – Categories – Written rules – International instruments.

2.2.1.2 Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

3.16 General Principles – Weighing of interests.

*Keywords of the alphabetical index:*

Treaty, ratification / International law, priority.

*Headnotes:*

International treaties ratified by the Republic of Kazakhstan, if they do not impose an obligation to adopt a national law on their execution, have priority over national legislation. Non-ratified treaties do not have such priority over national norms.

*Summary:*

The Prime Minister referred to the Constitutional Council a question on an interpretation of the Article 4.3 of the Constitution adopted on 30 August 1995. This article declares that ratified international treaties have priority over national legislation.

Some international treaties concluded before the adoption of the 1995 Constitution are in conflict with constitutional provisions and with the Decree of the President of 12 December 1995 on "Procedural aspects of the signature and ratification of international treaties by the Republic of Kazakhstan".

The applicant placed particular emphasis on the question whether international treaties concluded before the adoption of the 1995 Constitution and which did not need ratification had priority over national legislation.

The Council held that only ratified treaties had priority over national legislation. All international treaties concluded after 30 August 1995 that did not need ratification had to be implemented as long as they did not contradict national legislation. Some of the treaties concluded before that date had priority over national legislation because of the provisions of the Constitution of 1993. Such was the case of international norms in the field of human rights. This category had the same legal force as international treaties adopted and ratified after 1995.

The Constitutional Council ruled that Article 4.3 of the Constitution had to be interpreted as meaning that international treaties concluded by the Republic in conformity with its Constitution and ratified by its Parliament through a specific law had priority over national legislation.

International treaties concluded before the adoption of the 1995 Constitution and which did not need ratification were valid and had priority over national legislation if such priority was established by laws of Kazakhstan governing the corresponding legal fields.

*Languages:*

Kazakh.



# Latvia

## Constitutional Court

### Statistical data

1 September 2000 – 31 December 2000

Number of decisions: 1

### Important decisions

*Identification:* LAT-2000-3-004

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 30.08.2000 / **e)** 2000-03-01 / **f)** On Compliance of the *Saeima* Election Law and the City Dome, Region Dome and Rural Council Election Law with the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 307/309, 01.09.2000 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

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

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

2.1.3.2.2 Sources of Constitutional Law – Categories – Case-law – International case-law – Court of Justice of the European Communities.

2.1.3.3 Sources of Constitutional Law – Categories – Case-law – Foreign case-law.

2.3.3 Sources of Constitutional Law – Techniques of review – Intention of the author of the enactment under review.

3.3 General Principles – Democracy.

3.12 General Principles – Legality.

3.15 General Principles – Proportionality.

3.18 General Principles – Margin of appreciation.

4.6.11.2.1 Institutions – Executive bodies – The civil service – Reasons for exclusion – Lustration.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.2.1.4 Fundamental Rights – Equality – Scope of application – Elections.

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

*Keywords of the alphabetical index:*

Election, candidacy, restriction / Organisation, anti-constitutional, participation / Social need, pressing / Morality, democracy, protection.

*Headnotes:*

The right to be elected may be restricted for persons who have been active in organisations that tried to destroy the new democratic state and were recognised as anti-constitutional. Such restrictions are lawful where their aim is to protect the democratic state system, national security and the territorial unity of the state.

However, the legislator should determine the term of the restrictions; such restrictions may last only for a certain period of time.

*Summary:*

The case was initiated by twenty-three members of Parliament who claimed that provisions of the Parliament (*Saeima*) Election Law and of the City Dome, Regional Dome and Rural Council Election Law establishing various restrictions on the right to be elected contradicted Articles 89 and 101 of the Constitution, Article 14 ECHR, Article 3 Protocol 1 ECHR, and Article 25 of the International Covenant on Civil and Political Rights.

The laws established restrictions on the right of the following to be elected as deputies in Parliament and in the municipalities: those who after 13 January 1991 have been active in the Communist Party of the Soviet Union, the Working People's International Front of the Latvian S.S.R., the United Board of Working Bodies, the Organisation of War and Labour Veterans, the All-Latvia Salvation Committee or its regional committees; those who belong or have belonged to the regular staff of the U.S.S.R., the Latvian S.S.R. or foreign state security, intelligence or counterintelligence services.

Article 101 of the Constitution establishes the right of every citizen of Latvia, prescribed by law, to participate in the activity of the state and local authorities. This right guarantees the democracy and legitimacy of the democratic state system.

However the right is not absolute; Article 101 includes the condition “in the manner prescribed by law”. The constitution leaves it for the legislature to make decisions limiting the right. By including the words “in the manner prescribed by the law” the legislature determined that in every case one should interpret the words “every citizen of Latvia” as including the limitations established by law. Article 101 of the Constitution shall be interpreted together with Article 9 of the Constitution: “Any citizen of Latvia, who enjoys full rights of citizenship and, who is more than twenty-one years of age on the first day of elections may be elected to the Parliament.” Article 9 of the Constitution authorises Parliament to specify the content of the notion of “a citizen of Latvia, who enjoys full rights of citizenship”; and this is done in the *Saeima* Election Law. The limitations of this right are permissible only if they do not contradict the notion of democracy, mentioned in Article 1 of the Constitution, other Articles of the Constitution and general principles relating to fair elections. Thus the legislature, in passing the disputed norms creating a necessary legal norm to be realised for the right to be elected, implemented the task of Article 101 of the Constitution.

Reasonable restrictions on the right to vote and to be elected at genuine periodic elections, established in Article 25 of the International Covenant on Civil and Political Rights, are permitted. Not all types of different treatment constitute prohibited discrimination. Reasonable and objective prohibitions with an aim that is considered as legitimate by the Covenant cannot be regarded as discrimination.

The restrictions to the election rights established in Article 3 Protocol 1 ECHR shall be established according to the universal procedure: although the states have “a wide margin of appreciation in this sphere”, any restrictions must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Rights may be restricted only to the extent the restrictions do not deprive the right of its essence and/or diminish its efficiency. The principle of equality of treatment shall be respected and arbitrary restrictions must not be applied. Article 14 ECHR does not establish a prohibition of all difference in treatment with regard to the realisation of the rights and freedoms provided by the Convention. The principle of equal treatment is considered violated only if the difference of treatment does not have a reasonable and objective justification.

The Court found that the statement of the applicants that the disputed norms discriminated against the citizens just because of their political membership was groundless. The disputed norms do not establish

difference in treatment just because of the political opinion of the person, they establish a restriction for activities against the renewed democratic system. The words “to be active”, used in the disputed norms mean to continuously perform something, to take an active part, to act, to be engaged in. Thus the legislature has connected the restrictions with the degree of individual responsibility of every person in the realisation of the aims and programme of the organisations mentioned in the disputed norms. Formal membership of any of the mentioned organisations cannot alone serve as the reason for forbidding a person from being included in the candidate list and being elected. Thus the disputed norms are directed only against those persons who, with their activities after 13 January 1991 and in the presence of the occupation army, tried to renew the former regime, and are not applied just to those with different political opinions.

The norms of human rights included in the Constitution should be interpreted in compliance with the practice of application of international norms of human rights. To establish whether the disputed restrictions comply with Articles 89 and 101 of the Constitution, one has to evaluate whether the restrictions included in the disputed norms are determined by law, adopted under due procedure; justified by a legitimate aim, and necessary in a democratic society. As this case does not contain any dispute on whether the restrictions were determined by law or adopted under the due procedure, the two last issues have to be evaluated.

In 1990, although the democratic state and the first articles of the Constitution of 1922 were renewed, the Latvian Communist Party was not going to give up the role of the “leading and ruling force”. It started anti-state activities. With the efforts of the Latvian Communist Party and its satellite organisations the All-Latvia Salvation Committee was established. The aims of the activities of these organisations were connected with the destruction of the existing state power, and were therefore anti-constitutional. In August 1991 the legislature prohibited these organisations, evaluating them as anti-constitutional. Thus the aim of the restrictions of the election rights is to protect the democratic state system, national security and the territorial unity of Latvia. The disputable norms are not directed against a pluralism of ideas in Latvia or the political opinions of a person, but against persons, who with their activities have tried to destroy the democratic state system. Enjoyment of human rights must not be turned against democracy as such.

The essence and efficiency of rights lies also in morality. To demand loyalty to democracy from its

political representatives is within the legitimate interests of a democratic society. The democratic state system has to be protected from persons who are not ethically qualified to become the representatives of a democratic state on the political or administrative level. The state should be protected from persons who have worked in the former apparatus, implementing occupation and repression, and from persons who after the renewal of independence to the Republic of Latvia tried to renew the anti-democratic totalitarian regime and resisted the legitimate state power. The restrictions to the election right do not refer to all members of the mentioned organisations, but only to those who had been active in the organisations after 13 January 1991. Excluding a person from the candidates list if he has been active in the mentioned organisations is not administrative arbitrariness; it is based on an individual court decision. Thus the principle, requiring an equal attitude to every citizen has not been violated, the protection by a court is guaranteed, and the restrictions are not arbitrary. Consequently the aim of the restrictions is legitimate.

To establish whether the restrictions of the election right is proportional to the aims of protecting the democratic state system, national security and the territorial unity of Latvia, the legislature has repeatedly evaluated the political and historical conditions of the development of democracy in connection with the issues of the election right, adopting or amending the election law just before elections. The Court held that at the present moment there did not exist the necessity to doubt the proportionality of the applied restrictions. However, the legislature, in periodically evaluating the political situation in the state as well as the necessity of the restrictions, should decide on determining the term of the restrictions. Such restrictions to the election rights may last only for a certain period of time.

The Constitutional Court decided by a majority of 4 votes to 3. The dissenting judges disagreed with the majority on several grounds. According to the dissenting opinion, restrictions to human rights in a democratic society were necessary not only if they had a legitimate aim, but also if there was a pressing social need to establish the restrictions and the restrictions were proportionate. Today, ten years after the re-establishment of independence, the election of the persons mentioned in the disputed norms would not threaten democracy in Latvia, and therefore the pressing social need to establish the restrictions does not exist. Restrictions of fundamental rights are proportionate only if there are no other means that are as effective but are less restrictive of the fundamental rights. The election rights are restricted so far that in fact the persons do not enjoy the right at

all; the legislature has the possibility of using other "softer" forms, therefore the measure is not proportionate.

#### *Cross-references:*

In the Decision the Constitutional Court referred to the following Judgements of the European Court of Human Rights: *Mathieu-Mohin and Clerfayt*, 02.03.1987; *Belgian Linguistic Case*, 23.07.1968; *Karlheinz Schmidt v. Germany*, 18.07.1994; as well as to the Decision of the Federal Constitutional Court of Germany in Case 2 BvE 1/95, 21.05.1996, *Bulletin* 1996/2 [GER-1996-2-017].

In the dissenting opinion, the judges referred to the following Judgements of the European Court of Human Rights: *Dudgeon Case*, 22.10.1981; *Handyside Case*, 07.12.1976; *Barthold Case*, 25.03.1985; *Vogt v. Germany*, 26.09.1995; *Rekvenyi v. Hungary*, 20.05.1999; as well as to the Decision of the Constitutional Tribunal of Poland in Case no. K 39/97, 10.11.1998; *Bulletin* 1998/3 [POL-1998-3-018].

#### *Languages:*

Latvian, English (translation by the Court).



#### *Identification:* LAT-2000-3-005

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 31.10.2000 / **e)** 2000-06-04 / **f)** On Compliance of the Regulation on Incorporation of a State Owned Apartment House in the Equity Capital of a State Stock Company with the Law on the Privatisation of State and Local Governments Apartment Houses / **g)** *Latvijas Vestnesis* (Official Gazette), 386/389, 01.11.2000 / **h)** CODICES (Latvian, English).

#### *Keywords of the systematic thesaurus:*

3.12 General Principles – Legality.  
4.10.8.1 Institutions – Public finances – State assets – Privatisation.

#### *Keywords of the alphabetical index:*

Housing, privatisation, procedure / Stock company, investment, state funds.



*Headnotes:*

All state apartment houses should be privatised according to the relevant law unless the Cabinet of Ministers decides otherwise under the procedure established by that law.

*Summary:*

Twenty members of Parliament questioned the conformity of a Cabinet of Ministers' regulation, Regulation 128, with the Law on the Privatisation of State and Local Government Apartment Houses. Although the case concerned the compliance of only one regulation of the Cabinet of Ministers with the law, the Constitutional Court by its own initiative reviewed the compliance of two other regulations that were interconnected with the first regulation.

The disputed Regulation (Regulation 128) purported to confirm the investment of the state owned apartment house at 57 Elizabetes Street, Riga in the capital of the State Stock Company.

In order to create the conditions for a transition to a market economy, the liquidation of state commercial monopolies, re-structuring of the national economy and the renewal of justice, the Supreme Council determined in 1991 that privatisation was necessary for the conversion of state property. In 1992 the Supreme Council established that the sale of state apartment houses and apartments was one of the ways to pursue the privatisation of state and local government property. In 1995 the Parliament adopted the Law on the Privatisation of State and Local Government Apartment Houses with the goal of developing the real estate market and protecting the interests of individuals in the privatisation process. The right of individuals to take part in the privatisation process of apartments is determined by this law and can only be limited under the procedure established by the law. All individuals are guaranteed equal rights to the privatisation process in relation to their own apartments.

The State of Latvia held the property right in the real estate at 57 Elizabetes Street. The building was an apartment house, and the Law on the Privatisation of State and Local Government Apartment Houses applied to it. Under the disputed regulation, issued in 1999, the real estate was not invested in the capital of the state stock company; rather the Cabinet of Ministers only confirmed the investment. Earlier, in 1995, the investment of the above state property into the capital of the Stock Company "Rosme" was made under Regulation 717 and confirmed in 1996 under Regulations 334. "Rosme" was renamed the State

Stock Company "The Agency of the Diplomatic Service". All the above Regulations are interconnected. Therefore to evaluate the conformity of the disputed Regulation with the Law on the Privatisation of State and Local Government Apartment Houses, the Court decided to examine the legitimacy of Regulations 717 and 334 at the time of their adoption, even though they were no longer valid.

The Law in question provides for two possibilities: the state privatisation of apartment houses, or their preservation as state property by a special resolution of the Cabinet of Ministers. The Cabinet of Ministers did not decide to preserve as state property the building at 57 Elizabetes Street, or to privatise it. Thus, the building is subject to privatisation. Any activities that are not made in compliance with the procedure established by the Privatisation Law do not meet the requirements of the law, regardless of whether the activities may be qualified as alienation. Both the incorporation of the apartment house in the equity capital of the state stock company and the confirmation of it are incompatible with the Privatisation Law.

The Constitutional Court decided that the Cabinet of Ministers Regulation 128 on the State Stock Company "The Agency of the Diplomatic Service", Regulation 717 on the Share Capital of the State Stock Company "Rosme", and Regulation 334 on the State Stock Company "Rosme" – concerning confirmation of the investment of 57 Elizabetes Street in state property – are incompatible with the Law on the Privatisation of State and Local Government Apartment Houses, and null and void from the moment of their adoption.

*Cross-references:*

Constitutional Court Decision in Case no. 04-03 (99) of 09.07.1999; *Bulletin* 1999/2 [LAT-1999-2-003].

*Languages:*

Latvian, English (translation by the Court).



# Liechtenstein

## State Council

### Important decisions

*Identification:* LIE-2000-3-003

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 25.10.2000 / **e)** StGH 2000/45 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.4.9.2 Constitutional Justice – Procedure – Parties – Interest.

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

3.9 General Principles – Rule of law.

3.12 General Principles – Legality.

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

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – Citizenship.

5.4.2 Fundamental Rights – Economic, social and cultural rights – Right to education.

*Keywords of the alphabetical index:*

Education, special, access, refugee / Regulation, *praeter legem* / Legally protected interest, exception.

*Headnotes:*

In cases where there is no longer any legally protected interest at stake, the cause of action for a constitutional appeal ceases to exist. The sole exception to this rule concerns cases where the Constitutional Court can consider appeals relying on fundamental freedoms only if the legally protected interest has already ceased to exist. In allowing this exception to the ongoing legally protected interest rule, the Constitutional Court is able to fulfil its function of “constitutional guide” in such cases. It is therefore in the public interest for the Court to consider the facts pertaining to an alleged violation of fundamental freedoms, even if in the meantime the applicant ceases to have a specific, legally protected interest at stake. Concerning the claim that children of refugees belonging to a particular linguistic and

cultural group are subject to unequal treatment in terms of their integration into the ordinary education system, it is possible that the State Court will never have to rule on the constitutionality of such unequal treatment since before it does so, the victim is likely either to have already left the country or to have been integrated into an ordinary class.

The right to education under Article 2 Protocol 1 ECHR does not mean a child is entitled to a place at a particular state school. There are unassailable objective reasons why children of refugees, like other children who speak a foreign language, should receive special education designed to ensure that they master the German language sufficiently to cope with ordinary education. Special education lasting more than a year for people in need of protection does not violate the right to education as established in Article 2 Protocol 1 ECHR and understood as the right to be integrated into the general public education system, if the refugees are sure to be able to return to their home country in the near future. Nor, in this case, should special education lasting longer in the case of children of refugees than in the case of other children who speak a foreign language be considered *prima facie* discriminatory insofar as if they are able to return home in the near future there are a number of wholly objective reasons for keeping them in special education for longer and against integrating them into the ordinary education system for no more than a few months or even weeks.

*Praeter legem* regulations (regulations pertaining to spheres not fully regulated by law) are compatible with the Constitution providing they are not fundamental, serious, essential or controversial. The *praeter legem* administrative practice that consists in educating children of protected refugees from Kosovo in special classes for longer than is necessary for their integration into the ordinary education system has no legal basis; it concerns a regulatory sphere that is sensitive and probably controversial, in other words open to challenge. It is therefore unconstitutional.

*Summary:*

A child of refugee parents was refused a place at the ordinary local primary school. Under the regulations governing education administered in schools, immigrant children with an insufficient knowledge of German are required to follow a special intensive course for a maximum period of one year. In accordance with the Refugees Act, the education authorities set up such special intensive courses as a temporary protection measure for child refugees from Kosovo but failed to respect the maximum period of one year laid down in the regulations. Even though

the applicant was awarded a place at an ordinary school before the State Court ruled on the case, the Court allowed the appeal and set aside the impugned decision on the ground that it had no basis in law.

*Languages:*

German.



## Lithuania Constitutional Court

### Statistical data

1 September 2000 – 31 December 2000

Number of decisions: 5 final decisions

All cases - *ex post facto* review and abstract review.

The main content of the cases was the following:

- Procedural safeguards and fair trial: 1
- Freedom of association: 1
- The independence of local governments budgets: 1
- Privatisation: 1
- Taxes: 1

All final decisions of the Constitutional Court were published in the Lithuanian *Valstybės Žinios* (Official Gazette).

### Important decisions

*Identification:* LTU-2000-3-009

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.09.2000 / **e)** 25/99, 9/99, 35/99 / **f)** On anonymous witnesses / **g)** *Valstybės Žinios* (Official Gazette), 80-2423, 22.09.2000 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

**5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.**

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

**5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to examine witnesses.**

*Keywords of the alphabetical index:*

Witness, anonymous / Evidence, scrutiny, procedure.

*Headnotes:*

Criminal procedure laws must provide for a procedure which creates the pre-conditions for the speedy and thorough detection of crime, the imprisonment of offenders and, by the proper application of the respective criminal laws, fair punishment. They must also protect an innocent person from wrongful conviction. When the procedure for determining criminal responsibility and the imposition of penalties for crimes committed is being established, laws must provide for the protection of the rights of the accused.

In the determination of criminal liability the evidence of witnesses and victims is of great importance. The credibility of such evidence is necessary to avoid unjust or unreasonable convictions. Anonymity of witnesses and victims is only permissible as an exceptional measure when necessary to assure their security and when the procedure for questioning them in a trial, and the consideration and use of their evidence, does not infringe or deny the accused's constitutional right to a defence and a fair trial.

*Summary:*

The petitioners – the Panevezys Regional Court, Salcininkai Local District Court and Vilnius Regional Court – doubted whether some provisions of the Code of Criminal Procedure were in conformity with the Constitution.

The Constitutional Court emphasised that Article 317.1.1 of the Code of Criminal Procedure provides for the right of a court to decide to read out the testimony given during pre-trial investigation by a person whose identification has been classified, instead of summoning them to a hearing. In such a case the right of the accused to question the anonymous witness or victim or to challenge the credibility of their evidence is restricted.

The Court also noted that Article 317.1.2 and 317.1.3 of the Code of Criminal Procedure provide for the right of the court to question an anonymous witness or victim in court. The procedure for the appearance and questioning of such persons in court is established therein. Under Article 317.1.3 of the Code of Criminal Procedure, the court may question the anonymous witness or victim in the absence of participants in the trial. In such a case the right of the accused to question the anonymous witness or victim

or to participate in other ways in the scrutiny of the evidence given by them is not guaranteed. The Constitutional Court also emphasised that under Article 317.1.4 of the Code of Criminal Procedure, an anonymous witness or victim may be questioned in a non-public hearing where acoustic or visual barriers prevent their identification by participants in the proceedings; the questioning of the anonymous witness or victim is to be carried out by the court. In such a case the right of the accused to question the anonymous witness or victim is not guaranteed either.

The Constitutional Court concluded that Article 267.5 of the Code of Criminal Procedure, which provides that the accused has the right to take part in the investigation of all the evidence save situations provided for in Article 317.1 of the Code of Criminal Procedure, and Article 317.1 of the Code of Criminal Procedure to the extent that it does not guarantee the right of the accused to question, either in person or through the court, an anonymous witness or victim, and thus his right to participate in the investigation of evidence, infringed the right of the accused to a defence and a fair trial. These provisions conflicted with Article 31.2 and 31.6 of the Constitution.

The Constitutional Court ruled that the other disputed provisions were in compliance with the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).

*Identification:* LTU-2000-3-010

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 18.10.2000 / **e)** 29/98, 16/99, 3/2000 / **f)** On the privatisation / **g)** *Valstybės Žinios* (Official Gazette), 88-2724, 20.10.2000 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

**4.10.7.1 Institutions – Public finances – Taxation – Principles.**

**4.10.8.1 Institutions – Public finances – State assets – Privatisation.**

*Keywords of the alphabetical index:*

Privatisation, procedure / Shareholder, share, transfer / Company, reorganisation, shares.

*Headnotes:*

The Parliament (*Seimas*) and all those involved in the legislative process must ensure that all drafted and adopted legal acts are compatible with the Constitution. This is one of the most important means of securing constitutional order and a fundamental requirement of the Rule of law.

*Summary:*

On 29 September 1998, the Parliament adopted the Law on the Reorganisation of the Joint-Stock Companies ("*Būtingės nafta*", "*Mažeikių nafta*" and "*Naftotiekis*"), the Law on Supplementing and Amending Article 5 of the Law on Tax Administration, the Law on Supplementing Article 12 of the Law on Foreign Capital Investment in the Republic of Lithuania and the Resolution on the Recognition of a Strategic Investor. The Law on the Reorganisation of the Joint-Stock Companies provides for the procedure for reorganisation of the joint-stock companies. The law further provides for the conditions and procedure for investments into the company after reorganisation and the requirements for owners of blocs of shares. The other aforesaid laws and the resolution of Parliament are linked with the Law on the Reorganisation of the Joint-Stock Companies.

Some Members of Parliament filed a petition with the Constitutional Court requesting the investigation of whether the content and adoption of the aforementioned legal acts were in compliance with the Constitution. In addition, the Constitutional Court was asked to investigate whether Parliament's resolution was in compliance with the Constitution and the Law on the Basics of National Security.

The Constitutional Court ruled that:

1. the provision of Article 3.4 of the Law on the Reorganisation of the Joint-Stock Companies that the Government, in the agreements with the strategic investor and/or the joint-stock company, has the right to assume basic property liabilities in the name of the state for the strategic investor and/or the joint-stock company conflicts with Articles 5.1 and 128.1 of the Constitution;
2. the provision of Article 3.4 of the Law on the Reorganisation of the Joint-Stock Companies

that the Government, in the agreements with the strategic investor and the joint-stock company, has the right to assume basic property liabilities in the name of the state, even when the investor and/or the joint-stock company are responsible for the losses, conflicts with Article 46.3 of the Constitution and with the Rule of law enshrined in the Constitution;

3. the provision of Article 3.4 of the Law on the Reorganisation of the Joint-Stock Companies that the Government, in the agreements with the strategic investor and/or the joint-stock company, has the right to assume basic property liabilities in the name of the state, including recovery of losses, to the extent that the Government has the right to commit itself to covering losses even when such losses are incurred due to the adoption of laws enforcing constitutional norms and/or protecting the values laid down in the Constitution, conflicts with Article 4 of the Constitution and with the rule of law enshrined in the Constitution;
4. the provision of Article 4.2 of the Law on the Reorganisation of the Joint-stock Companies that the state, and by a decision of the Government the strategic investor, shall have priority in the acquisition of shares sold by or transferred from shareholders holding not less than one percent of shares of the joint-stock company conflicts with Article 23 of the Constitution to the extent that the right of the shareholders to transfer their shares is restricted;
5. the provision giving the Government the right to prolong the tax freeze on strategic investors for up to 10 years in Article 5.3 of the Law on Tax Administration conflicts with Articles 5.1.15, 67 and 127.3 of the Constitution, and with the rule of law enshrined in the Constitution.

The Constitutional Court also ruled that the other disputed provisions were in compliance with the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).



*Identification:* LTU-2000-3-011

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 08.11.2000 / **e)** 1/99 / **f)** On the independence of local governments budgets / **g)** *Valstybės Žinios* (Official Gazette), 96-3042, 10.11.2000 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.6.9.1.1 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

4.8.4.3 Institutions – Federalism and regionalism – Budgetary and financial aspects – Budget.

4.10.1 Institutions – Public finances – Principles.

4.10.2 Institutions – Public finances – Budget.

*Keywords of the alphabetical index:*

Budget, appropriation, particular purpose / Local authority, finances / Budget, appropriation, unused, return.

*Headnotes:*

Under Article 127.1 of the Constitution, local government budgets are independent and at the same time part of the indivisible budgetary system of Lithuania. The independence of local government budgets does not mean that appropriations for particular purposes established in laws may be used for other purposes, or that the remaining unused appropriations for a particular purpose should not be returned to the state budget.

*Summary:*

Article 6 of the Law on Amendment of the 1997 State Budget and Local Government Budgets (the disputed Law) provides as follows that:

“Unused appropriations of 1996 to finance capital investments (the estimated value of which exceeds 5000 thousand litas) and environmental protection objects shall be returned from local government budgets to the state budget to the extent that the actual revenues of 1997 of these local government budgets are larger than the revenues established on approval of deduction rates to local government budgets.”

The petitioner – the Kaunas Regional Court – questioned whether the disputed Law was in compliance with Article 127.1 of the Constitution. In the opinion of the petitioner, this provision of the

Constitution establishes the independence of local government budgets while the disputed Law provides for the taking of some funds from local government budgets against the will of local government institutions.

The Constitutional Court emphasised that the provision of Article 127.1 of the Constitution that local government budgets are independent does not mean that appropriations for financing environmental protection objects, established in laws, may be used for an improper purpose, or that the remaining unused appropriations made for a particular purpose should not be returned to the state budget. Thus, the Court decided that the requirement under Article 6 of the Law to return unused appropriations designated for financing environmental protection objects from local government budgets to the state budget in itself does not deny the principle of independence of local government budgets laid down in the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).

*Identification:* LTU-2000-3-012

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.12.2000 / **e)** 6/99, 23/99, 5/2000, 8/2000 / **f)** On taxes / **g)** *Valstybės Žinios* (Official Gazette), 105-3318, 08.12.2000 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

2.1.2.3 Sources of Constitutional Law – Categories – Unwritten rules – Natural law.

3.9 General Principles – Rule of law.

3.15 General Principles – Proportionality.

4.10.7.1 Institutions – Public finances – Taxation – Principles.

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

*Keywords of the alphabetical index:*

Tax, fine / Fine, minimum.

*Headnotes:*

Although the Constitution grants Parliament (*Seimas*) the competence to establish state taxes, as well as the legal responsibility for violations of tax laws, it does not allow the legislator to establish any type of legal responsibility, penalty or fine for violations of tax laws. By establishing sizes of fines for violations of tax laws, the legislator is bound by the constitutional principles of justice and the rule of law, as well as other constitutional requirements.

The principles of justice and the rule of law enshrined in the Constitution are universal principles and must be followed both in law-making and law enforcement. All state institutions must only act on the basis and in pursuit of law; human rights and freedoms must be secured and natural justice must be respected.

The constitutional principles of justice and the rule of law also mean there must be a fair balance (proportionality) between the objective sought and the means to attain this objective, between violations of law and penalties established for these violations. These principles do not permit the establishment of penalties for violations of law, including the amounts of fines, which would clearly be disproportionate to the violation of law and the objective sought to be achieved. Fines for violations of tax laws must be only of the amount necessary to achieve the legitimate and generally important objective, i.e. to secure the fulfilment of the constitutional duty to pay taxes.

*Summary:*

The petitioners – certain Members of Parliament and the Higher Administrative Court – questioned whether some norms of the Law on Tax Administration were in conformity with the Constitution of the Republic. A group of Members of Parliament also requested the investigation of whether Articles 1 and 2 of the Law on Recognition of Article 40 as Null and Void and Amendment of Article 251 of the Code of Administrative Violations of Law were compatible with the Constitution.

The Constitutional Court emphasised that two principles for determining the amount of the fine provided for in Article 50.3.1 and 50.3.2 of the Law on Tax Administration contradicted each other. Article 50.3.1 established the fine as a certain proportion (expressed as 10% or a one-tenth fine) whilst Article 50.3.2 established it as a certain strictly determined sum. The provisions contradicted each other because regardless of what sum is equivalent to 10% or a one-tenth fine, in all cases the fine may not be less than 20,000 or 50,000 litas respectively.

The provisions meant that for the same violation of laws a fine imposed on certain economic entities, which may be higher than 20,000 or 50,000 litas respectively, might not constitute more than 10% of the income (receipts) received during the previous 12 months, while the fine of 20,000 or 50,000 litas imposed respectively on other economic entities would constitute much more than 10% of the income received during the previous 12 months. Such a fine may even be much higher than the overall income received during the previous 12 months.

A similar situation occurs when under Article 50.3.1 and 50.3.2 of the Law on Tax Administration a one-tenth fine is imposed in cases of hidden income, false value of goods and unregistered payments for employees due to fraudulent book-keeping. The fine might be higher than 20,000 or 50,000 litas respectively without constituting more than the said one-tenth sum, while the fine of 20,000 or 50,000 litas imposed on other economic entities may exceed the said one-tenth sum. Such a fine might be many times larger than the said one-tenth sum.

The Constitutional Court ruled that such legal regulation is incompatible with the principles of justice including the principle of proportionality and the rule of law established in the Constitution.

The Constitutional Court also ruled that the other disputed norms were in compliance with the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).

*Identification:* LTU-2000-3-013

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 21.12.2000 / **e)** 8/99 / **f)** On the Associations of Apartment House Owners / **g)** *Valstybės Žinios* (Official Gazette), 110-3536, 28.12.2000 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Association, compulsory membership / Residence, owner, association.

*Headnotes:*

The constitutional right to freely form societies, political parties and associations is manifold. Its content is composed of the right to form societies, political parties and associations, the right to join them and take part in their activities, as well as the right not to be a member of any societies, political parties or associations, and the right to leave such unions. Thus the Constitution guarantees the right to decide of one's own free will whether to belong or not to belong to a certain society, political party or association.

The right to freely form societies, political parties, and associations guaranteed in the Constitution means that an individual either implements or does not implement this right of his own free will. Article 35.2 of the Constitution stipulates *expressis verbis* that no person may be forced to belong to any society, political party, or association. This is a constitutional guarantee protecting individuals from belonging to any union against their will.

The free will of an individual is a fundamental principle of his membership in various societies, political parties and associations. This constitutional principle must be observed when establishing all types of unions and when regulating their activities and rules of membership, regardless of the legitimate objectives these unions are trying to attain.

*Summary:*

The petitioner – Vilnius City Court of the First District – doubted whether some norms of the Law on the Associations of Apartment House Owners and the Standard Regulations of Associations of Apartment House Owners (Standard Regulations) were in conformity with the Constitution. The regulations were approved by the Government in Resolution no. 852 on the Procedure of Enforcement of the Law on the Associations of Apartment House Owners of 15 June 1995.

The Constitutional Court emphasised that while establishing the association to possess and use common shared property, the owners of residential and non-residential premises contained in an

apartment house implement the constitutional right to unite in order to attain a certain common objective. This constitutional right may be implemented only on the basis of the free will of individuals. Therefore membership in the association of apartment house owners must be based on the principle of voluntariness. When establishment, activities and membership rules are regulated by a law, one must as in cases of any other unions, observe the requirement of Article 35.2 of the Constitution that no one, i.e. neither natural persons nor formations of natural persons, may be forced to belong to any society, political party, or association. Thus, in cases when some of the owners of the premises contained in an apartment house decide to establish the association, other owners may not be regarded as members of this association only because of the fact of such a decision. Such forced membership in the association is impermissible.

The principle of voluntariness of membership in the association means that the owner has the right not to join the association, however in this case such an owner of residential and non-residential premises contained in the apartment house remains a subject of the other legal relations linked with the implementation of the rights of common shared ownership.

The Constitutional Court ruled that some provisions of the Law and the Standard Regulations conflicted with Article 35.1 and 35.2 of the Constitution, to the extent that the appearance of membership in the association of apartment house owners is not linked with the free will of the owner, and/or to the extent that they deny the right of the owner to leave the association of apartment house owners of his own free will.

The Constitutional Court ruled that the other disputed provisions were in compliance with the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).





# Malta

## Constitutional Court

### Statistical data

1 May 2000 – 31 August 2000

- Number of judgments: 7
- Number of introduced cases: 8

### Important decisions

*Identification:* MLT-2000-3-003

a) Malta / b) Constitutional Court / c) / d) 11.08.2000 / e) 526/95 / f) Constantino Consiglio *et al.* v. Air Supplies and Catering Company Limited / g) / h).

*Keywords of the systematic thesaurus:*

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

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

3.12 General Principles – Legality.

4.7 Institutions – Courts and tribunals.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.13.11 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Independence.

5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

5.3.25 Fundamental Rights – Civil and political rights – Right of access to administrative documents.

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

*Keywords of the alphabetical index:*

Employment, termination / Collective labour agreement.

### Headnotes:

As a general rule, an individual has fundamental human rights against the state, and the state has a duty to protect those rights. However, it is a misconception to argue that an individual has no human rights against a private body. Although it is an established principle that the state must guarantee the enjoyment of fundamental human rights and freedoms, bodies other than the state or its agencies are capable of violating such rights. To argue otherwise would mean that an individual employed by a corporation which was an agency or subsidiary of the state would enjoy a privileged position compared to an employee of a private company. It is unacceptable to apply such a restricted interpretation of human rights as this would only serve to discriminate between citizens.

A Disciplinary Board was declared not to qualify as a tribunal for the purposes of Article 6 ECHR. Therefore, their procedure was not subject to the guarantees established for a fair hearing, and a decision delivered by such a board could not be considered as being conclusive and binding on the respective parties. The decision of the Board was subject to an appeal and it was also possible to go to an Industrial Tribunal. Such proceedings were decisive for the private law rights and obligations of the applicants.

Notwithstanding this, the Court identified the possibility of a breach of the applicants' right to a fair hearing in the determination of their civil rights and obligations, both during the course of the judicial process as well as prior to its commencement.

### Summary:

The applicants were employed with Air Supplies Company Limited, a subsidiary of the national airline company, whose majority shareholder was the state. The applicants complained of a breach of their fundamental right to a fair hearing at the Industrial Tribunal, as the company principal had refused their request to submit a copy of the report issued by the Disciplinary Board.

The Constitutional Court expressed the view that the Disciplinary Board did not qualify as a tribunal in terms of Article 6 ECHR. The Court emphasised that a tribunal for the purposes of Article 6 ECHR is characterised by its judicial function, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must satisfy a series of other requirements relating to independence from the executive,

impartiality, duration of members' term of office, and guarantees afforded by its procedure, several of which appear in Article 6 ECHR. Furthermore, the Disciplinary Board was not established by law but by a collective agreement concluded between the respondent company and the respective trade unions.

The Court held that under these circumstances the Disciplinary Board could not be considered as a competent judicial authority to determine the civil rights and obligations of an individual. Consequently, proceedings held before the Disciplinary Board were not governed by the guarantees established for a fair hearing. This was notwithstanding that under the collective agreement, the Board was bound to observe the principle of natural justice in the course of proceedings. Furthermore, any decision taken by the Board which concerned the termination of employment of an employee was not final. The Board's decision was subject to the review of a tribunal established by law. The employee could refer the matter to the Industrial Tribunal under the Industrial Relations Act (Chapter 266 of the Laws of Malta). Such a tribunal had to satisfy the requirements stipulated in Article 6 ECHR, which provides for procedural and institutional safeguards including that the court is established by law, that it must be independent and impartial, and that a decision is delivered within a reasonable time.

The Court held that Article 6 ECHR applied to proceedings the results of which are decisive for private rights and obligations. Therefore, the character of the legislation that governs how the matter is to be determined and the authority vested with jurisdiction in the matter is of little consequence. The Board's refusal to provide the applicants with a copy of the report placed them at a disadvantage compared with the respondent company. The copy of the report was required by the applicants so that they could prepare the appeal proceedings following the decision delivered by the Disciplinary Board, a right granted to all employees in terms of the collective agreement. The right to a fair hearing requires compliance with the principle of equality of arms, which is a central feature of the concept of a fair hearing. Everyone who is a party to proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage *vis-a-vis* his opponent. The breach of an individual's right to a fair hearing was not restricted to violations which occur in the course of proceedings, but equally applies to actions performed prior to the commencement of proceedings and which might prejudice the outcome of the proceedings.

The Court delivered judgement in favour of applicants.

#### Cross-references:

European Court of Human Rights:

*Ringeisen v. Austria*, 16.07.1971, Series A, no. 13;  
*König v. Germany*, 28.06.1978, Series A, no. 27,  
*Special Bulletin ECHR* [ECH-1978-S-003];  
*Kaufman v. Belgium* (1986);  
*Belilos v. Switzerland*, 29.04.1988, Series A, no. 132;  
*H. v. Belgium*, 30.11.1987, Series A, no. 127-B;  
*H. v. France*, 24.10.1998, Series A, no. 162-A.

#### Languages:

Maltese.



#### Identification: MLT-2000-3-004

**a)** Malta / **b)** Constitutional Court / **c)** / **d)** 11.08.2000 / **e)** 700/99 / **f)** Marthese Azzopardi v. Maltacom plc / **g)** / **h)**.

#### Keywords of the systematic thesaurus:

2.1.1.4.3 Sources of Constitutional Law – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
4.7 Institutions – Courts and tribunals.  
5.1.3 Fundamental Rights – General questions – Limits and restrictions.  
5.3.13 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial.

#### Keywords of the alphabetical index:

Employment / Confidentiality, obligation, breach / Promotion, aspiration / Promotion, right.

#### Headnotes:

The issue referred to disciplinary proceedings held before an Appeals Board. The applicant was accused of breaching her confidentiality obligation under a collective agreement signed between the respondent company and the union which represented the applicant. A decision of a disciplinary board that

involves the determination of an employee's civil rights and obligations (for instance a decision ordering dismissal) could not be deemed to be decisive until the merits of the case are considered and determined by a tribunal established by law. The tribunal is to satisfy the conditions imposed by Article 6 ECHR. Article 6 ECHR was not applicable to proceedings that are not decisive for private rights and obligations.

### *Summary:*

Proceedings were filed against the applicant before the Disciplinary Appeals Board, appointed by the employer to investigate her conduct at the place of work, in particular whether she was in breach of her confidentiality obligation.

A decision was delivered and the applicant was declared to have breached the conditions of her employment. The Board was composed of three directors of the respondent company. The applicant alleged that due to the disciplinary board's decision, she forfeited her right to promotion. This meant a loss of income. The applicant contested the composition of the Appeals Board. The Court held that the proceedings were not decisive for private rights and obligations. The disciplinary proceedings did not necessarily affect the applicant's prospects of promotion. The proceedings were decisive in establishing whether or not the employee was responsible.

The Constitutional Court emphasised that internal appeal procedures in commercial enterprises should not be cramped by impracticable legal requirements. It was almost inevitable that the person who would make the original decision to dismiss would normally be in daily contact with the manager who would hear the appeal and make a final decision. As long as the disciplinary and appeal bodies acted fairly and justly, their decisions were to be supported. However, any overt expression of bias or other indications that a decision is reached prior to the hearing of evidence, must be avoided.

Furthermore, where the decision of a disciplinary board would determine an employee's civil rights and obligations, that decision would not be declared to be binding and conclusive unless it was subject to the scrutiny of a tribunal established by law which satisfied all the requirements of Article 6 ECHR. The Court then considered whether the decision delivered by the disciplinary board, which adversely affected the applicant's aspirations of promotion, could be qualified as one determining the applicant's civil rights and obligations.

The Court held that for Article 6 ECHR to apply:

1. there must be a genuine and serious claim or dispute relating to rights or obligations recognised at least on arguable grounds in domestic law;
2. the outcome of the dispute must be directly decisive of the rights and obligations in question; and
3. those rights or obligations must be civil in character.

The Court did not believe there was a right to promotion in domestic law. Although the applicant was entitled to aspire to promotion, the ultimate decision was clearly at the employer's discretion. Disciplinary matters which did not involve the dismissal of the employee were not disputes over civil rights. With respect to dismissal from employment, it was established that the law itself prohibited dismissal except for a just cause and for reasons stipulated by law. In such circumstances, the person concerned is entitled to have the matter dealt with by a tribunal. If the administrative or disciplinary body concerned is not itself a tribunal meeting the requirements of Article 6 ECHR, it must be subject to subsequent control by a judicial body which does comply with that article. The judicial body must moreover have full jurisdiction to deal with the dispute, and judicial review of the lawfulness of an administrative body's decision may not be sufficient. The same principle applied where the right to a pension or to social benefits regulated by law were in issue.

### *Cross-references:*

*Le Compte v. Belgium*, 23.06.1981, Series A, no. 43, *Special Bulletin ECHR* [ECH-1981-S-001];  
*Francesco and Gian Carlo Lombardo v. Italy*, 26.11.1992, Series A, no. 249-B.

### *Languages:*

Maltese.



# Moldova

## Constitutional Court

### Important decisions

*Identification:* MDA-2000-3-007

**a)** Moldova / **b)** Constitutional Court / **c)** / **d)** 03.10.2000 / **e)** 34 / **f)** Constitutionality of Government Order no. 676 of 06.10.1995 and of the provisional regulations, approved hereby / **g)** *Monitorul Oficial al Republicii Moldova* (Official gazette) / **h)** CODICES (Romanian).

*Keywords of the systematic thesaurus:*

3.24 General Principles – Market economy.

5.3.37 Fundamental Rights – Civil and political rights – Right to property.

*Keywords of the alphabetical index:*

Housing, construction, investment, private / Investment, contract / Private capital, investment / Regulation, provisional / Contract, conditions, performance / *Pacta sunt servanda*, principle.

*Headnotes:*

Article 102.2 of the Constitution provides for the adoption of government orders for the purpose of implementing laws. Article 72.3 of the Constitution stipulates that only the parliament can determine the general rules governing property ownership.

According to Article 46 of the Constitution, the right to private ownership belongs to legal persons. Natural or legal persons may be deprived of their property against their will only as provided for by law.

According to Article 8 of the provisional Regulations, if an investor fails to comply with the terms of an investment contract, the beneficiary is entitled to enter into a contract with another investor by unilaterally terminating the investment contract and by so notifying the defaulting investor in writing at least 10 days before the contract is terminated.

In accordance with Article 200 of the Civil Code, the reciprocal obligations of the contract must be fulfilled

simultaneously unless the law, the contract or the nature of the obligation require otherwise.

*Summary:*

The submission of a case to the Supreme Court of Justice by the legal authority of the Riscani sector, for review of the constitutionality of Government Order no. 676 of 6 October 1995 on the construction of unfinished houses and of the provisional regulation approved thereby, formed the basis for consideration of the matter.

The above-mentioned order stipulates that contracts on the investment of private capital in the construction of un-finished houses are registered by beneficiaries, whereas contracts relating to participation in completion of the construction of houses using the resources of State companies and organisations and with joint capital are registered by the ministry of privatisation and administration of public property.

The Constitutional Court examined the constitutionality of the measures in question from the point of view of their compliance with the principle of the separation of powers and the powers of the supreme organs of State, as defined in the Constitution.

Article 8.1 of the Regulations provided grounds for unilateral termination of an investment contract if the investor fails to comply with the terms of the contract. The Court stated that the principal meaning of the obligatory principle of the contract is the obligation entered into by the parties to fulfil exactly all the conditions provided for by the contract.

The Court noted that all contracts, being the result of the agreed intention of the parties, may be terminated or cancelled in the same way. The termination of a contract by the exclusive will of one party is impossible except as provided for by law. If one party fails to honour its obligations, the other party is entitled to take the matter to court.

Article 8.1 of the Regulations purports to resolve questions relating to the general rules governing property. The Constitution and the Law of 31 May 1990 relating to the government do not authorise the government to legislate in the matter. The above-mentioned article, concerning the unilateral termination of a contract of investment, is contrary to the Constitution. The other provisions of Government Order no. 676 and of the said Regulations comply with the Constitution, as they do not affect the general rules governing ownership.

In view of the above, the Court ruled that Government Order no. 676 of 6 October 1995 relating to public and private investment in the construction of unfinished houses and the provisional regulations approved thereby, are constitutional, with the exception of the provisions in Article 2 of the order in the part approving Article 8.1 of the provisional regulations on the unilateral termination of investment contracts, which is unconstitutional.

#### *Languages:*

Romanian, Russian.



#### *Identification:* MDA-2000-3-008

**a)** Moldova / **b)** Constitutional Court / **c)** / **d)** 10.10.2000 / **e)** 35 / **f)** Constitutionality of certain provisions of Law no. 894-XVI of 23.03.2000 to amend and supplement the Electoral Code and of Article 86 of the Electoral Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official gazette) / **h)** CODICES (Romanian).

#### *Keywords of the systematic thesaurus:*

**1.3.1 Constitutional Justice** – Jurisdiction – Scope of review.

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

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

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

**3.3 General Principles** – Democracy.

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

**4.9.2 Institutions** – Elections and instruments of direct democracy – Electoral system.

**5.2.1.4 Fundamental Rights** – Equality – Scope of application – Elections.

**5.2.2 Fundamental Rights** – Equality – Criteria of distinction.

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

**5.3.29 Fundamental Rights** – Civil and political rights – Right to participate in political activity.

**5.3.39.2 Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

#### *Keywords of the alphabetical index:*

Election, electoral code / Election, Central Electoral Commission / Political party, participation in elections, right / Parliament, representation, threshold.

#### *Headnotes:*

Article 41 of the Constitution decrees that citizens can freely join together in parties and other social and political organisations, contribute to the definition and expression of their political will and participate in elections, and that they are equal in the eyes of the law.

The Constitution expressly provides for access to all information of public interest (Article 34 of the Constitution). National sovereignty belongs to the people who exercise it directly and through representative organs. According to Article 38 of the Constitution, the participation of the people in elections is one of the main forms of the exercise of national sovereignty.

According to the Constitution, the electoral system is regulated by an organic law. The parliament is the only organ which can approve all types of voting or the method of awarding mandates to deputies.

#### *Summary:*

Referrals by the President of the Republic and of a member of parliament concerning the constitutionality of certain provisions of Law no. 894-XIV to amend and supplement the Electoral Code and of Article 86 of the Electoral Code formed the basis for consideration of the matter. They argued that certain provisions of Law no. 894-XIV, amending certain articles of the Electoral Code, were contrary to the Constitution and so infringed the rights of citizens to elect and be elected, to join together in parties and other socio-political organisations, and restricted citizens' access to information.

The President of the Republic sought a review of the constitutionality of certain provisions of the above-mentioned law, which determine the manner in which the Central Election Commission is established and its president elected.

In accordance with Article 42.2 of the Electoral Code, only parties and other social and political organisa-

tions registered, according to certain conditions, two years before the fixing of the date of the elections, are entitled to nominate candidates for the elections. Consequently, certain parties and social and political organisations, registered according to their own statutes (regulations) and the legislation in force, but which have not been registered for two years, are not able to nominate candidates for the elections.

In the opinion of the Court, Article 41.2.a of the Electoral Code, as amended by Law no. 894-XIV, infringes both the principle of equality of the parties and other social and political organisations, and the right of freely associated citizens to formulate their political will through the nomination of candidates to elections.

In its previous rulings, the Court has found that the right to information is a fundamental right, because the development of the person in the society, the exercise of liberties enshrined in the Constitution, including freedom of thought, opinion, creation, public expression in speech, images or by any other possible means, include the possibility of informing oneself about social, political, economic, scientific, cultural life etc.

The Court also mentioned that Article 34 of the Constitution establishes the correlative obligations of the public authorities which must ensure the proper information of citizens on public affairs and problems of personal interest, favouring the pluralism of the mass media, by obliging the public information media, whether State or private, to inform public opinion correctly.

In the opinion of the Court, the amendments made through Law no. 894-XIV to Article 47 of the Electoral Code comply with the provisions of both the Constitution and the European Convention on Human Rights of 1950, to which the Republic of Moldova is party.

Perceiving the principle of separation of powers as a mechanism whereby the powers check each other and functional equilibrium between them is ensured, the Court inferred through its Judgment no. 10 of 4 March 1997 that the purpose underlying this equilibrium is both to prevent the hegemony of one constitutional power, party, union or social class to the detriment of others, and to avoid violation of the constitutional order determined by the *bona fide* consent of the people.

In modifying Article 16.2 of the Electoral Code to the effect that the President of the Republic, the parliament and the Judicial Service Commission each appoint three members of the Central Electoral

Commission, the legislator has once again confirmed its attachment to the principle of the separation of powers in the State, enshrined in Article 6 of the Constitution. The provision introduced by the same amendment, whereby the president of the Electoral Commission is appointed from among the judicial members, accords perfectly, in the opinion of the Court, with Article 116.1 of the Constitution whereby the judges of the judicial authorities are independent, impartial and irremovable.

The Court held that elections are not only a means whereby citizens exercise their political rights under the Constitution, but are also a way of equipping the institutions of a democratic State with a capacity for coherent expression so as to make it possible to organise certain political centres of decision which are effective. Thus elections allow for a general non-fragmented orientation of the activity of the State to be determined. Consequently, the application of a proportional electoral system with a threshold of 6% of the total number of votes cast for the parties, social and political organisations and alliances, and of 3% of the total number of votes cast for independent candidates, under Articles 86 and 87 of the Electoral Code, is not contrary to the Constitution.

The election threshold fixed for independent candidates does not restrict citizens' constitutional right of access to a political or public post and does not violate the principle of equality of votes cast. Article 38.3 of the Constitution guarantees citizens the right to be elected and not their actual election.

It follows that the provisions of Articles 86 and 87 of the Electoral Code (set out in Law no. 894-XIV of 23 March 2000 to amend and supplement the Electoral Code) are not contrary to the provisions of the Constitution that deal with sovereignty and State power, equality before the law, the right to elect and to be elected, the right to administration, nor to the standards of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights.

Dissenting Opinion:

For other reasons, Judge Nicolae Chiseev concluded that the Court did not have the right to rule that the provisions of Articles 16.2, 86.2 and 87.3 of the Electoral Code comply with the Constitution. By its judgment, the Court has endorsed the above-mentioned provisions and so compounded their non-conformity with a number of constitutional principles.

*Languages:*

Romanian, Russian.



*Identification:* MDA-2000-3-009

**a)** Moldova / **b)** Constitutional Court / **c)** / **d)** 24.11.2000 / **e)** 38 / **f)** Constitutionality of certain provisions of Law no. 1234-XIV of 22.09.2000 relating to the procedure for election of the President of the Republic / **g)** *Monitorul Oficial al Republicii Moldova* (Official gazette) / **h)** CODICES (Romanian).

*Keywords of the systematic thesaurus:*

3.3.1 General Principles – Democracy – Representative democracy.

4.4.1.2 Institutions – Head of State – Powers – Relations with legislative bodies.

4.4.2.4 Institutions – Head of State – Appointment – Election.

4.5.2 Institutions – Legislative bodies – Powers.

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

*Keywords of the alphabetical index:*

Head of State, election, direct suffrage.

*Headnotes:*

The parliament reflects the sovereign will of the electorate as expressed periodically through universal suffrage and translates into decisions the will of the nation. Consequently, only the parliament is entitled to make decisions concerning the manner, procedure and conditions of election of the Head of State.

*Summary:*

A deputy in parliament requested the Court to review the constitutionality of the law relating to the procedure for the election of the President of the Republic, according to which a candidate for the office of President of the Republic can be nominated from the day of fixing the date of elections by: the candidate, supported by at least 15 deputies; a group of at least 15 deputies.

The applicant argued that, in this case, the legislator had violated both individual human rights and freedoms, including the right to elect the Head of State by direct suffrage, and the right of political parties and other social and political organisations to propose candidates for the office of head of State.

Under Article 78 of the Constitution, the President of the Republic is elected by parliament in a secret ballot; the candidate receiving three fifths of the votes of the elected deputies is elected.

According to the Constitution, as amended by Law no. 1115-XIV of 5 July 2000, the parliament is the representative of the national will.

Articles 60, 72 and 78 of the Constitution provide that the resolution of the problems raised by the applicant rests exclusively with the parliament, since both individual deputies and groups of deputies represent in parliament the political forces of society which proposed the candidates.

The Court declared that Article 5.1 of Law no. 1234-XIV of 22 September 2000 relating to the procedure for the election of the President of the Republic was constitutional.

*Languages:*

Romanian, Russian.



*Identification:* MDA-2000-3-010

**a)** Moldova / **b)** Constitutional Court / **c)** / **d)** 07.12.2000 / **e)** 41 / **f)** Constitutionality of certain provisions of Law no. 985-XIV of 18.05.2000 relating to revision of the Constitution by popular petition / **g)** *Monitorul Oficial al Republicii Moldova* (Official gazette) / **h)** CODICES (Romanian).

*Keywords of the systematic thesaurus:*

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – Extension.

3.3.2 General Principles – Democracy – Direct democracy.

4.1.1 Institutions – Constituent assembly or equivalent body – Procedure.

4.5.2 Institutions – Legislative bodies – Powers.

4.5.6 Institutions – Legislative bodies – Law-making procedure.

4.9.1 Institutions – Elections and instruments of direct democracy – Instruments of direct democracy.

5.2 Fundamental Rights – Equality.

*Keywords of the alphabetical index:*

Constitution, amendment / Legislative initiative / Popular initiative / "Unity of content", principle.

*Headnotes:*

The Constitution states that revision of the supreme law can be initiated by at least 200 000 citizens of the republic having the right to vote. The citizens proposing the revision of the Constitution must come from at least half of the second-tier territorial administrative units; at least 20 000 signatures in support of the initiative must be collected in each of them (Article 141.1 of the Constitution, as enacted by Law no. 1115-XIV of 5 July 2000 to amend and supplement the Constitution).

In order to spell out these provisions in more detail, on 18 May 2000, the parliament adopted ordinary Law no. 985-XIV relating to the revision of the Constitution by popular petition. This law describes the mechanism for revision of the Constitution by popular petition. Also, Organic Law no. 984-XIV was adopted, supplementing Title II of the parliament's rules of procedure by laying down special rules for debating and adopting laws amending the Constitution.

*Summary:*

The Court was asked to consider the constitutionality of certain provisions of Law no. 985-XIV concerning the parliament's right to declare void any popular initiative to revise the Constitution where the proposed amendment infringes the principle of unity of content, which implies that there must be an intrinsic relationship between all the elements of the Constitution. The applicant contested the right of the legislature to reject any improper petition to revise the Constitution, as well as the time limits governing the procedure for revision of the Constitution by popular petition: 14 days to complete the preliminary expert legal opinion of the Constitutional Bill; 10 days to register the Bill; 3-8 months to collect the signatures; 1 month to check the authenticity of the signatures; 3 days to present the Bill.

The applicant considered that the aforesaid stipulations create unequal conditions between the entities who have the right to initiate a revision of the Constitution and are contrary to the Constitution, and, in particular, to the constitutional provisions stipulating that national sovereignty belongs to the people who exercise it through their representative organs, in the forms determined by the Constitution, and that the citizens have the right to participate in the administration of public affairs directly, or through

their representatives (Articles 2.1 and 39.1 of the Constitution).

The Court held that, according to Article 60 of the Constitution, the parliament is the supreme representative organ of the people and the sole legislative authority of the State which, according to Article 66 of the Constitution, has the function of ensuring the unity of legislation throughout the country. Article 72 of the Constitution provides that the parliament is empowered to regulate through ordinary laws all fields of social relations, with the exception of fields reserved for constitutional and organic laws.

In accordance with the law whereby the Constitutional Court itself determines the limits of its jurisdiction and can extend the subject of constitutionality review (Article 6.2 and 6.3 of the Code of Constitutional Jurisdiction), the Court examined Law no. 985-XIV as to its constitutionality and found that it was contrary to Article 72 of the Constitution, in that certain of its provisions must be adopted by an organic law and not by an ordinary law.

The Court held that, according to Article 72.3 of the Constitution, Law no. 985-XIV includes provisions concerning the competence: of the parliament – the power of decision as to material unity; of the Supreme Court of Justice – consideration of objections concerning decisions relating to the failure of popular petitions to revise the Constitution; of the Ministry of Justice – the right to submit the Bill to amend the Constitution to the Constitutional Court, which in fact entails referring the case to the Court so that it can give a ruling on the proposed revision of the Constitution and as to whether these provisions fall within the scope of an organic law.

Furthermore, the Court found that the time limits governing petitions for revision of the Constitution, stipulated in Law no. 985-XIV, are excessive and impede the exercise of a constitutional right provided for in Articles 2.1 and 39.1 of the Constitution whereby citizens can exercise a right of initiative (Article 141 of the Constitution). The provisions mentioned put the persons entitled to initiate revision of the Constitution in different and unequal positions. This violates the provisions of Articles 16 and 141 of the Constitution, which state the principle of equality of all citizens before the law and of equal conditions in the exercise of the right to initiate revision of the Constitution.

The Court also held that Law no. 984-XIV includes certain provisions which are contrary to the supreme law and extended its review of constitutionality to those provisions.



According to the above-mentioned law, the Court presents the constitutional Bill to the parliament if the revision is initiated by citizens who do not have the right to present the Bill to parliament and to participate in the debates. The other subjects have the right to reject the constitutional Bill by a majority vote of the deputies present at the sitting of parliament. In so doing, the parliament can block all proposals for the revision of the Constitution and exercise a monopoly over the procedure for revision of the Constitution. The Court declared the above-mentioned law contrary to Articles 16, 134 and 141 of the Constitution which establish the principle of equality of all citizens in the eyes of the law and set equal conditions for exercise of the right to initiate revision of the Constitution.

According to Article 134 of the Constitution, the Court is the sole authority of constitutional jurisdiction and not the subject of an initiative to revise the Constitution or the representative of citizens by delegation. This capacity is conferred on it by Law no. 984-XIV.

Exercising constitutional jurisdiction, the Court declared that Law no. 985-XIV of 18 May 2000 and the provisions of Law no. 984-XIV of 18 May 2000 on revision of the Constitution by popular petition which violate the aforesaid constitutional provisions are unconstitutional.

#### *Cross-references:*

The Constitutional Court, in its Judgment no. 57 of 3 November 1999 (*Bulletin* 1999/3 [MDA-1999-3-004]), gave a ruling on the honouring of the obligatory requirements of a special two-thirds' majority of deputies necessary for the adoption of the laws relating to the amendment of the Constitution on the first and second reading, as well as for final adoption.

#### *Languages:*

Romanian, Russian.

## Netherlands Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 2000 – 31 December 2000.



# Norway

## Supreme Court

### Important decisions

*Identification:* NOR-2000-3-003

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 16.11.2000 / **e)** Inr 49B/2000 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2000, 1811 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

2.2.1.6.4 Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.

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

3.4 General Principles – Separation of powers.

4.5.2 Institutions – Legislative bodies – Powers.

*Keywords of the alphabetical index:*

Damages, reduction due to contributory negligence / European Economic Area, directive / Insurance, coverage.

*Headnotes:*

In a case concerning a conflict between provisions of the Motor Vehicle Liability Act and three European Economic Area (EEA) directives, a majority of the Supreme Court (10 justices) found that the statutory provision could not be disregarded. The minority of the Court (5 justices) found that the EEA directives should be given precedence.

*Summary:*

In 1995, A, who was 17 years and 10 months old, was seriously injured when the car in which she was a passenger left the road. The driver of the car was

under the influence of alcohol, and had an alcohol concentration in his blood of 0.012 per litre. A's blood-alcohol level was slightly higher. Section 7.3.b of the Motor Vehicles Liability Act provides:

“Damages cannot be awarded, unless special grounds prevail, if the victim voluntarily drove or allowed himself to be driven in the vehicle that was the cause of the injury in the knowledge or presumed knowledge that the driver was under the influence of alcohol or other intoxicating or anaesthetising substance (see the Road Traffic Act Section 22.1). This provision shall not apply to the extent that it must be assumed that the injury would have been inflicted even if the driver of the vehicle had not been under the influence as mentioned.”

In the district court it was found that A knew the driver was under the influence of alcohol. However, the district court referred to the provision concerning “special grounds” in Section 7.3 of the Motor Vehicle Act and awarded damages with a 50% reduction due to contributory negligence. On appeal, the Court of Appeal awarded damages with a 30% reduction for contributory negligence. The car insurance company appealed to the Supreme Court against the decision of the Court of Appeal. The Supreme Court determined the case in plenary session.

Like the courts of lower instance, the Supreme Court found unanimously that A was fully aware that the driver of the car had been under the influence of alcohol.

Three EEA directives were crucial to the case. Council Directive 72/166/EEC of 24 April 1972, Council Directive 84/5/EEC of 30 December 1983, and Council Directive 90/232/EEC of 14 May 1990 imposed a duty to provide insurance coverage for the victims of road traffic accidents and limited the power to exclude certain groups of victims. At the request of the Supreme Court, the Court of the European Free Trade Area (EFTA) delivered an advisory opinion to the effect that a scheme similar to the one in section 7 of the Motor Vehicle Liability Act, whereby the right to damages was forfeited, was incompatible with EEA law. In passing judgement, all of the Supreme Court concurred with the opinion of the EFTA court.

In 1992, the three EEA directives were purportedly implemented into Norwegian law through certain amendments to the Motor Vehicle Liability Act. The Ministry of Justice assumed at the time that Section 7.3.b was not contrary to the directives and made no proposal for its amendment. The primary issue before the Supreme Court was what significance to

attach to the directives when interpreting the provisions of the Motor Vehicle Liability Act.

A majority of the Supreme Court (10 justices) pointed out that Norwegian law subscribes to a principle whereby there is a presumption that a statute shall, as far as possible, be interpreted compatibly with Norway's obligations pursuant to international law and, thus, EEA directives. However, in this particular case the domestic rule of law in question was unambiguous. It would go beyond what could reasonably be termed an interpretation of the rule to disregard it, and to do so would almost be tantamount to giving the non-implemented directives direct application in Norwegian law with precedence over formal law. It would also be problematic for private individuals if they could not rely on the domestic law in force. Although there were strong indications that Section 7.3.b of the Motor Vehicles Liability Act would have been repealed if the scope of the directives had been evident in 1992, it was the task of the legislature and not the courts to correct the errors that were later revealed.

A minority of the Supreme Court (5 justices) were of the opinion that in this particular case the error that had been made in connection with the implementation of the three directives could be corrected by the courts. The presumption of compatibility with international law prevents Norway from committing this kind of breach of international law. The presumption is particularly strong within the area of EEA law, one of the major objectives of which is common interpretation and application of rules of law. Respect for the wishes of the legislature did not weigh against disregarding the domestic law; the Norwegian parliament had intended to implement the directives, and it was highly likely that the rule would have been amended if the parliament had been provided with the correct information. Considerations of predictability could not be conclusive.

Accordingly, the insurance company was found not to be liable for damages in this case.

#### *Languages:*

Norwegian.



## Poland Constitutional Tribunal

### Statistical data

1 September 2000 – 31 December 2000

#### I. Constitutional review

Decisions:

- Cases decided on their merits: 11
- Cases discontinued: 0

Types of review:

- Ex post facto review: 11
- Preliminary review: 0
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 8
- Courts referrals ("legal questions"), Article 25 of the Constitutional Tribunal Act: 3

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 7
- Cases on the legality of other normative acts under the Constitution and statutes: 1

Holdings:

- The statutes in question held to be wholly or partly unconstitutional (or the acts of lower rank held to violate the provisions of superior laws and the Constitution): 4
- Provisions upheld as constitutional: 7

Precedent decisions: 1

#### II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 10
- Motions requesting such interpretation rejected: 1

### Important decisions

*Identification:* POL-2000-3-019

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.09.2000 / **e)** P 11/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official

Digest), 2000, no. 6, item 187; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 81, item 921 / **h**) CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.3.5 Constitutional Justice – Jurisdiction – The subject of review.

3.12 General Principles – Legality.

3.24 General Principles – Market economy.

5.4 Fundamental Rights – Economic, social and cultural rights.

*Keywords of the alphabetical index:*

Market practice, unfair / Network enterprise / Tariff / Consumer, protection, constitutional value.

*Headnotes:*

Methods of calculating tariffs for the admission to an electrical energy network were not incompatible with the constitutional obligation to protect consumers, users and lessees by public authorities against unfair market practices.

*Summary:*

The Antimonopoly Court applied to the Tribunal to examine the case. The Court claimed that network enterprises, in the light of the challenged provisions, collect charges for the admission to the network, and for dispatching services, which are calculated on the basis of the costs of exploitation, modernisation and development of the network used for dispatch services. In the Court's opinion, the foregoing provisions had a highly burdensome nature for entities admitted to the network. The provisions legalise the abuse of market power by electro-energetic network enterprises.

The Constitutional Tribunal emphasised that the Court did not challenge the provisions of an Act but only provisions of secondary legislation adopted on the grounds of the Act. The Constitution defines protection of consumers and users against unfair market practices as a constitutional value, but only in the terms provided for by an Act. The Tribunal also referred to its earlier judgement, in which it mentioned that the foregoing provisions of the Constitution "provide for particular obligations of the state, which must be concretised in the Acts, but it doesn't create rights ... for a citizen".

These Constitutional provisions could not be treated as a standard for control in this case. Furthermore, the Tribunal did not see any reason for challenging

the compatibility of the provisions with the Constitution.

*Cross-references:*

Decision of 26.10.1999 (K 12/99), *Bulletin* 1999/3 [POL-1999-3-027];

Decision of 12.01.2000 (P 11/98), *Bulletin* 2000/1 [POL-2000-1-005].

*Languages:*

Polish.



*Identification:* POL-2000-3-020

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03.10.2000 / **e)** K 33/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 6, item 188; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 83, item 946 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

3.15 General Principles – Proportionality.

3.16 General Principles – Weighing of interests.

3.19 General Principles – Reasonableness.

4.5.2 Institutions – Legislative bodies – Powers.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.2.2 Fundamental Rights – Equality – Criteria of distinction.

5.3.37 Fundamental Rights – Civil and political rights – Right to property.

*Keywords of the alphabetical index:*

Lease, premises / Security deposit / Value, raising.

*Headnotes:*

Certain provisions of the Act on the Lease of Premises were incompatible with the constitutional rule of equal protection of ownership and other pecuniary rights, and the right of lessees to reimburse the security deposit after the termination of a lease. The relevant provisions concerned security deposits

paid in by a lessee before the commencement of the Act.

### Summary:

The Tribunal examined the case as a result of a motion of the Ombudsman. The Ombudsman stated that the challenged provisions excluded the possibility of value-raising mechanisms at court and led to an encumbrance on the lessee with the risk that a change in the value of the money results in the reimbursed deposit having no actual value.

The Tribunal held that in the light of the content of the challenged provisions and the juridical decisions of the Supreme Court, the regulation of a reimbursement of the security deposit adopted in the challenged provisions excluded the possibility of raising the value of the security deposit at court. The interest provided by the challenged provisions does not guarantee, even minimally, that the amount of the reimbursed deposit at least partially complies with the actual value of the amount paid in.

The Tribunal emphasised that none of the pecuniary rights guaranteed by the Constitution has an absolute character and the legislature may limit them. Such limitations are, however, subject to the following conditions: they must be made in the form of an Act; there must be a necessity for the introduction of a limitation; there must be a functional relationship between a limitation and such values as security of a country, public order, protection of the environment, health and public morality, and the rights and freedoms of other people. The Tribunal decided that the interference of the legislature in the right of lessees to reimbursement of the security deposit introduced in the challenged provisions does not comply with these conditions.

In the Tribunal's opinion, the applicant is right that the situation of lessees is differentiated, depending on the time of payment of the deposit. The Tribunal held that such a distinction in the protection of the pecuniary rights is possible. However, such a distinction must be made rationally, proportionally and with reference to the constitutional rules justifying it. A comparison of the situation of lessees under the previously binding provisions with the new Act leads to a conclusion that the foregoing conditions have not been met.

### Cross-references:

Decision of 13.04.1999 (K 38/98);  
Decision of 12.01.1999 (P 2/98), *Bulletin* 1999/1 [POL-1999-1-002].

### Languages:

Polish.



### Identification: POL-2000-3-021

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04.10.2000 / **e)** P 8/2000 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 6, item 189; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 83, item 947 / **h)** CODICES (Polish).

### Keywords of the systematic thesaurus:

4.7.4.1.3 Institutions – Courts and tribunals – Organisation – Members – Status.

### Keywords of the alphabetical index:

Judge, remuneration, rules / Judge, material independence / Justice, independence, guarantees / Judge, material status.

### Headnotes:

Provisions of the Act on the structure of common courts providing for rules of determining judge's remuneration are compatible with the Constitutional order to assure judges' working conditions and remuneration correspond with the dignity of their office and the scope of their duties.

### Summary:

The case was examined before the Tribunal as a result of legal questions introduced by District Courts. The Courts claimed that the rules of remuneration of public officers in particular authorities had been disapplied. The Courts claimed that the Constitution requires not only the remuneration of judges on a level corresponding with their dignity but also prohibits the adoption of any provisions which would lead to incompatibility with that rule.

The Tribunal confirmed that the constitutional provision introducing an order to assure that judges' conditions of work and remuneration corresponded

with the dignity of their office is an appropriate standard for an appraisal of the challenged provisions. However, the constitutional provision does not determine the amount of remuneration of judges and cannot constitute a single ground for claims of judges against the state. In particular, such a provision could not give judges a ground to make a constitutional claim. It should be stated that the provision in question points out a necessary standard which must be respected by the legislature while determining a system for judge's remuneration. There are no doubts that this provision aims to consolidate the position of judicial authority in a system of national authorities, and to guarantee to judges such conditions of work and remuneration which would serve the appropriate execution of justice.

The Tribunal noted that in its earlier judgements it already stated that "material independence of judges was always treated as an element supporting the guarantee of their independence; however there is no absolute dependence between the independence rule and the material status of judges". The "adequacy" of remuneration of a judge has not only a quantitative (expressed in money) but also a qualitative aspect expressed in resolutions emphasising the dignity of the judge, the stability of his office and the independence of his judgements.

#### *Cross-references:*

Decision of 08.11.1994 (P 1/94), *Bulletin* 1994/3 [POL-1994-3-018];  
Decision of 22.03.2000 (P 12/98).

#### *Languages:*

Polish.



#### *Identification:* POL-2000-3-022

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.10.2000 / **e)** P 8/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 6, item 190; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 88, item 988 / **h)** CODICES (Polish).

#### *Keywords of the systematic thesaurus:*

4.10.7.1 Institutions – Public finances – Taxation – Principles.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

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

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

5.4.16 Fundamental Rights – Economic, social and cultural rights – Right to a sufficient standard of living.

#### *Keywords of the alphabetical index:*

Premise, revenue, taxation / Housing, rent, regulated / Fundamental right, nature / Fundamental right, core.

#### *Headnotes:*

The provisions of the Act on a Lease of Premises violated ownership rights and the rules of social justice, because they imposed on a natural person renting premises for a regulated rent duties which led to outlays exceeding the revenues received from the property in which the premises are situated.

#### *Summary:*

A Regional Court applied to the Tribunal. The Court claimed that the challenged provisions imposed on the lessee financial obligations to maintain low-rent regulated properties the cost of which exceeded revenue received from the property. The legislature did not provide any help from the government. Such regulation leads to a limitation of the right to ownership of natural person owning properties covered by provisions of the regulated rent.

The Tribunal noted that the concept of the "nature" of rights and freedoms is based on an assumption that each of them entails a certain core, without which it could not exist. There can be no purpose, even a constitutional purpose, that can justify violating the nature of rights and freedoms protected by the Constitution.

In the Tribunal's opinion a property should, as an element of the economic structure of the country, bring revenue to its owner. Provisions protecting ownership rights indirectly include protection of the material existence of citizens. These are significant guarantees enabling every human being and his family to remain materially independent from the government.

In the Tribunal's opinion, the Constitution does not generally exclude the possibility of imposing public duties on private property which exceed the revenue received from it. But the nature of the ownership right and the prohibition of indirect expropriation limit such a possibility. In the Tribunal's opinion, even in an area of private legal relationships, the legislature may impose some duties on owners. But it is not constitutionally admissible to impose duties that lead to a property only producing loss (resulting from the existence of the regulated rent) yet still obliging the owner to maintain the property in a state which allows third persons to use it.

Additionally, the challenged provisions limit the ownership right as a result of the lack of equivalency of considerations of parties to the lease relationship. Public authorities should bear some responsibilities for the tenants of properties where the regulated rent is still binding and the burden of such responsibilities cannot in whole be transferred to natural persons. Such duties cannot be performed by the owner of a property without any participation by a public authority.

#### *Supplementary information:*

Two dissenting opinions were made to the judgement (Judge A. Maczynski, Judge J. Stepień).

#### *Cross-references:*

Decision of 12.01.2000 (P 11/98), *Bulletin* 2000/1 [POL-2000-1-005];  
 Decision of 12.01.1999 (P 2/98), *Bulletin* 1999/1 [POL-1999-1-002];  
 Decision of 25.05.1999 (SK 9/98), *Bulletin* 1999/2 [POL-1999-2-017];  
 Decision of 26.10.1993 (U 15/92), *Bulletin* 1993/3 [POL-1993-3-015];  
 Decision of 12.10.1993 (K 4/93), *Bulletin* 1993/3 [POL-1993-3-014].

#### *Languages:*

Polish.



#### *Identification:* POL-2000-3-023

a) Poland / b) Constitutional Tribunal / c) / d) 17.10.2000 / e) SK 5/99 / f) / g) *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 88, item 990 / h) CODICES (Polish).

#### *Keywords of the systematic thesaurus:*

3.9 General Principles – Rule of law.  
3.10 General Principles – Certainty of the law.  
3.17 General Principles – General interest.  
5.1.3 Fundamental Rights – General questions – Limits and restrictions.  
5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

#### *Keywords of the alphabetical index:*

Abuse of right / Social existence rules.

#### *Headnotes:*

Article 5 of the Civil Code include provisions that make particular acts or omissions an abuse of law where they are inconsistent with the social existence rules and the socio-economic purpose of the law. This general rule was not found to be incompatible with the rule of law or the constitutional right to a fair hearing.

#### *Summary:*

The Tribunal examined the case as a result of a constitutional claim. The applicant claimed that the provisions in question are too general and therefore do not create enough certainty for entities to predict the court's judgement from the point of view of a material justice. The applicant emphasised that the right to a just examination of a case by the court cannot be understood as only a right to formal justice.

The Tribunal emphasised that the challenged provisions of Article 5 of the Civil Code constitute the so-called general rule, which is of high importance for the whole system of civil law, is historically shaped, and has its equivalents in legal systems of other countries. The main feature of such clauses is that they refer to non-legal provisions. The challenged provisions provide for two criteria justifying recognition of a particular act or omission as an abuse of the law: inconsistency with rules of social existence and the socio-economic purpose of the law.

In the Tribunal's opinion, the right to a fair hearing cannot be understood only as a right to access to a court, to the appropriate court proceedings, and to the court's judgement. All these rights are connected with the expectations of interested parties that the judgement of the court is going to be compatible with the content of the material law.

The Tribunal referred to an earlier judgement where it stated that every legal provision which gives a public authority the right to encroach upon citizens' rights and freedoms must be specific. However, bearing in mind that the general rules refer to non-legal provisions of assessment, the requirement of specificity directed to the general rules must take into account the significant features of such clauses and the necessity of their existence in the legal system.

In the Tribunal's opinion, a breach of the requirement of predictability of the court's judgement as a result of the application of the general rule could take place in three situations. First, if the right of understanding of the general rules would be not only of an objective but also of a subjective nature. Second, if the content of a general rule would not give enough guarantees that an interpretation of a judgement would be uniform and strict. Third, if the content of the clause would give a court law-making rights which would allow it to create a new substance to Article 5 of the Civil Code. In the Tribunal's opinion, with reference to the above-mentioned criteria, it cannot be stated that the challenged provisions constitute a threat to the right to a fair hearing because they exclude the possibility of predicting the court's decision. Additionally, it should be ascertained that the foregoing provisions do not violate the requirement of specification of legal provisions expressed in the constitutional rule of law.

#### *Cross-references:*

Decision of 07.12.1999 (K 6/99), *Bulletin* 2000/1 [POL-2000-1-001];

Decision of 19.06.1992 (U 6/92);

Decision of 07.06.1994 (K 17/93), *Bulletin* 1994/2 [POL-1994-2-009].

#### *Languages:*

Polish.



#### *Identification: POL-2000-3-024*

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.10.2000 / **e)** K 12/2000 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 92, item 1025 / **h)** CODICES (Polish).

#### *Keywords of the systematic thesaurus:*

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

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

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

#### *Keywords of the alphabetical index:*

Employee, discrimination / Work hours, doctor.

#### *Headnotes:*

Provisions of the Act on Health Protection Institutions, which regulate the working hours of doctors in a different way than the Labour Code regulates the working hours of employees are compatible with the constitutional rule of equality.

#### *Summary:*

The Tribunal examined the case as a result of a motion from the National Association of Doctors. They claimed, in particular, that the resolutions concerning the working hours of doctors adopted in the challenged Act were disadvantageous in the light of general rules provided by the Labour Code.

The Tribunal noted that the doctrine of the labour law emphasises that the prohibition of discrimination of employees does not mean an exclusion of the distinction of rights and duties of employees but assumes such a distinction. The Constitution protects against discrimination. However, it cannot be interpreted as prohibiting distinction between regulations concerning various different social-occupational groups, provided that the distinction is subject to discussion in a democratic society.

In the Tribunal's opinion, standards adopted by the Labour Code are not supposed to be treated as creating a constitutional right. The possibility of departing from these standards is dependant on arguments that justify such a departure. The



legislature is granted a broad freedom to regulate social relationships and there is no constitutional requirement that such relationships are subordinated to provisions concerning certain occupations. The different characteristics of medical duty allows for different treatment when it comes to working hours.

#### *Cross-references:*

Decision of 17.05.1999 (P 6/98), *Bulletin* 1999/2 [POL-1999-2-015];

Decision of 03.09.1996 (K 10/96), *Bulletin* 1996/3 [POL-1996-3-013].

#### *Languages:*

Polish.



## Portugal Constitutional Court

### Statistical data

1 September 2000 – 31 December 2000

Total: 212 judgments, of which:

- Abstract *ex post facto* review: 4 judgments
- Appeals: 73 judgments
- Complaints: 125 judgments
- Election of the President of the Republic: 3 judgments
- Electoral disputes: 5 judgments
- Political parties' accounts: 2 judgments

### Important decisions

*Identification:* POR-2000-3-002

a) Portugal / b) Constitutional Court / c) Plenary / d) 04.10.2000 / e) 412/00 / f) / g) *Diário da República* (Official Gazette), 269 (Series II), 21.11.2000, 18871-18881 / h).

*Keywords of the systematic thesaurus:*

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

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

4.7.4.3 Institutions – Courts and tribunals – Organisation – Prosecutors / State counsel.

4.7.9 Institutions – Courts and tribunals – Administrative courts.

5.3.13.12 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Adversarial principle.

*Keywords of the alphabetical index:*

Decision, administrative, enforceable / Citizen, guarantee / Judge, status / Appeal, to the courts / Judicial protection, effective / Decision, administrative, authoritative nature / Appeal, suspensive effect.

*Headnotes:*

The guarantee of access to the courts enshrined in Article 20.1 of the Constitution is intended to secure the defence of legally protected rights and interests. The effectiveness of this guarantee depends heavily on justice being administered within a reasonable time. After the Constitution was revised in 1997, it was agreed that the legislature must organise fast-track court proceedings so that citizens could have effective protection, in good time, against threats to, or violations of, personal rights, freedoms and guarantees.

Suspension of the effect of an administrative decision against which an appeal has been lodged is a preventive procedure that is dependent on the appeal to set aside the administrative decision and takes the form of emergency proceedings. Suspension of the effect of an administrative decision against which an appeal has been lodged is, in some circumstances, essential in order to anticipate the success of the appeal, since in a system of executive administration such as the Portuguese system, an appeal against an administrative decision does not, as a rule, have suspensive effect. This is because the authoritative nature of an administrative decision means that, despite the appeal, the decision can, in principle, be enforced.

Article 268.4 of the Constitution shows clearly that the principle whereby effective court protection is guaranteed in all administrative matters includes an obligation on the legislature to make provision for procedural means which enable the citizen to require the authorities to take the administrative decisions they are supposed to take by law and, if necessary, to request appropriate preventive measures. The principle also provides for the traditional right of appeal against administrative decisions and the right of access to administrative justice for the purpose of upholding legally protected rights or interests. However, Article 268.4 of the Constitution does not prevent the law setting criteria that might limit the courts' scope to suspend the effect of an administrative decision, according, in particular, to whether enforcement of the decision is likely to cause damage that is difficult to redress.

It is the case law of the European Convention on Human Rights (ECHR), in particular, which develops the concept of a "fair hearing". Indeed, the 1997 revision of the Portuguese Constitution was designed to transcribe, in an explicit way, the "right to a fair hearing" as recognised by Article 6 ECHR, by taking into account all the work of the European Court of Human Rights. With the judgment in the case of *Lobo Machado v. Portugal* of 20 February 1996 (*Reports of judgments and decisions* 1996 - I, p. 195 et seq.; *Bulletin* 1996/1 [ECH-1996-1-003]), the European Court of Human Rights established case law according to which the right to a fair hearing encompasses the right to an adversarial trial. This implies, in principle, that the parties involved in a trial, criminal or civil, have the right to inspect and discuss all the information or observations submitted to the judge, even by an independent magistrate, with a view to influencing the decision. This case law was unvaryingly confirmed in subsequent judgments.

Respect for the principle of a fair trial presupposes conditions of objectivity. It is difficult to see how this could be the case where the external members of the judges' bench, whose task is to settle disputes, may take part in the discussion and attend confidential deliberations, at a stage in the proceedings when any intervention appears to have an especially decisive effect because it takes place immediately before the decision is taken.

*Summary:*

The Court ruled on the constitutionality of two provisions of the Law on Proceedings in the Administrative Courts ("the Law"), and also of a provision of the Regulations on Court Judges (which lay down certain special rights for Court Judges).

Regarding the provisions of the Regulations on Court Judges, the Court concluded unanimously that judges' exemption from advances and expenses cannot be regarded as a privilege. It is, rather, a special right, the recognition of which is intended to create conditions of objectivity enabling the judge to carry out the task of handing down a judgment with independence and impartiality. This exemption is therefore valid only for proceedings to which the judge is party by virtue of his/her duties.

Under the first of the provisions in the Law – relating to suspension of the effect of administrative decisions – the decision to suspend the effect of the administrative decision may be taken only if there is a possibility that enforcement of the decision will cause damage which is difficult to redress. The Court ruled that this provision was not unconstitutional, since it does not limit the right of appeal to the courts. It governs only

the exercise of this right in reasonable and proportionate terms and, accordingly, in terms necessary for the protection of the public interest. Moreover, it is not unconstitutional in terms of violation of the judicial guarantee enshrined, since the revision of the constitution in 1997, in Article 268.4 of the Constitution.

On the question of appeal to the courts, although the public prosecutor's office has the right to appeal against any administrative decision, and although there is also a set of measures for ensuring that such decisions are lawful, the challenged provision of the Law is unconstitutional because, in allowing a representative of the public prosecutor's office to attend hearings and speak during discussions, it violates the right to a fair trial enshrined in Article 20.4 of the Constitution.

#### *Supplementary information:*

Bearing in mind the grounds put forward by the European Court and Commission of Human Rights and the clear history of willingness on the part of those who drafted the Portuguese Constitution to follow the example of European case law relating to the promotion of fundamental rights such as the right to judicial protection, the Constitutional Court departed from the case law that predated the 1997 revision of the Constitution.

The Court considered, firstly, that the arguments presented by the French government were not valid in the case in question, because the presence of a government commissioner at the deliberations of the Conseil d'Etat – comparable to the Portuguese *Supremo Tribunal Administrativo* (*Kress v. France* case) – was still compatible with the requirements of a fair trial; and, secondly, that there was no parallel with the Order of 4 February 2000 of the Court of Justice of the European Communities in case C-17/98, regarding the inadmissibility of the written observations submitted by the parties in response to the Advocate General's conclusions.

Although that Judgment, no. 412/2000, relates to the review of the constitutionality of specific provisions, it was examined by the plenary assembly, by a decision of the President of the Court, pursuant to Section 79-A of the law on the Constitutional Court. Several judges delivered divergent or interpretative opinions.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2000-3-003

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 17.10.2000 / **e)** 436/00 / **f)** / **g)** *Diário da República* (Official Gazette), 266 (Series II), 17.11.2000, 18707-18711 / **h)**.

#### *Keywords of the systematic thesaurus:*

##### 3.15 General Principles – Proportionality.

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

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

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

##### 5.3.41 Fundamental Rights – Civil and political rights – Right to self fulfilment.

#### *Keywords of the alphabetical index:*

Casino, right of entry / Gaming room, access, employees / Gambling / Uniform.

#### *Headnotes:*

Gambling is authorised only in establishments specially intended for it – casinos – in specific premises run solely by private entities licensed by the state.

Regulation of access to gambling areas is dictated by ethical, social and financial considerations. It stems from a choice between an absolute ban on gambling on the one hand and, on the other hand, legalisation subject to rigorous regulation so as to ensure that gambling is conducted with probity and that there is some benefit to the public sector. A deliberate effort was therefore made to lay down rules for the protection of interests, which is the reason for prohibiting access by a limited group of employees, namely those who have a professional relationship with the premises in question.

The general freedom of action which the right to express one's personality entails prevents the law from controlling the "private space" in which each individual is his or her own person, and which is the core of the private organisation of his or her life, although not incompatible with restrictions. However,

such restrictions, as well as having to respect the principle of proportionality – thereby defending freedom of action against the substantive principles that seek to limit it – must also be appropriate and necessary and must not become distanced from the objective pursued.

### Summary:

A group of members of parliament requested the Constitutional Court to declare unconstitutional – with general binding force – a series of provisions of the Law on Gambling, particularly those concerning employees who work in gaming rooms. Some provisions limit employees' access to gaming rooms when they are not on duty and another obliges them to be well presented and to wear the uniform approved by the company holding the licence. The uniform may not have any pockets, except for a small pocket sewn on to the outside.

The court's opinion, firstly, is that the statutory restriction on access to gaming rooms does not constitute discrimination, since the measure, far from being unreasonable, can be interpreted either in terms of the guarantee of transparency in gambling, or from the point of view of the professionalism of gaming room employees; and, secondly, that the compulsory work uniform does not conflict with personal autonomy and the freedom to express one's personality, as personal rights recognised under Article 26 of the Constitution. The type of uniform is a requirement or restriction imposed on all casino gaming room employees without discrimination and ensures that there can be no reasonable doubt as to their honesty; on the contrary, it is a means of preventing, eliminating or mitigating in advance any suspicions that might arise. In this way, their honesty, good name and reputation are preserved.

The court therefore took a unanimous and generally binding decision not to declare the rules in question unconstitutional.

### Languages:

Portuguese.



### Identification: POR-2000-3-004

a) Portugal / b) Constitutional Court / c) Plenary / d) 18.10.2000 / e) 437/00 / f) / g) *Diário da República* (Official Gazette), 272 (Series I-A), 24.11.2000, 6712-6713 / h).

### Keywords of the systematic thesaurus:

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

1.6.5.2 Constitutional Justice – Effects – Temporal effect – Limitation on retrospective effect.

3.15 General Principles – Proportionality.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.4.9 Fundamental Rights – Economic, social and cultural rights – Freedom of trade unions.

### Keywords of the alphabetical index:

Trade union, enrolment / Trade union, leaving / Trade union, dues / Admission, discretionary, decision.

### Headnotes:

Freedom to belong to a trade union comprises two dimensions, one positive and the other negative. The positive dimension recognises the right of workers to form and belong to a trade union which may represent them, without obliging them to be dependent on a discretionary decision on admission by the trade union. The negative dimension guarantees the right not to be a member of a trade union and the right to leave a trade union at any time.

As well as essentially entailing protection against discrimination, the freedom not to join a trade union implies indirect restrictions, and has to be interpreted in an extensive way so as to cover direct and indirect obligations, as well as the genuine obligations of union membership and any steps taken to apply pressure which could conflict with the exercise of freedom.

### Summary:

The Ombudsman requested the Constitutional Court to declare unconstitutional, with general binding force, a provision in a legislative decree approved before the current constitution entered into force, which states that a worker has the right at any time to leave the trade union to which he or she is affiliated, by means of a letter addressed to the senior manager. The trade union may, however, demand payment of

dues for the three months following the letter. The Ombudsman considered that this requirement restricted the freedom of workers not to join a union and, once they were union members, to leave the union, that it was not necessary for the constitutional protection of trade unions, and that it was contrary to the principle of proportionality in three respects: appropriateness, necessity and fairness.

Article 55 of the Constitution recognises freedom to form trade unions, which guarantees workers freedom of affiliation, among other freedoms; no worker may be obliged to pay dues to a trade union of which he/she is not a member.

The Court declared the rule in question unconstitutional, on the grounds that the need to fund trade unions and, thereby, the consolidation of trade union activity, is the only possible reason for the situation covered by the rule in question, while freedom of trade unions, in all its dimensions, justifies the protection of trade union activity. To require extraordinary payment of trade union dues is therefore unjustified.

#### *Supplementary information:*

This judgment also ruled that, for reasons of legal certainty, precisely because of the effect that a declaration of unconstitutionality could have on existing trade unions and the normal pursuit of their activities, it would be prudent to limit its effects. Therefore, after declaring, with general binding force, that the rule in question was unconstitutional, the judgment restricted the effects of this unconstitutionality so that they would apply only after publication of the declaration in the official gazette, except with regard to sums which had not been paid or of which payment had in the meantime been contested by the workers.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2000-3-005

a) Portugal / b) Constitutional Court / c) First Chamber / d) 29.11.2000 / e) 520/00 / f) / g) *Diário da República*

(Official Gazette), 26 (Series II), 31.01.2001, 2074-2076 / h).

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – Weighing of interests.

3.21 General Principles – Prohibition of arbitrariness.

4.5.6 Institutions – Legislative bodies – Law-making procedure.

5.2 Fundamental Rights – Equality.

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

#### *Keywords of the alphabetical index:*

Public health, crime / Economic crime / Legislature, discretionary power / Penalty, limit / Judgment, publication.

#### *Headnotes:*

The principle of equality does not prohibit the legislature from adopting different legislative solutions for situations that appear to be identical. It stipulates that things which are essentially equal should be treated in the same way and that things which are essentially different should be treated in different ways. It prohibits only arbitrary legislation, i.e. the adoption of arbitrary or discriminatory legal measures, which are unreasonable and have no material or rational justification.

In the field in question – economic crime, which damages important collective interests and causes a high level of non-pecuniary and material damage – it should be recognised that the publication in newspapers or through legal notices of convictions for crimes against public health doubtless helps to meet the community's expectations as to the validity and enforcement of the rule that has been infringed, and therefore helps to improve the community's awareness of the law and feeling of security.

#### *Summary:*

The obligation to publish judgments which convict a person of committing a crime against public health, and specifically against food authenticity, quality or composition, is neither arbitrary nor discriminatory. Offences of the same type are equal before the law. The level of non-pecuniary and material damage caused by economic crime is very high and such crime damages important collective interests.

In this field, the legislature's freedom may be limited only when the penalty is clearly excessive. Given that the legislation in question is not arbitrary, the ancillary penalty of publication of the sentence is appropriate and necessary.

Since the conviction is announced publicly at the end of a judgment, which is also public, it is difficult to see how publication of the judgment could constitute a violation of the right to privacy. It is a special form of publicity that is being called into question. However, such publicity is legitimate on account of the need to fight this type of crime and is justified constitutionally by the requirement of justice imposed by the principle of the rule of law in this regard.

Concerning the right to a reputation, it is the criminal conduct of accused persons which actually damages that right. Moreover, the publicity of this "dishonour" – which publication of the sentence nonetheless implies – is justified by the need to fight this type of crime.

#### *Supplementary information:*

The judgment confirms the Court's case law, which found that another provision in the same legislative sphere – which defines, in identical terms, the economic crime of fraud relating to subsidies – was unconstitutional.

#### *Languages:*

Portuguese.



## Romania Constitutional Court

### Important decisions

*Identification:* ROM-2000-3-013

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 25.01.2000 / **e)** 15/2000 / **f)** Decision on the objection challenging the constitutionality of government emergency Order no. 23/1999 repealing Act no. 31/1996 on the state monopoly system / **g)** *Monitorul Oficial al României* (Official Gazette), 276/14.06.2000 / **h)** CODICES (Romanian).

*Keywords of the systematic thesaurus:*

**3.17 General Principles** – General interest.

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

**4.6.3.1 Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.

**4.6.7 Institutions** – Executive bodies – Relations with the legislative bodies.

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

*Keywords of the alphabetical index:*

Government, emergency order / Organic law, scope / Exceptional case / Organic law, repeal.

*Headnotes:*

In exceptional circumstances which must be justified on a case-by-case basis, the government may issue emergency orders, subject to certain restrictions, in fields governed by organic laws.

*Summary:*

By interlocutory decision of 22 July 1999, the Constitutional Court was asked to rule on an objection challenging the constitutionality of the provisions of government emergency Order no. 23/1999 repealing Act no. 31/1996 on the state monopoly system.

It was alleged that emergency Order no. 23/1999, repealing an institutional Act, breached Article 114 of the Constitution on two grounds: the government's

right to pass regulations in fields governed by institutional Acts and the absence, at the time the order was issued, of exceptional circumstances necessitating the repeal of an institutional Act by an emergency order of this nature.

With regard to the first ground, concerning the government's right to pass regulations in fields governed by institutional Acts, the Court found that an emergency order was a prescriptive instrument adopted by the government in accordance with a constitutional provision, empowering it to resolve exceptional situations, subject to strict parliamentary supervision.

The executive's right to exercise authority by means of emergency orders must be justified in each case by the existence of exceptional circumstances making it necessary to pass emergency regulations.

The exceptional circumstances governing the constitutional legitimacy of issuing emergency orders are defined in relation to the necessity and urgency of tackling a situation whose exceptional nature means that immediate measures must be taken if a serious danger to the public is to be averted.

In the instant case, after examining the government's submissions, the explanatory memorandum from the Ministry of Finance and the other documents in the case-file, the Court held that the grounds advanced did not warrant the issue of an emergency order repealing an institutional Act, in particular the State Monopoly Act. There were no factors constituting exceptional circumstances; in other words, there was no evidence of a major public danger that could only be averted by issuing an emergency order.

The Court consequently upheld the objection and declared government emergency Order no. 23/1999 unconstitutional.

#### *Supplementary information:*

The decision was adopted by majority vote.

#### *Cross-references:*

Previous decisions on the government's issuing of emergency orders and on exceptional cases: Decision no. 4 of 17.02.1998, published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 88 of 25.02.1998, and Decision no. 5 of 20.06.1995, published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 129 of 28.06.1995.

#### *Languages:*

Romanian.



#### *Identification:* ROM-2000-3-014

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 24.02.2000 / **e)** 32/2000 / **f)** Decision on the objection challenging the constitutionality of Article 361.2 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 222/19.05.2000 / **h)** CODICES (Romanian).

#### *Keywords of the systematic thesaurus:*

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

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

#### *Keywords of the alphabetical index:*

Decision, first instance, appeal / Defence counsel, officially assigned.

#### *Headnotes:*

Article 361.2 of the Code of Criminal Procedure, which provides for the possibility of appealing against first-instance interlocutory decisions, but only to the trial courts on the merits of the case rather than as a separate appeal to a higher court, makes for more effective administration of justice and prevents delays and hindrances to the conduct of criminal proceedings.

#### *Summary:*

By interlocutory decision of 28 October 1999, the Orăştie Court asked the Constitutional Court to rule on an objection challenging the constitutionality of the provisions of Article 361.2 of the Code of Criminal Procedure.

It was alleged that these provisions infringed the Constitution in that first-instance decisions could not be appealed against separately to a higher court, but only to the trial courts on the merits; this breached the rights of the defence, as enshrined in Article 24 of the Constitution, and the right to a fair trial, as enshrined in Article 6.1 ECHR.

The Court found that the provisions of Article 361.2 of the Code of Criminal Procedure did not hinder the accused's right to the services of a lawyer or, in accordance with the law, to officially assigned defence counsel. It does not even appear that the person lodging the objection was prevented from hiring a lawyer or arguing the case.

Nor was it possible, for the same reasons, to maintain that there was a breach of Article 6.1 ECHR.

On the contrary, Article 361.2 of the Code of Criminal Procedure is compatible with Article 6.1 ECHR in that it ensures the necessary conditions for settling cases within a reasonable time and with due regard to the other requirements of the Convention provision.

#### *Languages:*

Romanian.



#### *Identification:* ROM-2000-3-015

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 14.03.2000 / **e)** 45/2000 / **f)** Decision on the objection challenging the constitutionality of Articles 2 and 362 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 370/09.08.2000 / **h)** CODICES (Romanian).

#### *Keywords of the systematic thesaurus:*

2.1.1.2 Sources of Constitutional Law – Categories – Written rules – Foreign rules.

3.12 General Principles – Legality.

4.7.4.3 Institutions – Courts and tribunals – Organisation – Prosecutors / State counsel.

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

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

#### 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

#### *Keywords of the alphabetical index:*

Case, criminal aspect / Sentence, criminal case, first instance, appeal / Jurisdiction, decision, challenge / Prosecutor's office, role.

#### *Headnotes:*

The principle of legality is the fundamental rule of criminal proceedings, and ensures that anyone who has committed an offence will be punished according to his or her degree of guilt and that no innocent person may be held responsible for a criminal offence.

The principle of the official nature of proceedings means that when offences are committed, criminal proceedings are initiated and conducted *ex officio* by the state prosecution service, except where the law provides otherwise. The purpose of prosecuting, trying and punishing offenders *ex officio* is to ensure maximum effectiveness in protecting society and its interests.

#### *Summary:*

By interlocutory decision of 18 June 1999, the Constantza Court of Appeal (Criminal Division) asked the Constitutional Court to rule on an objection challenging the constitutionality of Article 362 of the Code of Criminal Procedure.

It was alleged that the provisions in issue infringed Article 21 of the Constitution, on freedom of access to the courts, and Article 22.1 of the Constitution, which safeguards the right to life and to protection from physical and mental injury, because they failed to afford parties claiming damages in criminal proceedings the right to challenge decisions by the Criminal Court in cases where the proceedings had been initiated by the state prosecution service.

The Court found that Article 2 of the Code of Criminal Procedure, which lays down the principles of the lawfulness and official nature of criminal proceedings, was consistent with Article 123 of the Constitution, which provides that justice is delivered in the name of the law, Article 21 of the Constitution, on freedom of access to the courts, and with Article 125.3 of the Constitution, which provides that the courts' jurisdiction and procedure are specified by law.



Regarding Article 362 of the Code of Criminal Procedure, under which appeals against first-instance decisions in criminal proceedings initiated by the injured party may be lodged by that party (albeit only in respect of the criminal aspects of the case) and by the party claiming damages or the party held liable (albeit only in respect of the civil aspects of the case), the Court found that the inability of parties claiming damages to appeal against decisions concerning criminal aspects of cases did not constitute a restriction on their access to the courts. Indeed, under Article 130 of the Constitution, on the role of the state prosecution service, the task of bringing criminal proceedings rests with public prosecutors as representatives of the interests of society.

At the same time, a court examining an appeal by a party claiming damages may find that the accused was wrongfully acquitted, but this finding can only affect the claim for damages, as acquittal represents the final decision in criminal proceedings.

The Court further held that appeals by parties claiming damages may also contest criminal aspects of the decision in question if the settlement of the claim is dependent on the judgment issued in respect of these aspects.

The Court noted that the reasons why parties claiming damages in criminal proceedings were unable to appeal in respect of criminal aspects were also delineated in legislation in other countries, such as Belgium, Germany and Italy.

#### *Languages:*

Romanian.



*Identification:* ROM-2000-3-016

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 16.03.2000 / **e)** 48/2000 / **f)** Decision on the objection challenging the constitutionality of the final sentence of Article 177.8 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 242/01.06.2000 / **h)** CODICES (Romanian).

#### *Keywords of the systematic thesaurus:*

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.

2.1.1.1.1 Sources of Constitutional Law – Categories – Written rules – National rules – Constitution.

2.1.1.4.5 Sources of Constitutional Law – Categories – Written rules – International instruments – European Social Charter of 1961.

2.1.3.1 Sources of Constitutional Law – Categories – Case-law – Domestic case-law.

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – Nationals living abroad.

5.2.2 Fundamental Rights – Equality – Criteria of distinction.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

#### *Keywords of the alphabetical index:*

Discriminatory treatment / Citizen, residence abroad / Summons, procedure, trial court / Summons, issue, rules.

#### *Headnotes:*

The principle that all citizens are equal before the law and the public authorities, without any privilege or discrimination, (Article 16.1 and 16.2 of the Constitution) does not rule out, but rather presupposes, the possibility of different solutions for differing situations.

This also follows from Article E, part V of the Appendix to the European Social Charter (Revised), adopted in Strasbourg on 3 May 1996.

When a summons is issued by registered letter to a person residing abroad who is charged with a criminal offence (Article 177.8 of the Code of Criminal Procedure), it is assumed that the summons will be delivered in person to the addressee, who will consequently take note thereof.

#### *Summary:*

By interlocutory decision of 13 December 1998, the Bucharest Court (Second Criminal Division) asked the Constitutional Court to rule on an objection challenging the constitutionality of the final sentence of Article 177.8 of the Code of Criminal Procedure.

It was alleged that these provisions, whereby summonses are issued by registered letter to persons

residing abroad who are charged with a criminal offence and the slip acknowledging receipt of the letter acts as proof of service, created an unacceptable form of discrimination, on the ground of residence, between persons living in the country and those residing abroad. For persons living in the country, the document certifying that the summons has been delivered is required as proof of service, whereas for those residing abroad, the slip acknowledging receipt of the letter sent by registered post containing the summons is sufficient. It was also argued that the provision failed to comply with the necessary procedural safeguards protecting the rights of the defence.

Accordingly, it was alleged that there was a breach of Article 16.1 and 16.2 of the Constitution, on citizens' equal rights, and Article 24.1 of the Constitution, safeguarding the rights of the defence.

Referring to its own case-law and to Article E of the European Social Charter (Revised), the Court held that the provision in issue did not discriminate between citizens in terms of the law.

The principle of equality before the law implies that situations that are no different in terms of the aims pursued should be treated equally. However, the situation of persons residing abroad is fundamentally different from that of persons living in the country itself. This serves as an objective justification for using different procedures. Objective grounds for this include the fact that national legislation cannot impose obligations on individuals within the jurisdiction of other states. There are also objective differences in terms of communication facilities and mobility.

Even for persons living in the country, procedural rules provide for a large number of exceptions to the general rule that summonses are delivered directly and in person.

Such exceptions do not amount to discrimination, but represent different ways of serving summonses, having regard to the objective differences in the situations of those being summonsed.

Interested parties, or the trial court concerned, may object that the procedure for serving the summons was flawed; however, these aspects are not constitutional issues.

The Court held that the rights of the defence (Article 24.1 of the Constitution) were not infringed because it could be inferred from standard mail-delivery arrangements that if the summons was issued by registered post, it would be handed over to

the addressee in person. It was therefore entirely possible for addressees to ascertain that they had been summoned to appear in specified proceedings before a particular court within a set period of time.

#### *Supplementary information:*

The European Social Charter (Revised), adopted in Strasbourg on 03.05.1996, was ratified by Romania through Act no. 74/1999.

#### *Cross-references:*

With regard to the principle of equal rights for all citizens before the law and the public authorities: Decision no. 1 of 08.02.1994, issued by the Plenary Assembly of the Constitutional Court, published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 69 of 16.02.1994, and Decision no. 6 of 24.01.1996, published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 23 of 31.01.1996.

#### *Languages:*

Romanian.



#### *Identification: ROM-2000-3-017*

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 06.07.2000 / **e)** 134/2000 / **f)** Decision on the objection challenging the constitutionality of Article 207 of the Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 393/23.07.2000 / **h)** CODICES (Romanian).

#### *Keywords of the systematic thesaurus:*

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

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

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

5.3.13.21 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

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

*Keywords of the alphabetical index:*

Criminal proceedings, accused, defendant / Evidence, truth / Legitimate interest / Defamation.

*Headnotes:*

Article 207 of the Criminal Code, on evidence of the truth, affords the accused the opportunity to prove the truth of statements or allegations he or she has made about a particular person. In such cases, the statement is not treated as a criminal offence, in view of the absence of danger to society, if, exceptionally, it was made in order to protect a legitimate interest.

The existence of a legitimate interest must be established by the trial courts in each criminal case.

The fact that the admissibility of the evidence of the truth of what was stated or alleged is contingent on the existence of a legitimate interest does not contravene the presumption of innocence (Article 23.8 of the Constitution) or the rights of the defence, as enshrined in Article 24.1 of the Constitution.

*Summary:*

It was alleged that the provisions in issue breached Articles 23.8 and 24.1 of the Constitution.

The Constitutional Court held that Article 207 of the Criminal Code, on evidence of the truth, did not govern the establishment of guilt where offences of insult and defamation were concerned. On the contrary, it is for the prosecution to establish the existence of all the possible ingredients of a criminal offence, guilt being one of them. Those accused of such offences are entitled to dispute the factual and legal basis of the prosecution, including their guilt, throughout the proceedings and by all evidential means permitted by law. Until criminal responsibility for an offence is established by means of a final court decision, the accused is presumed innocent.

In accordance with Article 30.6 of the Constitution and Article 10.2 ECHR, the Court held that in some cases, protecting citizens' rights and freedoms meant imposing criminal sanctions when statements and allegations, even if true, were not made in order to protect a legitimate interest.

In view of the foregoing, it is also worth referring to the case-law of the European Court of Human Rights regarding the media's freedom of expression.

On similar grounds, and because anyone accused of the offences of insult or defamation is entitled, in his or her defence, to refute the accusation using any evidential means permitted by law, including court appeals, the Court held that there had been no violation of the rights of the defence.

*Cross-references:*

Regarding the media's freedom of expression, see the judgments of the European Court of Human Rights in the cases of *Bladet Tromsø and Stensaas v. Norway* (1999), *Lingens v. Austria* (1986), *Special Bulletin ECHR* [ECHR-1986-5-003], and *I. Dalban v. Romania* (1999), published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 277 of 20.06.2000.

*Languages:*

Romanian.



## Russia Constitutional Court

Summaries of important decisions of the reference period 1 September 2000 – 31 December 2000 will be published in the next edition, *Bulletin* 2001/1.



## Slovakia Constitutional Court

### Statistical data

1 September 2000 – 31 December 2000

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 1
- Decisions on the merits by the panels of the Court: 19
- Number of other decisions by the plenum: 4
- Number of other decisions by the panels: 61
- Total number of cases submitted to the Court: 191

### Important decisions

*Identification:* SVK-2000-3-005

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 12.09.2000 / **e)** II.ÚS 7/00 / **f)** / **g)** to be published in *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

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

3.16 General Principles – Weighing of interests.

4.7.8 Institutions – Courts and tribunals – Ordinary courts.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Public hearings.

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

*Keywords of the alphabetical index:*

Hearing public, tape recordings / Proceedings, purpose, fulfilment.

*Headnotes:*

A participant in civil proceedings has the right to make a sound recording of an open oral hearing without the prior consent of the court.

*Summary:*

The applicant was a participant in civil proceedings before a District Court. He recorded the proceedings on a tape recorder during the open hearing. Upon discovering this fact the presiding judge called on him not to record the proceedings without the consent of the court and instructed him to turn off the tape recorder.

The applicant filed a motion (petition) at the Constitutional Court seeking a pronouncement that his fundamental right to information, as guaranteed in Article 26.1 and 26.2 of the Constitution and in Article 10.1 ECHR was infringed through the procedure of the court of first instance.

After accepting the petition, the Constitutional Court found that within Article 26 of the Constitution there are two groups of conduct and activities. First, those which require permission, which is a necessary condition for their exercise, e.g. "enterprise in the field of broadcasting and television may be liable to permission from the state". Second, those which may be performed without permission from any state authority. Supposing that there occur such circumstances as are mentioned in Article 26.4 of the Constitution they may however be restricted by law (if the restrictions are necessary in a democratic society for the protection of rights and freedoms of others, national security, public order, and the protection of public health and morals).

Concerning this case, the laws defining the right to information in connection with the possibility and means of obtaining it are the Code of Civil Procedure (§§ 116.2 and 117.1) and the Law on Courts and Judges.

According to the legal opinion of the Constitutional Court, the Code of Civil Procedure establishes the boundaries of judicial decision-making on measures needed for controlling the behaviour of people present at proceedings, on the conduct of proceedings with regard to their dignified and uninterrupted

course, as well as on the appropriateness of measures for ensuring the fulfilment of the purpose of proceedings.

If the application of these measures could lead as a consequence to an infringement of the right guaranteed in Article 26.2 of the Constitution the judge is restricted by some of the purposes enumerated in Article 26.4 of the Constitution. The measures objected to in this case were assessed by the Constitutional Court as those stipulated by law for the protection of public order and for the protection of the rights and freedoms of others. In conformity with the Constitution, the right to information according to Article 26.1 and 26.2 of the Constitution may only be restricted and not excluded by such measures.

The Constitution does not include any restriction on the acquisition of information concerning the activity of the authorities of the Republic or the activity of the authorities of judicial power. The applicant was in the position of a participant in civil proceedings which, on the one hand, forms a generally accessible information source for the public and, on the other, represents a special source of information for each participant in the proceedings. Constitutional and legal guarantees of the right to information derive from the status of a participant in civil proceedings. Apart from the constitutional law which guarantees every person the right to acquire and search for information in the sense of Article 26.1 and 26.2 of the Constitution, a participant in legal proceedings also has the legal right to search for information (e.g. the right to look in the court records) or to be informed (the right to be supplied with court documentation).

Neither the Constitution nor the legal regulation specify the ways in which a participant in proceedings may acquire information. They leave it to the discretion of each participant to decide how to apply the right to acquire information (whether he/she will make notes, memorise it or make use of devices intended for making sound recordings).

In this case, the single judge pronounced her finding that the applicant was recording the proceedings without the consent of the court and combined it directly with a demand to turn off the tape recorder. The judge made the consent of the court the condition for exercising the freedom to acquire information by making use of a device intended for making sound recordings.

A prohibition which may be lifted subject to the granting of permission may only be applied in situations where, on the basis of law, a certain right may be made available as and when a state authority gives prior permission for its exercise. The single

judge assumed she could make such a prohibition with regard to her powers resulting from particular provisions of the Law on Courts and Judges.

The provision of this Law, however, concerns the use of video technology, and in the field of audio technology it concerns only long-distance transmission (broadcasting, television) but not tape recordings, unless they are simultaneously reproduced over a distance.

Whereas the Law on Courts and Judges does not require the consent of the presiding judge (single judge) for making a sound recording (as distinct from making a video recording or picture and sound broadcast) and nor does any other legal regulation, the Court expressed the opinion that the powers of the presiding judge include only that of adopting the "appropriate measures" of the relevant provision of the Code of Civil Procedure.

On the basis of the observed facts, the Constitutional Court found that the single judge's instruction not to record the course of the proceedings without her consent, combined with the requirement to turn off the tape recorder, amounted to a prohibition which could be lifted if permission was granted. This exceeded the possibility of restricting the fundamental right to acquire information as stipulated by law. It is neither an appropriate nor a commensurate measure according to the Code of Civil Procedure or the Law on Courts and Judges. In this way the procedure of the District Court at the open hearing led to an infringement of the applicant's fundamental right according to Article 26.1 and 26.2 of the Constitution.

The Constitutional Court also found an infringement of the applicant's right to acquire information according to Article 10 ECHR. The infringement was caused by the fact that the court required that permission be granted in order to exercise rights that do not require permission according to Article 10 ECHR (although their exercise may be restricted under specific circumstances).

#### *Languages:*

Slovak.



#### *Identification: SVK-2000-3-006*

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 15.11.2000 / **e)** II.ÚS 56/00 / **f)** / **g)** to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

#### *Keywords of the systematic thesaurus:*

1.4.4 Constitutional Justice – Procedure – Exhaustion of remedies.

4.6.9.1.1 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – National or ethnic origin.

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

5.3.43 Fundamental Rights – Civil and political rights – Protection of minorities and persons belonging to minorities.

5.4.18 Fundamental Rights – Economic, social and cultural rights – Right to culture.

#### *Keywords of the alphabetical index:*

Minority, cultural activity / Cultural institution, participation.

#### *Headnotes:*

Any restriction on an ethnic minority member's right to pursue cultural activities in his/her mother language involving a scope or intensity which does not respect the spirit and essence of the right may constitute a breach of it.

#### *Summary:*

The petitioner, a member of the Hungarian ethnic minority in Slovakia, was dismissed from the position of mixed choir conductor as a result of a Local Council resolution in the village T., and thereafter he was prevented from attending the choir rehearsals as a regular singing member.

The petitioner applied to the Constitutional Court claiming that the action by the Local Council led to a breach of his fundamental rights as defined in Articles 34.1, 43.1 and 43.2 of the Constitution. These provisions *inter alia* guarantee to citizens forming ethnic minorities or other ethnic groups in the Slovak Republic the right to comprehensive personal development, particularly the right to evolve their own culture or artistic freedom along with other ethnic minority and group members.

The Constitutional Court assumed jurisdiction after finding that the general courts cannot provide any protection to the petitioner against the breach of his fundamental rights pursuant to Articles 34.1, 43.1 and 43.2 of the Constitution.

The Constitutional Court established that when the Local Council took its decision to restrict the petitioner's access to cultural activities, it did so in accordance with Articles 65 and 67 of the Constitution, as a body entitled to act autonomously and in the manner stipulated by the Law on Communal Administration and Common Property.

When implementing its self-government functions pursuant to the cited law, a Local Council *inter alia* creates conditions for education, culture, artistic club activities, physical training and sport. The above provision permits a Council as an autonomous legal entity to perform such functions using the resources of their own choice and in the time and scope that correspond with community policy as constituted by its bodies and inhabitants.

The Constitutional Court subsequently examined whether the Local Council had restricted the petitioner's cultural activities in such a manner and to such an extent that it might be a breach of his fundamental rights and freedoms. In particular, the Court examined decisions regarding the utilisation of the Local Council's property, the access of citizens (the petitioner) to that property and to what extent the petitioner's cultural activities might be subsidised from the Local Council's resources.

The Court established that while the Local Council's decision and its officials' subsequent actions might have denied the petitioner the opportunity to perform in the local choir and thus partially restricted his ability to pursue cultural activities in his mother tongue, the extent and nature of this restriction may not be considered as entailing a breach of the stated fundamental rights, since their spirit and essence were still respected. The violation of fundamental rights and freedoms under Articles 34.1 and 43 of the Constitution assumes such an intensity of interference that the citizen might pursue his/her cultural activities as a consequence under considerably more difficult and restricted terms.

The petitioner has no right in law to perform in a choir subsidised by the Local Council, and his engagement in other national or cultural institutions is not limited. The Constitutional Court did not find that the action undertaken by the Council was motivated by nationalism. For these reasons the Court did not grant the petitioner's claim.

*Languages:*

Slovak.



# Slovenia

## Constitutional Court

### Statistical data

1 September 2000 – 31 December 2000

The Constitutional Court held 21 sessions (13 plenary and 8 in chambers). There were 404 unresolved constitutional cases (denoted U- in the Constitutional Court Register) and 471 unresolved human rights cases (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 September 2000). The Constitutional Court accepted 80 new U- and 144 new Up- cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 92 constitutional cases (U-), in which the Plenary Court made:
  - 25 decisions and
  - 67 rulings;
- 16 cases (U-) joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 108.

In the same period, the Constitutional Court resolved 169 (Up-) human rights cases (13 decisions issued by the Plenary Court, 156 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, all decisions and rulings are published and submitted to users:

- in an official annual collection (Slovenian full text versions, including dissenting / concurring opinions, and English abstracts);
- in the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting / concurring opinions);

- since 1 January 1987 via the on-line STAIRS database (Slovenian and English full text versions);
- since June 1999 on CD-ROM (complete Slovenian full text versions from 1990 to 1998, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act, Rules of Procedure of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms – Slovenian translation);
- since September 1998 in the database and/or Bulletin of the Association of Constitutional Courts using the French language (A.C.C.P.U.F.);
- since August 1995 on the Internet (full text versions, including dissenting/concurring opinions, from 1991 to 2000, in Slovenian as well as in English: <<http://www.sigov.si/us/>> or <<http://www.us-rs.si>> or <<http://www.us-rs.com>>);
- in the CODICES database of the Venice Commission.

### Important decisions

*Identification:* SLO-2000-3-003

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 28.09.2000 / **e)** U-I-200/00 / **f)** / **g)** *Uradni list RS* (Official Gazette), 94/2000; *Odločbe in sklepi ustavnega sodišča* (Official Digest), IX, 2000 / **h)** *Pravna praksa, Ljubljana, Slovenija* (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

**3.12 General Principles – Legality.**

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

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

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

*Keywords of the alphabetical index:*

Law, rights, determination, executive regulations, statutory authority / Time-limit, element of right / Time-limit, right, condition.



### Headnotes:

Pursuant to Article 120.2 of the Constitution, administrative bodies have limited powers to issue regulations. For a regulation to be issued there needs to be a substantive basis (though not explicit authority) for it in statute. The principle of the separation of powers (Article 3.2 of the Constitution) prevents administrative bodies amending or independently regulating subject matters that fall to be regulated by statute. Thus, laws cannot authorise executive regulations with provisions that have no basis in statute; in particular, administrative bodies must not independently determine rights and obligations. The powers laid down in Article 30 of the Temporary Refuge Act providing for the Government to determine by decree which citizens of Bosnia and Herzegovina may be granted the right of temporary refuge transfers to the Government the complete regulation of the temporary refuge right of citizens of Bosnia and Herzegovina who have already been provided temporary refuge in Slovenia. The Constitutional Court thus annulled this part of the Act. Furthermore, it annulled *ab initio* the executive act (Decree) issued on the basis of the impugned provisions.

### Summary:

Article 30 of the Temporary Refuge Act ("the Act"), which provides that the Government may decide by a decree which citizens of Bosnia and Herzegovina may acquire the right of temporary refuge, transfers to the Government the authority to regulate in its entirety the right of citizens of Bosnia and Herzegovina who have already enjoyed temporary refuge. The authority vested in the Government to determine by a decree which citizens of Bosnia and Herzegovina may be granted the right of temporary refuge is absolute. The Act regulated in detail the procedure for granting the right of temporary refuge, the persons who may be granted it and the resulting rights and duties. However it left entirely to the executive branch the granting of the same right to citizens of Bosnia and Herzegovina who had already been in Slovenia. The statute should have determined which citizens of Bosnia and Herzegovina registered with the Slovenian Red Cross because of the conditions in Bosnia and Herzegovina may be granted the right of temporary refuge on the basis of the Act, and under what conditions.

The Government determined by the Decree on the Provision of Temporary Refuge to citizens of Bosnia and Herzegovina (Official Gazette RS, nos. 41/97 and 31/98) which citizens of Bosnia and Herzegovina who already enjoyed the right of temporary refuge may be granted the right of temporary refuge under statute.

Article 3.2 and 3.3 of the Decree did not even determine the conditions that citizens of Bosnia and Herzegovina had to fulfil in order to be provided temporary refuge, but referred to individual government orders and positions adopted prior to the coming into force of the Act, which were not published in the Official Gazette. Furthermore, the Decree determined time-limits in which citizens of Bosnia and Herzegovina were to make their status conform with the new Act if they wanted to be granted the right of temporary refuge, although no provision for time-limits was made in the Act. A time-limit for the exercise of a certain right is part of the right itself, or a condition for its acquisition. The expiration of the time-limit determined for the exercise of a certain right results in the loss of that right. For this reason the complainants were denied their requests for the recognition of temporary refuge. Therefore, due to the expiration of the time-limit, their right of temporary refuge was not recognised.

The powers granted to the Government under Article 30 of the Act provided for the Decree to create a special right of temporary refuge for citizens of Bosnia and Herzegovina. This also follows from the amended Decree which in Article 16.1 expressly mentioned persons "who are entitled to temporary refuge in accordance with this Decree". The Decree provisions which determined which citizens of Bosnia and Herzegovina may be granted the right of temporary refuge and the conditions for its acquisition (Articles 1 to 5 of the Decree), the provisions of Article 6.1 in the part determining the time-limit for filing a request for temporary refuge, as well as the provisions of Articles 7, 8 and 9 which determined mandatory attachments to an application for the obtaining of temporary refuge (a valid temporary refugee card, a valid passport and the opinion of Office of the High Representative), are not in conformity with the Act. They determined independently of the Act which citizens of Bosnia and Herzegovina may be granted the right of temporary refuge and what the conditions were for the right. Therefore, pursuant to the powers granted under Article 30 of the Act, the Decree may have determined, completely independently from the Act for the implementation of which it had been adopted, the rights and duties of citizens of Bosnia and Herzegovina. Thus, this part of the powers granted is not in conformity with Articles 3.2 and 120.2 of the Constitution.

Furthermore, that part of Article 30 of the Act which vests in the Government the authority to determine the "type of procedure" according to which citizens of Bosnia and Herzegovina may be provided temporary refuge is also inconsistent with Articles 3.2 and 120.2 of the Constitution. The Act already regulated a

procedure by which requests for the granting of the right of temporary refuge are considered. Article 9 of the same Act provides that: "Procedures according to this Act shall be conducted following General Administrative Act provisions (Official Gazette RS, no. 80/99)." If the legislature opined that certain exemptions from the General Administrative Act were to apply to the procedure for the granting of this right, it should have determined this in the Act itself.

The authority vested in the Government to determine by a decree the period of time for which citizens of Bosnia and Herzegovina were granted the right of temporary refuge is also not in conformity with the Constitution. The duration of a certain right is part of that right. If the legislature intended to regulate the duration of the right of temporary refuge of citizens of Bosnia and Herzegovina in a different way, it should have done this by statute. The right of temporary refuge is, pursuant to the Act, not acquired for a definite time since it is impossible to predict when the circumstances having justified it cease to exist. Therefore, Article 5 of the Act determines the cessation of the circumstances which led to the providing of temporary refuge as the first reason for which such refuge terminates. If the circumstances having justified temporary refugee status cease to exist, the Government determines a time-limit within which such persons must leave the country, and the Office is obliged to organise their return home (Article 26 of the Act).

Temporary refuge may be terminated for other reasons, in particular because a refugee has acquired a different status in Slovenia or a third country. Such status may also be revoked; this is provided for in Article 6 of the Act. If the legislature intended to provide additional reasons for the termination of the temporary refuge of citizens of Bosnia and Herzegovina, it should have done this itself. A decree, as an executive regulation, can only provide for the termination of the temporary refuge status of citizens of Bosnia and Herzegovina in the framework of the reasons laid down by law. For these reasons, the Constitutional Court held that the power provided for in Article 30 of the Act was completely inconsistent with the Constitution and annulled this Article.

#### *Supplementary information:*

Legal norms referred to:

- Articles 3.2, 48, 87, 120.2 of the Constitution;
- Articles 40.2, 43, 45.2 of the Constitutional Court Act (ZUstS).

#### *Cross-references:*

In the reasoning of its Decision the Constitutional Court refers to its case no. U-I-58/98 of 14.01.1999, Official Gazette RS, no. 7/99 – DecCC VIII,2.

#### *Languages:*

Slovenian, English (translation by the Court).



# South Africa

## Constitutional Court

### Important decisions

*Identification:* RSA-2000-3-012

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 27.09.2000 / **e)** CCT 23/2000, CCT 34/2000 / **f)** The State v. Dzukuda and Others, The State v. Tshilo / **g)** 2000 (4) *South African Law Reports* (Official Gazette) 1078 (CC) / **h)** 2000 (11) *Butterworths Constitutional Law Reports* 1252 (CC); CODICES (English).

*Keywords of the systematic thesaurus:*

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

3.16 General Principles – Weighing of interests.

4.7.2 Institutions – Courts and tribunals – Procedure.

5.3.13 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial.

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

5.3.14 Fundamental Rights – Civil and political rights – *Ne bis in idem*.

*Keywords of the alphabetical index:*

Criminal procedure / Sentence, imposition by another court.

*Headnotes:*

A law that allows a “split procedure”, in terms of which an accused is convicted by a lower Court and sentenced by a higher Court, does not violate the accused person’s right to a fair trial and is, therefore, constitutionally valid.

*Summary:*

Criminal trials comprise separate stages for the conviction and sentencing of an accused. The

sentencing stage usually occurs immediately upon conviction and before the same judicial officer. Section 52 of the Criminal Law Amendment Act 105 of 1997 (the Act), however, introduces a “split procedure” in terms of which lower courts must, after convicting accused of certain serious crimes, refer the cases to a High Court for the imposition of a punishment beyond the usual sentencing jurisdiction of the lower Court.

The accused in this case were separately convicted in lower courts of raping girls under the age of 16, a crime which carries a mandatory life sentence. These courts do not, however, possess the sentencing jurisdiction to impose life sentences. The presiding magistrates accordingly invoked the mechanism in Section 52 of the Act and referred the cases to the High Court for the imposition of sentence. That Court, however, held that the split procedure unjustifiably violated several aspects of the accused persons’ right to a fair trial (Section 35.3 of the Constitution) and was, accordingly, invalid. The order of unconstitutionality was referred to the Constitutional Court for confirmation (Section 172.2.a of the Constitution).

Justice Ackermann, writing for a unanimous Court, held that the right to a fair trial is a comprehensive and integrated right, comprising several specified and unspecified elements which collectively aim at ensuring fairness. As such, the right did not dictate any form of proceeding, as long as it complied with the norm of fairness. The Court did not consider it prudent to give a full exposition of fairness, which is bound to the broad and protean notion of justice and is founded on other values such as dignity, freedom and equality.

Three arguments were presented to the Court for consideration. First, it was argued that the fragmentation of the trial was not “ideal” as the sentencing Court was faced with a “bare record” of the conviction proceedings and, as such, was not steeped in the atmosphere of the trial. The Court, however, pointed out that the test was not whether the proceedings were ideal, but whether they were fair. The “split procedure” was fair since Section 52 of the Act allowed the sentencing Court to call for further evidence to ensure that it had all the material evidence needed to properly impose a sentence. As a result, the sentencing Court could place itself in a position similar to that of the convicting Court so as to determine both the factual background of the crime, as well as the appropriate sentence. The atmosphere in the convicting Court added nothing of relevance. In fact, in most cases, a conviction follows a rejection of the evidence and a credibility finding against an accused.

Secondly, it was argued that allowing the sentencing Court to hear evidence may amount to a violation of an accused person's right against double jeopardy (Section 35.3.m of the Constitution). The Court dismissed the argument that double jeopardy could apply before a trial was completed. The argument also pointed to other unfair consequences to an accused of allowing this evidence, such as the continued trauma of the trial, the stress of being examined and cross-examined again, and the danger that fatal inadequacies in the conviction by the lower Court could be "perfected" by this evidence. The Court referred to its well established jurisprudence that legislation should be read to accord with fundamental values wherever possible. In this case this would mean that the sentencing court should only admit further evidence if it does not violate any of the accused person's rights. The protection of these rights does not depend on an accused getting a good judge. All judges are expected to apply the law properly. If judges fail, an accused may appeal to a higher Court.

Finally, it was argued that the split procedure would cause unreasonable delays in contravention of Section 35.3.d of the Constitution. The Court, however, distinguished this post-conviction delay from pre-conviction delays. The earlier decisions of the Court had been concerned with pre-conviction delays which could cause an accused to suffer prejudice because he or she is presumed innocent until proven guilty. The presumption of innocence does not apply, however, in the case of post-conviction delays. Accordingly, the prejudice to the accused is decreased. Furthermore, unreasonable delays were usually determined on a case-by-case basis. To strike down a statutory provision on this basis would require proof that a reasonable application of the provision will always lead to an unreasonable delay. This had not been established.

In the circumstances the Court rejected all arguments raised by the accused and declined to confirm the constitutional invalidity of Section 52 of the Act.

#### *Cross-references:*

Fair trial: *S v. Zuma and Others*, 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC), *Bulletin* 1995/3 [RSA-1995-3-001].

Institutional delay: *Wild and Another v. Hoffert NO and Others*, 1998 (3) SA 695 (CC); 1998 (6) BCLR 656 (CC), *Bulletin* 1998/2 [RSA-1998-2-003]; *Sanderson v. Attorney-General, Eastern Cape*, 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC).

#### *Languages:*

English.



#### *Identification: RSA-2000-3-013*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 28.09.2000 / **e)** CCT 17/2000 / **f)** Hoffmann v. South African Airways / **g)** / **h)** 2000 (11) *Butterworths Constitutional Law Reports* 1211 (CC); CODICES (English).

#### *Keywords of the systematic thesaurus:*

3.21 General Principles – Prohibition of arbitrariness.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.2.2 Fundamental Rights – Equality – Criteria of distinction.

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

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

#### *Keywords of the alphabetical index:*

Employment, discrimination / HIV (AIDS), discrimination / Intolerance.

#### *Headnotes:*

The refusal to employ a person solely because of his or her HIV positive status constitutes unfair discrimination which impairs that person's dignity, and therefore violates the right to equality (Section 9 of the Constitution).

#### *Summary:*

The appellant, Mr. Hoffmann, was refused employment as a cabin attendant by South African Airways (SAA) because he was HIV positive. He unsuccessfully challenged the constitutionality of the refusal to employ him in the High Court.

That Court reasoned:

- a. that the refusal to appoint the appellant was soundly based on medical, safety and operational considerations;
- b. that SAA did not exclude persons with HIV from employment in other positions, but only from cabin crew posts;
- c. that its competitors applied a similar employment policy and if SAA were obliged to employ people living with HIV, it would be seriously disadvantaged; and
- d. that it was an inherent requirement for a flight attendant to be HIV negative. Accordingly, the High Court held that the impugned practice constituted fair discrimination against HIV positive people. That Court added that even if the policy resulted in unfair discrimination, it would amount to a justifiable limitation within the meaning of Section 36 of the Constitution.

On appeal in the Constitutional Court, the appellant alleged that his rights to equality (Section 9 of the Constitution), human dignity (Section 10 of the Constitution) and fair labour practices (Section 23.1 of the Constitution) had been violated. He argued that SAA's practice was irrational because it disqualified all people living with HIV from employment as cabin crew, even though the medical evidence showed that not all HIV positive people were unsuitable for employment. Moreover, the policy did not exclude existing HIV positive cabin attendants although they pose the same health, safety and operational hazards asserted by SAA.

SAA conceded that this employment practice could not be justified on medical grounds and that it was therefore unfair to refuse to employ the appellant. In view of these concessions, the Court concluded that two issues remained to be resolved:

- a. whether any constitutional rights of the appellant had been violated; and if so,
- b. to what relief the appellant would be entitled.

Justice Ngcobo, writing for a unanimous Court, reasoned that it was unnecessary to reach a firm conclusion on whether the practice in issue was irrational. The Court held that human dignity was at the heart of the prohibition against unfair discrimination, since dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations when deciding discrimination cases include the position of the victim in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim

had been affected and whether the discrimination had impaired the dignity of the victim.

In this case, the denial of employment on the basis of HIV status impaired the appellant's dignity and constituted unfair discrimination. As a result, the Court held that the refusal by SAA to employ him as a cabin attendant because he was HIV positive violated his right to equality. The Court further indicated that it was unnecessary to hold that the discrimination should be judged on the listed ground of disability as set out in Section 9.3 of the Constitution.

Furthermore, the Court held that the question of whether the violation was justified did not arise because the case did not deal with a law of general application as required by Section 36 of the Constitution.

And since the case had been settled on the grounds of unfair discrimination, the Court indicated that it would be unnecessary for it to consider the other constitutional attacks based on human dignity and fair labour practices.

In granting relief, a court should consider the interests of those who might be affected by the order. The objectives of relief include addressing the wrong occasioned by the infringement, deterring future violations, and ensuring fairness to all those who might be affected. The order should be capable of being complied with. The nature of the infringed right and the nature of the infringement would provide guidance as to the appropriate relief to be granted in a particular case. Applying these principles, the Court held that where employment had been wrongfully denied, the fullest redress obtainable is instatement. Instatement would address the wrong suffered and thus eliminate the effect of the unfair discrimination. It further sends a message that under the Constitution discriminatory practices will not be tolerated. In the end, instatement vindicates and enhances faith in the Constitution.

The appeal was upheld. The Court ordered SAA to employ the appellant as a cabin attendant with effect from the date of the judgment, but added the proviso that should the appellant fail to accept the offer within thirty days of judgment, the order would lapse. Exceptionally, SAA was ordered to pay the appellant's costs.

#### *Cross-references:*

Rationality: *Jooste v. Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)*, 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC), *Bulletin* 1998/3 [RSA-1998-3-010]; *National Coalition for Gay and*

*Lesbian Equality and Another v. Minister of Justice and Others*, 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC), *Bulletin* 1998/3 [RSA-1998-3-009]; *Harksen v. Lane NO and Others*, 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC), *Bulletin* 1997/3 [RSA-1997-3-011].

*Dignity: President of the Republic of South Africa and Another v. Hugo*, 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), *Bulletin* 1997/1 [RSA-1997-1-004]; *S v. Makwanyane and Another*, 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002].

Law of General Application: *August and Another v. Electoral Commission and Others*, 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC), *Bulletin* 1999/1 [RSA-1999-1-002].

Constitutionally Appropriate Relief: *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC), *Bulletin* 2000/1 [RSA-2000-1-001]; *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC), *Bulletin* 1997/2 [RSA-1997-2-005].

#### Languages:

English.



#### Identification: RSA-2000-3-014

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 29.09.2000 / **e)** CCT 13/99 / **f)** Janse van Rensburg NO and Another v. Minister of Trade and Industry NO and Another / **g)** / **h)** 2000 (11) *Butterworths Constitutional Law Reports* 1235 (CC); CODICES (English).

#### Keywords of the systematic thesaurus:

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

**4.7.9 Institutions** – Courts and tribunals – Administrative courts.

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

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

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

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

#### Keywords of the alphabetical index:

Discretion, administrative / Administrative procedure.

#### Headnotes:

A law that authorises the Minister of Trade and Industry to stay or prevent, for a temporary period, any unfair business practice which is the subject of investigation, or to attach money or property relating to such investigation, is unconstitutional to the extent that it does not ensure procedural fairness.

#### Summary:

This case dealt with the constitutional validity of two sections of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (the Act). Section 7.3 authorised investigating officers to conduct searches and seizures for the purpose of ensuring compliance with the Act. Section 8.5.a made provision for the Minister, on the recommendation of the Consumer Affairs Committee, to stay or prevent any unfair business practice which was the subject of an investigation for a period not exceeding six months, and to attach money or property relating to the investigation.

Mr. Janse van Rensburg (the first applicant) was a trustee of Omega Trust Power Marketing CC (the second applicant). The Minister launched an investigation under Section 8.1.a of the Act to determine whether the business constituted an unfair (harmful) business practice. As a result of this investigation, the applicants brought an urgent application in the High Court for an order declaring the whole Act, or specific provisions thereof, constitutionally invalid.

The High Court held that Section 7.3 infringed the right to privacy (Section 14 of the Constitution) because it sanctioned searches and seizures without judicial authorisation. That Court held furthermore that Section 8.5.a infringed the right to freedom of trade, occupation and profession (Section 22 of the Constitution). The High Court also held that Section 8.5.a violated both the right to property (Section 25.1 of the Constitution) and the right to just administrative action (Section 33.1 of the Constitution) and concluded that the infringements could not

be saved by the limitations clause (Section 36 of the Constitution).

Before the matter was argued at confirmation proceedings in the Constitutional Court (in terms of Section 172.2.a of the Constitution), Section 7.3 of the Act was amended. The inserted Section 7.3A stipulated that any search or seizure conducted by an investigating officer in the absence of the written consent of the owner or person in charge of the premises, now required a search warrant issued by a magistrate.

In the Constitutional Court, the Minister argued that Section 7.3A of the Act had not been before the High Court and that the declaration of invalidity of the original provisions had become moot. Justice Goldstone, writing for a unanimous Court, agreed that the amended search and seizure provisions rendered the privacy challenge moot.

The Court then dealt with the challenge to Section 8.5.a. The Court recognised the interest of the state in protecting the public from unfair business practices and the need to ensure that persons engaging in unfair business practices did not hide or alienate assets. But this concern had to be subject to the rules of administrative justice and considered with regard to the facts and circumstances of each case. The Court held that any law which confers a wide discretion upon a functionary should contain guidelines as to how that discretion should be exercised. The absence of such guidance rendered the procedure in Section 8.5.a unfair and in violation of Section 33.1 of the Constitution.

The order of constitutional invalidity was suspended for a period of twelve months to enable Parliament to correct the defects. In the interim, the Court provided guidelines in the implementation of the Act.

#### Cross-references:

Mootness: *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC), *Bulletin* 2000/1 [RSA-2000-1-001]; *President of the Ordinary Court Martial and Others v. Freedom of Expression Institute and Others*, 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC).

Procedural fairness: *Dawood and Another v. Minister of Home Affairs and Others*, *Shalabi and Another v. Minister of Home Affairs and Others*, *Thomas and Another v. Minister of Home Affairs and Others*, 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC); *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, 2000 (1)

SA 1 (CC); 1999 (10) BCLR 1059 (CC), *Bulletin* 1999/3 [RSA-1999-3-008].

#### Languages:

English.



#### Identification: RSA-2000-3-015

a) South Africa / b) Constitutional Court / c) / d) 04.10.2000 / e) CCT 11/2000 / f) Government of the Republic of South Africa and Others v. Grootboom and Others / g) / h) 2000 (11) *Butterworths Constitutional Law Reports* 1169 (CC); CODICES (English).

#### Keywords of the systematic thesaurus:

3.19 General Principles – Reasonableness.

5.3.42 Fundamental Rights – Civil and political rights – Rights of the child.

5.4 Fundamental Rights – Economic, social and cultural rights.

5.4.11 Fundamental Rights – Economic, social and cultural rights – Right to housing.

#### Keywords of the alphabetical index:

Crisis, situation, assistance / Housing, access / Social right, progressive realisation / Right, realisation, reasonable time / Housing, programme, need.

#### Headnotes:

A state housing programme which does not deal with the needs of people in crisis and emergency situations is not reasonable and is therefore in breach of the constitutional right of access to adequate housing (Section 26 of the Constitution).

The obligations arising out of a child's right to "basic nutrition, shelter, basic health care services and social services" (Section 28.1.c of the Constitution) fall upon the child's primary care-giver. The state has only a residual right to provide shelter to children no longer in the care of their parents or other care-giver. The right to shelter includes all aspects of child-care and is not limited to physical shelter.

### Summary:

The respondents, a group of 900 adults and children, were rendered homeless after being evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the High Court for an order requiring government to provide them with adequate basic housing or shelter until they obtained permanent accommodation. The High Court ordered the appellants to provide the respondents who were children and their parents with shelter, including tents, portable latrines and a regular supply of water. The appellants, representing all spheres of government responsible for housing, challenged this order in the Constitutional Court.

Justice Yacoob, writing for a unanimous Court, started from the premise that any socio-economic right should be considered in the context of the cluster of socio-economic rights in the Bill of Rights, which enable people to enjoy their other rights. Section 26 entails more than the provision of bricks and mortar. It also requires the financing and supply of land and appropriate services (such as the provision of water and the removal of sewage). Furthermore, the state is not solely responsible for the provision of houses. Legislative and other measures must enable other agents within society, including individuals themselves, to access housing. The state's duty in this respect is to create an environment enabling people at all economic levels to access adequate housing.

The Court held that the Section 26 obligation is qualified and defined by three separate elements:

- a. the obligation to "take reasonable legislative and other measures";
- b. "to achieve the progressive realisation" of the right; and
- c. "within available resources".

"Reasonable legislative and other measures" requires a co-ordinated and comprehensive state housing programme determined by all three spheres of government. National government must ensure that the programmes are adequate to meet the state's Section 26 obligations. In determining reasonableness, housing problems must be considered in their social, economic and historical context and the capacity of institutions responsible for implementing the housing programme should be taken into account. The programme must give attention to short-, medium- and long-term needs and must be flexible and regularly reviewed. Legislation by itself is not enough and must be supported by well-directed policies implemented by the executive. Policies must be reasonable both in their conception and their

implementation. The Court emphasised that everyone must be treated with care and concern for their dignity. If the housing programme, though statistically successful, fails to respond to the needs of those most desperate, it will not pass muster.

The term "progressive realisation" implies that the right might not be realised immediately. The state must take steps as expeditiously as possible, to progressively facilitate accessibility: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number, but to a wider range of people as time progresses.

The state is not required to achieve more than its available resources permit. The content of the obligation is governed by the availability of resources both in relation to the rate at which it is fulfilled and the reasonableness of the measures employed.

In this case, the Court held that the current nationwide housing programme was commendable in its medium- and long-term housing goals, in that it sought to provide people with access to permanent residential structures with secure shelter and tenure, and facilitated convenient access to economic opportunities and to health, educational and social amenities. There was, however, no component aimed at people who were living in intolerable conditions and who were in crisis because of natural disasters or because their homes were under threat of demolition. The absence of short-term measures could not be regarded as reasonable. The Court recognised that the local authority concerned had begun to devise such a short-term programme. The appellants had to take all reasonable steps necessary to initiate and sustain this programme, having due regard to the urgency of the circumstances.

In defining the concept of "shelter" in Section 28.1.c, the Court said that housing and shelter are related concepts and one of the aims of housing is to provide physical shelter. While all shelter represents protection from the elements and even danger, shelter may range from being rudimentary at the one extreme to being effective at the other. Shelter in this context is unqualified and embraces all its manifestations.

The obligation to provide shelter to children in Section 28.1.c is imposed primarily on the family and only alternatively on the state, which must provide shelter to those children who, for example, are removed from their families. Section 28.1.c does not create any primary state obligation to provide shelter on demand to children and their parents if children



are being cared for by their parents or families. There was consequently no failure by the state to comply with its constitutional obligations in this case.

The Court allowed the appeal in part but ordered the appellants to devise and implement a programme that included measures to provide relief for those desperate people who had not been catered for prior to the introduction of the local government's programme.

#### Cross-references:

International treaties: *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others*, 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC), *Bulletin* 1996/2 [RSA-1996-2-014].

Socio-economic rights: *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), *Bulletin* 1996/3 [RSA-1996-3-016].

#### Languages:

English.



#### Identification: RSA-2000-3-016

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 24.11.2000 / **e)** CCT 3/2000 / **f)** Metcash Trading Limited v. Commissioner for the South African Revenue Service and Another / **g)** / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

3.9 General Principles – Rule of law.

3.17 General Principles – General interest.

4.7.12 Institutions – Courts and tribunals – Special courts.

4.10.7.1 Institutions – Public finances – Taxation – Principles.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

#### Keywords of the alphabetical index:

Tax, power to enforce payment before appeal / Tax, value-added tax.

#### Headnotes:

The right of access to courts (Section 34 of the Constitution) is not unjustifiably infringed by a tax law that provides:

- a. that an appeal against the correctness of a tax assessment does not suspend the obligation on the taxpayer to pay the assessed amount of tax;
- b. empowers the Commissioner for the South African Revenue Service to enforce payment by filing a statement with a court having the effect of an exigible civil judgment for a liquid debt; and
- c. puts the correctness of the assessment beyond challenge in such execution.

#### Summary:

This case concerned the constitutionality of three sections of the Value-Added Tax Act 89 of 1991 (the Act) that make up the “pay now, argue later” rule. Section 36.1 provides that, upon assessment by the Commissioner for the South African Revenue Service (the Commissioner), a taxpayer is obliged to pay Value-added tax (VAT) plus consequential imposts immediately, notwithstanding that the taxpayer has noted an appeal against the correctness of the assessment. Section 40.2.a empowers the Commissioner, where payment of an assessment is overdue, to file a statement at court which has the effect of an exigible civil judgment in the Commissioner's favour for a liquid debt (thereby obviating the requirement of issuing court process for the judicial enforcement of a debt). Section 40.5 puts the correctness of the Commissioner's assessment beyond challenge in such execution.

Metcash Trading Limited is a wholly-owned subsidiary and the principal operating entity of a public company listed on the Johannesburg Stock Exchange. The Commissioner alleged that Metcash or its associated companies had entered into fictitious transactions and therefore assessed Metcash for VAT in excess of R265 million. The assessment included additional tax of double the amount due (imposed for tax evasion), an automatic penalty of 10%, and interest. The Commissioner disallowed an objection and demanded payment, failing which the Sec-

tion 40.2.a summary procedure would be initiated. Metcash brought an urgent application to the High Court to block the threatened action. That Court, relying extensively on the judgment of the Constitutional Court in *Chief Lesapo v. North West Agricultural Bank and Another*, found that the sections infringed the right of access to courts because they explicitly excluded the requirement of recourse to a Court of law.

In a unanimous judgment of the Constitutional Court, Justice Kriegler held that the High Court had erred and that none of the sections unjustifiably infringed the right of access to courts. The unconstitutionality of Section 36.1 was not confirmed because the Act provides aggrieved vendors with a special appeal procedure to specialised tax tribunals, while leaving intact all other forms of relief including common law judicial review as buttressed by the right to just administrative action (Section 33 of the Constitution). Section 36.1 is therefore not concerned with access to courts of law and says nothing that can be construed as a prohibition against resort to such courts. It also has nothing to do with judgment on the tax debt nor with execution of such a judgment. It does not afford any authority to circumvent the courts, nor any right to levy execution. The challenge to the validity of Section 40.2.a was dismissed on the grounds that the provision specifically requires the intervention of judicial institutions. Accordingly, the impugned section was distinguishable from the provisions struck down by the Court in the Lesapo case. Those provisions had allowed the Land Bank itself to attach and sell up the assets of its defaulting debtors without recourse to a court, breaching the rule of law by sanctioning self-help on the part of the creditor. The challenge to Section 40.5 was dismissed on the basis that, although it limits possible grounds for objection, it does not prohibit litigation. Having regard to the nature of the limitation and the pressing national interest in obtaining full and speedy settlement of tax debts, such limitation is justifiable under the limitations clause (Section 36 of the Constitution).

In the result the Court declined to confirm the invalidation of the three impugned sections.

#### Cross-references:

*First National Bank of SA Ltd v. Land and Agricultural Bank of South Africa and Others*, *Sheard v. Land and Agricultural Bank of South Africa and Another*, 2000 (3) SA 626 (CC); 2000 (8) BCLR 876 (CC); *Chief Lesapo v. North West Agricultural Bank and Another*, 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

#### Languages:

English.



#### Identification: RSA-2000-3-017

a) South Africa / b) Constitutional Court / c) / d) 28.11.2000 / e) CCT 27/2000 / f) South African Association of Personal Injury Lawyers v. Heath and Others / g) / h) CODICES (English).

#### Keywords of the systematic thesaurus:

1.6.5.4 Constitutional Justice – Effects – Temporal effect – Postponement of temporal effect.

2.1.2 Sources of Constitutional Law – Categories – Unwritten rules.

3.4 General Principles – Separation of powers.

3.12 General Principles – Legality.

4.4.1.3 Institutions – Head of State – Powers – Powers with respect to the judiciary.

4.6.4 Institutions – Executive bodies – Composition.

4.6.8 Institutions – Executive bodies – Relations with the courts.

4.7.4.2 Institutions – Courts and tribunals – Organisation – Officers of the court.

#### Keywords of the alphabetical index:

Administrative decision, unlawful / Judicial authority, independence / Public funds, recovery.

#### Headnotes:

A requirement that a High Court judge be appointed as the head of a special unit investigating state corruption, undermines the independence of the judiciary and the separation of powers and is therefore unconstitutional.

A Proclamation referring allegations concerning the conduct of legal practitioners dealing with claims against the Road Accident Fund to the unit was, in any case, beyond the scope of the law under which the unit conducts its investigations and was accordingly invalid.

### Summary:

The appellant, an organisation representing the interests of legal practitioners involved *inter alia* in the lodging of clients' claims for compensation from the Road Accident Fund (RAF), challenged the constitutionality of Section 3.1 of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the Act) and presidential Proclamation R24 of 1997. The appellant also challenged the constitutionality of presidential Proclamation R31 of 1999.

In terms of the Act, the President is empowered to establish a Special Investigating Unit (SIU) for the purpose of investigating allegations of maladministration or unlawful or improper conduct relating to state institutions (Section 2.2) and from time to time to refer matters to the unit for investigation. Section 3.1 required that the SIU be headed by a judge of the High Court, to be appointed by the President. The President appointed the first respondent to this position in Proclamation R24. Under Proclamation R31, the President requested the SIU to investigate allegations that various legal practitioners had been involved in corrupt practices when claiming compensation for their clients from the RAF.

The appellant unsuccessfully brought an application requesting the Transvaal High Court to declare Section 3.1 and Proclamation R24 invalid on the basis that they infringed the constitutional imperatives of the separation of powers between the executive and the judiciary and the independence of the judiciary vis-à-vis the executive. The appellant further argued that Proclamation R31 unconstitutionally referred a matter to the SIU that did not relate to an allegation contemplated by Section 2.2 of the Act.

On appeal to the Constitutional Court the section and both Proclamations were held to be unconstitutional and invalid. In the judgment of the unanimous Court, President Chaskalson found that the principle of separation of powers, although not explicitly set out in the Constitution, is (as in the United States) nevertheless a central aspect of the South African constitutional state. The practical application of the doctrine was found to be influenced by the history, conventions and circumstances of the different countries in which it is applied. The Court held that the separation of powers between the executive and the judiciary is particularly important in the South African context. The judiciary plays a vital role as an independent arbiter of issues involving the legality of executive and legislative action measured against the Bill of Rights as well as issues concerning the separation of powers itself.

The Court proceeded to set out the relevant factors in considering whether it is constitutional to assign a non-judicial function to a judge and took the view that the factors should be given a weight appropriate to the nature of the function that the judge is required to perform, and the need for that function to be performed by a person of undoubted independence and integrity. Ultimately the Court is required to determine whether or not the functions are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary. Although it was clear that the head of the SIU should be a person of integrity, judges are not the only persons with that attribute. Furthermore, the functions required to be performed by the head of the SIU, which include a duty to investigate and litigate on behalf of the state are, by their very nature, partisan. Another relevant factor was that the judge concerned had not performed his judicial functions for more than three years and that his appointment to the SIU was indefinite. Having taken all these factors into account, the Court concluded that the appointment of the judge as head of the SIU was incompatible with his judicial office and contrary to the separation of powers required by the Constitution.

The Court recognised the importance of the SIU's work in dealing with the unjust and anti-democratic practices it was established to investigate and suspended the invalidity of the section and Proclamation R24 for a period of one year in order to give the legislature an opportunity to replace the judge as the head of the SIU.

In considering the constitutionality of Proclamation R31, the Court was of the view that the allegations referred to the SIU in terms of that Proclamation related, not to any fraud perpetrated on a state institution (e.g. the RAF) or any appropriation or expenditure of public money as required by Section 2.2.c of the Act, but rather to dealings between particular attorneys and their clients. The Court expressed doubt as to whether the Proclamation fell within the terms of Section 2.2.g of the Act which refers to "serious harm" caused to the "interests of the public or any category thereof". It was found that the referral required the SIU to "undertake a fishing expedition" and that it lacked the specificity required by the section. The Court concluded that the President had no power to refer the RAF issue to the SIU for investigation under the Act and that the Proclamation therefore violated the principle of legality. It was accordingly declared inconsistent with the Constitution and invalid with immediate effect.

**Cross-references:**

Separation of powers: *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others*, 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC), *Bulletin* 2000/1 [RSA-2000-1-003]; *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC), *Bulletin* 1999/3 [RSA-1999-3-008]; *De Lange v. Smuts NO and Others*, 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004]; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), *Bulletin* 1996/3 [RSA-1996-3-016]; *Bernstein and Others v. Bester NO and Others*, 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC), *Bulletin* 1996/1 [RSA-1996-1-002].

Principle of legality: *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others*, 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), *Bulletin* 1999/1 [RSA-1999-1-001].

**Languages:**

English.

**Identification: RSA-2000-3-018**

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.2000 / **e)** CCT 19/2000 / **f)** The State v. Steyn / **g)** / **h)** CODICES (English).

**Keywords of the systematic thesaurus:**

**1.6.5.4 Constitutional Justice – Effects – Temporal effect – Postponement of temporal effect.**

**2.3 Sources of Constitutional Law – Techniques of review.**

**3.15 General Principles – Proportionality.**

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

**3.22 General Principles – Equity.**

**4.7.8.2 Institutions – Courts and tribunals – Ordinary courts – Criminal courts.**

**5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.**

**5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.**

**Keywords of the alphabetical index:**

Interpretation, contextual / Appeal, right / Criminal procedure, lower courts.

**Headnotes:**

A law which removes the unconditional right of appeal from a Court of first instance in criminal matters and instead requires convicted and sentenced persons to first obtain leave to appeal to a higher Court, infringes an accused person's right of appeal (Section 35.3.0 of the Constitution) and cannot be justified under the limitations clause (Section 36 of the Constitution).

**Summary:**

Prior to the introduction of Sections 309B and 309C of the Criminal Procedure Act 51 of 1977 (the Act), a person convicted and sentenced in a magistrate's Court had an unconditional right of appeal. In terms of these sections such persons were required to first obtain the leave of the magistrate and, if refused, the High Court could be petitioned for leave to appeal. The applicant was convicted and sentenced to a long term of imprisonment by a regional magistrate's Court and both his application to that Court for leave to appeal and his subsequent petition to the High Court were unsuccessful. He then approached the Constitutional Court contending that the provisions infringed his right of appeal to a higher Court. In a previous decision the Court had held the leave and petition procedure in respect of appeals against High Court judgments to be valid. The state argued that this analysis should apply equally in respect of appeals against magistrates' courts judgments.

Acting Justice Madlanga, writing for a unanimous Court, held that the procedure does infringe the right of appeal, which requires that there be an informed reappraisal of the case. The Court pointed out that crucial material such as the record of proceedings in the trial Court and its judgment were not necessarily available to the High Court when it considered a petition, nor was it compulsory for the High Court to hear oral argument. The High Court might accordingly not be able to make a sufficiently informed decision as to whether leave to appeal should be granted. This risk of a genuine miscarriage of justice not being detected was particularly great when the petitioner

was unrepresented. Additionally, magistrates function under great pressure, are often faced with unrepresented accused, and must contend with relatively inexperienced legal practitioners, investigating officers, rudimentary library facilities and other resource-related impediments. Given these circumstances, the risk of errors leading to wrongful convictions was substantially greater than in the high courts, necessitating fewer restrictions on appeals from magistrates' courts.

The state failed to adduce sufficient evidence to justify the procedure on the grounds that it prevented the clogging of appeal rolls and ensured that hopeless appeals would not waste valuable Court time. The procedure could, therefore, not be justified in terms of the limitations clause.

The Court accordingly declared Sections 309B and 309C of the Act to be inconsistent with the Constitution and invalid. In the interests of justice and equity, however, it suspended the declaration of invalidity for a period of 6 months to enable the state to address the impact of the increased number of cases on the Court rolls. The relatively short period of suspension was designed to ensure a swift government response. In order to protect the rights of would-be appellants during this period, the Court stipulated that in certain circumstances a petition to the High Court must be accompanied by a full trial record and judgment. This would apply where, for example, the person seeking to appeal against conviction and sentence had no legal representation or would spend a substantial period in prison.

#### Cross-references:

Right of appeal: *S v. Twala (South African Human Rights Commission Intervening)*, 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC), *Bulletin* 1999/3 [RSA-1999-3-010]; *S v. Rens*, 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC), *Bulletin* 1995/3 [RSA-1995-3-012]; *S v. Ntuli*, 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC), *Bulletin* 1995/3 [RSA-1995-3-011].

Contextual interpretation: *Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others*, 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC), *Bulletin* 1995/3 [RSA-1995-3-010].

Suspension of order of invalidity: *Minister of Justice v. Ntuli*, 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC), *Bulletin* 1997/2 [RSA-1997-2-006].

#### Languages:

English.



#### Identification: RSA-2000-3-019

a) South Africa / b) Constitutional Court / c) / d) 29.11.2000 / e) CCT 26/2000 / f) Permanent Secretary of the Department of Education, Eastern Cape and Another v. Ed-U-College (P.E) (Section 21) Inc. / g) / h) CODICES (English).

#### Keywords of the systematic thesaurus:

1.3.5.13 Constitutional Justice – Jurisdiction – The subject of review – Administrative acts.

3.16 General Principles – Weighing of interests.

4.5.6 Institutions – Legislative bodies – Law-making procedure.

4.5.9 Institutions – Legislative bodies – Relations with the courts.

4.6.2 Institutions – Executive bodies – Powers.

5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.

#### Keywords of the alphabetical index:

Decision, administrative, review / Budget, allocation / Decision, legislative, reviewability / Policy decision, reviewability / Subsidy, independent school / School, subsidy, reduction / Legislative act, judicial review.

#### Headnotes:

The appropriation of funds for education by a provincial legislature constitutes legislative action that is not justiciable in terms of the right to just administrative action (Section 33 of the Constitution).

The allocation of funds for independent school subsidies by a provincial legislature constitutes legislative action that is not justiciable in terms of Section 33 of the Constitution.

The determination by a Member of the Provincial Executive Council of a formula for the distribution of funds set aside by a provincial legislature for educational subsidies does constitute administrative action within the meaning of Section 33 of the Constitution.

### Summary:

The respondent in this matter was an independent school in the Eastern Cape Province which had received subsidies from the provincial Department of Education for the years 1995 and 1996. During 1997, the amount of the subsidy payable to the school was decreased. The school then instituted proceedings in the High Court claiming a sum of money on the basis that the decision to decrease the subsidies had been in breach of the school's right to just administrative action (Section 33 of the Constitution) and was therefore unconstitutional. The Department of Education denied that the decision to decrease the subsidies was "administrative action" within the meaning of Section 33, since that section is deemed to be read in terms of item 23.2.b of Schedule 6 to the Constitution. The High Court found that the decision was administrative action within the meaning of Section 33, but declined to finally determine the matter because further evidence was required on the question whether the administrative action was unfair or not. The Department applied to the Constitutional Court for leave to appeal against the High Court judgment.

The process which ultimately resulted in the independent schools subsidy decrease began in the provincial legislature. During the course of debating the 1997 Appropriations Act 4 of 1997 (which stipulated *inter alia* that an amount of approximately R5.4 billion was allocated to "education"), a memorandum was circulated together with the draft Bill. This memorandum, colloquially known amongst the members of the legislature as the "white book", contained a detailed breakdown showing how the amount provisionally allocated to education would be spent. Although the "white book" indicated that R8.45 million was to be spent on independent schools in the province, it did not form part of the Appropriations Act which ultimately passed into law. It was common cause between the parties that the amount earmarked for independent schools subsidies was considerably less than had been set aside for this purpose in previous years.

In arguing its application for leave to appeal, the Education Department contended that the decrease in the independent schools subsidy was legislative, as opposed to administrative, action and that the decrease was therefore not justiciable on the basis of Section 33 of the Constitution. The applicant argued alternatively that, should the Court come to the conclusion that the decrease did constitute administrative action, the action was in the nature of a policy decision that was excluded from the ambit of administrative action.

In a judgment concurred in by all the justices of the Court, Justice O'Regan agreed with the High Court that three questions arose for consideration. First, did the appropriation of approximately R5.4 billion in the Appropriation Act constitute a legislative act which is not justiciable under Section 33? Secondly, did the appropriation of R8.45 million to independent schools, as stipulated in the memorandum to the Act, constitute a legislative act or other act which is not justiciable under Section 33? Thirdly, did the determination of the precise subsidy formula which determines the amount of money to be paid to independent schools constitute a legislative act or other act which is not justiciable under Section 33?

The Court held that, in determining whether a particular act constituted administrative action, the focus of the enquiry should be on the nature of the power, not the identity of the actor, and that the formulation of policy by elected members of the executive in the course of implementing legislation may constitute administrative action. Applying these principles, Justice O'Regan concluded that the appropriations under review in the first two questions did not constitute administrative action as contemplated by Section 33 of the Constitution. These appropriations could consequently not be challenged by the respondent on administrative law grounds. The Court found, however, that the determination of the subsidy formula by the Member of the Provincial Executive Council (MEC) did constitute administrative action. Accordingly, this determination could be reviewed by a court.

In dismissing the application for leave to appeal, the Court noted that, in order to demonstrate an infringement of its right to just administrative action, it remained for the school to demonstrate that the determination of the subsidy formula by the MEC was procedurally unfair or unreasonable. The Court declined to decide the question because full evidence on these issues had not been led, but the school was entitled to lead evidence and seek a determination of the issue in the High Court.

### Cross-references:

Legislative decisions: *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others*, 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), *Bulletin* 1999/1 [RSA-1999-1-001].

Policy decisions: *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC), *Bulletin* 1999/3 [RSA-1999-3-008]; *Premier, Province of Mpumalanga and Another v.*

*Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal, 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC), Bulletin 1998/3 [RSA-1998-3-011].*

*Languages:*

English.



## Spain Constitutional Court

### Statistical data

1 September 2000 – 31 December 2000

Type and number of decisions:

- Judgments: 103
- Decisions: 118
  - Inadmissibility: 50
  - Discontinued proceedings: 15
  - Other resolutions: 53
- Procedural decisions: 1968
- Cases submitted: 2186

### Important decisions

*Identification:* ESP-2000-3-026

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 18.09.2000 / **e)** 215/2000 / **f)** Enrique Miret Magdalena / **g)** *Boletín oficial del Estado* (Official Gazette), 251, 19.10.2000, 25-33 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

4.6.11.4 Institutions – Executive bodies – The civil service – Personal liability.

4.7.10 Institutions – Courts and tribunals – Financial courts.

4.10.6 Institutions – Public finances – Auditing bodies.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

*Keywords of the alphabetical index:*

Court of Auditors, independence / Court of Auditors, procedural safeguards.

*Headnotes:*

The function conferred upon the Court of Accounts of determining the responsibility of persons entrusted with the utilisation of public funds or assets (Article 136 of the Constitution), is in no way at variance with the principle of exclusivity of jurisdiction (Article 117.3 of the Constitution).

The Court of Accounts is answerable directly to Parliament (the *Cortes Generales*) and is not part of the judiciary. However, it meets the criteria of independence and impartiality required of a court and its accounting jurisdiction takes the form of a fully and exclusively judicial activity conducted according to a special procedure appropriate to its sphere of jurisdiction and separate from its other function of external auditing of public sector economic and financial activity.

*Summary:*

In this judgment, the Constitutional Court ruled on a constitutional appeal lodged by a former senior official who had been found to have improperly disbursed a sum of money allocated to a particular section of the budget and had been ordered to repay that amount personally. He applied to the Constitutional Court after the Supreme Court had declared inadmissible his administrative appeal against the Court of Accounts' decisions finding him liable. This decision of the Supreme Court was based on the grounds that such an appeal was not provided for in the legislation governing the determination of liability by the Court of Accounts. Decisions by the Court of Accounts in the exercise of this function are subject to appeal on points of law only if they exceed a certain amount and, in exceptional cases only, to an application for a re-trial.

The Constitutional Court judgment confirmed the judicial nature of the liability-determining function performed by the Court of Accounts. The applicant contended that, notwithstanding the provisions of Article 136.2 of the Constitution concerning the 'jurisdiction' of the Court of Accounts, the Court's determination of accounting liability was not to be regarded as a judicial function, in a systematic interpretation of the Constitution, insofar as:

- i. the relevant provisions were contained in Title VII – Economy and Finance and not in Title VI – Judicial Power;
- ii. the legal status of its members is not that of career judges.

The Constitutional Court, rejecting the applicant's arguments, stated that "neither the idea which the authors of the Constitution had of it, nor the most recent constitutional precedents, nor the systematic interpretation of 'jurisdiction' in the Constitution support the applicant's view".

After analysing the background to Article 136 of the Constitution, the Constitutional Court found that, in the framework of its traditional function, which consists in determining the accounting responsibility of persons entrusted with public funds, the Court of Accounts is subject under the Constitution to the safeguards applicable to any proceedings, viz those deriving from Article 24 of the Constitution, but also to those of other constitutional provisions, such as the independence and irrevocability of those exercising judicial authority, as specifically stipulated by Article 136.3 of the Constitution in the case of members of the Court of Accounts. Accordingly, the exercise by the Court of Accounts of the judicial function of determining accounting responsibility is not in itself contrary to the fundamental right to effective judicial protection (Article 24.1 of the Constitution), insofar as the Constitution itself enables judicial functions to be conferred upon that Court.

Having regard to the foregoing, the Constitutional Court ruled that the finding of inadmissibility concerning the applicant's administrative appeal did not violate his right to effective judicial protection.

*Cross-references:*

Constitutional Court Judgments nos. 187/1988 of 17.10.1988; 18/1991 of 31.01.1991; Constitutional Court decision no. 312/1996 of 29.10.1996.

*Languages:*

Spanish.

*Identification: ESP-2000-3-027*

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 03.10.2000 / **e)** 234/2000 / **f)** Government urgency / **g)** *Boletín oficial del Estado* (Official Gazette), 267, 07.11.2000, 47-60 / **h)** CODICES (Spanish).



*Keywords of the systematic thesaurus:*

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

4.5.6 Institutions – Legislative bodies – Law-making procedure.

4.5.8 Institutions – Legislative bodies – Relations with the executive bodies.

4.6.3.1 Institutions – Executive bodies – Application of laws – Autonomous rule-making powers.

*Keywords of the alphabetical index:*

Urgency, parliamentary procedure / Senate.

*Headnotes:*

The government is empowered to decree the urgency of a Bill at any time and so to reduce the time allotted for its consideration by the Senate, even after its receipt by the Senate.

The possibility of appealing to the Constitutional Court in disputes based on a conflict between the constitutional bodies of the state enables each of the institutions empowered to refer cases to the Constitutional Court to preserve its powers against other bodies' decisions infringing its prerogatives.

The purpose of allowing appeals based on conflicts between constitutional bodies is to safeguard the constitutional structure, which is a system of relations between constitutional bodies which each have their own powers.

*Summary:*

In this judgment, the Constitutional Court ruled on a conflict between the government and the State. The Bureau of the Senate had declared inadmissible the emergency procedure invoked by the Government concerning the draft organic law on voluntary termination of pregnancy, thus making it impossible to examine the bill before the dissolution of parliament for the 1996 general elections.

The Senate contended that the government could not decree the urgency of a bill after it had been received by the Upper House. The Executive maintained that the power conferred upon it by Article 90.3 of the Constitution was not subject to any time limitation.

The Court first analysed the purpose of the Government's power in order to determine whether or not it may be in any way limited in time. There is no denying that the full force of this power becomes

apparent in the overall context of the government's powers in relation to legislative proceedings. The emergency procedure, which is intended to ease and speed up the passage of legislation, reflects a certain view of relations between parliament and government in the shape of a mechanism whereby the latter can act on the legislative proceedings and exert influence over their chronological conduct when it considers that the circumstances of the moment so require. Regarding the limitation in time claimed by the Senate, the Constitutional Court first re-stated the literal content of the constitutional provision and the purpose of the mechanism placed at the government's disposal to reduce the time normally taken by the consideration of bills in the Senate for bills declared urgent. Their urgency may be perceived by the government when the bill is laid before the Congress of Deputies or later, even after parliamentary proceedings have started. Lastly, the Court points out that there have been many previous instances in all parliaments of the emergency procedure being invoked by the government after receipt of the bills concerned in the Senate, without the Upper House having claimed a limitation in time as in this case.

*Supplementary information:*

The notion of conflicts between constitutional bodies of the state serving as a basis for applications to the Constitutional Court was instituted by the Organic Law on the Constitutional Court (Title IV, Chapter III, Articles 73-75) under Article 161.1.d of the Constitution.

*Languages:*

Spanish.

*Identification:* ESP-2000-3-028

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 16.10.2000 / **e)** 236/2000 / **f)** Jesús Tapia Fernández / **g)** *Boletín oficial del Estado* (Official Gazette), 276, 17.11.2000, 3-6 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

4.8.5.2.1 Institutions – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.2.2 Fundamental Rights – Equality – Criteria of distinction.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

*Keywords of the alphabetical index:*

Paternity, recognition / *Legitimatio ad causam* / Civil law, descent / Conflict of rules, autonomous communities.

*Headnotes:*

The fact that regional civil law in the Autonomous Community of Navarre does not permit a person to take legal proceedings in the civil courts to secure recognition of his biological paternity in relation to a minor born out of wedlock does not infringe the right to equality (Article 14 of the Constitution), even though the Civil Code generally applicable throughout Spain does permit him to do so.

The Constitution accepts conflicts or contradictions between rules in co-existing bodies of civil law. Article 149.1.8 of the Constitution guarantees the existence of regional civil law through the political autonomy of the autonomous Communities with their own regional or special civil law; it is content to reserve to the general state institutions exclusive powers to enact rules governing conflicts of laws.

*Summary:*

The civil courts declared inadmissible an application by Mr Tapia for recognition of the filiation of a minor; under Navarre civil law, applicable in this instance because the minor in question was resident in the Autonomous Community of Navarre, a biological father does not have standing to seek recognition of his paternity. Mr Tapia then applied for constitutional protection against those judicial decisions, alleging infringement of his rights to equality and non-discrimination (Article 14 of the Constitution), knowing that if the provisions of common civil law had been applied, his interest would not have been barred.

The Constitutional Court first reiterated that the Constitution recognises regional or special law where it exists (Article 149.1.8 of the Constitution) and pointed out that according to the rules enacted by the state for resolving conflicts of laws that may arise from the co-existence of different civil legislation within Spanish territory, the question of descent is governed by the law applicable to the child or that of the child's habitual place of residence (Article 9.4 of the Civil Code). In this case, there is no doubt that the regional civil legislation of Navarre applied and under that legislation, the applicant did not have standing to make the desired claim. The applicant was inescapably subject to such regional civil law insofar as it was the consequence of a provision adopted by the state legislature exercising the powers conferred upon it by Article 149.1.8 of the Constitution and doing so within the freedom which it enjoys for framing the law. The impugned judicial decision simply applied Navarre regional civil legislation. Consequently, although it allowed the applicant no right to take legal proceedings in this sphere, it did not infringe the principle of equality.

Lastly, regarding the right to equality, the Constitutional Court held that it is not valid to compare the rules of common civil law and Navarre regional law. The latter constitutes a complete, closed system of regulation of the legal field in question. It is not therefore appropriate to integrate it by substituting common civil law since to do so would amount to suspending the application of the relevant rules in Navarre.

*Supplementary information:*

The Spanish Civil Code was adopted in 1889; the provisions governing conflicts of laws were drafted in 1974; those governing disputed matrimonial descent in 1981. The civil law of the Autonomous Community of Navarre was consolidated in 1973.

*Languages:*

Spanish.



*Identification:* ESP-2000-3-029

a) Spain / b) Constitutional Court / c) Plenary / d) 19.10.2000 / e) 248/2000 / f) “Sa Punta de N’amer” natural area of special interest / g) *Boletín oficial del Estado* (Official Gazette), 276, 17.11.2000, 52-58 / h) CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.2.3 Constitutional Justice – Types of claim – Referral by a court.

2.2.2 Sources of Constitutional Law – Hierarchy – Hierarchy as between national sources.

4.5.2 Institutions – Legislative bodies – Powers.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.16 Fundamental Rights – Civil and political rights – Right to compensation for damage caused by the State.

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

*Keywords of the alphabetical index:*

Protected natural area, declaration / Protected area, owner, compensation / Law, judicial review, incident / Law, particular.

*Headnotes:*

The right to property (Article 33.3 of the Constitution) is not violated by a law establishing a protected area for environmental reasons and placing certain restrictions on the owners, but not specifically dealing with the obligation to compensate them for the damage sustained. In such cases, the general rules governing liability for the acts of public authorities must be taken to apply.

The right to effective judicial protection (Article 24.1 of the Constitution) is not infringed where a matter is regulated by a provision with force of law which is not therefore subject to judicial scrutiny by the courts.

*Summary:*

This judgment ruled on a question of unconstitutionality raised by the Supreme Court (Administrative Division) concerning two laws of the Autonomous Community of the Balearic Islands: Law 1/1984 determining the legal status of land forming part of natural areas of special interest so designated by the Autonomous Community, and Law 8/1985 classifying

“Sa Punta de N’amer” as a natural area of special interest. Two main issues were raised:

- i. Does the right to property necessitate the adoption of a specific legal provision dealing with the obligation to compensate the owners for any damage they may sustain in the event of their property being classified as a natural area?
- ii. Is the right to effective judicial protection (Article 24.2 of the Constitution) infringed insofar as the law regulates a matter which, according to the court which raised the question of unconstitutionality, itself constitutes the very object of the impugned administrative measures, bearing also in mind that the relevant rules are contained in a law and so are immune from ordinary jurisdiction?

The Constitutional Court answered both questions in the negative. As to the first, it held that a law’s failure to include a formula or course of reparation for the prohibitions or restrictions of the exercise of property rights which result from it cannot be regarded as an exclusion constituting a violation of Article 33.3 of the Constitution. This aspect must be regarded as falling under the general rules governing liability for the acts of public authorities which apply to anyone subjected to impairment of their rights or property in the public interest.

The second question had already been dealt with by the Constitutional Court in very similar terms in Judgment no. 73/2000 of 14 March 2000, *Bulletin* 2000/1 [ESP-2000-1-011]. The Court reiterated its doctrine and rejected the claim of unconstitutionality against one of the impugned laws. It was not as a matter of principle contrary to the Constitution for the legislature to perform a task previously devolved to the regulatory authority; in the Spanish constitutional system, there is no principle whereby any matter may be regulated only by a provision not enactable by the legislature. Accordingly, under the Constitution and within the restrictions it imposes, a law may have any content whatsoever; there is nothing to prevent it dealing with matters previously governed by regulations.

The Constitutional Court added that the system of specialised courts enables recourse to be had to the courts to protect all kinds of rights and legitimate interests. The courts themselves have an instrument, the question as to unconstitutionality, with which to ensure that the acts of the legislature comply with the Constitution.

*Cross-references:*

Constitutional Court Judgment no. 28/1997 of 13.02.1997.

*Languages:*

Spanish.

*Identification:* ESP-2000-3-030

a) Spain / b) Constitutional Court / c) Second Chamber / d) 30.10.2000 / e) 252/2000 / f) El Campello residents' association / g) *Boletín oficial del Estado* (Official Gazette), 288, 01.12.2000, 29-34 / h) CODICES (Spanish).

*Keywords of the systematic thesaurus:*

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

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

*Keywords of the alphabetical index:*

Dispute as to jurisdiction / *Legitimitas ad causam*, municipal dues / Resident, association, status.

*Headnotes:*

Any association is empowered to contest in the courts administrative measures affecting its members, provided there is a connection between the purpose of the association and the impugned measures.

*Summary:*

Two local residents' associations applied to the administrative court seeking annulment of tax assessments made by the municipality of El Campello (Alicante Province), concerning some fifty village residents, in respect of sewage disposal for the year 1992. The Valencia High Court declared this application inadmissible, holding that associations are

not empowered to take legal proceedings to contest individual tax assessments, insofar as such assessments do not affect collective interests, but only the particular interests of the taxpayers concerned, who alone can contest them through the courts.

The two associations concerned then made an application for constitutional protection, arguing that their right to effective judicial protection (Article 24.1 of the Constitution), their right of association (Article 22.1 of the Constitution) and their right of petition (Article 29 of the Constitution) had been infringed. The Court granted their application, holding that the first right invoked by the applicants had been infringed.

In its judgment, the Court pointed to consistent constitutional case law on the right to effective judicial protection (Article 24.1 of the Constitution): in order to satisfy this requirement, the judicial body making a ruling must not only make a finding on the merits, it must also base any finding of inadmissibility on reasonably applied legal grounds. It also affirms that the verification of judicial conditions is a matter of ordinary law. In cases where a decision of inadmissibility makes it impossible to obtain a judicial response, verification of the constitutionality of those conditions must be more thorough. In administrative matters, a claimant whose legal sphere is clearly and sufficiently affected by the impugned decision (or absence thereof) has a legitimate interest in proceedings and is therefore fully entitled to be a party thereto. Consequently, by that very fact, a decision of inadmissibility against an application where there is a legitimate interest is unconstitutional.

The Court also affirmed that associations are empowered to act as parties in administrative proceedings where there is a link or connection between the subject of the proceedings and the purpose of the association. Such a link is only real if there is a relationship between the advantage or benefit accruing from a favourable decision and the statutory aims or purpose of the association. That is the only means of determining whether the individual interests of the persons entitled to appeal individually and the aims of the association coincide.

In this case, after examining the statutes of the applicant residents' associations and the essential purpose of such associations, the Court concluded that there did exist the necessary link to determine that the applicant associations were empowered to take legal proceedings to contest all the tax assessments for sewage disposal made in respect of a number of the village residents.

*Cross-references:*

Constitutional Court Judgments nos. 24/1987 of 25.02.1987; 106/1991 of 13.05.1991; 195/1992 of 16.11.1992; 101/1996 of 11.06.1996, *Bulletin* 1996/2 [ESP-1996-2-017]; 7/2001 of 15.01.2001; 24/2001 of 29.01.2001.

*Languages:*

Spanish.

*Identification:* ESP-2000-3-031

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 15.11.2000 / **e)** 273/2000 / **f)** Retroactive waste disposal charges / **g)** *Boletín oficial del Estado* (Official Gazette), 299, 14.12.2000, 39-48 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

3.10 General Principles – Certainty of the law.

3.21 General Principles – Prohibition of arbitrariness.

4.6.8 Institutions – Executive bodies – Relations with the courts.

4.10.7.1 Institutions – Public finances – Taxation – Principles.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.3.36.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – Taxation law.

*Keywords of the alphabetical index:*

Retroactivity, laws and other normative acts / Regulation, retroactive effect / Water, treatment, charge / Regulation, executive, procedural rules.

*Headnotes:*

A retroactive tax provision may be contrary to the principle of legal certainty if it introduces changes which could not reasonably be foreseen. To determine whether it infringes the Constitution, an assessment must be made of the degree of

retroactivity and the precise circumstances that arise in each case.

The public authorities have a duty to comply with the basic procedure for framing legal rules, according to the principles of legal certainty and the avoidance of arbitrary conduct.

The rules governing fiscal charges are not provisions which restrict individual rights, and so they are not subject to the prohibition of retroactivity laid down by Article 9.3 of the Constitution.

The Spanish Constitution does not recognise any principle whereby certain matters may be regulated only by regulations: any matter may be regulated by law.

*Summary:*

Law 5/1981 dated 4 June 1981 of the Autonomous Community of Catalonia concerning sewage disposal included a number of provisions for financing sewage disposal and treatment. It provided for an increase in the rates payable by users of the water supply networks and for a waste disposal charge for certain types of water consumption. In 1983, the Executive Council (*Generalidad*) of the Autonomous Community of Catalonia enacted several regulatory provisions under this law, for the purpose of financing and under taking the relevant works. Some of these provisions formed the subject of appeals by businesses required to pay the above-mentioned charge and were annulled by the courts on procedural grounds, as no mandatory preliminary technical report had been produced.

On 13 July 1987, when the courts had not yet ruled on the appeals, the Parliament of Catalonia adopted Law 17/1987 on water management, which contained a number of regulations on the increase of rates and the introduction of a waste disposal charge, previously approved by the autonomous government. The Parliament also decided that these regulations would have force of law and would be applied immediately, pending the entry into force of the law. The Supreme Court then referred the 1987 Law to the Constitutional Court, arguing that it infringed the principles of legal certainty and non-retroactivity of provisions restricting individual rights, as protected by Article 9.3 of the Constitution. The Supreme Court contended that a legislative provision cannot confer a higher status and retroactive effect upon regulatory provisions of a fiscal nature, which are void as the corresponding tax assessments would otherwise themselves be void.

The Constitutional Court stated that provisions giving rise to fiscal charges (Article 31.1 of the Constitution) are not, by definition, provisions which restrict individual rights within the meaning of Article 9.3 of the Constitution. Accordingly, fiscal provisions as such are not restricted by the prohibition of retroactivity stipulated in the Constitution.

However, the judgment points out that retroactive fiscal provisions may be contrary to other constitutional principles, in particular the principle of legal certainty. But this principle is not absolute, as that would result in what the Court calls 'freezing' or 'petrification' of the legal system. Nor is there any citizens' right to the maintenance of a particular tax law system. But the principle of legal certainty protects citizens against rule changes which cannot reasonably be foreseen, it being understood that back-dating fiscal provisions must never be contrary to the prohibition of arbitrary behaviour by the public authorities.

Determining whether a fiscal provision infringes the principle of legal certainty entails assessing, firstly, its degree of retroactivity and, secondly, the specific circumstances which arise in each case. In this instance, the Court found that the retroactivity of the law did not infringe the principle of legal certainty insofar as it was in conformity with the guarantee of certainty of the provision and the foreseeability of its application by the public authorities, the two elements of the principle susceptible of violation.

The Court also stressed that, although the second supplementary provision of Law 17/1987 does not clearly identify the specific regulatory provisions incorporated into the law, that is a defect of legislative technique which, in this particular instance, does not impair the objective aspect of legal certainty or reliability.

Nor did the Court consider that the impugned provision impaired the subjective aspect of legal certainty, i.e. the foreseeability of its effects. The Court emphasised that the requirement to pay the charge had been clearly established since Law 5/1981, having been affected neither by the court decisions annulling the regulations, nor by the fact that Law 17/1987 conferred the status of a Law on the regulations in question. The regulations had not yet been annulled insofar as the Supreme Court had not yet ruled on the appeals; their nullity was based on a procedural defect and not on any substantive infringement. Consequently, conferring a higher legal status on the retroactive provisions had no negative impact on citizens' confidence, as they had been able to adapt to the legislation in force.

The Court also stated that the principle of legal certainty and non-arbitrary behaviour by the public authorities require the latter to comply with the basic procedure for framing legal provisions. But these same constitutional principles do not oblige the public authorities to remain passive when a provision of a nature to serve the public interest is impaired by a procedural defect. In this particular instance, the legislature of the Autonomous Community of Catalonia acted to further a constitutional interest, namely the improvement of environmental water quality (Article 45 of the Constitution), which would have been seriously impaired if the necessary sewage disposal and water treatment works had not been carried out.

The Court also held that the legislative decision to confer a higher status on the retroactive provisions is irreproachable from the point of view of the system of sources. There is no principle laid down in the Spanish Constitution whereby it is mandatory for certain matters to be dealt with by regulatory, and not legislative, provisions. Under the Constitution and subject to the limits it sets, a law may have any content whatsoever.

Finally, it should be noted that the impugned legislative provision had been repealed before the Constitutional Court ruled on its constitutionality. However, this did not render the constitutional proceedings pointless, insofar as repeal of the provision does not prevent its being applied to the dispute in connection with which the question of unconstitutionality was raised, or to other similar cases that might arise.

#### *Cross-references:*

Concerning the retroactivity of fiscal provisions: Constitutional Court Judgments nos. 150/1990 of 04.10.1990 (FJ 8); 173/1996 of 31.10.1996 (FJ 3); 182/1997 of 28.10.1997 (FJ 11b), *Bulletin* 1997/3 [ESP-1997-3-022].

Concerning the absence in the Spanish Constitution of any principle making certain matters subject to regulatory provisions: Constitutional Court Judgment no. 73/2000 of 14.03.2000 (FJ 15), *Bulletin* 2000/1 [ESP-2000-1-011].

Concerning legislative validation: European Court of Human Rights Judgments of 23.10.1997, *National and Provincial Building Society and others v. United Kingdom*, §§ 111 and 112; of 09.12.1994, *Greek Refineries, Strain and Straitis Andreatis v. Greece*, §§ 49-50, *Bulletin* 1994/3 [ECH-1994-3-021]; and of 22.10.1997, *Papageorgiou v. Greece*, § 37.

*Languages:*

Spanish.

*Identification:* ESP-2000-3-032

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 16.11.2000 / **e)** 276/2000 / **f)** 50% tax surcharge / **g)** *Boletín oficial del Estado* (Official Gazette), 299, 14.12.2000, 72-88 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

**4.10.7.1 Institutions** – Public finances – Taxation – Principles.

**5.3.13.1.2 Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.

**5.3.13.2 Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

*Keywords of the alphabetical index:*

Sanction, administrative, concept / Tax, surcharge, late payment.

*Headnotes:*

The 50% surcharge for late payment of taxes is an administrative sanction covered by the Constitution. As such, it must respect the principle of lawfulness of sanctions and the procedural guarantees applying to sanctions (Articles 25.1 and 24.2 of the Constitution).

Whatever the legislator calls them, only punitive measures taken by the public authorities may be termed sanctions, and regardless of whether their remunerative function is accompanied by others.

*Summary:*

The Administrative Disputes Chamber of the Supreme Court of Catalonia applied to the Constitutional Court for a ruling that the General Tax Law was unconstitutional, arguing that Section 61.2 of the law,

as drafted under law 18/1991, was incompatible with Articles 24 and 25.1 of the Constitution, and thus with Article 9.3 of the Constitution. The contested provision introduced a 50% surcharge for non-payment within the stated time of sums due on tax returns and assessments, unless the tax-payer had previously informed the tax authorities that the payment would be late.

The referring Chamber argued that the surcharge actually constituted an administrative sanction, which was not provided for as such in law, and was not attended by the guarantees applying to the sanctions procedure.

The Constitutional Court declared the said provision unconstitutional and void. Two judges delivered concurring opinions.

This judgment was based on the assumption that only measures which are genuinely punitive, i.e. which are covered by the state's right to punish, are subject to the constitutional guarantees applying to measures which have the characteristics of a sanction. The Court accordingly started by trying to establish whether, regardless of its legal title, the contested surcharge was an administrative sanction or mere compensation for delay, as argued by the State Counsel.

For this purpose, the Court first examined the way in which the legislature regulated this surcharge. It concluded that the legal regime can be deduced from the firm intention not to treat the surcharge as a sanction, since at no point is the surcharge termed a sanction, and no express provision is made for its application under the sanctions procedure. Moreover, it is provided that application of the surcharge excludes the application of any sanction. It nonetheless points out that tax surcharges may have the external characteristics of a sanction, since they are imposed on persons guilty, under the established legal system, of tax fraud (under Section 79 of the law, any failure to pay all or part of a tax debt before expiry of the statutory time limit constitutes a serious offence). This is, in other words, a measure which produces negative effects on the assets of the tax-payers to whom it is applied, and which involves restriction of a right; the amount of the surcharge is determined with reference to the nature of the fraudulent activities (it depends on the sum which has not been paid in time, and on the extent of the delay).

That said, as the Constitutional Court stated in its judgment, the legal name assigned to this restrictive measure, and the legislator's intention not to treat it as a sanction, are by no means sufficient to justify the conclusion that the tax surcharge is not subject to the

restrictions imposed on sanctions by the Constitution. Nor, on the other hand, is it sufficient to find that the contested surcharge has the characteristics of a sanction. In fact, as the Constitutional Court pointed out, a measure of this kind constitutes a sanction only if it serves a punitive function. To determine its legal nature, the Court accordingly set out to establish whether it was in fact a punitive measure or served other functions.

It concluded that the surcharge was primarily intended as a coercive, dissuasive and incentive measure, and also served a compensatory function; in addition, however, it served a punitive function, since the difference between the amount of the surcharge and that of fiscal sanctions was a small one, and since it was a measure which restricted certain rights, and was imposed for violation of the law. The Court accordingly ruled that the contested surcharge did serve a punitive function, and was subject to the substantive and judicial guarantees provided by Articles 25.1 and 24.2 of the Constitution.

In its judgment, the Constitutional Court finally emphasised that the surcharge in question was introduced by a legal rule having force of law and was consistent with the guarantees of certainty derived from the principle of legality, enshrined in Article 25.1 of the Constitution. However, it violated Article 24.2 of the Constitution, since it was imposed directly without a prior hearing, and without the tax-payer's being able to exercise his defence rights in the proceedings. The legal provision introducing the surcharge must therefore be declared void.

#### *Supplementary information:*

Section 61.2 of the law, as drafted under Law 18/1991, provides as follows:

“Any delay in the payment of sums due on tax returns and assessments shall give rise, unless the tax-payer has previously informed the tax authorities of the delay, to payment of a single 50% tax surcharge, and shall exclude the payment of interest for delay, and any other applicable penalty. Notwithstanding the above, if payment is made within three months of expiry of the time limit for presentation of the said returns and assessments, and for settlement of the sum due, the surcharge shall be fixed at 10%.

A tax-payer who fails to pay taxes when the corresponding tax returns and assessments are presented late, and who has not expressly applied to postpone payment or pay in instalments, shall be required to pay a 100% surcharge”.

The Court thus ruled in this judgment that the subsection covering the 50% tax surcharge was void. However, the 10% surcharge had already been declared constitutional (Constitutional Court Judgment no. 164/1995 and Constitutional Court decisions 57/1998 of 3 March 1998 (FJ 4) and 237/1998 of 10 November 1998 (FJ 4)). As for the 100% surcharge, the Plenary Court held in Judgment no. 291/2000 of 30 November 2000 that this has the characteristics of a sanction, and annulled the surcharge imposed on the applicant by the tax authority. This same judgment also raised an internal question concerning the constitutional validity of the second paragraph of Section 61.2 of the law.

#### *Cross-references:*

Constitutional Court Judgments nos. 164/1995, *Bulletin* 1995/3 [ESP-1995-3-030] and 291/2000. See also Judgment of the European Court of Human Rights of 24.02.1994, case *Bendenoun v. France*, *Bulletin* 1994/1 [ECH-1994-1-004].

#### *Languages:*

Spanish.



#### *Identification: ESP-2000-3-033*

**a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 27.11.2000 / **e)** 282/2000 / **f)** Mrs Adoración Rodríguez Holguín contre la société “Wendy Restaurants Spain, S.A.” / **g)** *Boletín oficial del Estado* (Official Gazette), 4, 04.01.2001, 29-33 / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

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

#### *Keywords of the alphabetical index:*

Dismissal, publicity within firms / Honour, right, concept / Worker, professional prestige, right.



*Headnotes:*

If a woman worker's dismissal for disciplinary reasons is publicised within a firm, this does not prejudice her honour, provided that the aim is to inform, and that no insulting or offensive language is used.

The prestige attaching to a person's occupation or work forms part of the fundamental right to honour (Article 18.1 of the Constitution).

*Summary:*

Mrs Rodríguez Holguín was dismissed by her firm for failing to report the holding of a birthday party in one of its restaurants. The firm issued an internal circular, informing other staff of her dismissal and of the reasons. The dismissed employee brought a civil action for damages in defence of her honour. She also complained to the Labour Court against the decision to dismiss her.

The civil courts rejected her application. However, the Labour Court declared her dismissal unlawful. She then appealed – unsuccessfully – to the Constitutional Court against the decision of the Civil Chamber of the Supreme Court.

The Constitutional Court noted that professional prestige was one aspect of the fundamental right to honour (Article 18.1 of the Constitution) and was also enjoyed by paid employees. That said, criticisms of a person's professional activity – even if embarrassing or hurtful – did not in themselves affect his/her honour. That fundamental right was violated only by criticisms which were personally offensive, insulting or abusive.

*Cross-references:*

Concerning professional prestige: Constitutional Court Judgments nos. 223/1992 of 14.12.1992, and 180/1999 of 11.10.1999.

*Languages:*

Spanish.

*Identification:* ESP-2000-3-034

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 30.11.2000 / **e)** 289/2000 / **f)** Tax imposed by the Autonomous Community of the Balearic Islands on installations harmful to the environment / **g)** *Boletín oficial del Estado* (Official Gazette), 4, 04.01.2001, 60-70 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

4.8.4.1 Institutions – Federalism and regionalism – Budgetary and financial aspects – Finance.

4.8.4.2 Institutions – Federalism and regionalism – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

4.10 Institutions – Public finances.

*Keywords of the alphabetical index:*

Tax, autonomous communities, power to impose taxes / Tax, environment, preservation / Region, autonomous, simultaneous taxation / Region, financial autonomy.

*Headnotes:*

The Autonomous Communities have no authority to introduce taxes based solely on ownership of immovable property, even for the purpose of protecting the environment.

*Summary:*

In 1991, the Autonomous Community of the Balearic Islands introduced a tax on environmentally harmful installations. This tax applies to firms owning installations powered by electricity, liquid and solid fuels, and/or owning telephonic or telematic communications systems. The products obtained form the basis of assessment.

The President of the Government appealed to the Constitutional Court against the law adopted by the Parliament of the Balearic Islands. In its judgment, the Constitutional Court upheld the appeal and declared the said law unconstitutional and invalid.

The Constitutional Court took as its starting point the principle that financial autonomy is an essential element in achieving genuine political autonomy (Article 137 and 156 of the Constitution). Under the Constitution, the Autonomous Communities are in fact empowered to introduce and collect their own taxes (Articles 133.2 and 157.1 of the Constitution). However, in exercising their fiscal powers, they must

comply fully with the restrictions laid down in the Organic Law on funding of the Autonomous Communities (provided for in Article 157 of the Constitution and adopted in 1980).

One of the restrictions in the Organic Law is that taxes introduced by the Autonomous Communities may not affect “matters reserved for local authorities under local law”. Since the 1988 Local Finance Law provides for a tax on real property, the Autonomous Communities may levy no further taxes on ownership (however defined) of such property.

Having carefully analysed the structure of the tax introduced by the Autonomous Community of the Balearic Islands, the Court concluded that the tax, while designed to protect the environment, applies, not to the polluting activity, but directly to certain installations, which are taxed independently of their effects on the environment.

#### *Cross-references:*

Concerning the financial autonomy of the Autonomous Communities: Constitutional Court Judgments nos. 201/1988, 13/1992 and 68/1996.

Concerning taxation by the Autonomous Communities: Constitutional Court Judgments nos. 37/1987, 150/1990 and 186/1993.

#### *Languages:*

Spanish.



#### *Identification:* ESP-2000-3-035

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 30.11.2000 / **e)** 292/2000 / **f)** Transfer of personal data / **g)** *Boletín oficial del Estado* (Official Gazette), 4, 04.01.2001, 104-117 / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

2.1.1.4 Sources of Constitutional Law – Categories – Written rules – International instruments.

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

3.12 General Principles – Legality.

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

#### *Keywords of the alphabetical index:*

Personal data, law, reservation / Law, precision, need / Personal data, information of subject / European Union, Charter of Fundamental Rights / Personal data, genuine control.

#### *Headnotes:*

No regulation may authorise one public authority to transfer personal data to another without the express prior consent of the person concerned.

A public authority that has collected personal data from individuals may not be dispensed by law from informing them in advance as to how such data are to be used, who has charge of the file and what the individuals' rights are, for vague reasons, such as impossibility or difficulty of discharging its “supervisory or verification functions”. Nor may it be dispensed from this obligation to inform on the pretext that prosecuting administrative offences is impossible or difficult.

A public authority may not be empowered by law to prevent individuals from exercising their right to inspect, rectify or destroy personal data concerning them for vague reasons, such as the “public interest” or the need to protect “interests of third parties more deserving of protection”.

The Charter of Fundamental Rights of the European Union and other international agreements signed by Spain provide valuable criteria for interpretation of the meaning and scope of the rights and freedoms recognised by the Constitution (Article 10.2 of the Constitution).

#### *Summary:*

The Ombudsman appealed to the Constitutional Court against several provisions in the 1999 Organic Law on Protection of Personal Data. In its judgment, the Constitutional Court upheld the appeal and declared all the contested provisions unconstitutional and void.

Article 18.4 of the Constitution provides that “the law shall limit the use of information”. This provision

guarantees the individual's right to privacy and honour, and also full enjoyment of all other individual rights. This guarantee itself embodies a fundamental right or freedom: the right to freedom from any violation of personal dignity or freedom resulting from the unlawful use of automated data-processing, or "computer freedom". Protection is not limited to intimate personal data, but extends to personal data of all kinds. Individuals have a broad range of powers allowing them to monitor use by third parties of personal data concerning them: no such data may be collected or used without their prior consent, they have the right to know and be informed why such data are being collected and how they will be used, and they have the right to inspect, rectify and destroy those same data. They have, in short, genuine control over personal data concerning them.

Of course, the fundamental right to protection of personal data is not unrestricted – but any restrictions must be determined by law, and not by lower-ranking regulations. Moreover, they must be precisely defined, and are permissible only to the extent required for the protection of other fundamental rights or legal interests covered by the Constitution. Any lack of precision in the law applying to restrictions on this fundamental right breeds uncertainty. Moreover, in such cases, making all due allowance for reasonable interpretation, the law no longer fulfils its function of guaranteeing the fundamental right which it restricts, insofar as it quite simply yields to the wishes of those responsible for applying it – thus vitiating, not only the effectiveness of the right in question, but certainty of the law as well.

Section 21.1 of the contested law authorises public authorities to exchange personal data for purposes other than those for which they were collected, without having to secure the consent of the persons concerned. Among cases in which such transfers are lawful, the law recognises all those provided for in laws or regulations. This blanket reference to regulations is unconstitutional, since it violates the constitutional principle that the exercise of fundamental rights may be regulated only by law (Article 53.1 of the Constitution).

Section 24.1 of the 1999 Law releases public authorities, which have collected personal data, from their normal obligation of informing the persons concerned of the purpose for which data have been collected, of the person in charge of the file, and of their right to inspect, rectify and destroy such data. The Court held that waiving this obligation in cases where it is impossible or difficult for public authorities to exercise their "supervisory and verification functions" is far too sweeping, and thus unconstitutional. The Court also stated that the law may not

authorise public authorities to conceal information on files, on the pretext that it is impossible or difficult to prosecute administrative offences: the public interest in punishing such offences of this type, unlike criminal offences, is not sufficient.

Finally, Section 24.2 of the law authorises those responsible for a file to oppose the exercise by persons concerned of the right to inspect, rectify and destroy personal data concerning them, for "reasons of public interest", or to guarantee "interests of third parties more deserving of protection". The Constitutional Court holds that the vagueness of these provisions violates the constitutional principle that the exercise of fundamental rights may be regulated only by law, since the authorities are left to decide whether the right to protection of data may be exercised.

The Court based its reasoning on various international texts, which themselves create no fundamental rights, but provide a basis for interpretation of the rights and freedoms enshrined in the Spanish Constitution (Article 10.2 of the Constitution). It referred to Article 8 of the Charter of Fundamental Rights of the European Union; the 1995 Community Directive; from the Council of Europe, Article 8 ECHR and the 1981 Convention on the Protection of Personal Data, and a UN Resolution dating from 1995.

#### *Supplementary information:*

The Organic Law on the Protection of Personal Data (Organic Law 15/1999 of 13 December 1999) superseded the first law on this question – the Organic Law on Regulation of the automated Processing of Personal Data (Organic Law 5/1992 of 29 October 1992).

On the same day, the plenary Constitutional Court gave its Decision 290/2000 on constitutional appeals brought by several Popular Party parliamentarians and by the Ombudsman against the 1992 Law. It concluded that these appeals had lost their object, since the 1992 Law had been superseded by the 1999 Law, now in force. This decision was thus concerned solely with an appeal lodged by one Autonomous Community, claiming that its powers had been violated. Decision 290/2000 confirmed that it is constitutionally acceptable for the general law of the state to establish an agency responsible for data protection throughout the national territory: its power to intervene and impose administrative sanctions in respect of all files containing personal data serves to guarantee the fundamental rights of citizens (Article 18.4 of the Constitution), rights which all Spaniards must be equal in exercising (Article 149.1.1 of the Constitution).

The international texts referred to in the Constitutional Court's decision are: Article 8 of the Charter of Fundamental Rights of the European Union; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (particularly Article 13); Article 8 ECHR; Articles 5, 6, 8 and 9 of the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, signed in Strasbourg on 28 January 1981; Resolution 45/95 of the General Assembly of the United Nations containing the revised version of the "Guidelines for the regulation of computerised personal data files".

#### *Cross-references:*

Concerning the fundamental right to protection of personal data or computer freedom: Judgments of the Constitutional Court nos. 254/1993, 143/1994, 11/1998, *Bulletin* 1998/1 [ESP-1998-1-001]; 94/1998 and 202/1999, *Bulletin* 1999/3 [ESP-1999-3-025].

#### *Languages:*

Spanish.



#### *Identification:* ESP-2000-3-036

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 18.12.2000 / **e)** 311/2000 / **f)** Mrs Encarnación Palomo Cayón / **g)** *Boletín oficial del Estado* (Official Gazette), 14, 16.01.2001, 119-128 / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

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

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – Physical or mental disability.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

#### *Keywords of the alphabetical index:*

Handicapped person, matrimonial separation / *Legitimatio ad causam*, civil dispute in matrimonial matters / Marriage, equality / Handicapped person, personality rights, personal exercise, guardian / Appeal on points of law in the interest of the law.

#### *Headnotes:*

The guardian of a woman left disabled by an accident is entitled to bring proceedings against the latter's husband on her behalf, for the purpose of securing a separation and division of the assets of the marriage.

The disabled spouse must not be totally deprived of access to the courts, for the purpose of seeking a legal separation. If she were, there would be an unjustified inequality between the spouses, violating the principle of equality, and hence the constitutional requirement that the public authorities must protect the rights of disabled persons, and also the legal equality of spouses.

A constitutional appeal may be lodged before judgment has been given on an appeal on points of law brought by the Public Prosecutor's Office in the interest of the law.

#### *Summary:*

The applicant had been appointed guardian to her daughter, recognised as disabled following a serious accident. After various problems with the daughter's husband, the applicant applied to the civil courts for a legal separation and for various measures concerning the family assets.

The civil court declared the action inadmissible, on the ground that the guardian had no interest in bringing proceedings relating to personality rights. In its judgment, the Constitutional Court upheld the appeal, considering that the lower court's ruling on inadmissibility had violated the right of access to justice, which forms part of the right to effective judicial protection (Article 74.1 of the Constitution), and constituted discrimination against the disabled spouse (Articles 14, 49 and 32.1 of the Constitution).

Logically and chronologically, the first element in the right to effective protection by judges and courts is access to justice, i.e. the right to be a party to proceedings and pursue them until judgment has been given on the claims. Since this right belongs to

anyone possessing legitimate rights or interests, the courts are required to interpret the laws regulating the right to take part in proceedings fairly liberally.

Separation satisfies a legitimate interest of spouses, when cohabitation harms them, for any of the reasons specified in the Civil Code. This also applies to disabled married people, when their disability makes them totally dependent on an able-bodied spouse.

When it rejected the application and refused to consider the reasons cited for separation, on the ground that the guardian had no interest in proceeding, the civil court denied the disabled spouse all access to justice, since there is no other way of applying for a separation or for the taking of associated measures affecting the assets of the marriage. The strictness of this prohibition is disproportionate, and so violates Article 24.1 of the Constitution. It also violates the principle of equality, since there is no objective and reasonable justification for this difference in treatment between the spouses.

The Constitutional Court's judgment concerned the merits of the constitutional appeal, although the Public Prosecutor's Office had previously appealed to the Supreme Court on a point of law, in the interest of the law. In accordance with Spanish procedural law, this appeal was solely intended to clarify interpretation of the law, but had no effect on the legal situation created by the contested decision. Since it proposed no reparation for the alleged violation of the Constitution, and was not brought by the applicant, no ruling on it was required before a constitutional appeal was lodged.

*Supplementary information:*

One judge gave an opinion concurring with this judgment, concerning court proceedings relating to personality rights.

*Languages:*

Spanish.

## Sweden Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 2000 – 31 December 2000.



# Sweden

## Supreme Administrative Court

### Important decisions

*Identification:* SWE-2000-3-003

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 07.11.2000 / **e)** 3621-1999 / **f)** / **g)** / **h)** CODICES (Swedish).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Advertising, tax control / Secrecy, obligation / Anonymity, right to exception, guarantee.

*Headnotes:*

The Freedom of the Press Act (an Act on the same level as the Constitution) contains regulations protecting the anonymity of anyone supplying information for publishing. It imposes on the publisher the duty to observe secrecy as to the identity of the informant and it prohibits any public authority investigating the identity of the informant. The regulations also cover advertisers. Under certain conditions, these regulations do not prevent tax authorities from exercising the right, according to tax legislation, to request from anyone conducting a business activity, including a newspaper publisher, an income statement concerning *inter alia* payments received when selling goods and services, including advertisements, to a certain other business enterprise.

*Summary:*

The Freedom of the Press Act (an Act on the same level as the Constitution) gives anyone the right to make statements and communicate information on any subject for the purpose of publication in print. The Act also contains regulations protecting the anonymity of anyone supplying information for

publishing, imposing on the publisher an obligation to observe secrecy as to the identity of the informant (Chapter 3, Article 3) and prohibiting any public authority from making investigations into the identity of the informant (Chapter 3, Article 4).

According to the tax legislation, tax authorities can request from anyone conducting a business activity an income statement concerning *inter alia* payments received when selling goods and services to a certain other business enterprise. Where the person ordered to supply the income statement considers that observing the order would lead to a violation of the regulations of the Act he is required to ask the County Administrative Court for an exemption. At the same time he has to hand the requested information to the court. He may ask the court to decide on his obligation to supply the information without examining the information.

In the present case a Swedish newspaper publisher was ordered by the local tax office to provide an income statement concerning a businessman (B). The request concerned invoices made out to B during the years 1997 and 1998 as well as information about the mode of payment. The publisher asked for an exemption from the request referring to his obligation to observe secrecy under the Act. The Court ordered the publisher to present the requested information. The publisher maintained that he could neither confirm nor refute possession of the information in question and, thus, was prevented from complying with the court's order. The lower court stated that the publisher's refusal to present the requested information deprived them of the possibility of making a substantial examination of his application and therefore made it impossible to grant it.

The Supreme Administrative Court held that in so far as the requested information concerned B as an advertiser, the publisher may have a right to exemption by virtue of his obligation of secrecy under the Act, subject to the following conditions. First, the requested information must be of such character that it is possible to make a connection between B and certain advertisements. Second, the contents of the advertisements must not be such that it may be presumed that B had given his consent to the disclosure of his identity.

The publisher had to carry out the court's order to present the requested information. The information was of a fairly general nature and thus the publisher's confirmation of his possession of it could not be regarded as a breach of the obligation to observe secrecy. The court's examination of the information would be done in the interest of the protection of the individual's legal right to anonymity in publishing

information and hence could not be regarded as an “investigation” within the meaning of Chapter 3, Article 4 of the Act. The fact that the submitted information would turn into public records during the trial of the case would not jeopardise the obligation to observe secrecy as the information is covered by a section in the Official Secrets Act. The Court presupposed that the application of the provisions in that section would be done with due consideration of the interest of anonymity granted by Chapter 3, Article 3 of the Act.

As the company had refused to present any documents or information the court could not try the case in substance and consequently could not grant an exemption.

*Supplementary information:*

One judge expressed a dissenting opinion.

*Languages:*

Swedish.



## Switzerland Federal Court

### Important decisions

*Identification:* SUI-2000-3-007

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 23.05.2000 / **e)** 1P.645/1999 / **f)** S. v. Directorate of Public Health and Social Security and Administrative Court of Bern Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 I 112 / **h)** *Die Praxis des Bundesgerichts*, 2000 146 853; CODICES (German).

*Keywords of the systematic thesaurus:*

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

3.12 General Principles – Legality.

3.15 General Principles – Proportionality.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

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

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

*Keywords of the alphabetical index:*

Isolation / Medication, forced / Measure, coercive / General law and order clause.

*Headnotes:*

Forced medication and isolation. Personal freedom (Article 10 of the Federal Constitution; Article 8 ECHR).

Requirements as to the legal basis for compulsory medical care (recital 3c). Admissibility in exceptional circumstances of coercive measures in the absence of a formal legal basis (recital 4c).

Compliance of the material and temporal conditions with the principle of proportionality (recitals 5b and 5c).

*Summary:*

S., born in 1977, was treated in the winter of 1997 at the Waldau university psychiatric clinic in Bern for acute delirium linked with multiple drug addiction. In the autumn of 1997, he was again examined and detained at the clinic by order of the Prefect of Bern, delivered in accordance with the provisions of Articles 397a et seq. of the Civil Code on confinement for purposes of assistance. He was certified by the doctors to be suffering from schizophrenic psychosis, multiple drug addiction due to abuse of various drugs, and psychotic decompensation. An extended course of treatment was prognosticated. On 2 January 1998, S. escaped from the clinic but returned of his own accord on 5 January 1998. He was consigned to the emergency department the next day and placed in an isolation ward where he was compelled to take medicines against his will. S. complained of deprivation of liberty and forced medication to the Directorate of Public Health and Social Security of Bern Canton. He asked that the coercive measures be ruled unconstitutional. The Directorate dismissed the complaint, whereupon S. appealed to the Bern Administrative Court. The Court found that, in the light of the constitutional guarantees, the measures complained of (forced medication and isolation) had not been allowable after 8 January 1998. S. lodged a public law appeal with the Federal Court to determine that the coercive measures had been contrary to the guarantee of personal freedom as from 6 January 1998. The Federal Court dismissed the appeal.

Articles 7 and 10 of the Federal Constitution and Article 8.1 ECHR secure to every human being the right to personal freedom, bodily and mental integrity, and respect for human dignity. Isolation and forced medication are measures that seriously affect these constitutional guarantees. The Civil Code provisions on confinement for purposes of assistance cannot provide a legal basis on which the coercive measures at issue could be deemed admissible. Nor does the cantonal law embody any regulations in the matter, whether on the conditions of forced medication or on the way in which patients confined for purposes of assistance should be generally treated.

Considering the real danger posed by S. to himself as well as others, the Cantonal Administrative Court founded its decision on the general law and order clause. The Federal Court noted that the application of this clause and the adoption of coercive measures without a clear legal basis were questionable in a field as sensitive as psychiatry. Medication against the appellant's will was nonetheless called for in response to the material circumstances and the imminence of danger. The measures were clearly proportionate to the need and not in excess of the

action that appeared necessary to soothe S. in his agitated condition and to maintain security in the clinic. Therefore the coercive measures taken on 6 and 7 January 1998 were not contrary to the Constitution and the Convention.

*Languages:*

German.

*Identification:* SUI-2000-3-008

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 25.08.2000 / **e)** 2A.493/1999 / **f)** P. and C. v. State Council and Administrative Court of Zurich Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 II 425 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

2.1.1.4.3 Sources of Constitutional Law – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
3.12 General Principles – Legality.  
3.15 General Principles – Proportionality.  
5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – Foreigners.  
5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – Sexual orientation.  
5.3.9 Fundamental Rights – Civil and political rights – Right of residence.  
5.3.31 Fundamental Rights – Civil and political rights – Right to private life.  
5.3.32 Fundamental Rights – Civil and political rights – Right to family life.

*Keywords of the alphabetical index:*

Cohabitation, same-sex partners / Residence, permit, refusal / Homosexuality, family life.

*Headnotes:*

Right of a lesbian couple of different nationalities to carry on their relationship in Switzerland. Article 8 ECHR in conjunction with Article 14 ECHR; Articles 8, 13.1, 14 and 36 of the Federal Constitution (equal treatment, protection of privacy, right to marry and found a family, conditions for the limitation of



fundamental rights); Federal Act on Residence and Settlement of Foreigners (LSEE).

Cohabitation of same-sex partners does not constitute family life within the meaning of Article 8 ECHR, or under Article 13.1 of the Federal Constitution (recital 4b); nevertheless, refusal to grant a residence permit to the foreign partner may in certain circumstances interfere with private life, so that the cantonal authority's power of decision under the terms of Article 4 LSEE may be fettered (recital 4c; alteration of precedent).

The Federal Court entertained the administrative law appeal filed by two appellants who had been living together for six years (recital 4d), but held that the interference with private life consequential to the refusal of a permit was justified according to Article 8.2 ECHR and Article 36 of the Federal Constitution (recital 5).

### *Summary:*

During a trip to New Zealand in 1994, Ms P., a Swiss national, became acquainted with Ms C., a New Zealand and United Kingdom national. The upshot of their meeting was a homosexual relationship. In February 1995, P. returned to Switzerland to complete her studies in Chinese acupuncture, and C. visited her there from May to July 1995. On completion of her studies, P. went to Christchurch (New Zealand) and lived with C. for twenty months. For professional and personal reasons, P. returned to Switzerland in April 1997 and began working as a therapist. C. regularly came to see her in Switzerland.

In 1998 the Zurich Canton immigration authorities refused C. a permit to enter Switzerland and a residence permit which would enable her to live at P.'s home without engaging in gainful activity. The State Council and the Administrative Tribunal of Zurich Canton confirmed the decision. In an administrative law appeal, P. and C. asked the Federal Court to set aside the cantonal decisions and grant C. a residence permit. The appeal was dismissed.

The Judicature Act precludes an administrative law appeal against refusal of permits in the field of immigration control to which Federal law does not attach a right. According to Article 4 of the Federal Act on Residence and Settlement of Foreigners (LSEE), the authority shall freely decide as to the award of the residence permit, in accordance with the requirements of the law and treaties with other countries. It was thus necessary to determine whether Article 8 ECHR accorded the appellants a right to receive such a permit.

Article 8 ECHR and Article 13 of the Federal Constitution secure to everyone the right to respect for their private and family life. These provisions may be invoked by a foreigner with relations in Switzerland who hold a residence or settlement permit. Nevertheless, court practice has hitherto withheld the application of Article 8 ECHR from same-sex partners.

The Federal Court found that, as the legal situation of homosexual couples had changed in recent years, a fresh examination was called for. Whereas the term "family life" always relates to heterosexual couples, that of "private life" also applies to the situation of same-sex partners wishing to live together. As this case involved two lesbians who had lived as a couple for some years despite numerous difficulties, refusal of a permit to reside in Switzerland constituted interference with respect for their private life. The application of Article 8.1 ECHR and Article 13.1 of the Federal Constitution thus fettered the discretion of the authorities in deciding to refuse a residence permit under the terms of Article 4 LSEE, and necessitated an examination with reference to Article 8.2 ECHR.

Refusal of a residence permit has a clear and sufficiently precise foundation in the Federal Act on Residence and Settlement of Foreigners. It is one of the measures intended to guard against a disproportionately large foreign population and keep the size of the Swiss population and the resident foreign population in a balanced ratio, and is furthermore conducive to the integration of foreign workers and residents. The question of proportionality proved more complex. Indeed, life in Switzerland offered the appellants many advantages for professional and personal reasons but, despite the difficulties encountered, they had been able to live together over the past few years. Without going into the question of its expediency, the Federal Court found that, considering the full material circumstances, the refusal of a residence permit met the requirements of Article 8.2 ECHR.

### *Languages:*

German.



*Identification:* SUI-2000-3-009

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 20.09.2000 / **e)** 2P.59/2000 / **f)** A. v. Lawyers' Supervisory Board and Cantonal Court of Zurich Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 I 228 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

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

3.17 General Principles – General interest.

4.7.13 Institutions – Courts and tribunals – Other courts.

4.7.15 Institutions – Courts and tribunals – Legal assistance and representation of parties.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Public hearings.

*Keywords of the alphabetical index:*

Lawyer, disciplinary measure / Civil right / Disciplinary proceedings.

*Headnotes:*

Right to receive a public hearing before a judicial authority in the event of a lawyer's temporary suspension from practice; Article 6.1 ECHR and Article 30.1 of the Federal Constitution.

Relevance of Article 6 ECHR to disciplinary proceedings instituted under the law governing the legal profession; definition of a judicial authority.

In this regard, the Lawyers' Supervisory Board of Zurich Canton is not a judicial authority as defined by Article 6.1 ECHR or by Article 30.1 of the Federal Constitution. For that reason, a public hearing held by it cannot take the place of a public hearing before the Cantonal Court if such a hearing is requested.

*Summary:*

Lawyer A. had appealed to the Zurich Cantonal Court against a district court judgment. In his memorial, he reviled the judicial authorities and derided the procedure. The presiding judge of the first Civil Chamber of the Cantonal Court found that A. had

committed a breach of decorum, and offered him an opportunity to rectify his memorial.

Further to a complaint by the presiding judge, the Lawyers' Supervisory Board of the canton instituted disciplinary proceedings against A. It received his submissions during a public hearing, fined him 1 000 CHF and ordered his suspension from practice for 3 months. The lawyer appealed to the Cantonal Court, which upheld the ruling of the Supervisory Board.

In a public law appeal, A. requested the Federal Court to set aside the Cantonal Court's judgment. He alleged a violation of Article 6.1 ECHR on the ground that the Cantonal Court had not delivered judgment in public session. The Federal Court allowed the public law appeal.

While the disciplinary fine in the instant case did not come within the ambit of Article 6.1 ECHR, the suspension from practice affected civil rights within the meaning of this treaty provision. Lawyer A. was therefore entitled to a public hearing of his case before an independent and impartial tribunal. As an institution, the Lawyers' Supervisory Board is independent. Its task and its functions are nevertheless more akin to those of an administrative authority, as it acts in the public interest to maintain the good repute and the proper functioning of the legal profession. A lawyer subject to disciplinary action deals directly with the Board, which may take action of its own motion. Therefore it does not constitute a tribunal within the meaning of the European Convention on Human Rights.

It is not contrary to the guarantees of the Convention for such a body to conduct disciplinary proceedings but, in order to meet the Convention's requirements, there must be a legal remedy before a tribunal which affords the guarantees set out in Article 6.1 ECHR. In the instant case the Cantonal Court, though petitioned by A., did not hear him in public session, and so he did not benefit from a procedure in accordance with the European Convention on Human Rights.

*Languages:*

German.



*Identification:* SUI-2000-3-010

**a)** Switzerland / **b)** Federal Court / **c)** First Civil Law Chamber / **d)** 09.11.2000 / **e)** 4P.87/2000 / **f)** Real-estate company X. v. S. and Appeals Chamber of the Vaud Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 I 235 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

4.7.8.1 Institutions – Courts and tribunals – Ordinary courts – Civil courts.

5.3.13.11 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Independence.

5.3.13.12 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

*Keywords of the alphabetical index:*

Judge, associate / Rent Tribunal, jointly constituted.

*Headnotes:*

Right to an independent and impartial tribunal; jointly constituted Rent Tribunal; Article 6.1 ECHR.

The composition of the Rent Tribunal in Vaud Canton does not present any objective and organisational incompatibilities with Article 6.1 ECHR. The member of this court representing an association of tenants with which he is connected need not withdraw simply because another employee of the association is assisting one of the litigants, saving the possibility of the association itself having a direct interest in the outcome of the action or of this judge's failing to provide adequate assurances of independence and impartiality in the specific case.

*Summary:*

X., a real estate company, had rented a flat in a building situated in Lausanne to tenant S. who challenged the initial rental before the Lausanne district rent conciliation board. The conciliation session did not achieve a settlement. S. thereupon applied to the Rent Tribunal for a reduction of the agreed rental. The respondent company objected that the action was out of time and that the claim was barred by limitation. In a preliminary ruling, the Rent Tribunal dismissed both objections.

Before the Appeals Chamber of the Vaud Cantonal Court, X. submitted in particular that, following the aforementioned ruling, it had learned that a member of the Rent Tribunal was legal advisor to the Swiss Association of Tenants (ASLOCA), a tenants' protection association which was assisting S. in the proceedings. The Appeals Chamber upheld the challenged ruling.

In a public law appeal, X. requested the Federal Court to set aside the Appeals Chamber's decision. Relying on Article 30.1 of the Federal Constitution and Article 6.1 ECHR, X. contended that the Rent Tribunal was not an independent and impartial tribunal. The Federal Court dismissed the public law appeal.

The provisions invoked secure to everyone the right to be heard, in both civil and criminal cases, before an independent and impartial tribunal. The Rent Tribunal of Vaud Canton is a joint body constituted for each case by a career judge who presides the hearing and the deliberations, and two associate judges, one of whom represents the landlords and the other the tenants' organisations. This composition has the advantage of enabling specialists in the relevant legal field, who have direct knowledge of the practical problems raised, to take part in the deliberations.

The European Court of Human Rights and the Federal Court acknowledge that specialised tribunals comprising representatives of the groups concerned are compatible with the guarantee of an independent and impartial tribunal. The associate judge does not act as representative of an interest group but in a personal capacity, being appointed to this judicial office by the state authorities. It must be assumed that members of a joint tribunal are capable of placing themselves above the contingencies linked with their designation as associate judges.

It was therefore inappropriate to accept that membership of ASLOCA necessitated the withdrawal of the associate judge designated to represent it. Nor was it conclusive that another employee of ASLOCA was assisting one of the litigants, considering the associations' function of service to tenants. It did not even have any direct interest, capable of influencing the associate judge, in the outcome of the case. Nor was it proven that the judge personally gave advice to tenant S. or could have been biased for personal reasons. The complaint of violation of Article 6.1 ECHR and Article 30.1 of the Federal Constitution was therefore unfounded.

Languages:

French.



## "The former Yugoslav Republic of Macedonia" Constitutional Court

### Important decisions

*Identification:* MKD-2000-3-007

**a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 13.09.2000 / **e)** U.br.77/2000 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 76/2000 / **h)** CODICES (Macedonian).

*Keywords of the systematic thesaurus:*

**3.5 General Principles** – Social State.

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

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

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

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

**5.2.1.3 Fundamental Rights** – Equality – Scope of application – Social security.

**5.2.2 Fundamental Rights** – Equality – Criteria of distinction.

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

**5.4.12 Fundamental Rights** – Economic, social and cultural rights – Right to social security.

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

*Keywords of the alphabetical index:*

Civil servant, end of functions / Labour law / State employee, end of functions / Pension, and disability insurance, age / Pension, retirement / Retirement, age / Worker, fundamental right.

*Headnotes:*

The legislature is vested with the power to regulate issues within the sphere of employment and social

security. The regulation of these issues must be consistent with the equality of citizens before the law and the Constitution. Such regulation must also be consistent with human rights and freedoms, irrespective of sex, race, colour, national and social origin, political and religious conviction, property and social status. The termination of employment and the fixing of the age of retirement cannot be regulated beyond and parallel to current employment pension and insurance legislation.

*Summary:*

A group of 27 petitioners including individuals and associations of citizens lodged a petition with the Court challenging the constitutionality of the Law on Attaining a Premature Pension. The Court declared the Law to be void.

The Law in question specified the terms for attaining a premature pension for state employees. Men aged at least 63 years and women aged 58.5 years were entitled to premature pensions if they had worked for the body for a period of at least 20 years. Those who had worked for a body for at least 35 years were also entitled to a premature pension, regardless of their age or sex.

The Law entitled certain employees in higher education (readers and professors) and in public scientific institutions (scientific associates, senior scientific associates and scientific counsellors) to take voluntary retirement. The Law was of temporal duration, it would have been implemented until the end of 2000.

In making its decision, the Court took into consideration constitutional provisions regulating the rights and status of employees, the right to social security and insurance, as well as the principle of equality.

According to Article 32.5 of the Constitution, the exercise of the rights of employees and their position are regulated by law and collective agreements.

Article 34 of the Constitution guarantees citizens the right to social security and social insurance determined by law and collective agreement.

The Court thus concluded the legislature’s right to regulate issues regarding the termination of employment and the attainment of the right to a pension is indisputable. The Court stated that it is inevitable that these issues cannot be regulated without observing the principle of equality and non-discrimination. Judging its content, the Court found

that the Law disregarded the principle of equality on several grounds:

- a. the Law referred only to some, not all state employees, this implied unequal treatment of citizens who were otherwise in an equal social position;
- b. the Law prescribed the possibility for voluntary premature retirement of certain state employees, it thus treated other persons in the same social position unequally;
- c. the Law only allowed certain employees of higher educational and scientific institutions to apply for voluntary premature retirement;
- d. the Law was of temporal validity only, thus it would have been only effective to some employees, not to others;
- e. because the Law applied to both men and women the same period of working time required for eligibility for a premature pension where at least 35 years had been served, the Law introduced inequality in terms of gender by specifying a different threshold where eligibility is based on age;
- f. gender inequality appeared in the determination of a different percentage of the pension basis for a man and woman, where they had identical years of working time.

The Court also took into consideration the parallel existence of employment regulation and of the pension system (the Law on Labour Relations and the Law on Pension and Disability Insurance) consisting distinct provisions on employment termination and the attainment of the right on retirement.

Another ground justifying the Court’s opinion was the principle of legal safety and the rule of law. Since the Law has altered the employment and pension rights of state employees but not other employees, the Court found that the Law violated legal safety, a constituent element of the principle of the rule of law.

*Languages:*

Macedonian.



*Identification: MKD-2000-3-008*

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 27.09.2000 / e) U.br.92/2000 / f) / g) / h) CODICES (Macedonian).

*Keywords of the systematic thesaurus:*

3.24 General Principles – Market economy.

5.2 Fundamental Rights – Equality.

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

*Keywords of the alphabetical index:*

Competition, economic, protection / Competition, unfair / Market, unfair behaviour / Monopoly / Public order / Working hours.

*Headnotes:*

The determination of retailers' working hours does not restrict the freedom of the market and entrepreneurship but aims to maintain public order. The Constitutional guarantee of an equal legal position for all market entities refers to those having the same or similar scopes of operation.

*Summary:*

Considering the petition lodged, the Court did not invalidate certain provisions of the Book of Regulations on the Determination of Working Hours in Retail Trade, passed by the Ministry of Trade.

According to the challenged provisions, non-essential retail shops can only open between the hours of 8.00 am and 11.00 pm or 12.00 pm during summer time. During holidays and on Sundays, they can be open from 8.00 am until 11.00 am. 'Traffic retail shops' – those selling daily newspapers and tickets for city transport – can remain open for 24 hours each day during the week. The act in question also stated that gas stations can remain open 24 hours a day.

In the petitioner's view, such a restriction of working hours restricted freedom of the market and entrepreneurship, i.e. it enabled a monopoly position to be obtained by retailers selling daily newspapers and tickets for city transport and by those operating through gas stations. Therefore, they submitted, the disputed provisions were inconsistent with Article 55.3 of the Constitution.

In its decision, the Court held that Article 12 of the Law on Trade, which authorised the Ministry of Trade to determine opening hours for retail shops, was the legal basis for the adoption of the Book of Regulations in question. Tradesmen were liable to comply the Minister's act.

Article 8.7 of the Constitution defines the freedom of the market and entrepreneurship as a fundamental value of the constitutional order of the country.

Article 55 of the Constitution guarantees freedom of market and entrepreneurship. Thereby, the state ensures an equal legal position to all market entities and undertakes measures to prevent one entity gaining a monopoly position or monopolistic behaviour in the market. According to Article 55.3 of the Constitution, the freedom of the market and entrepreneurship can be restricted by law only if it is for the purposes of the defence of the Republic, the protection of the environment, or public health.

Having this in mind, the Court concluded that this freedom could not be taken as a private matter for market entities, because the state itself, while safeguarding this freedom has a significant role as regulator of the country's economic development. Therefore, the determination of opening hours in retail the trade aims to safeguard public order and cannot restrict the freedom of the market and entrepreneurship, nor can it establish a monopolistic position in the market for certain entities.

In respect to the longer hours 'traffic retail shops' and gas stations were allowed to open, the Court found the regulations did not create inequality or a monopoly position, because the nature and scope of the activities involved was different. The basic activity of gas stations is selling oil and oil derivatives. The basic activity of 'traffic retail shops' was selling daily newspapers and tickets for city transport. Bearing in mind the need for these kinds of goods, the opening hours of these shops is longer than that of other retail shops selling a wider assortment of non-essential goods, which according to the Book of Regulations in question have restricted opening hours. Regarding the question whether gas stations and retail shops selling only daily newspapers and tickets sell other goods as well, the Court found that this was a matter of fact which it was not competent to determine.

*Languages:*

Macedonian.



*Identification:* MKD-2000-3-009

**a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 15.11.2000 / **e)** U.br.103/2000 / **f)** / **g)** / **h)** CODICES (Macedonian).

*Keywords of the systematic thesaurus:*

3.9 General Principles – Rule of law.  
3.17 General Principles – General interest.  
3.18 General Principles – Margin of appreciation.  
4.10.5 Institutions – Public finances – Central bank.  
4.10.8 Institutions – Public finances – State assets.  
5.1.3 Fundamental Rights – General questions – Limits and restrictions.  
5.2 Fundamental Rights – Equality.  
5.3.37 Fundamental Rights – Civil and political rights – Right to property.

*Keywords of the alphabetical index:*

Balance of payments, policy / Legitimate aim / Ownership, types / Property, possession / Property, right to dispose of.

*Headnotes:*

The state can determine the maintenance of the economic health of the country, its currency and its exchange rates as an issue of general interest and it can restrict the ownership and disposing of frozen foreign currency deposits in pursuance of that interest. By warranting these deposits, the state has entered into a debtor-creditor relationship with their owners. Therefore, it can issue bonds and regulate their payment. When the state provides funds for the payment of deposits, it can pass a laws specifying the interest rate. Since foreign currency depositors existing before the independence of the country are in a different legal position than those of the current foreign currency system, the question of equality of citizens in terms of foreign currency savings does not arise.

*Summary:*

The Court did not invalidate the Law on the Redemption of Foreign Currency Deposits of Macedonian citizens.

In the petitioner's view, the Law in question was not in conformity with the principles of the rule of law, legal protection of ownership and of equality of citizens.

According to Articles 3 and 6 of the Constitution, the rule of law and the legal protection of ownership are fundamental principles of the constitutional order of the country.

Article 30 of the Constitution safeguards the right to ownership and of inheritance. According to Article 30.2 and 30.3 of the Constitution, ownership creates rights and duties and should serve the well-being of both the individual and the community. No person may be deprived or restricted of his/her property and rights deriving therefrom, except in cases of public interest determined by law.

By virtue of Article 68.2 of the Constitution, the National Assembly adopts laws and provides authentic interpretation for them.

The provisions indicated refer to the constitutional guarantee of the right to ownership and rights deriving therefrom, which cannot be deprived, nor restricted, except in cases of public interest determined by law.

However, there is a lack of accurate indications of the content of the public interest as a ground for restriction of ownership in the Constitution itself. Therefore, the Court found that in accordance with its own findings, the legislature is vested with the power to clarify the existence of a public interest in each case. The Court held that it was within the legitimate public interest of maintaining the general liquidity of the country's payments to restrict ownership and disposition of a particular category of foreign currency savings.

In addition, the Law in question referred to foreign currency deposits of citizens held before monetary independence of the country for which the state has given a warranty for payment. This occurred in accordance with the Law on Warranty of the Republic for Foreign Currency Deposits of Citizens and for ensuring funds and their payment. That Law had in fact made the necessary adjustments to the country's obligations to the new circumstances and its possibilities.

Therefore, the Court found that although the Law in question restricted the ownership of foreign currency savings deposits, it was not inconsistent with Articles 8.3, 6 and 30 of the Constitution. This was because the total payment or payment with a

prescribed interest rate of deposits would have put into question the country's general liquidity and its internal or external payments, which was unquestionably an issue of public interest.

On the other hand, by giving the warranty, the country entered into debtors-creditor relationships with saving deposit owners. Thereby, it is entitled to issue bonds binding itself to pay the holder the nominal value of the savings with interest of 2%. The convergence of the savings into the Euro, according to the average exchange rate of the National Bank of Macedonia, did not depreciate their value.

The Court found that in specifying the interest rate at 2%, the state took into consideration its material capability. The Court defined the fact that the state is providing the necessary funds for the payment of savings as ground for such authorisation.

The disputed Law did not put into question the equality of citizens in the sphere of foreign savings. The legal regime for foreign currency savings existing before the monetary independence of the country differs from the current regime regulated under the Law on Foreign Currency Operation. It presupposed a different legal position for old foreign currency depositors in relation to those in the present system.

The Court also did not accept the petitioner's claim to sustain the savings card as a saver's document. By recording the bond into the registry of long-range securities, citizens become owners of those bonds. Thereby, the right to ownership of foreign currency deposits is changed into another type of ownership - ownership of bonds, being regulated by regulations on securities and not by regulations on savings deposits.

#### *Languages:*

Macedonian.



*Identification:* MKD-2000-3-010

**a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 22.11.2000 / **e)** U.br.85/2000 / **f)** / **g)** *Sluzben vesnik na Republika*

*Makedonija* (Official Gazette), 104/2000 / **h)** CODICES (Macedonian).

#### *Keywords of the systematic thesaurus:*

##### 3.5 General Principles – Social State.

##### 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons.

##### 5.2.1.3 Fundamental Rights – Equality – Scope of application – Social security.

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

##### 5.4.12 Fundamental Rights – Economic, social and cultural rights – Right to social security.

#### *Keywords of the alphabetical index:*

Maternity leave, compensation for wages lost , right / Maternity, protection / Reciprocity, principle / Solidarity, social, principle.

#### *Headnotes:*

Persons with health insurance should have equal rights to compensation. Making the attainment of the right to compensation for wages lost during maternity leave dependent on the health insurance being paid for at least six months before the leave, puts women insured in a disadvantageous position in relation to others who were not restrained by the same condition.

#### *Summary:*

Following a petition lodged by an individual from Skopje, the Court partly repealed Article 14.1 of the Law on Health Insurance.

The Court had previously rejected Article 194.2 of the Law on Health Protection, according to which the insured was entitled to compensation for wages during maternity leave in identical circumstances, if the health insurance had lasted at least six months before the leave. The duration of time required to have insurance in that case to entitle a person to compensation was determined by labour regulations. The Court found that provision violated the constitutional special protection of maternity and woman workers, enshrined in Article 42.1 and 42.3 of the Constitution, the principle of solidarity in Article 8.1.8 of the Constitution, and the principle of equality in Article 9 of the Constitution.

In its previous judgment, the Court did not constitutionally invalidate Article 17-a.1.1 of the Law



amending the Law on Health Protection. That provision limited the general right to compensation for wages to persons with health insurance lasting at least six months before the occurrence of the event entitling them to compensation, unless the event was unforeseeable injury or illness. In that judgment, the Court had held that the attainment of health protection rights is directly connected with the payment of health insurance contributions. Therefore, the principle of insurance relied upon the different investments of persons insured within the fund and was not equal irrespective of the obligation to pay contributions.

In this case, the Court based its opinion upon constitutional provisions on social security and insurance, equality of citizens and the special constitutional position and protection of mothers and women workers.

Thus, according to Article 8.8 of the Constitution, human dignity, social justice and solidarity are amongst the fundamental values of the constitutional order. Article 9.2 of the Constitution guarantees the equality of all citizens before the Constitution and laws. The right to social security and social insurance is enshrined within Article 34 of the Constitution, which prescribes this right to be regulated by law and collective agreement. Article 42.1 and 42.3 of the Constitution protect maternity rights, children and minors in particular, and entitle mothers to special protection at work.

Article 12.1.1 of the Law on Health Insurance determines the right to compensation for lost wages during leave from work. The provision in question made the attainment of this right (in cases of maternity) dependant on the duration of health insurance (at least six months before leave started). The Court found this condition applicable only to women, who take maternity leave. It was therefore unconstitutional because it put women in an unequal position in relation to other insured persons, for which the law did not prescribe such dependence. The fact itself that grounds for the attainment of this right (maternity) differ from unforeseeable illness and injury was inappropriate to be treated as a ground to put this category of persons insured in a disadvantaged position to others. Herewith, the mother's role in the biological reproduction and the need to safeguard the necessary conditions for the proper development of children has to be observed. The special constitutional protection of mothers and children must be taken into consideration as well.

In pursuance of the Law on Health Insurance, compulsory health insurance is based on the principle of solidarity and reciprocity between insurance rights and payments of the health insurance contribution. It means that the attainment of the right deriving from compulsory health insurance depends on the payment of a contribution, provided that it is paid by all persons insured. In the Court's opinion, making the right of compensation for wages lost during maternity leave dependant on insurance duration is not in conformity with the principle of reciprocity and solidarity.

*Languages:*

Macedonian.



## Turkey Constitutional Court

Summaries of important decisions of the reference period 1 September 2000 – 31 December 2000 will be published in the next edition, *Bulletin* 2001/1.



## Ukraine Constitutional Court

### Important decisions

*Identification:* UKR-2000-3-009

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 09.02.2000 / **e)** 1-rp/2000 / **f)** Constitutionality of the Law on Local Self-Government (the case of self-government) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 30/2000 / **h)**.

*Keywords of the systematic thesaurus:*

4.6.9.1.1 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

4.6.9.2.2 Institutions – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.

4.8.4.3 Institutions – Federalism and regionalism – Budgetary and financial aspects – Budget.

*Keywords of the alphabetical index:*

Local government, finances / Mayor, term of office, premature termination.

*Headnotes:*

Provisions regarding the pre-termination of village, settlement or city mayor authorities according to the resolution of an appropriate council are incompatible with the Constitution, except for cases where the mayor violates the Constitution or laws, rights and liberties of citizens, or does not exercise the authority assigned to him/her (Article 79.3 of the Law on Local Self-Government in Ukraine).

*Summary:*

An executive committee is an executive body of a village, settlement or city council. Its term of office is for the same period as the council. The executive committee consists of the mayor, who heads the executive committee, the deputy mayor, the administrator, heads of units, departments and other executive bodies of the council, and other persons. The Secretary of an appropriate council is a member

of the executive committee *ex officio*. The executive committee meets and exercises its legal powers by passing resolutions. It reports to and is controlled by the council.

Units, departments and other executive bodies of the council are the council's executive bodies of branch and functional authority. They report to and are controlled by the council, which formed them, and are subordinated to the council's executive committee as well as the mayor. Heads of units, departments and other executive bodies of the council are appointed and dismissed by the mayor personally.

Within the structure of local self-government there is a hierarchy of bodies. In accordance with article 140.1 of the Constitution, a territorial community is the principal bearer of the functions and authorities of local self-government. According to article 140.3 of the Constitution, villages, settlements, and city councils are bodies of local self-government which represent territorial communities and carry out the functions and powers of local self-government on their behalf. Village, settlement, and city councils have their own executive bodies, which report to and are controlled by them.

The mayor is responsible for the organisation of the work of the council and its administration. He/she elaborates the agenda of the council, concludes contracts and agreements on behalf of the council on issues related to the exclusive competence of the council, and represents the council in relations with bodies of state power and other bodies of local self-government (Article 42.3 of the law).

The procedures for the formation and election of local councils and mayors are the same, though a council and mayor have different status. According to the Constitution, the mayor heads the executive body of the council and is responsible to the council for exercising the powers of the executive body and his/her own activities until the termination of his authority. This is subject to a resolution of a council where sufficient grounds for the adoption of such a resolution exist: Article 79.2 of the Law, where there has been a violation of the Constitution or law, or the rights and liberties of citizens, or where there has been a failure to exercise the mayor's powers.

Subsidies from the state budget are distributed by regional councils (*oblast*) to districts and cities of regional importance in the amount required for the formation of revenues not lower than the minimal amount of local budgets prescribed by law, they are also used for regional budget funding of joint projects of territorial communities.

The following provisions of the Law on Local Self-Government in Ukraine ("the Law") do not violate the Constitution: provisions defining the status of territorial communities of cities with district divisions and district councils in cities (Articles 6.5, 16.4, 41.3, 41.4, and Section V.3.2 of the "Final and Transitional Provisions"); provisions defining the system of executive committees of villages, settlements, and city councils (Articles 11.1, 51, 52, 53, and 54); provisions defining the status of villages, settlements, city mayors; the pre-termination procedures of villages, settlements, cities, district and regional councils, as well as the pre-termination procedure of villages, settlements, and city mayors (Articles 3.26.1, 5.26.1, 6.26.1, 9.26.1, 10.26.1, 16.26.1, 42.6, 78.4, 78.5, 78.6, 79.3, 79.5, and 79.7); and provisions defining the independence of local budgets (Articles 61.4, 63.1, 63.6, and 63.7).

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2000-3-010*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.04.2000 / **e)** 7-rp/2000 / **f)** Constitutionality of the Law on *Ad Interim* Serving of Officials that shall be Appointed by the President Subject to the Consent of Parliament or by Parliament Subject to Nomination by the President (*Ad interim* serving case) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 29/2000 / **h)**.

#### *Keywords of the systematic thesaurus:*

4.5.2 Institutions – Legislative bodies – Powers.

4.6.4.1 Institutions – Executive bodies – Composition – Appointment of members.

4.6.4.3 Institutions – Executive bodies – Composition – Status of members of executive bodies.

#### *Keywords of the alphabetical index:*

Official, *ad interim*.

*Headnotes:*

The Law on the *ad interim* Serving of Officials Appointed by the President subject to the Consent of Parliament, or by Parliament subject to Nomination by the President (“the Law”) was consistent with the Constitution to the extent to which it laid down procedures governing the *ad interim* serving and appointment of a Chairman of the National Bank, General Procurator, Chairman of the Antimonopoly Committee, Chairman of the State Property Fund, Chairman of the Television and Radio Broadcasting Committee.

The procedure for the appointment and serving *ad interim* of such officials, including the terms for proposing candidates to one of these offices, and the procedure of entering proposals regarding such candidates, is simply one aspect of the regulation of executive authorities and the framework of the civil service and as such shall be regulated exclusively by law. The procedure for the appointment of officials to run relevant governmental authorities and the uncertainty of their legal status, and the procedure for their appointment or service *ad interim* may have a direct impact on the lawfulness and efficiency of their activities. Such offices cannot remain vacant for long periods of time, in so far as practice shows that this results in negative consequences.

However, it was unconstitutional in so far as it regulated the serving and appointment of an *ad interim* Prime Minister or member of the Central Election Committee, whose regular appointment and conditions of service were subject to different constitutional provisions.

*Summary:*

The President petitioned the Court requesting that it declare the Law inconsistent with the Constitution.

The Law lays down the procedure to be followed with respect to *ad interim* serving and appointment of officials appointed by the President subject to the consent of Parliament, or by Parliament subject to nomination by the President. The Law regulates the following matters: persons that may serve as officials *ad interim* in cases of the resignation of the appointed official and the terms of exercise of their *ad interim* functions (Article 1); the nomination procedures in such cases (Article 2); the terms governing the presentation of a new nominee by the President if Parliament refuses to give its consent to the appointment of a proposed nominee or rejects the nominee (Article 3).

The applicant argued that, in adopting the Law, Parliament went beyond the limits of its powers as laid down by Articles 85 and 92 of the Constitution. This violated Article 8.2 of the Constitution, pursuant to which laws shall be adopted on the basis of the Constitution and shall be consistent with the Constitution.

The applicant also asserted that the Law restricted the powers of the President laid down by Articles 106.1.9, 106.1.11 and 106.1.14 of the Constitution. These provisions governed the appointment of the Prime Minister, the General Procurator, the Chairman of the Antimonopoly Committee, the Chairman of the State Property Fund and the Chairman of the Television and Radio Broadcasting Committee, subject to the consent of Parliament. In addition, the applicant argued the Law restricted the powers of the President laid down by Articles 85.1.18 and 85.1.21 of the Constitution with respect to proposing nominees for the office of the Chairman of the National Bank and members of the Central Election Committee.

Articles 85 and 106 of the Constitution provide for the appointment of certain officials by the President subject to the consent of Parliament and by Parliament subject to their nomination by the President. The Law implements these provisions and lays down a single procedure for the *ad interim* serving and appointment of such officials. These rules apply to all such officials, without any exception, including the Prime Minister and members of the Central Election Committee.

The Court ruled that the Law complied with the Constitution in so far as it establishes procedures with respect to the *ad interim* serving and appointment of the Chairman of the National Bank, the General Procurator, the Chairman of the Antimonopoly Committee, the Chairman of the State Property Fund and the Chairman of the Television and Radio Broadcasting Committee. The reasoning for this decision is as follows.

In accordance with the requirements of the Constitution, the President shall propose nominees for official positions in concert with Parliament, within the limits of parliamentary procedures. The Constitution also provides for the manner in which agreement may be reached between the President and Parliament in such matters.

In accordance with Article 75 of the Constitution, the sole legislative authority of Ukraine is its parliament, and its terms of reference include the adoption of laws and the exercise of other powers attributed to it (Articles 85.1.3 and 85.2 of the Constitution). This is

also true with regard to the appointment or resignation of officials in cases provided for by Article 85.1.15 of the Constitution. Article 92.1.12 of the Constitution provides that the organisation and functioning of executive authorities and the framework of the civil service shall be laid down exclusively by law. Similar rules are laid down in Article 120.2 of the Constitution, under which the organisation, powers and procedures of the Cabinet of Ministers and other central and local executive authorities shall be determined by the Constitution and by laws.

Parliament did not exceed its powers in adopting the Law. This follows from the above-mentioned Articles of the Constitution and does not restrict the powers of the President in any way. On the contrary, the laying down by law of the procedures for the *ad interim* appointment and serving of the Chairman of the National Bank, the General Procurator, the Chairman of the Antimonopoly Committee, the Chairman of the State Property Fund, and the Chairman of the Television and Radio Broadcasting Committee is a positive aspect of the legal regulation of the organisation of these authorities and of their interaction with other governmental authorities, in so far as it aims at increasing their efficiency. Moreover, having established by law the procedures for the *ad interim* appointment and serving of the said officials, Parliament also set itself certain legal deadlines for the consideration of these matters.

The Court found the Law to be unconstitutional to the extent to which it lays down the procedures governing the *ad interim* serving and appointment of the Prime Minister and members of the Central Election Committee, based on the fact that the procedures of appointment to and termination of these offices, as well as the execution of official duties attached to them, differ essentially from the procedures of appointment to and termination of office and *ad interim* serving of the other mentioned above.

Chapter VI of the Constitution lays down conditions and procedures governing the appointment to office, duties of office and resignation of the Prime Minister and other members of the Cabinet of Ministers.

It follows from these provisions of the Constitution that the procedures governing the appointment and *ad interim* serving of officials established by the challenged law are unconstitutional with respect to position of the Prime Minister.

The Central Election Committee is a standing governmental authority; its creation and functioning proceeds from the tenor of Articles 85.1.21, 92.1.12 and 92.1.20 of the Constitution and, accordingly, shall be regulated by the special Law on Central Election

Committee, dated 17 December 1997. This Law lays down the procedures governing the creation, membership and organisation of the functioning of this Committee, as well as the legal status and powers of its members.

The constitutional provisions mentioned above show that the procedure governing the appointment and *ad interim* serving of officials established by the Law is unconstitutional with respect to members of the Central Election Committee.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2000-3-011*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.05.2000 / **e)** 8-rp/2000 / **f)** Constitutionality of separate provisions of the Law on Status of a Peoples' Deputy, as amended by the Law on Introduction of Amendments and Supplementary Provisions to the Law on Status of a Peoples' Deputy, dated 25 September 1997 (Case of peoples' deputy of Ukraine status) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 37/2000 / **h)**.

#### *Keywords of the systematic thesaurus:*

**3.4 General Principles – Separation of powers.**  
**4.5.2 Institutions – Legislative bodies – Powers.**  
**4.5.8 Institutions – Legislative bodies – Relations with the executive bodies.**  
**4.5.12 Institutions – Legislative bodies – Status of members of legislative bodies.**  
**4.6.9.1.1 Institutions – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.**  
**5.3.37.3 Fundamental Rights – Civil and political rights – Right to property – Other limitations.**

#### *Keywords of the alphabetical index:*

Parliament, member, supervision of governmental authorities / Parliament, member, powers of control.

*Headnotes:*

Provisions of a Law that widened the power of people's deputies to exercise parliamentary control beyond the powers expressly laid down in the Constitution contravened the constitutional provisions governing the exercise of parliamentary control.

Further provisions contained in the same Law placing publishers of newspapers founded by local self-government bodies under an obligation to publish materials submitted by people's deputies infringed the property rights of the local self-government bodies that founded such newspapers and as such were also unconstitutional.

*Summary:*

On 25 September 1997, Parliament adopted the Law introducing amendments to the Law on the Status of People's Deputies of Ukraine, which sets forth separate provisions using new wordings or amends them as appropriate.

According to the tenor of Article 24.2 of the Law, "a people's deputy shall be entitled to execute control over consideration of proposals, applications and claims received by national governmental authorities, bodies of public associations and enterprises, establishments and organisations notwithstanding their form of ownership and management, if necessary, with the help of his/her consulting assistants and representatives from public associations and supervising authorities, and participate personally in such considerations". The applicant contended that this provision secured wider powers to people's deputies with respect to parliamentary control than those set forth in Articles 85.1.33 and 86 of the Constitution.

According to Article 19 of the Constitution, state and local self-government bodies and their officials shall act only on the grounds, within the limits of powers and in the manner proscribed by the Constitution and Law. According to Article 85.1.33 of the Constitution, Parliament shall exercise parliamentary control within the limits determined by the Constitution.

The people's deputies represent the people of the Ukraine in Parliament, which is the sole legislative authority of the Ukraine (Articles 75 and 76.1 of the Constitution). They shall have a special legal status (Article 92.1.21 of the Constitution), and their powers, including those related to control over activities of state and local self-government authorities and their officials shall be determined by the Constitution and by the Law (Article 76.4 of the Constitution).

Activities of people's deputies related to execution of their constitutional powers in Parliament are connected with their activities in electoral districts (Articles 76.1, 78.1, 85.34, 86, 87, and 93.1 of the Constitution). The exercise in parliamentary control may be initiated by individual members of Parliament or by the Parliament as a whole but in both cases it requires the direct participation of people's deputies.

At the same time, the exercise of parliamentary control has certain specific features. According to the Constitution, a people's deputy shall execute his/her powers of control in the form of an inquiry. Thus, in accordance with the provisions of the Constitution, a people's deputy shall be entitled to submit such inquiries during sessions of Parliament to bodies of Parliament, to the Cabinet of Ministers and to heads of other bodies of state and local self-government, as well as to heads of enterprises, establishments and organisations located at the territory of the Ukraine regardless of their management and form of ownership (Article 86.1 of the Constitution). A people's deputy may exercise these powers of control only during sessions of Parliament, and in certain cases only on the basis of a resolution adopted by the Parliament in accordance with procedure established under the Constitution.

The Parliament as a whole exercises parliamentary control in accordance with various rules, but only within the limits determined by the Constitution. In particular, it exercises control over compliance with the State Budget and over activities of the Cabinet of Ministers; hearing annual reports of the Human Rights Commissioner of Parliament regarding the situation with respect to the protection of human rights and freedoms in Ukraine; questions of credibility of the Procurator General resulting in his dismissal; consideration in accordance with established procedure of matters concerning the responsibility of the Cabinet of Ministers and the adoption of a resolution of no confidence in the Cabinet of Ministers. According to the Constitution, Parliament may also exercise other powers of control, including but not limited to the creation of temporary special commissions for preliminary consideration of matters within its competence (Article 89.3 of the Constitution) and temporary investigative commissions for investigating matters of public concern.

Individual members of Parliament may exercise such control directly in accordance with Article 86 of the Constitution and within the framework of other constitutional provisions.

The Constitution lays down the framework governing the status and basic guarantees afforded to a people's deputy (Articles 78, 79, 80, 81, 86, 87, 93 of

the Constitution), which imply no incidental right of preference in using mass media in comparison with other officials. In placing publishers of newspapers founded by local self-government bodies under an obligation to publish materials submitted by people's deputies, Parliament restricts the exercise of a constitutional right of property by local self-government bodies (Articles 142, 143 of the Constitution).

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2000-3-012

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.06.2000 / **e)** 1-v/2000 / **f)** Compliance of the draft Law on Amendments to the Constitution Following Results of All-Ukrainian Referendum on the People's Initiative with requirements of Articles 157 and 158 of the Constitution (case of amendments to Articles 76, 80, 90 and 106 of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 30/2000 / **h)**.

#### *Keywords of the systematic thesaurus:*

2.1.1.1.1 Sources of Constitutional Law – Categories – Written rules – National rules – Constitution.

3.9 General Principles – Rule of law.

4.1.2 Institutions – Constituent assembly or equivalent body – Limitations on powers.

4.4.1.2 Institutions – Head of State – Powers – Relations with legislative bodies.

4.5.1 Institutions – Legislative bodies – Structure.

4.5.3 Institutions – Legislative bodies – Composition.

4.5.12 Institutions – Legislative bodies – Status of members of legislative bodies.

5.1 Fundamental Rights – General questions.

5.3.39 Fundamental Rights – Civil and political rights – Electoral rights.

#### *Keywords of the alphabetical index:*

Immunity, parliamentary / Constitution, amendment / Parliament, membership / Referendum, constitutional,

implementation of results / Parliamentary majority, “permanently acting”.

#### *Headnotes:*

A draft Law on Amendments to the Constitution reducing the number of members in the exiting chamber of Parliament and introducing a second chamber of Parliament, eliminating the immunity of members of Parliament and giving the President the right to dissolve Parliament if it failed to form a permanently acting majority within one month of elections did not affect the scope and substance of human and civil rights, nor did it aim to destroy the independence or territorial integrity of the Ukraine, and therefore it was not in conflict with the Constitution.

#### *Summary:*

Parliament applied to the Court concerning the compliance with Articles 157 and 158 of the Constitution of the draft Law on Amendments to the Constitution Following the Results of the All-Ukrainian Referendum on the People's Initiative, which law proposed the introduction of certain amendments to the Constitution (“the draft Law”).

In accordance with Article 85.1.1 of the Constitution, the powers of Parliament include the introduction of amendments to the Constitution within the limits and in accordance with the procedure laid down by Chapter XIII of the Constitution. The requirements applicable to such amendments are laid down, in particular, in Articles 157 and 158 of the Constitution.

In accordance with Article 158 of the Constitution, it shall be forbidden to submit to Parliament a legislative draft for the introduction of amendments to the Constitution if this draft has already been discussed by Parliament within the preceding year and the relevant law was rejected. In addition, Parliament is forbidden to change a given provision of the Constitution twice within the same term of the legislature. The draft Law was put for the first time before the current Parliament. Therefore, it met the requirements set forth in Article 158 of the Constitution.

Analysis of modern constitutional practice of democratic states shows that the composition of Parliament and the number of parliamentary chambers are a matter of political choice, depending to some extent, for example, on national traditions, the population of the country, specific historical features and the structure of Parliament and other circumstances. The composition of Parliament and

the number of parliamentary chambers have no immediate impact on the substance and scope of human and civil rights and freedoms, including electoral rights. A reduction in the number of members of Parliament does not of itself divest citizens holding active and passive electoral rights of their equal rights of participation in parliamentary elections. A reduction of the constitutional membership of Parliament from four hundred and fifty to three hundred people's deputies, as proposed by the draft Law, does not extinguish or restrict human and civil rights and freedoms in any way.

In accordance with Article 80.1 of the Constitution, people's deputies shall be guaranteed parliamentary immunity. In accordance with Articles 80.2 and 80.3 of the Constitution and relevant articles of the Law on Status of People's Deputies as well as foreign experience in matters of parliamentary immunity, the term "parliamentary immunity" refers to the special conditions applicable to people's deputies in order to protect them from undue interference in the activities they undertake in the exercise of their office as representatives of the people.

In accordance with the results of the all-Ukrainian referendum, it is proposed to delete Article 80.3 of the Constitution, thus limiting parliamentary immunity, which would consist only of the guarantee of that deputies cannot be held liable for the results of voting or statements made in Parliament or its bodies, except they are insulting or defamatory. The proposed changes to Article 80 of the Constitution would apply only to the special status of a people's deputy and have no impact on the substance of constitutional human and civil rights and freedoms. Therefore, deleting Article 80.3 of the Constitution would not contravene Article 157 of the Constitution.

Analysis of constitutions existing in modern democratic states give grounds to affirm that they do not use such a term such as a "permanently acting majority". The words "permanently acting" is imprecise and therefore may be interpreted in different ways.

On the other hand, the notion of "parliamentary majority" is used quite often in constitutional theory and practice. It refers to a certain parliamentary organisation resulting from the electoral victory of a party or a block of parties or the coalition of parties after elections. The parliamentary majority is, for example, responsible for forming of government policy. However, this notion is not equivalent to notions of a "majority of the constitutional membership" of Parliament and a "majority of deputy's votes", which are used in modern constitutions, including the

Constitution of the Ukraine, and which apply to the procedures used in adopting resolutions.

The proposed supplementary provisions to Article 90 of the Constitution giving the President a right to dissolve Parliament if it fails to form a "permanently acting majority" within one month does not extinguish or restrict human and civil rights and freedoms in any way. Furthermore, it is not aimed at destroying the independence of the territorial integrity of the Ukraine. The fact that the Constitution grants the President such powers does not affect the scope and substance of human and civil rights. It also does not affect the independence or territorial integrity of the Ukraine. The above additional provision therefore does not contradict the requirements of Article 157 of the Constitution.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2000-3-013*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.07.2000 / **e)** 2-v/2000 / **f)** Compliance of the draft Law on Amendments to the Constitution Following Results of All-Ukrainian Referendum of 16 April 2000, submitted by people's deputies, with requirements of Articles 157 and 158 of the Constitution (case of amendments to Articles 157 and 158 of the Constitution on the initiative of the people's deputies) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 28/2000 / **h)**.

#### *Keywords of the systematic thesaurus:*

**2.1.1.1.1 Sources of Constitutional Law – Categories – Written rules – National rules – Constitution.**

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

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

**3.1 General Principles – Sovereignty.**

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

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

**3.12 General Principles – Legality.**



4.1.2 Institutions – Constituent assembly or equivalent body – Limitations on powers.

4.5.1 Institutions – Legislative bodies – Structure.

4.5.3 Institutions – Legislative bodies – Composition.

4.5.12 Institutions – Legislative bodies – Status of members of legislative bodies.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.13.11 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Independence.

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Adversarial principle.

#### *Keywords of the alphabetical index:*

Immunity, parliamentary / Constitution, revision / Parliament, membership / Referendum, constitutional, implementation of results.

#### *Headnotes:*

The draft Law on Amendments to the Constitution Following the Results of the All-Ukrainian Referendum of 16 April 2000 (“the draft Law”), submitted to the Court by the Parliament, was in compliance with the Constitution to the extent to which it modified Articles 90 and 106.1.8 of the Constitution in a manner identical to that proposed by the draft Law submitted by the President, giving the President the authority to dissolve the Parliament if it failed to form a permanently acting majority within one month, in case number 1-v/2000 (*Bulletin* 2000/2 [UKR-2000-2-011]).

The proposed changes to Article 80.3 of the Constitution, dealing with parliamentary immunity, were unconstitutional, as they ran contrary to the principles of the independence of the judiciary and the separation of prosecution and justice.

Further amendments proposed in the draft Law, concerning the introduction of a bicameral parliament, were too imprecise to allow the Court to analyse comprehensively their compliance with Article 157 of the Constitution, under which the Constitution cannot be amended in such a way as to restrict the human rights and civil freedoms or destroy the independence or territorial integrity of the Ukraine. The case was dismissed to the extent to which the proposed amendments to the Constitution were directly or indirectly related to the introduction of a bicameral parliament.

#### *Summary:*

Parliament applied to the Court for a declaration on the compatibility of the requirements of Articles 157 and 158 of the Constitution with the draft Law, which was submitted to Parliament by the people’s deputies in accordance with the procedure laid down by Article 154 of the Constitution.

In accordance with Article 85.1.1 of the Constitution, the powers of Parliament include the introduction of amendments to the Constitution within the limits and in accordance with the procedure provided by Chapter XIII of the Constitution. The requirements applicable to such amendments are laid down, in particular, in Articles 157 and 158 of the Constitution. Thus, in accordance with Article 157.1 of the Constitution, it is forbidden to introduce any amendments to the Constitution envisaging the cancellation or restriction of human and civil rights, or aimed at destroying the independence or territorial integrity of the Ukraine. Furthermore, in accordance with Article 158 of the Constitution, it shall be forbidden to submit to Parliament a legislative draft for the introduction of amendments to the Constitution if the draft was already discussed by Parliament within the preceding term of office and was rejected. In addition, Parliament is forbidden to change a given provision of the Constitution twice within the same term of office. The draft Law was put for the first time before the current Parliament. Therefore, it met the requirements of Article 158 of the Constitution.

The Court based its conclusion on the compliance of the draft Law with the requirements of Article 157 of the Constitution on the following arguments:

The draft law submitted to the Court proposes to use the following wording in Article 75: “The Parliament of the Ukraine shall be the sole legislative authority of the Ukraine. It shall comprise two chambers: the Parliament and Senate of the Ukraine”.

Analysis of the modern constitutional practice of foreign states shows that the creation of a two-chambered parliament in a unitary state is a matter of practicality. The parliamentary structure itself (monocameral or bicameral) does not have any impact on the substance and scope of human and civil rights and freedoms. However, they can be affected by the manner in which the chambers are formed, their procedures, and the allocation of powers between the chambers.

In the draft Law proposed by the people’s deputies, the question of the allocation of powers between two chambers of the Parliament of the Ukraine, i.e., Parliament and the Senate, is not dealt with

sufficiently, as it fails to take into account the Constitution is a single, integral act, and, therefore, introduction of any amendments into it requires a systematic approach. This is especially true for amendments dealing with the introduction of a bicameral parliament, which are rather wide-ranging. The draft Law refers only to amendments to Articles 5, 76, 79, 80, 84, 85, 88, 93, 94, 96, 97, 106, 107, 109, 113, 114, 115, 116, 122, 126, 128, 131 and 150 of the Constitution and supplementing Articles 82.1, 84.1, 101.1-101.16 of the Constitution, whereas the introduction of a bicameral parliament in a proposed draft version will require amendments or adjustments to a number of other Articles, in particular, Articles 9, 20, 55, 72, 101, 104, 148, 151, 154, 155, 156, 158 and 159 of the Constitution.

The very absence of complex, systematic amendments to the Constitution connected with the introduction of a bicameral parliament in the draft proposed by the people's deputies makes impossible a comprehensive analysis of the compliance of the proposed amendments to the Constitution with Article 157 of the Constitution.

Furthermore, as follows from the list of constitutional provisions mentioned above, amendments to the Constitution related to the introduction of a bicameral parliament concern not only Chapters II, IV, V, VI, VII, VIII, IX, X, XI, XII, XIV and XV of the Constitution, but Chapters I, III and XIII of the Constitution as well. The procedures for submitting a draft law introducing amendments into these Chapters is different from the procedures of submitting a draft law introducing amendments into other Chapters of the Constitution (Article 156 of the Constitution).

In such circumstances, the Court cannot provide a comprehensive conclusion regarding compliance of the draft Law with requirements of Articles 157 and 158 of the Constitution and considers that the case be dismissed to the extent to which the proposed amendments to the Constitution are directly or indirectly related to the introduction of a bicameral parliament.

The amendments to Article 80.3 of the Constitution proposed in this draft law contravene the principle of independence of the judiciary (Article 126 of the Constitution), and, in particular to the principle of legality (Article 129 of the Constitution). Moreover, the fact that the Supreme Court has given its consent to the detention, arrest or bringing to trial of a member of Parliament could lead to prejudice during the consideration of the subsequent case by the courts of first instance and of appeal.

These amendments are also inconsistent with Article 8 of the Constitution and with Article 6 ECHR, under which, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Nor are they in accordance with a number of decisions of the European Court of Human Rights regarding the necessity of consistently upholding the compliance with the principle of the separation of prosecution and justice.

Furthermore, parliamentary immunity is not exclusively a personal right of a people's deputy. It is also aimed at ensuring the normal functioning of the Parliament. Therefore, in those countries where parliamentary immunity exists, the power to lift that immunity falls within the powers of the parliamentary chamber. In its determination of whether to prosecute, detain or arrest a people's deputy, Parliament will not only have legal considerations, but also political considerations related to the normal functioning of the Parliament.

The draft version of Article 80.3 proposed by people's deputies also fails to comply with decision adopted by the All-Ukrainian Referendum of 16 April 2000, in so far as it retains the scope of parliamentary immunity provided for by this Article (which is to be deleted from the text of the Constitution in accordance with the results of the referendum), and provides for the transfer to another subject of the power to consent to the lifting of parliamentary immunity.

Thus, the amendments to Article 80.3 of the Constitution provide for the limitation of human and civil rights and freedoms and, therefore, contravene Article 157 of the Constitution.

The amendments to Article 90 of the Constitution proposed by people's deputies coincide with the amendments to the same Article provided by the draft Law submitted to Parliament by the President. The Court has already issued its conclusion regarding compliance of this draft with the requirements of Articles 157 and 158 of the Constitution, in which it stated that amendments to Article 90 of the Constitution do not extinguish or restrict civil rights and freedoms. Also, they are not aimed at destroying the independence or territorial integrity of the Ukraine.

Finally, the draft Law before the Court proposes to supplement Article 106.1.8 of the Constitution by the following words: "as well as in other cases provided by the Constitution". This amendment completely coincides with the amendment to the same clause provided by the draft Law on Amendments to the

Constitution of the Ukraine following the results of the All-Ukrainian Referendum on the People's Initiative, submitted to Parliament by the President. Thus, the same conclusion shall be adopted with respect to the additional provisions to Article 106.1.8 of the Constitution proposed by people's deputies.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2000-3-014

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.07.2000 / **e)** 9-rp/2000 / **f)** Constitutionality of the Law on Ratification of European Charter of Regional Languages or Languages of Minorities (Language charter ratification case) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 29/2000 / **h)**.

#### *Keywords of the systematic thesaurus:*

4.4.1.4 Institutions – Head of State – Powers – Promulgation of laws.

4.5.2 Institutions – Legislative bodies – Powers.

4.5.6 Institutions – Legislative bodies – Law-making procedure.

#### *Keywords of the alphabetical index:*

Language, regional or of minority, Charter / Law on Ratification, procedure of signing / Countersigning, laws.

#### *Headnotes:*

The Law on the Ratification of the European Charter of Regional or of Minority Languages 1992, dated 24 December 1999, was found to be unconstitutional, due to the failure to comply with requirements related to the procedure of its signing. The provisions of Article 7.1 of the Law on International Treaties of the Ukraine were also found to be unconstitutional in so far as the procedure it laid down for signing a law on the ratification by the Ukraine of an international treaty failed to comply with the constitutional provisions on the counter-signature and promulgation of laws by the President.

#### *Summary:*

The procedures for the signing and official publication of the laws are clearly regulated in Article 94 of the Constitution, pursuant to which a law adopted by Parliament shall be signed by the Chairman of Parliament and shall be submitted by him without any delay to the President; within fifteen days of receiving the law, the President shall either sign and promulgate this law, or return it with substantiated proposals to Parliament for reconsideration; if the law is not returned for reconsideration by the President within the stated period, it shall be treated as approved by the President and shall be signed and published; if in the course of reconsideration, the law is adopted unchanged by Parliament by a majority of at least two-thirds of its members, the President shall be obliged to sign and promulgate the law within ten days; the law shall come into force ten days after the date of its promulgation, unless otherwise provided by the law; however, it may only come into force on or after the date of its publication.

The Constitution does not provide for any exceptions from these rules with respect to the signing and promulgation of laws dealing with the ratification of international treaties.

The Law on International Treaties of the Ukraine establishes that international treaties of the Ukraine shall be ratified by Parliament "through approval of a special law on ratification, which shall be signed by the Chairman of Parliament" (Article 7.1). Contrary to the requirements of Article 94 of the Constitution, this Law does not provide for the delivery of such a law to the President for its counter-signing and promulgation immediately after its signing by the Chairman of Parliament.

The signing of a law on ratification by the Chairman of Parliament in accordance with Article 7.1 of the Law is read in fact as a sufficient and final action, to be followed by promulgation. This contravenes the requirements of Article 94 of the Constitution. Thus the provisions of Article 7 of the Law are inconsistent with the Constitution as they lay down a procedure for signing a law on ratification of an international treaty of the Ukraine.

#### *Languages:*

Ukrainian.



*Identification:* UKR-2000-3-015

a) Ukraine / b) Constitutional Court / c) / d) 28.09.2000 / e) 10-rp/2000 / f) Constitutionality of provisions of the Law on State Housing Stock Privatisation, Article 2.2 (State housing privatisation case) / g) / h).

*Keywords of the systematic thesaurus:*

4.5.2 Institutions – Legislative bodies – Powers.

4.10.8.1 Institutions – Public finances – State assets – Privatisation.

5.2.2 Fundamental Rights – Equality – Criteria of distinction.

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

*Keywords of the alphabetical index:*

State stock privatisation / Residence, discrimination.

*Headnotes:*

Provisions of a law governing the privatisation of state owned dwellings which allowed Parliament to draw up, on the basis of certain given criteria, a list of specific dwellings that could not be privatised were not contrary to the constitutional right not to be discriminated against based on place of residence. Nor did these provisions conflict with the principle of inviolability of private property laid down in Article 41 of the Constitution.

*Summary:*

A group of people's deputies applied to the Court concerning the constitutionality of provisions of Article 2.2 of the Law on State Housing Stock Privatisation, dated 19 June 1992, as amended under the Law on Introduction of Amendments and Supplementary Provisions to the Law on State Housing Stock Privatisation, dated 22 February 1994. Under this Article, the following property could not be privatised: apartments with a status of museum; apartments or houses located within the territory of closed military settlements, enterprises, establishments and organisations; nature and environmental conservation areas, national parks, botanical gardens, zoological, regional and landscape parks; parks being monuments of landscape architecture, historical and cultural conservation areas, conservation areas with a status of museum; rooms in hostels; apartments or houses where it is impossible to provide safe dwelling conditions for people; apartments, rooms, or houses classified as departmental in accordance with the established procedure,

as well as apartments or houses located on the territory of the obligatory resettlement area contaminated due to the Chernobyl accident.

The applicants alleged that the provisions prohibited certain privatisations in contravention to provisions set forth in Article 24.2 of the Constitution – that there should be no discrimination in the entitlement to rights of citizens based on their place of residence – and Article 41 of the Constitution, under which nobody shall be unlawfully deprived of the right to property and which declares the right of private property to be inviolable. The Court rejected these arguments for the following reasons:

National and local self-governmental authorities execute the right of property on behalf of the Ukrainian people within the limits determined by the Constitution (Articles 13, 142, and 143 of the Constitution).

In accordance with Articles 92.1.7 and 85.1.36 of the Constitution, the powers of Parliament include the determination of the legal regime of property through the adoption of a relevant law, as well as the power to approve the list of state-owned property that shall not be privatised.

Article 24 of the Constitution guarantees equal constitutional rights and freedoms to every citizen of the Ukraine and declares that all citizens shall be equal before the law.

In accordance with the tenor of Article 24 of the Constitution, the wording, "place of residence" implies a territorial entity (village, community, city or any other local territorial subdivision) and not a specific dwelling of a citizen (house, apartment or dwelling), as the authors of the application suggest. Therefore, the inclusion of specific dwellings in the list of property that shall not be privatised in pursuance of the Law shall not be treated as a restriction of a human right based on place of residence.

Specific state-owned dwellings may be included in the list of property that shall not be privatised for a number of reasons, including but not limited to specific features of the territories where such dwellings are located, by specific features of such dwellings, the necessity of providing citizens with safe dwelling conditions, specific features related to the protection of national cultural values and areas of natural reserves, or the temporary character of occupancy.

In view of the above, the determination by Parliament that particular state-owned dwellings cannot be privatised due to their location or other circumstances

related to the specific character of the legal regime to which the property is subject shall not be treated as a restriction of any human or civil rights. Where the legislature imposes restrictions on the privatisation of such state-owned dwellings, compensation is envisaged.

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Thus, the provisions of Article 2.2. of the Law shall not be considered as restrictions of human rights based on place of residence, but rather as restrictions applicable to specific, individual state-owned dwellings that cannot be transferred into the private property of Ukrainian citizens.

Furthermore, citizens are not deprived of a right to resolve such matters in accordance with the procedure laid down by the Law, including the right to make an application to an ordinary court for protection against violations of their right, if a change arises in the legal status of dwellings that makes privatisation of such property possible.

Article 41 of the Constitution, referred to by the applicant, deals with constitutional guarantees of already existing rights of property; therefore, there is no foundation for the contention that the challenged provision of the Law is inconsistent with this provision of the Constitution.

#### *Languages:*

Ukrainian.



## United States of America Supreme Court

### Important decisions

*Identification:* USA-2000-3-010

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 12.12.2000 / **e)** 00-949 / **f)** Bush v. Gore / **g)** / **h)** 2000 *U.S. Lexis* 8430; CODICES (English).

*Keywords of the systematic thesaurus:*

**3.6 General Principles** – Federal State.  
**4.9.8.8 Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.  
**5.2.1.4 Fundamental Rights** – Equality – Scope of application – Elections.  
**5.3.39.1 Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

*Keywords of the alphabetical index:*

Voter, intent / Ballot paper, recount / Undervote.

*Headnotes:*

When a state legislature has granted the right to vote for President of the United States to its people, that right to vote acquires a fundamental dimension under the federal Constitution.

One attribute of the fundamental right to vote is the equal weight and dignity accorded to the vote of each individual voter.

The constitutional equal protection requirement applies to the manner of the exercise of the individual's fundamental right to vote, and a state, having once granted the right to vote, may not by subsequent differential treatment give one person's vote greater value than that of another.

A judicial command to consider the intent of the voter in counting legally cast votes is an abstract principle that requires for constitutional validity the articulation

of specific, uniform standards for its practical implementation.

### *Summary:*

Albert Gore, candidate for the office of President of the United States, challenged the extremely close outcome of the 7 November 2000 popular vote in the state of Florida. Under the federal system of Presidential elections in the United States, the winner of an election is determined by the outcome of the vote in the Electoral College, in which votes are cast by electors representing each of the fifty states. Those electors are chosen on the basis of the popular vote in each state. Because of the closeness of the votes of the other forty-nine states in the Electoral College, it was evident after 7 November that the winner of Florida's votes would be the next President.

In his challenge, candidate Gore sought manual (by hand) recounts of voting ballots in three Florida counties. On 8 December 2000, the Supreme Court of Florida ordered a manual recount of approximately 9,000 votes in one Florida county (Miami-Dade) and the inclusion of 168 votes in the certified total of votes for candidate Gore in Miami-Dade County and the inclusion of 215 votes in the certified total of votes for candidate Gore in another Florida county (Palm Beach). In addition, the Court ordered manual recounts in all Florida counties where so-called "undervotes" (voter ballots upon which vote counting machines had not detected votes for the office of President) had not been subject to manual counting. Presidential candidate George W. Bush, who opposed manual recounts in the Florida counties, immediately petitioned the United States Supreme Court to review the decision of the Florida court. On 9 December, the U.S. Supreme Court agreed to such review and also ordered an immediate halt to the recounts, pending the outcome of the Court's decision on the merits of the case.

On 12 December, the U.S. Supreme Court reversed the decision of the Florida Supreme Court. By a vote of seven Justices to two, the Court ruled that the Florida Court's decision violated the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the U.S. Constitution, which states in relevant part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." By a vote of five to four, the Court also ruled that there was not any time left under the election laws for the Florida Court to revise its decision in a manner that would conform to the Equal Protection Clause. As a result, the Florida vote recounts could not proceed, and candidate Bush would receive Florida's votes in the Electoral College, giving him sufficient votes to win the Presidential election. On 13 December,

candidate Gore terminated his challenge of the Florida popular vote outcome and conceded the election to candidate Bush.

In its decision, the U.S. Supreme Court concluded that the Florida recounts as ordered by the Florida Court would violate the Equal Protection Clause because the Florida Court had not articulated a uniform, state-wide standard for the manual counting of ballots that satisfied constitutional standards. As a result, the fundamental right under the Constitution of each voter to have his or her vote counted with weight and dignity equal to those of all other voters was violated. The Florida Court had directed that the only ballots that should be counted were those where the "clear intent of the voter" is evident, and the U.S. Supreme Court ruled that this guideline was insufficient to protect against constitutionally unacceptable differential treatment of ballots cast by different voters. In striking down the Florida Court's guideline, the U.S. Supreme Court did not set forth its own standard for satisfying the Equal Protection Clause because the specific articulation of such a standard is assigned to the states under Article II of the U.S. Constitution. In addition, the U.S. Court stated that its construction and application of the Equal Protection Clause should be limited to the circumstances of this case, because "the problem of equal protection in election processes generally presents many complexities."

### *Supplementary information:*

Four Justices, in four separate written opinions, dissented from the Court's decision on various grounds, including disagreement with the conclusion that the election laws did not allow time for the Florida Court to fashion constitutional acceptable recount standards and – for two of the dissenting Justices – rejection of the majority's equal protection analysis.

Because mechanisms and procedures for recording and counting votes vary significantly between the states and within the sub-divisions of individual states, it can be expected that litigants in future election vote disputes will call upon the courts to apply the U.S. Supreme Court's equal protection analysis set forth in *Bush v. Gore*. If so, an important question in those cases will be whether the courts, including perhaps the U.S. Supreme Court itself, will conclude that this analysis is limited solely to the circumstances of this extraordinary Presidential election dispute or is subject to broader application.

*Languages:*

English.



## European Court of Human Rights

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Summaries of important decisions of the reference period 1 September 2000 – 31 December 2000 will be published in the next edition, *Bulletin* 2001/1.





# Court of Justice of the European Communities and Tribunal of First Instance

## Important decisions

*Identification:* ECJ-2000-3-001

a) European Union / b) Court of Justice of the European Communities / c) Fifth Chamber / d) 29.01.1998 / e) C-161/96 / f) Südzucker Mannheim v. Ochsenfurt AG and Hauptzollamt Mannheim / g) *European Court Reports* 1998, I-281 / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

3.15 General Principles – Proportionality.

*Keywords of the alphabetical index:*

Penalty, proportionality / Obligation, primary / Obligation, secondary.

*Headnotes:*

In order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalise failure to comply with the secondary obligation as severely as failure to comply with the primary obligation.

*Summary:*

The Bundesfinanzhof (German Federal Finance Court) referred to the Court of Justice for a preliminary ruling under Article 177 EC on the validity of two community regulations relating, *inter alia*, to the

arrangements for the export of sugar produced within the Community and the penalties for breaches of these regulations. The request related more specifically to the question as to whether, once a product had been exported, a breach of the relevant customs formalities could be penalised, without infringing the principle of proportionality, in the same way as a failure to export.

The Court held that compliance with the customs formalities relating to sugar exports and the actual exportation itself should be regarded as forming part of the main obligations of the system in question, in so far as these formalities were designed not just to facilitate administrative processes but were also crucial for the proper running of the sugar quota system. These formalities could not therefore be regarded as one of those secondary, chiefly administrative obligations for which penalties cannot be as strict as for the breach of a fundamental obligation if the risk of infringing the principle of proportionality is to be avoided.

*Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2000-3-002

a) European Union / b) Court of First Instance / c) / d) 29.01.1998 / e) T-113/96 / f) Edouard Dubois et fils v. Council of the European Union and Commission of the European Communities / g) *European Court Reports* 1998, II-125 / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.4.5.3 Constitutional Justice – Procedure – Originating document – Formal requirements.

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

2.2.3 Sources of Constitutional Law – Hierarchy – Hierarchy between sources of Community law.

3.11 General Principles – Vested and/or acquired rights.

3.18 General Principles – Margin of appreciation.

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

**5.3.16 Fundamental Rights – Civil and political rights – Right to compensation for damage caused by the State.**

**5.4.4 Fundamental Rights – Economic, social and cultural rights – Freedom to choose one's profession.**

*Keywords of the alphabetical index:*

Single European Act / Customs, intra-Community / Customs agent, profession, demise, compensation.

*Headnotes:*

1. Under Article 19.1 of the Statute of the Court of Justice, and under Article 44.1.c of the Rules of Procedure of the Court of First Instance, all applications are to indicate the subject-matter of the dispute and contain a brief statement of the grounds on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself.

In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage.

2. A claim is inadmissible where it seeks to impute liability to the Community for damage whose source is to be found in the Single European Act, which is an instrument of primary Community law and is thus neither an act of the Community institutions nor an act of the servants of the Community in the performance of their duties and cannot, therefore, give rise to non-contractual liability on the part of the Community.

Moreover, under the hierarchy of rules, the provisions of Article 178 and Article 215.2 EC, which govern the non-contractual liability of the Community and are primary law, cannot be brought to bear on instruments belonging to an equivalent level, such as the

provisions of the Single European Act, where this is not expressly provided for.

3. Omissions by the Community institutions give rise to the non-contractual liability of the Community only where the institutions have infringed a legal obligation to act under a provision of Community law.

In the case of the demise of the profession of intra-Community customs agent as a result of the Single European Act, there is no obligation under the Single European Act itself or under any other formal rule of written Community law, nor under any general principle of law, by virtue of which the Community would be obliged to compensate a person who has been subject to a measure expropriating his property or restricting his freedom to enjoy his right to property since the Community cannot be obliged to make good damage caused by acts which cannot be imputed to it. Consequently the Community is not obliged to compensate the members of this profession.

However, the possibility cannot be excluded that an obligation to provide compensation might, in appropriate circumstances, arise under the domestic law of the member state on whose territory the intra-Community customs agent carried out his activities.

4. The non-contractual liability of the Community for damage caused, either by legislative acts adopted by its institutions, or by unlawful failure to adopt such acts, can be incurred only if there has been a breach of a higher-ranking rule of law for the protection of individuals. Moreover, if the institution has adopted or failed to adopt a legislative act in the exercise of a broad discretion, the Community cannot be rendered liable unless the breach is clear, that is to say, of a manifest and serious nature.

Any insufficiency of the Community's action to assist the profession of customs agents when the single market was established, if the institutions are in breach of an obligation to act, is not such as to give rise to the liability of the Community by reason of the violation of the principle of vested rights, since the institutions have, when adopting acts of a legislative nature which concern economic policy decisions, a broad discretion in deciding what action to take.

In that connection, Regulation no. 3632/85 defining the conditions under which a person may be permitted to make a customs declaration, which does not define or clarify, in Community law, the pursuit of the profession of customs agent, and is confined to harmonising the conditions under which a person is entitled to make a customs declaration, did not therefore create for customs agents a clear advantage which could be defined as a vested right.

Furthermore, even if Regulation no. 3632/85 did in practice grant a specific advantage to the professional category of customs agents, the members of that profession are still not justified in claiming a vested right in the maintenance of that advantage, since the Community institutions are entitled to adapt rules and regulations to the necessary developments which they must undergo and, therefore, traders cannot claim a vested right in the maintenance of an advantage which they obtained from the rules in issue and which they enjoyed at a given time.

5. The right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations. On the other hand, a person may not plead a breach of that principle unless the administration has given him precise assurances.

6. The freedom to pursue a trade or profession forms part of the general principles of Community law, the observance of which the Community judicature ensures. However, that principle does not constitute an unfettered prerogative, but must be viewed in the light of its social function. Consequently, the freedom to pursue a trade or profession may be restricted, provided that those restrictions correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which would affect the very substance of the right so guaranteed.

In the light of the essential aim pursued, the completion of the internal market, which is an objective of evident general interest, does not entail any undue limitation on the exercise of the fundamental right in question.

#### *Summary:*

The Single European Act, which came into force on 1 July 1987, amended the EEC Treaty to make way for an internal market, comprising a space with no internal borders, where goods, people, services and capital could circulate freely. This led, starting on 1 January 1993, to the disappearance of border controls on goods circulating between member states.

As a result, there was no longer any need for the customs agents and professionals who used to earn their living helping others to cope with the customs and fiscal formalities necessary when goods were shipped across borders. Various support measures

were taken by the Community to cushion the socio-economic effects of the single market on these professions, for example by helping the firms concerned and their employees to develop new activities and skills.

The French firm of customs agents *Dubois et fils*, considering that these measures failed to offset the damage done to it by the elimination of customs formalities at the Community's internal borders, brought proceedings for damages against the Council and the Commission, which it considered responsible, before the Court of First Instance.

After dismissing a plea of inadmissibility based on the alleged lack of clarity of the application, the Court examined the merits of the case successively for liability without fault, and for fault liability. It dismissed liability without fault, noting that under no circumstances could the Single European Act, an instrument of primary law, render the Community liable as it was neither an act of the Community institutions nor an act of the servants of the Community in the performance of their duties. On the question of fault liability, the Court, having recalled the circumstances on which such liability is conditional, noted that the defendants had done nothing illegal that could be considered to render the Community liable.

It is not possible to hold that, because they did not do more for the professions affected by the elimination of border controls, the institutions violated any rule protecting private individuals. The introduction of the single market, a fundamental objective of the Communities, did not result in any violation of established rights, of the principle of protection of people's legitimate expectations, or of their freedom to carry on professional activities. Even if any compensation were due, perhaps responsibility for it should lie with the member states, the authors of the Single European Act. Accordingly, the application was dismissed.

#### *Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2000-3-003

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 17.02.1998 / **e)** C-249/96 / **f)** Grant v. South-West Trains / **g)** *European Court Reports* 1998, I-621 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

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

2.1.3.2.3 Sources of Constitutional Law – Categories – Case-law – International case-law – Other international bodies.

3.12 General Principles – Legality.

3.25 General Principles – Principles of Community law.

5 Fundamental Rights.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

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

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

*Keywords of the alphabetical index:*

Homosexuality, couple / Community law, international law.

*Headnotes:*

1. The refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 EC or Directive 75/117 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women.

First, the condition for the grant of those concessions cannot be regarded as constituting discrimination directly based on sex, since it applies in the same way to female and male workers, as the concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex. Second, in the present state of the law within the Community, stable relationships between two

persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex, and an employer is not therefore required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex. It is for the legislature alone to adopt, if appropriate, measures which may affect that position (cf. points 27-36, 50 and disp.).

2. Although respect for the fundamental rights which form an integral part of the general principles of Community law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community.

With regard to the International Covenant on Civil and Political Rights, which is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law, an observation, with no binding force in law and for which no specific reasons were given, of the Human Rights Committee established under Article 28 of the Covenant, noting that the reference to "sex" in Articles 2.1 and 26 is to be taken as including sexual orientation, cannot in any case constitute a basis for the Court to extend the scope of Article 119 EC. The scope of that article, as of any provision of Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context (cf. points 44-47).

*Summary:*

The Industrial Tribunal, Southampton (United Kingdom) referred to the Court of Justice for a preliminary ruling under Article 177 EC. The national tribunal wished to know whether an employer's refusal to grant reduced rate travel to a person of the same sex with whom an employee had a stable relationship amounted to discrimination under Article 119 EC and Directive 75/117, when reduced rates were awarded to an employee's spouse or a person of the opposite sex with whom the employee had a stable relationship outside marriage. The Court found that there was no discrimination on the grounds of sex.

*Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2000-3-004

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 10.03.1998 / **e)** C-122/95 / **f)** Germany v. Council / **g)** *European Court Reports* 1998, I-973 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Community law – Secondary legislation.

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

3.20 General Principles – Equality.

5.2 Fundamental Rights – Equality.

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

*Keywords of the alphabetical index:*

GATT / International agreement, conclusion.

*Headnotes:*

1. The right of a member state to bring an action for annulment of a Council decision concerning the conclusion of an international agreement and to apply for interim relief at that time is not undermined by the fact that that agreement was concluded by the Community without reservation and that it binds the institutions and the member states in both Community law and international law (cf. points 41-42).

2. There is no general principle of Community law obliging the Community, in its external relations, to accord third countries equal treatment in all respects, and if different treatment of third countries is compatible with Community law, then different treatment accorded to traders within the Community must also be regarded as compatible with Community law, where that different treatment is merely an automatic consequence of the different treatment accorded to third countries with which such traders have entered into commercial relations (cf. point 56).

*Summary:*

The Federal Republic of Germany brought an action under Article 173.1 EC for the partial annulment of Council Decision 94/800/EC of 22 December 1994 approving a Framework Agreement on bananas with certain South American countries and stipulating in particular that the countries concerned would not initiate GATT dispute settlement procedures. Germany claimed that the regime introduced by the Framework Agreement infringed one of the fundamental rights of operators marketing certain categories of bananas, namely their freedom to pursue a trade or business and their right to property, and discriminated against them in relation to operators marketing other categories of bananas. Germany also argued that the agreement contravened the principles of the protection of legitimate expectations and of proportionality. The Court rejected all of the applicant's pleas with the notable exception – because it resulted in the success of the appeal – of the violation of the general principle of non-discrimination because the exemption of certain categories of operators from the export-licence system was not an automatic consequence of the legal difference in treatment accorded to certain third countries.

*Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2000-3-005

**a)** European Union / **b)** Court of First Instance / **c)** / **d)** 19.03.1998 / **e)** T-83/96 / **f)** Gérard van der Wal v. Commission of the European Communities / **g)** *European Court Reports* 1998, II-545 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

3.17 General Principles – General interest.

4.7.6 Institutions – Courts and tribunals – Relations with bodies of international jurisdiction.

5.3.13.16 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

5.3.25 Fundamental Rights – Civil and political rights – Right of access to administrative documents.

*Keywords of the alphabetical index:*

Document, access, restrictions / Measure, justification.

*Headnotes:*

1. Decision 94/90 on public access to Commission documents provides, as an exception to the general principle of the right of access to documents, that the institutions are to refuse access to any document where disclosure could undermine, *inter alia*, “the protection of the public interest (... court proceedings ...)”. That exception is intended to ensure general respect for the fundamental right of every person to a fair hearing by an independent tribunal which means that both national and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular. The scope of that exception is therefore not restricted solely to the protection of the interests of the parties in the context of specific court proceedings, but encompasses the procedural autonomy of the aforementioned courts, so that it entitles the Commission to rely on that exception even when it is not itself party to the court proceedings which justify the protection of the public interest.

Application of that exception can be justified only in respect of documents drafted by the Commission for the sole purposes of a particular court case, to the exclusion of other documents which exist independently of such proceedings, since the decision whether or not to grant access to the first category of documents is a matter for the appropriate national court alone, in accordance with the essential rationale of the aforementioned exception.

As regards documents sent by the Commission to a national court in response to a request for information from the latter in the context of cooperation based on Notice 93/C 39/05 on the application of Articles 85 and 86 EC, the protection of the public interest requires the Commission to refuse access to that information, and therefore to the documents containing it, because the decision concerning access to such information is a matter to be decided exclusively by the appropriate national court on the basis of its own national procedural law for as long as

the court proceedings giving rise to its incorporation in a Commission document are pending.

2. The duty to give reasons for a decision laid down in Article 190 EC has a two-fold purpose, namely, on the one hand, to permit interested parties to know the justification for the measure so as to enable them to protect their rights and, on the other, to enable the Community judicature to exercise its power to review the legality of the decision. The question as to whether a statement of reasons satisfies those requirements must be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question.

When the institution rejects an application for access to documents, and states the reasons, and the party concerned submits a confirmatory application seeking to have that rejection reconsidered, and the institution's reply confirms the rejection on the same grounds, it is appropriate to consider the sufficiency of the reasons given in the light of all the exchanges between the institution and the applicant, taking into account also the information already available to the applicant.

*Summary:*

The code of conduct incorporated in Commission Decision 94/90/ECSC, EC, Euratom, 8 February 1994, on public access to Commission documents (OJ L 46, p. 58), provides, *inter alia*, for refusal of access to any document where disclosure could undermine the protection of the public interest, including court proceedings.

In Notice 93/C 39/05 on co-operation between national courts and the Commission in applying Articles 85 and 86 EC (OJ 1993 C 39, p. 6), the Commission states its readiness to answer any questions the courts may ask about its established practice concerning Community law on competition, particularly with regard to the conditions of application of Articles 85 and 86 relating to practices affecting trade between member states and the sensitive nature of the restriction of competition by the practices listed therein.

Having read in the Commission's annual report on competition policy that the Commission had received requests for information from various national courts and answered them, Mr Van der Wal, a lawyer and specialist in competition, asked the Commission to let him have copies of the replies. The Commission refused, arguing that once sent to the national court the answer became a part of the national case file, and the Commission did not want to jeopardise the

relationship of trust it had with the national courts. Mr Van der Wal appealed to the Court of First Instance to have this decision set aside on two counts: violation of Decision 94/90 and failure to give adequate reasons, in breach of Article 190 EC.

The Court upheld the Commission's refusal, as the replies had been made in respect of cases pending before the national courts, which alone could decide, by virtue of the right to a fair trial, what evidence should be made public. It rejected the allegation of inadequate reasons, noting that it was quite clear from the correspondence exchanged between the applicant and the Commission what had motivated the latter's refusal. The application was accordingly dismissed in full.

#### *Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2000-3-006

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 31.03.1998 / **e)** C-68/94, C-30/95 / **f)** France and Société commerciale des potasses et de l'azote et Entreprise minière et chimique v. Commission / **g)** *European Court Reports* 1998, I-1375 / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

1.4.9.2 Constitutional Justice – Procedure – Parties – Interest.

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

#### *Keywords of the alphabetical index:*

Application, admissibility / Bringing proceedings, interest.

#### *Headnotes:*

An application for annulment is not inadmissible on the ground of lack of interest in bringing proceedings merely because, if the contested act were annulled, it might prove impossible in the circumstances for the

institution from which the act emanated to fulfil its obligation under Article 176.1 EC. In such a case, an interest in making the application still subsists, at least as the basis for a possible action for damages.

#### *Summary:*

Under Article 173 EC, the French Republic and the applicant companies applied for the annulment of a decision of the European Commission authorising concentrations in the potassium industry under certain conditions. The Court declared the application admissible and annulled the contested decision under European Community competition law.

#### *Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2000-3-007

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 28.04.1998 / **e)** C-116/96 / **f)** Reisebüro Binder v. Finanzamt Stuttgart-Körperschaften / **g)** Order: *European Court Reports* 1998, I-1889; Judgment: *European Court Reports* 1997, I-6103 / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

1.2.3 Constitutional Justice – Types of claim – Referral by a court.

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

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

4.7.6 Institutions – Courts and tribunals – Relations with bodies of international jurisdiction.

#### *Keywords of the alphabetical index:*

Preliminary ruling, party, rule / Preliminary ruling, jurisdiction of national courts / Preliminary ruling, party, revision, request.

*Headnotes:*

Article 177 EC establishes a procedure for direct cooperation between the Court of Justice and the national courts, in the course of which the parties concerned are merely invited to submit observations within the legal framework set out by the court making the reference.

Within the limits established by Article 177 EC, it is thus for the national courts alone to decide on the principle and purpose of any reference to the Court of Justice and it is also for those courts alone to judge whether they have obtained sufficient guidance from the preliminary ruling delivered in response to their reference or whether it appears to them necessary to refer the matter once more to the Court. Accordingly, the parties to the main proceedings cannot rely on Article 41 of the Statute of the Court of Justice or on Articles 98 to 100 of the Rules of Procedure in order to seek revision of rulings delivered in pursuance of Article 177 EC. Only the national court to which such a ruling is addressed may, if appropriate, submit new considerations to the Court which might lead it to give a different answer to a question submitted earlier.

*Summary:*

One of the parties to a national dispute over jurisdiction on which the Court of Justice had given a preliminary ruling appealed to the Court for a revision of the ruling. The Court of Justice declared the application inadmissible.

*Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.

*Identification:* ECJ-2000-3-008

**a)** European Union / **b)** Court of First Instance / **c) / d)** 28.04.1998 / **e)** T-184/95 / **f)** Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Communities and Commission of the European Communities / **g)** *European Court Reports* 1998, II-667 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

2.1.1.4.1 Sources of Constitutional Law – Categories – Written rules – International instruments – United Nations Charter of 1945.

4.16 Institutions – Transfer of powers to international organisations.

4.17.2 Institutions – European Union – Distribution of powers between Community and member states.

5.1.3 Fundamental Rights – General questions – Limits and restrictions.

5.3.16 Fundamental Rights – Civil and political rights – Right to compensation for damage caused by the State.

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

*Keywords of the alphabetical index:*

Embargo, debts, recovery / Asset, freezing / Sanction, international law, consequences.

*Headnotes:*

1. If the Community is to incur non-contractual liability as the result of a lawful or unlawful act, it is necessary to prove that the alleged damage is real and the existence of a causal link between that act and the alleged damage. It is incumbent upon the applicant to produce to the Community judicature evidence to establish the fact of the loss which he claims to have suffered.

2. Liability on the part of the Community, as a result of the adoption of Council Regulation no. 2340/90 prohibiting trade by the Community as regards Iraq and Kuwait, for damage caused by the impossibility, for an undertaking established in a member state, of recovering its debts from the Government of Iraq following the latter's adoption, in response to the embargo imposed on it, of a law freezing the assets of undertakings established in the States responsible for the embargo, cannot be incurred unless there is a direct causal link between the adoption of that regulation and the damage. It is for the undertaking seeking compensation for the damage to establish that the adoption of that law constituted, as a retaliatory measure, an objectively foreseeable consequence, in the normal course of events, of the adoption of that regulation.

In any event, there can be no causal link between the adoption of Regulation no. 2340/90 and the damage concerned since the trade embargo against Iraq was imposed by a United Nations Security Council



resolution. Whilst it is true that, under Article 25 of the United Nations Charter, only the Members of the United Nations are required to accept and carry out the decisions of the Security Council and were required, in that capacity, to take all necessary measures to give effect to the trade embargo imposed by it, the fact remains that those Members of the United Nations Organisation which were also member states of the Community were able to take action to that effect only under the Treaty, since any measure of common commercial policy, such as the imposition of a trade embargo, falls, by virtue of Article 113 EC, within the exclusive competence of the Community.

Regulation no. 2340/90 was adopted on the basis of those considerations in order to ensure uniform implementation, throughout the Community, of the measures concerning trade with Iraq and Kuwait decided upon by the United Nations Security Council. The damage allegedly resulting from the counter-measures adopted by the Iraqi Government can therefore be attributed not to the adoption of Regulation no. 2340/90 but only to the United Nations Security Council resolution which imposed the embargo.

3. In the event of the principle of Community liability for a lawful act being recognised in Community law, such liability can be incurred only if the damage alleged, if deemed to constitute a "still subsisting injury", affects a particular circle of economic operators in a disproportionate manner by comparison with others (special damage) and exceeds the limits of the economic risks inherent in operating in the sector concerned (unusual damage), without the legislative measure that gave rise to the alleged damage being justified by a general economic interest.

A Community undertaking whose claims against the government of a non-member country have become irrecoverable following the imposition by a Community regulation of a trade embargo against that country cannot be regarded as having suffered special damage where not only its claims were affected but also those of all other Community undertakings which, when the embargo was imposed, had not yet been paid.

Furthermore, the damage resulting from the suspension of payments by that non-member country cannot be regarded as unusual damage, falling outside the foreseeable risks inherent in any provision of services in a "high-risk" non-member country.

In any event, whilst it is true that rules intended, by the imposition of a trade embargo against a non-

member country, to maintain international peace and security have, by definition, effects which affect the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions, the fact nevertheless remains that the importance of the aims pursued by such rules is such as to justify negative consequences, even of a substantial nature, for some operators. Such damage cannot therefore render the Community liable.

### *Summary:*

The Dorsch Consult company is owed money by the Iraqi government, for engineering services rendered. Nobody disputes this and in February 1990 the Iraqi authorities even ordered the money to be paid.

However, when the Iraqi army invaded Kuwait, the Community, applying UN Security Council Resolution no. 661 (1990), adopted Council Regulation (EEC) no. 2340/90 banning trade by the Community with Iraq and Kuwait (OJ 1990 L 213, p. 1), to which Iraq reacted by adopting a law freezing all goods and assets, and the revenues there from, owned by governments, undertakings, firms and banks in countries which had adopted arbitrary decisions against Iraq.

The applicant company was thus unable to recover its debt. Alleging that Regulation no. 2340/90 was at the origin of the loss it had sustained, it filed an application for damages against the Community with the Court of First Instance.

It based its claim for compensation on the liability of the Community arising either out of a lawful act or possibly out of an unlawful act, insofar as Regulation no. 2340/90 made no provision for the compensation of firms affected by the embargo it introduced.

The Court recalled the requisite conditions for liability without fault: a loss, a cause-and-effect relationship and the unusual and special nature of the loss.

In considering whether these different conditions had been met, it noted first that the applicant had not proved beyond doubt that it had suffered a real and effective loss, as there was no proof that its loss was final and irrevocable.

As for cause and effect, the Court held that the source of the alleged loss lay not in the Community regulation but in Resolution no. 661 (1990) of the Security Council.

Further considering whether the alleged loss could be qualified as special and unusual, the Court found that the applicant was by no means the only firm to have suffered as a result of the embargo against Iraq and that, even before the invasion of Kuwait, supplying services to Iraq was clearly a hazardous undertaking in view of the country's belligerent policy and poor solvency.

The Court accordingly ruled out any liability arising out of a lawful act and likewise the possibility of fault liability, as the lack of any right to compensation for loss suffered following the adoption of Regulation no. 2340 meant that the regulation could not be considered illegal for making no provision for compensation.

The application was therefore dismissed in full.

#### *Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2000-3-009

**a)** European Union / **b)** Court of First Instance / **c)** / **d)** 30.04.1998 / **e)** T-214/95 / **f)** Vlaams Gewest v. Commission of the European Communities / **g)** *European Court Reports* 1998, II-717 / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

1.2.1.4 Constitutional Justice – Types of claim – Claim by a public body – Organs of regional authorities.

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

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

3.12 General Principles – Legality.

5.3.13.16 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

#### *Keywords of the alphabetical index:*

Competition, distortion / Aid, notification / Loan, contract.

#### *Headnotes:*

1. When the Commission finds, in a decision, that a loan granted to an undertaking by a regional authority of a member state involves aid incompatible with the common market, that authority has standing to challenge the Commission's decision, notwithstanding the fact that it is addressed to the member state concerned.

Although regional authorities are not covered by the term member state for the purposes of Article 173.2 EC, they must nonetheless – since they have legal personality under national law – be treated as legal persons within the meaning of Article 173.4 EC.

Furthermore, the contested decision has a direct and individual effect on the legal position of such a regional authority since it directly prevents it from exercising its own powers, consisting, *inter alia*, of granting aid to undertakings, and requires it to modify the loan contract entered into with the recipient of the aid.

The regional authority has an interest of its own in challenging such a decision, distinct from that of the member state, since it does not appear that the latter is able to determine the manner in which the regional authority exercises its own powers.

2. No breach by a member state of an obligation under the Treaty can be justified by the fact that other member states are also failing to fulfil this obligation.

3. The statement of reasons required by Article 190 EC must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question, in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Community judicature to exercise its power of review. It is not, however, necessary for the reasoning to go into all the relevant facts and points of law since the question whether the statement of reasons meets the requirements of Article 190 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

In giving its reasons for the decisions it takes in order to ensure compliance with the rules on competition,

the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.

When applied to the classification of aid, that principle requires the Commission to indicate the reasons why it considers that the aid in question falls within the scope of Article 92.1 EC. In that respect, even in cases where it is clear from the circumstances in which the aid has been granted that it is liable to affect trade between member states and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision.

By contrast, provided the Commission explains the respects in which the effect on trade between member states is obvious, it is not required to carry out an extremely detailed economic analysis of the figures.

Furthermore, in the case of aid which has not been notified to the Commission, the decision declaring that aid to be incompatible with the common market need not demonstrate the real effect of that aid on competition or trade between member states. To hold otherwise would ultimately favour those member states which grant aid in breach of the duty to notify laid down in Article 93.3 EC, to the detriment of those which do notify aid at the planning stage.

4. When assessing aid granted to an airline, the Commission is under no obligation specifically to consider whether, in view of its amount, the aid could benefit from an exemption under Article 92.3.c EC, since the amount of the aid does not constitute a criterion for assessment laid down by that provision or by the guidelines applicable to aid in the air transport sector.

In the context of the broad discretion enjoyed in applying Article 92.3.c EC, the Commission is justified in relying on the criteria it considers to be most appropriate in order to determine whether an aid can be considered compatible with the common market, provided that those criteria are relevant having regard to Articles 3.g and 92 EC. In that respect, it can specify the criteria it intends to apply in guidelines which are consistent with the Treaty. The adoption of such guidelines by the Commission is an instance of the exercise of its discretion and requires only a self-imposed limitation of that power when considering the aids to which the guidelines apply, in accordance with the principle of equal treatment. By assessing specific aid in the light of such guidelines, the Commission

cannot be considered to exceed the limits of its discretion or to waive that discretion.

5. The authorisation of State aid granted to certain airlines does not automatically mean that other airlines are entitled to a derogation from the principle that aid is prohibited. It is for the Commission, within the framework of its discretion concerning State aid, to consider each proposal for aid individually. It must do so in the light, first, of the specific circumstances surrounding the aid and, second, of general principles of Community law and the guidelines. Even if companies established in other member states have received illegal aid, that is irrelevant for the purposes of assessing the aid in question.

The Commission's discretion cannot, in any event, be overridden by the sole fact that it authorised aid intended for a competitor of the recipient of the aid since, if that were so, it would deprive the provisions of the Treaty granting it that power of all useful effect.

### *Summary:*

The Flemish region applied to have a decision of the Commission set aside. The decision addressed to the Kingdom of Belgium declared aid in the form of an interest-free loan from the Flemish region to an airline company incompatible with the EC Treaty and ordered it stopped.

The first question the Court of First Instance had to answer was whether the application was admissible. The Flemish region is in fact distinct from the Kingdom of Belgium and the impugned decision was addressed to the latter.

The Court declared the application admissible, insofar as the Flemish region had legal personality and was directly and individually affected by the decision, within the meaning of Article 173.4 EC.

The other issues the Court considered when examining the merits of the case concerned the distortion of competition and whether the aid affected trade between the member states – failing which state aid does not fall within the scope of Article 92 EC banning states from granting certain aids –, whether proper reasons were given for the impugned decision as required under Article 190 EC, whether the Commission should be allowed to lay down guidelines for itself to follow when assessing whether specific aid is compatible with the treaty, and the use made by the Commission of its power under Article 92 EC to authorise exceptions to the ban on state aid.

The Court rejected the applicant's arguments and dismissed the application.

*Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2000-3-010

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 12.05.1998 / **e)** C-85/96 / **f)** María Martínez Sala v. Freistaat Bayern / **g)** *European Court Reports*1998, I-2691 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

3.25.1 General Principles – Principles of Community law – Fundamental principles of the Common Market.

5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – Foreigners.

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – Citizenship.

*Keywords of the alphabetical index:*

Citizenship, european.

*Headnotes:*

A national of a member state lawfully residing in the territory of another member state comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship and can rely on the rights laid down by the Treaty which Article 8.2 attaches to the status of citizen of the Union, including the right, laid down in Article 6, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty (cf. points 61-62).

*Summary:*

The Court was asked by the Bavarian State Social Security Court (*Bayerisches Landessozialgericht*)

under Article 177 EC for a preliminary ruling on the interpretation of a number of community regulations relating *inter alia* to the application of social security schemes to immigrant workers and their families. The request was made in connection with proceedings between Ms Martínez Sala, a Spanish national working and living in Germany, and Freistaat Bayern relating to the latter's refusal to grant Ms Sala child-raising allowance. The Court held that, provided the party concerned is covered by Community law, requiring the party to produce a residence permit in order to receive a child-raising allowance whereas this requirement is not applied to the member state's own nationals amounts to unlawful discrimination on grounds of nationality.

*Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2000-3-011

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 12.05.1998 / **e)** C-106/96 / **f)** United Kingdom v. Commission / **g)** *European Court Reports*1998, I-2729 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.6.5.2 Constitutional Justice – Effects – Temporal effect – Limitation on retrospective effect.

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

3.10 General Principles – Certainty of the law.

3.12 General Principles – Legality.

4.10.2 Institutions – Public finances – Budget.

*Keywords of the alphabetical index:*

Payment made, annulment / Expenditure, dual legal basis, principle.

*Headnotes:*

Since annulment of the Commission's decision referred to in its Press Release IP/96/67 of

23 January 1996, announcing certain grants for European projects seeking to overcome social exclusion, takes place at a time when all, or almost all, of the relevant payments have been made, important considerations of legal certainty, comparable with those arising where certain regulations are annulled, justify the Court in exercising the power conferred on it by Article 174.2 EC when it annuls a regulation and in deciding that the annulment is not to affect the validity of payments made or undertakings given under contracts which were the subject of the funding in issue.

### *Summary:*

Under Article 173 EC, the United Kingdom applied for the annulment of the decision or decisions referred to in the Commission's press release of 23 January 1996 (IP/96/67) announcing certain grants for European projects seeking to overcome social exclusion, on the ground that the Community expenditure committed to fund these projects contravened the principle of the separation of budgetary and legislative powers deriving directly from the EC Treaty and reflected in the requirement of a dual legal basis for expenditure, namely entry in the budget and, as a general rule, prior adoption of an act of secondary legislation authorising the expenditure in question. Having ascertained the absence of any legislative act and hence the Commission's lack of competence to commit the contested expenditure, the Court annulled the contested decision. However it also specified that the annulment did not affect the validity of payments made or undertakings given under the contracts in issue.

### *Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



### *Identification:* ECJ-2000-3-012

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 12.05.1998 / **e)** C-170/96 / **f)** Commission v. Council / **g)** *European Court Reports* 1998, I-2763 / **h)** CODICES (English, French).

### *Keywords of the systematic thesaurus:*

1.3.1 Constitutional Justice – Jurisdiction – Scope of review.

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

3.25.1 General Principles – Principles of Community law – Fundamental principles of the Common Market.

### *Keywords of the alphabetical index:*

Transit, airport, visa / European Community, European Union, distribution of powers / European Community, exclusive powers.

### *Headnotes:*

Article M of the Treaty on European Union makes it clear that a provision such as Article K.3.2, which provides for the adoption of joint action by the Council in the areas referred to in Article K.1 does not affect the provisions of the EC Treaty. In accordance with Article L of the Treaty on European Union, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers apply to Article M. It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3.2 do not encroach upon the powers conferred by the EC Treaty on the Community.

It follows that where an action is brought before the Court seeking a declaration that, in light of its objective, an act adopted by the Council on the basis of Article K.3.2.b of the Treaty on European Union falls within the scope of Article 100c EC, so that it should have been based on that provision, the Court has jurisdiction to review the content of the act in the light of Article 100c EC in order to ascertain whether the Act affects the powers of the Community under that provision (cf. points 13-17).

### *Summary:*

Under Article 173 EC, the Commission of the European Communities applied for the annulment of the Joint Action regarding airport transit visas adopted by the Council on 4 March 1996 on the basis of Article K.3 of the Treaty on European Union. Having recognised its own jurisdiction over the case, the Court found that the aim of the contested Action fell outside the Community's scope of application because it did not entitle persons granted an airport visa to enter and move around within the internal market. It considered that the legal basis referred to, namely Article K.3.2 of the Treaty of Union, did not

encroach on Community powers and so it rejected the Commission's application.

*Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2000-3-013

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 12.05.1998 / **e)** C-367/96 / **f)** Kefalas e.a. v. Elliniko Dimosio et Organismos Oikonomikis Anasygkrotisis Epicheiriseon / **g)** *European Court Reports* 1998, I-2843 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

2.2.1.6.4 Sources of Constitutional Law – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.

4.17.2 Institutions – European Union – Distribution of powers between Community and member states.

*Keywords of the alphabetical index:*

Abuse of right / Fraudulent evasion of the law / Company law / Capital, increase / Community law, application, national courts / Community law, full effect / Community law, uniform application.

*Headnotes:*

Community law cannot be relied on for abusive or fraudulent ends. Consequently, Community law does not preclude the application by national courts of a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively. However, the application of such a national rule must not prejudice the full effect and uniform application of Community law in the member states. In particular, it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to

alter the scope of that provision or to compromise the objectives pursued by it (cf. points 20-22, 29 and disp.).

*Summary:*

The Court was asked by the Athens Court of Appeal (Efeteio – Athina) for a preliminary ruling under Article 177 EC on two questions relating to the interpretation of Council Directive 77/91/EEC of 13 December 1976 on company law and on the abusive exercise of a right arising from a provision of Community law. The questions were raised in connection with legal proceedings between Mr. Kefalas and others, the shareholders in a public limited company, and the Greek state and the Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (Organisation for the Restructuring of Companies). The plaintiffs contested the validity of the increase in capital carried out by this organisation to which the administration of the company had been transferred under a legal system relating to companies in serious financial difficulties. The Court acknowledged *in abstracto* that it was possible for a national court to object to a right arising from a provision of community law being exercised abusively. However, it found in the present case that, in the absence of any telling evidence, it could not regard a claim in respect of a contested capital increase under Article 25 of the aforementioned directive – which guarantees that the decision on any increase lies with the general meeting of the public limited company concerned – as being abusive merely because the increase in capital had resolved financial difficulties which threatened the existence of the company in question and was of obvious economic benefit to the shareholders.

*Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2000-3-014

**a)** European Union / **b)** Court of First Instance / **c)** / **d)** 14.05.1998 / **e)** T-348/94 / **f)** Enso Española SA v. Commission of the European Communities / **g)** *European Court Reports* 1998, II-1875 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.4.5.3 Constitutional Justice – Procedure – Originating document – Formal requirements.

2.1.1.3 Sources of Constitutional Law – Categories – Written rules – Community law.

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

3.18 General Principles – Margin of appreciation.

4.17.1.3 Institutions – European Union – Institutional structure – Commission.

5.2 Fundamental Rights – Equality.

5.3.13.16 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards and fair trial – Adversarial principle.

*Keywords of the alphabetical index:*

Competition, infringement, gravity / Competition, infringement, fine.

*Headnotes:*

1. Fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories. The European Convention on Human Rights has special significance in that respect.

2. The Commission cannot, when applying provisions of Community competition law, be described as a “tribunal” within the meaning of Article 6 ECHR. A decision applying the Community competition rules cannot therefore be unlawful merely because it was adopted under a system in which the Commission carries out both investigatory and decision-making functions. However, during the administrative procedure before it, the Commission must observe the procedural guarantees provided for by Community law.

Community law confers upon the Commission a supervisory role which includes the task of conducting proceedings in respect of infringements of Articles 85.1 and 86 EC. Furthermore, Regulation no. 17 gives it the power to impose, by decision, fines on undertakings and associations of undertakings which

have infringed those provisions either intentionally or negligently.

The requirement for effective judicial review of any Commission decision finding and punishing an infringement of the Community competition rules is a general principle of Community law which follows from the common constitutional traditions of the member states. That principle is not infringed where such a review is carried out, pursuant to Council Decision 88/591, by an independent and impartial court, such as the Court of First Instance, which may, in accordance with the pleas on which the natural or legal person concerned may rely in support of his application for annulment, assess the correctness in law and in fact of any accusation made by the Commission in competition proceedings and which, pursuant to Article 17 of Regulation no. 7, has jurisdiction to assess whether the fine imposed is proportionate to the seriousness of the infringement found.

3. Observance of the right to be heard is, in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed, a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings.

4. The purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted.

Although pursuant to Article 190 EC the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure.

5. Under Article 44.1.c of the Rules of Procedure of the Court of First Instance all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if appropriate without other information in support. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is

based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible

6. The purpose of the obligation to give reasons for an individual decision is to enable the Community judicature to review the legality of the decision and to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted.

In the case of a decision imposing fines on several undertakings for an infringement of the Community competition rules, the scope of the obligation to state reasons must be assessed in the light of the fact that the gravity of infringements falls to be determined by reference to numerous factors including, in particular, the specific circumstances and context of the case and the deterrent character of the fines; moreover, no binding or exhaustive list of criteria to be applied has been drawn up.

Furthermore, when fixing the amount of each fine, the Commission has a margin of discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose.

Lastly, the reasons for a decision must appear in the actual body of the decision and, save in exceptional circumstances, explanations given *ex post facto* cannot be taken into account.

When the Commission finds in a decision that there has been an infringement of the competition rules and imposes fines on the undertakings participating in it, it must, if it has systematically taken into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees thereof to verify that the level of the fine is correct and to assess whether there has been any discrimination.

### *Summary:*

The Enso Española company was penalised by the Commission for participating in an agreement involving Europe's major cardboard manufacturers.

It applied to the Court of First Instance to set aside the Commission's decision to subject it to a substantial fine for violation of Article 85 EC.

Its very numerous arguments concern the legality of the proceedings against it, the fundamental rights

recognised in Community law and the European Convention on Human Rights, failure to comply with the obligation to state reasons laid down in Article 190 EC, the reality of its participation in a prohibited agreement and the size of the fine.

The Court's ruling gave partial satisfaction to the applicant, for example by reducing the size of the fine by about one third, but was above all an opportunity for the Court to explain to what degree Article 6 ECHR was applicable in the repression of violations of Community rules governing competition.

### *Languages:*

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



### *Identification:* ECJ-2000-3-015

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 16.06.1998 / **e)** C-162/96 / **f)** Racke v. Hauptzollamt Mainz / **g)** *European Court Reports* 1998, I-3655 / **h)** CODICES (English, French).

### *Keywords of the systematic thesaurus:*

**1.2.3 Constitutional Justice** – Types of claim – Referral by a court.

**1.3.1.1 Constitutional Justice** – Jurisdiction – Scope of review – Extension.

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

**1.6.3 Constitutional Justice** – Effects – Effect *erga omnes*.

**2.1.1.3 Sources of Constitutional Law** – Categories – Written rules – Community law.

**2.1.1.4 Sources of Constitutional Law** – Categories – Written rules – International instruments.

**2.1.2.1 Sources of Constitutional Law** – Categories – Unwritten rules – Constitutional custom.

**3.25.2 General Principles** – Principles of Community law – Direct effect.

### *Keywords of the alphabetical index:*

Preliminary ruling, Court of Justice of the European Communities, jurisdiction / International agreement,



validity, assessment / International agreement, suspension / International agreement, direct applicability / *Pacta sunt servanda*, principle / International law, respect / Fundamental change of circumstances.

*Headnotes:*

1. The jurisdiction of the Court of Justice to give preliminary rulings under Article 177 EC concerning the validity of acts of the Community institutions cannot be limited by the grounds on which the validity of those measures may be contested. Since such jurisdiction extends to all grounds capable of invalidating those measures, the Court is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law.

2. A provision of an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.

[...]

An agreement concluded by the Council with a non-member country in accordance with the provisions of the EC Treaty is, as far as the Community is concerned, an act of a Community institution, and the provisions of such an agreement form an integral part of Community law. If, therefore, a Community regulation suspending the application of a cooperation agreement were to be declared invalid by reason of its being contrary to rules of customary international law, the trade concessions granted by the provisions of that agreement would remain applicable in Community law until the Community brought that agreement to an end in accordance with the relevant rules of international law.

Moreover, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.

It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.

3. Where an individual is incidentally challenging the validity of a Community regulation under rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances in order to rely upon rights which he derives directly from an agreement of the Community with a non-member country, the case in question does not concern the direct effect of those rules.

Moreover, those rules form an exception to the *pacta sunt servanda* principle, which constitutes a fundamental principle of any legal order and, in particular, the international legal order. Applied to international law, that principle requires that every treaty be binding upon the parties to it and be performed by them in good faith.

In those circumstances, an individual relying in legal proceedings on rights which he derives directly from an agreement with a non-member country may not be denied the possibility of challenging the validity of a regulation which, by suspending the trade concessions granted by that agreement, prevents him from relying on it, and of invoking, in order to challenge the validity of the suspending regulation, obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations.

However, because of the complexity of those rules and the imprecision of some of the concepts to which they refer, judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules.

*Summary:*

The Court was asked by the Bundesfinanzhof (the German Federal Finance Court) for a preliminary ruling under Article 177 EC on two questions relating to the validity of Council Regulation (EEC) no. 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia. The questions had been raised in the context of a dispute between A Racke GmbH & Co. and the main customs office in Mainz concerning a customs debt arising on the importation into Germany of certain quantities of wine originating in the Socialist Federal Republic of Yugoslavia.

*Languages:*

Danish, Dutch, English, French, Finnish, German,  
Greek, Italian, Portuguese, Spanish, Swedish



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<sup>1</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court etc).

<sup>2</sup> E.g. Rules of procedure.

<sup>3</sup> Including the conditions and manner of such appointment (election, nomination etc).

<sup>4</sup> Including the conditions and manner of such appointment (election, nomination etc).

<sup>5</sup> Vice-presidents, presidents of chambers or of sections etc.

<sup>6</sup> E.g. State Counsel, prosecutors etc.

<sup>7</sup> Registrars, assistants, auditors, general secretaries, researchers etc.

<sup>8</sup> E.g. assessors, office members.

<sup>9</sup> Registrars, assistants, auditors, general secretaries, researchers etc.

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<sup>11</sup> Enactment required by law to be reviewed by the Court.

<sup>12</sup> Review *ultra petita*.

<sup>13</sup> Horizontal distribution of powers.

<sup>14</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>15</sup> Decentralised authorities (municipalities, provinces etc).

<sup>16</sup> This keyword concerns decisions on the procedure and results of referenda and other consultations.

<sup>17</sup> This keyword concerns decisions preceding the referendum including its admissibility.

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<sup>19</sup> As understood in private international law.

<sup>20</sup> Including constitutional laws.

<sup>21</sup> For example organic laws.

<sup>22</sup> Local authorities, municipalities, provinces, departments etc.

<sup>23</sup> Or: functional decentralisation (public bodies exercising delegated powers).

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<sup>34</sup> Presumption of constitutionality, double construction rule.

<sup>35</sup> Including the principle of a multi-party system.

<sup>36</sup> Includes the principle of social justice.

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<sup>39</sup> Prohibition of punishment without proper legal base.

<sup>40</sup> Including compelling public interest.

<sup>41</sup> Only where not applied as a fundamental right. Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.

<sup>42</sup> Including questions of treason/high crimes.

<sup>43</sup> Including prohibition on monopolies.

<sup>44</sup> For the principle of primacy of Community law, see 2.2.1.6.

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<sup>45</sup> Including the body responsible for revising or amending the Constitution.

<sup>46</sup> For example nomination of members of the government, chairing of Cabinet sessions, countersigning of laws.

<sup>47</sup> For example presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>48</sup> For example the granting of pardons.

<sup>49</sup> Bicameral, monocameral, special competence of each assembly etc.

<sup>50</sup> Including specialised powers of each legislative body.

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<sup>52</sup> Representative/imperative mandates.

<sup>53</sup> Presidency, bureau, sections, committees etc.

<sup>54</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>55</sup> Including their creation, composition and terms of reference.

<sup>56</sup> State budgetary contribution, other sources etc.

<sup>57</sup> For example incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others.

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<sup>60</sup> Local authorities.

<sup>61</sup> The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.

<sup>62</sup> Civil servants, administrators etc.

<sup>63</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>64</sup> Other than the body delivering the decision summarised here.

<sup>65</sup> Positive and negative conflicts.

<sup>66</sup> For example, Judicial Service Commission, Conseil supérieur de la magistrature.

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<sup>68</sup> See also keywords 5.2.38 and 5.2.1.4.

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<sup>70</sup> E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>71</sup> Tracts, letters, press, radio and television, posters, nominations etc.

<sup>72</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>73</sup> E.g. signatures on electoral rolls, stamps, crossing out of names on list.

<sup>74</sup> E.g. in person, proxy vote, postal vote, electronic vote.

<sup>75</sup> E.g. Panachage, voting for whole list or part of list, blank votes.

<sup>76</sup> E.g. Auditor-General.

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<sup>83</sup> Taxes and other duties towards the state.

<sup>84</sup> Here, the term national is used to designate ethnic origin.

<sup>85</sup> Discrimination in particular between married and single persons.

<sup>86</sup> This keyword also covers Personal liberty. It includes for example identity checking, personal search and administrative arrest.

<sup>87</sup> Including questions related to the granting of passports or other travel documents.

<sup>88</sup> May include questions of expulsion and extradition.

<sup>89</sup> 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.

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<sup>90</sup> Including the right to be present at hearing.

<sup>91</sup> This keyword covers the right of appeal to a court.

<sup>92</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword Freedom of worship below.

<sup>93</sup> This keyword also includes the right to freely communicate information.

<sup>94</sup> Militia, conscientious objection etc.

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<sup>95</sup> Aspects of the use of names are included either here or under Right to private life.

<sup>96</sup> Including compensation issues.

<sup>97</sup> This keyword also covers Freedom of work.

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\* 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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