

THE BULLETIN

The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four 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 2001 Edition in 2001, volumes 2 and 3 in 2002.

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

*The Commission is grateful to liaison officers of constitutional and other equivalent courts, who regularly prepare the contributions reproduced in this publication. **As such, the summaries of decisions and opinions published in the Bulletin do not constitute an official record of court decisions and should not be considered as offering or purporting to offer an authoritative interpretation of the law.***

The 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
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G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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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

Important decisions

Identification: ALB-2001-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 07.02.2001 / **e)** 5 / **f)** Case Huqi v. United Chambers / **g)** *Fletorja Zyrtare* (Official Gazette), 10/2001, 351 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.

1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.

1.6.8.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.

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

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

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

4.7.1.1 **Institutions** – Courts and tribunals – Jurisdiction – Exclusive jurisdiction.

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

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

Keywords of the alphabetical index:

Court, decision, execution / Interpretation, law, universally binding / *Res iudicata*, Constitutional Court, judgment / Decision, final and binding.

Headnotes:

The exercise of the right of appeal against a criminal court decision, exercised by the advocate of the accused tried *in absentia* (where the advocate may be officially appointed or appointed by the family of the accused) constitutes a fundamental guarantee protecting the interests of the accused and respecting the principle of a fair trial.

The interpretation of this law is a power that the Constitution has left to the discretion of each state body dealing with the implementation of the law, but the Constitutional Court is the only body competent to make a final interpretation of this law. Supreme Court decisions which unify or change judicial practice may not be excluded from this constitutional review.

Constitutional Court decisions have general binding force. They are final and must be implemented. State bodies cannot question their implementation.

Summary:

The Constitutional Court in its Decision no. 17/2000 decided to set aside Decision no. 386/1999 of the United Chambers of the Supreme Court (the United Chambers) on constitutional grounds, and to return the case to the Supreme Court. According to the Constitutional Court decision, the United Chambers infringed the individual's right to a fair trial, through denial of his right to a defence and of access to the courts, guaranteed by Articles 31.c and 42 of the Constitution and Article 6 ECHR. The United Chambers reviewed the case, but did not apply the Constitutional Court decision. The United Chambers concluded that the advocate of the accused tried *in absentia*, who may be officially appointed or appointed by the family of the accused, is not a legitimate person to appeal against the decision delivered *in absentia* of the accused. The applicant submitted his application before the Constitutional Court again.

The applicant requested the setting aside of Decision no. 371/2000 of the United Chambers on constitutional grounds, arguing that they resolved the case in the same way as in their Decision no. 48/1999, which is set aside by Decision no. 17/2000 of the Constitutional Court as unconstitutional. The applicant adds that the United Chambers, through the denial of the advocate's right of appeal, has infringed the right to a defence and this constitutes a violation of the principle of a fair trial. Finally, the applicant alleges that Decision no. 371/2000 of the United Chambers, which does not recognise or implement the Constitutional Court decision, is contrary to Article 132 of the

Constitution and constitutes a violation of the Constitution.

The Constitutional Court underlined that its Decision no. 17/2000 set aside Decision no. 386/1999 of the United Chambers on constitutional grounds and that it had returned the case to the Supreme Court. According to the terms of that decision, the Court held that the decision of the United Chambers infringed the individuals' right to a fair trial. It denied the right to a defence and the right of access to the courts, which are guaranteed by Articles 31.c and 42 of the Constitution and Article 6 ECHR. Nevertheless, in its decision the United Chambers adopted the same interpretation of the procedural provisions, and reached the conclusion that "the advocate, who may be officially appointed or appointed by the family of the accused in order to defend the accused tried *in absentia*, is not a legitimate person to appeal against the decision delivered *in absentia* of the accused". They concluded that the trial had been lawful.

The Constitutional Court considered the analysis of arguments about the constitutional functions or limits of powers and competencies of each of the state bodies – the Constitutional and Supreme Courts. The Court reconfirmed that it is the only body assigned to finally decide and resolve conflicts of competencies between the powers, to guarantee the upholding of the Constitution and to make a final interpretation.

After having mentioned that the disposition of its Decision no. 17/2000 consists of two important elements – the first relating to the setting aside of the United Chambers decision on constitutional grounds and the second relating to the return of the case to the Supreme Court – the Constitutional Court observed that only the second element had been implemented. As to the arguments propounded in its reasoning, which have to do with the irregularities and infringements of the right to a defence and the right to a fair trial, the United Chambers have not obeyed them, but they have resolved the case in contradiction to the correct constitutional interpretation.

The applicant repeated his allegations about the denial of the advocate's right of appeal and the infringement of the right to a fair trial while presenting the case before the ordinary courts. The Constitutional Court decided that further examination and analysis of constitutional arguments employed in its previous decision would be in contradiction to the principle of *res judicata*.

The problem concerning the advocate's right of appeal as the representative of the accused tried *in absentia* is resolved once and for all, and according to the principle of *res judicata*, it cannot be reviewed

in the future. In its respective decision, the Constitutional Court has expressed that, "[T]he appointment of the advocates according to the ways and criteria provided by the law, including where officially appointed, and ... the right of appeal against the court decision, aim at respecting the fair trial in each instance of judgment, as it has been settled by Article 2.2 Protocol 7 ECHR and by Article 145 of the International Covenant for Civil and Political Rights".

The applicant's allegation relating to the problem of the non-implementation of Decision no. 17/2000 of the Constitutional Court by the United Chambers of the Supreme Court represents the essence of this examination. This is an examination of the same case between the same parties, but it contains a new allegation about constitutionality, and so it would not represent a case of *res judicata*.

The compulsory implementation of Constitutional Court decisions is guaranteed by Articles 132 and 145 of the Constitution. Constitutional Court decisions have general binding force and are final. They form part of a constitutional jurisprudence and, as a consequence, they have legal force. None of the state bodies can question Constitutional Court decisions.

Leaving the assessment of constitutional decisions to other bodies generates a dangerous precedent of denying the Constitutional Court its function as guarantor of the Constitution. The efficiency of Constitutional Court decisions lies exactly in their binding force. Even the reasoning found in a constitutional decision has legal force. It is compulsory and extends its effect to each state body, including the courts. The constitutional lawmaker has attributed unequivocal binding force to Constitutional Court decisions, which stems from the authority of the body. By refusing to apply the Constitutional Court decision, the United Chambers have adopted an attitude that constitutes an infringement of the Constitution and generates a dangerous precedent for institutional relations.

In the appealed decisions the United Chambers have interpreted some constitutional provisions to mean that certain court decisions should be excluded from constitutional review. Article 131.f of the Constitution vests the Constitutional Court with the authority to give a final decision on an individual's application concerning the infringement of his constitutional right to a fair trial. When the individual has exhausted all the instances of ordinary judicial review, the Constitutional Court, upon an individual request, exercises constitutional review of court decisions. In this respect, the Constitutional Court clarifies that, as with any other legal act, the United Chambers

decisions regarding the unification or changing of judicial practice – as unique and compulsory decisions only for the ordinary courts – must not be immune from constitutional review.

In reasoning its decision, the United Chambers expressed the view that the Constitutional Court does not enjoy the authority to interpret a law: this interpretation is the exclusive competence of the United Chambers. The Constitutional Court considers that it is necessary to emphasise the fact that interpretation of a law is not an exclusive attribute of the courts of ordinary jurisdictions. Article 142.2 of the Constitution has attributed to the United Chambers the authority to unify or change judicial practice, which can be based on interpretation of the law relating to a concrete case. The Court observes that each state body, including the Supreme Court, that deals with the implementation of a law may exercise the competence to make an interpretation, but it emphasises that such an interpretation may not be considered as final and of general binding force. In this case, the Court has exercised constitutional review concerning the respect of the fundamental right to a fair trial and this is considered a final interpretation. The application before the Constitutional Court did not consist of an interpretation of a law, but on the judgment of an individual's application about the infringement of the right to a fair trial. According to Article 124 of the Constitution, its final interpretation is competence of the Constitutional Court. When the Constitutional Court, during the examination of an individual's application, comes to the conclusion that a right during a criminal trial must be respected, this does not imply that the Constitutional Court has made an interpretation of a law. Through its interpretation, the court has reconfirmed an essential principle that constitutes a constitutional guarantee for the individual involved in a trial.

When the Court makes a final interpretation of the Constitution and exercises the constitutional review of legal norms, this interpretation becomes law itself. Interpretation of law in conformity with the constitutional principles takes the qualities of a final interpretation, compulsory for everybody. That is the reason why the Constitutional Court insists that each decision given by it constitutes a constitutional jurisprudence. The examination of the given case cannot be exempted from this.

Based on the above-mentioned arguments, the Court concludes that the United Chambers, by not accepting the implementation of Decision no. 17/2000, have infringed the Constitution, an infringement that in the concrete case has led to the denial of the right to a defence and the right of access to the courts.

For these reasons, the Court decided to set aside Decision no. 371/2000 of the United Chambers on constitutional grounds and to return the case to the Supreme Court.

Languages:

Albanian.



Andorra Constitutional Court

Summaries of important decisions of the reference period 1 January 2001 – 30 April 2001 will be published in the next edition, *Bulletin* 2001/2.



Argentina Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2001-1-001

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 11.01.2001 / **e)** T.421.XXXVI / **f)** T., S. c/ Gobierno de la Ciudad de Buenos Aires s/ amparo / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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.
 2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
 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.
 5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.
 5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Health, mental / *Lex artis* / Congenital abnormality / Child, premature birth.

Headnotes:

A mother's right to protection of mental health justifies authorising the premature delivery of an anencephalic child when the advanced stage of pregnancy means that premature birth would not lessen the probability of the child's survival.

Summary:

A woman in an advanced state of pregnancy with an anencephalic foetus asked the hospital treating her to induce delivery. As the hospital refused to do so, the mother brought an *acción de amparo* before the Appeal Court which allowed her application and directed the medical team to comply, in accordance with the medical standards and protocols governed by the rules of the professional code (*lex artis*). The Prosecution Department representative responsible for persons lacking legal capacity (*Asesor General de Incapaces*) initiated an exceptional review procedure (*recurso extraordinario*) before the Supreme Court. Although it upheld the judgment, the Court stated new grounds for its decision.

First, the Court was compelled to deliver its ruling with the utmost celerity. It went on to emphasise that neither the application nor the decision implied consent to abortion. Furthermore, the desired outcome was quite evidently not the death of the foetus. Neither did the measure involve a eugenic abortion or a variety of euthanasia, or in any way invoke reproductive freedom as a basis for termination of pregnancy.

Further, although the advanced state of pregnancy (eighth month or thirty-second week) made it permissible for the requested delivery to be termed "premature", considering that the child to be delivered was already a "mature foetus", this act could not be deemed a proceeding intended to cause the death of the unborn individual. According to the scientific evidence adduced, the degree of viability of the foetus on leaving the mother's womb would have been nil; whether delivery was induced at the time of the judgment under appeal, or once the nine months of gestation were up, it would make no difference to the likelihood of the child's survival because, being without a brain and all associated structures, it could not stay alive independently. Hence its death was inevitable even if it benefited from every precaution which medical science can offer in such cases. Neither an induced delivery nor continued gestation could alter the fate of the unborn child, whether positively or negatively, in view of the stage of pregnancy reached. Even if continued, the pregnancy would unavoidably reach its natural conclusion since the child would have to be delivered on completion of the natural cycle.

The Court held in the present case that the delivery was not a proceeding intended to cause the death of the foetus, this being purely the consequence of a congenital abnormality. Indeed, the delivery would conclusively demonstrate the impossibility of the child's unsupported survival. Thus, the solution which

the ruling proposed did not affect the due protection of life from the moment of conception secured by the Convention on the Rights of the Child and Article 4 of the American Convention on Human Rights, both these instruments having constitutional status. If the child was born alive and managed to survive in spite of the prognosis, premature birth would not alter its chances of survival.

However, the fragile intra-uterine life of the unborn child was concomitant with the mental anguish of its mother and of the entire family group, who saw how this shared life gradually deteriorated with apprehension of a distressing event as the situation was protracted and aggravated and relief from sorrow was denied them.

The permission granted in no way perverted the natural course of events: conception, life in the mother's womb, completion of a period of gestation quite sufficient to form a whole, viable human being, delivery free of risk to the child or mother, and preservation of the right to life for both throughout the process.

In view of the inevitable outcome, rendered irretrievable by the aforementioned malformation, and considering the inability of science to provide a remedy, the mother's rights to protection of her mental and bodily health regained their full force.

An unborn child's life is protected by all the resources of science, and none of the measures taken may aggravate an abnormality in the child. On the other hand, the health of the mother is protected, and her psychological stability stood out among the personal assets worthy of protection as one conspicuously requiring preservation in this case, also having regard to the limitations imposed.

One judge delivered a separate opinion and two judges expressed dissenting opinions on the merits of the case. A third judge founded his dissent on the inadmissibility of the *recurso extraordinario*.

Supplementary information:

An *acción de amparo* is an expeditious procedure affording protection against acts or omissions of a manifestly arbitrary or illegal nature capable of causing immediate or imminent infringement, restriction, impairment or imperilment of the rights secured by the Constitution.

Languages:

Spanish.



Identification: ARG-2001-1-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 13.02.2001 / **e)** P.252.XXXV / **f)** Palacio de Lois, Graciela y otro c/ P.E.N. s/ amparo ley 16.986. / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 3.19 **General Principles** – Reasonableness.
- 5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Inter-American Convention on the Forced Disappearance of Persons / Disappearance, forced, person.

Headnotes:

The families of persons presumed “missing” during the *de facto* military rule from 1976 to 1983, and the community as a whole, are entitled to ascertain the truth about the events that occurred in the building which formerly housed a detention centre, and consequently to obtain the judicial authority’s declaration that a decree signed by the executive authority ordering the demolition of the building is unconstitutional.

Summary:

Members of the families of persons presumed to have “disappeared” in the Naval College of Mechanics (*Escuela de Mecánica de la Armada*) during the *de facto* military rule which prevailed from 1976 to 1983 had introduced an *acción de amparo* to prevent a building allocated to the college, housing a detention centre in the days of the junta, from being demolished by order of the executive authority in a decree of 1998. Their action relied, among other grounds, on

the right to ascertain the truth about the events which had transpired in that building and thus to find out what had happened to the people whose disappearance occurred there. Other individuals were subsequently joined to this action: certain members of parliament, the “Mothers of Plaza de Mayo” association and the Ombudsman of Buenos Aires. The judgment, acceding to the request to halt demolition, was upheld by the Appeal Court on the ground that one group of appellants had the undeniable right to learn the fate of missing relatives and, if dead, to know the circumstances of their death and what was done with their remains. For the other appellants, the Appeal Court held that they – and the entire community – were manifestly entitled to know the historical truth, which moreover has yet to be established. In addition, the rights in question could be seriously affected by demolition of the building. Among other provisions invoked, the Appeal Court applied the Inter-American Convention on the Forced Disappearance of Persons. The appeal court therefore deemed unreasonable the decree by the executive authority approving demolition which it had adopted in the discharge of its discretionary powers, having regard to society’s interest in preserving extremely valuable evidence associated with its recent history. The Supreme Court subsequently entertained and dismissed an exceptional review procedure (*recurso extraordinario*) initiated by the national government, and upheld the impugned judgment.

The Court found that the action brought did not refute the grounds stated by the appeal court, whether regarding the possibility of the aforementioned demolition and the ensuing adverse effects which were liable to prejudice the rights of the appellants, or regarding their *locus standi*.

The Court added that the work proceeding on the land around the building in question to develop a green area in itself constituted an infringement of the appellants’ right, as it might yield conclusive evidence concerning the fate of the missing persons.

The Court also relied on its earlier decision of 15 October 1998 in the case of *Urteaga v. Estado Mayor Conjunto de las Fuerzas Armadas*, recognising the right of relatives of missing persons to disclosure of information recorded on registers or in official data banks which made it possible either to determine the fate of the missing person or, if it came to that, find out what was done with the remains.

Supplementary information:

The *Urteaga* decision was published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official

Digest), part 321, vol. 3, p. 2767. On the forced disappearance of persons, see also *Bulletin* 1999/3 [ARG-1999-3-009].

An *acción de amparo* is an expeditious procedure affording protection against acts or omissions of a manifestly arbitrary or illegal nature capable of causing immediate or imminent infringement, restriction, impairment or imperilment of the rights secured by the Constitution.

Languages:

Spanish.



Identification: ARG-2001-1-003

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 03.04.2001 / **e)** S.622.XXXIII / **f)** S., V. c/ M., D. A. s/ medidas precautorias / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 1.5.6.5 **Constitutional Justice** – Decisions – Delivery and publication – Press.
- 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.
- 2.1.1.4.8 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.
- 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.

- 2.1.3.2.3 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Other international bodies.
- 2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
- 2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
- 2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
- 3.16 **General Principles** – Weighing of interests.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
- 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
- 5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Prior censorship.

Headnotes:

A restriction imposed by a court on the release of any information whereby a minor can be identified (such as name, photograph, mother's name, address) is constitutionally valid for the duration of proceedings in which the child's parentage is at issue.

Summary:

In the course of proceedings to determine whether the respondent was the father of a minor, the appeal court had forbidden the release of any news relating to the child's parentage, subject to possible public disclosure of the final ruling and to the limitations prescribed by the Code of Procedure regarding the names of litigants or other persons affected. A press agency challenged this ruling by means of a *recurso extraordinario* before the Supreme Court, which dismissed it in part. The applicant claimed that the ruling was contrary to the prohibition of prior censorship, which is absolute, stipulated by Article 14 of the Constitution and Article 13 of the American Convention on Human Rights.

The Court first referred to its established case-law according to which freedom of expression is a freedom of paramount importance, so much so that

without its due protection, democratic life would exist only in name.

It added that constitutional guarantees are nonetheless exercised within the bounds of the purpose for which they have been instituted.

In this context, Article 13 of the American Convention on Human Rights, Articles 3 and 16 of the Convention on the Rights of the Child and Article 14.1 of the International Covenant on Civil and Political Rights create a field of protection of the rights of the child, which includes the right to privacy set out in general terms by Article 19 of the Constitution of Argentina and also Article 5 of the American Declaration of the Rights and Duties of Man, Article 12 of the Universal Declaration of Human Rights and finally Article 17 of the International Covenant on Civil and Political Rights and Article 11 of the American Convention on Human Rights.

It therefore rests with the Court to harmonise protection of freedom of expression and prohibition of prior censorship with protection of the right of minors not to be subjected to unlawful and arbitrary encroachment on their privacy.

Accordingly, publication by the press of a minor's name during affiliation proceedings would entail improper intrusion into the child's private sphere, liable to impair his/her psychological and social development.

However, the order to withhold "any news relating to parentage" exceeds the protection required by the case, and so the scope of the challenged ruling should be confined to the intrusion mentioned.

Separate opinions also contended that:

- constitutional guarantees are not absolute, being exercised within the bounds of the purpose for which they have been instituted;
- under the terms of the Constitution and Article 13 of the American Convention on Human Rights, freedom of expression is a concept which can only be defined in accordance with what is expressed. Expression as such is to be distinguished from the medium whereby it is conveyed, so that not everything transmitted by the media need necessarily be identified with the acts protected by the aforementioned provisions and by the prohibition of censorship, since these acts solely concern expression whose content brings it within the definition of seeking, receiving and disseminating ideas and information;

- the preventive measures taken by the courts invariably carry all requisite constitutional safeguards.

These separate opinions also cite, among other sources of law, Articles 8, 16, 19, 27 and 29 of the American Convention on Human Rights, Articles 3.1, 8, 12.2 and 40.2.b.vii of the Convention on the Rights of the Child, Article 53 ECHR, Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, and the opinion and practice of the Inter-American Court of Human Rights, the German Federal Constitutional Court, the Committee on the Rights of the Child and the United States Supreme Court.

Two of the three separate opinions were signed by two judges, and the third by one judge only. Two judges expressed dissent, based on the absolute nature of the prohibition of prior censorship. One of the dissenting opinions drew attention to the difference in the letter of Article 13 of the American Convention on Human Rights and Article 10 ECHR, the latter of which does not expressly prohibit prior censorship.

Languages:

Spanish.



Armenia

Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

22 referrals made, 22 cases heard and 22 decisions delivered, including:

- 21 decisions concerning the conformity of international treaties with the Constitution. All the international treaties were declared compatible with the Constitution;
- 1 decision concerning the compliance of a law with the Constitution. The referral was initiated by the President of the Republic of Armenia.

Important decisions

Identification: ARM-2001-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 11.01.2001 / **e)** DCC-278 / **f)** On the conformity of several provisions of the Law of the Republic of Armenia “On Television and Radio” with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
 4.5.8 **Institutions** – Legislative bodies – Relations with the executive bodies.
 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, television / Media, radio / Informational system, independence / National Commission on Television and Radio, member, independence.

Headnotes:

Guarantees directed at strengthening the independent operation of the newly established informational

system must exclude continuous, durable, direct and indirect influence of and interference by state authorities on the activity of the newly formed system.

Summary:

The President of the Republic, initiating the case, disputed several provisions of the Law on Television and Radio. The disputed provisions of Articles 28, 32, 35, 36, 40, 42 and 59 of the law concern the confirmation of the Statutes of the Public Teleradio company and National Commission of Television and Radio and the review of their activity, as well as the system of state financing of the Public Teleradio company.

The applicant considered that the disputed provisions of the law were contrary to the Constitution for two reasons. First, the powers of the National Assembly are determined by the Constitution and they did not include such functions as the confirmation of the Statute of any legal entity, a special financial review separate from the general state budget, or the control of an activity through reports. Second, the law in question, by reserving such powers to the National Assembly, makes the Public Teleradio company directly dependent on a legislative body.

The main arguments of the respondent were that the statutes of both the Public Teleradio company and the National Commission on Television and Radio were to be confirmed by law, for which the National Assembly possesses the constitutional authority. Furthermore, the disputed provisions concerning financial control fall within the powers granted to the National Assembly by the Constitution, in particular, by the provisions of Article 77 of the Constitution.

As the main purpose of the Law on Television and Radio was to create a legal basis for transforming National Television and Radio into the Public Teleradio company and establishing a new information system, the Court considered the constitutionality of the disputed provisions in the light of the fundamental issue of whether the law guaranteed the functional independence of the new information system.

The law provided an appropriate system for the formation and operation of the Council of Public Teleradio company by laying down the principle of stable, fixed terms of office of members of the Council. Their terms of office were longer than that of the President of the Republic and were dependent on the nomination and election of the President and Deputy President of the Commission. Such links with state institutions are not equivalent to continuous control.

In relation to the disputed provisions of the Law on Television and Radio regarding the foundation and activity of the Public Teleradio company and the granting of powers to the National Assembly, it is obvious from Articles 62, 71, 76, 77 and 81 that the supervisory powers of the National Assembly regarding executive authorities are defined in precise and concrete terms. Besides, the authority granted to the National Assembly by Articles 28.10 and 42.2 supposes not the existing law-making powers of the National Assembly, but direct and unbalanced power.

Article 28.10 of the Law on Television and Radio states that the National Assembly confirms the Statute of the Public Teleradio company. In Article 32, which determines the powers of the governing body (Council) of the company, it is provided that the Council drafts and presents the Statute of Public Teleradio company to the National Assembly and delivers an annual report on its activity to the President and the National Assembly.

Article 75 of the Constitution provides an exhaustive list of entities that have the right of legislative initiative in the National Assembly. Thus, the Constitutional Court found that Articles 28.10 and 32 of the disputed law are not in conformity with the requirements of Article 62 of the Constitution.

Article 35.1 of the law provides that the Council annually drafts the budget of the company for the next year, notifying the Council separately on the amounts distributed for the company and submits it to the government, which submits it to the National Assembly for confirmation.

The drafting, confirmation and exercise of the state budget of the Republic of Armenia are governed by Articles 76 and 89.2 of the Constitution and by the Law on the Budget System of the Republic of Armenia, adopted on 24 June 1997, and by other legal acts.

According to Article 21 of the Law on the Budget System of the Republic, government bodies and agencies present their budget to the Ministry of Finance, attaching to it the estimate of expenses with the relevant justifications. The government presents the final draft of the budget to the National Assembly. Therefore, the Court found that Article 35.1 of the Law on Television and Radio does not violate the requirements of the Constitution.

Part Five of the Law on Television and Radio is dedicated to questions on the creation, powers and operation of the National Commission on Television and Radio as an independent state body. According to Article 37 of the Law, the activity of the National

Commission pertains only to the licensing and supervision of the Public Teleradio company. The idea behind the creation of such a commission is to restrict opportunities for influence by the executive powers and replace the function of governing with the function of regulation, and to provide legal guarantees as to the freedom of activity and equal certainty of the law in its application to all subjects. After an analysis of the different articles of the law, it follows that the law has not fully resolved this issue.

As regards the disputed provisions on the National Commission, the National Assembly is granted a number of powers, relating to the creation of the National Commission on Television and Radio and its supervision.

Languages:

Armenian, English (translation by the Court).



Austria

Constitutional Court

Statistical data

Session of the Constitutional Court during March 2001

- Financial claims (Article 137 B-VG): 5
- Conflicts of jurisdiction (Article 138.1 B-VG): 12
- Review of regulations (Article 139 B-VG): 29
- Review of laws (Article 140 B-VG): 135
- Challenge of elections (Article 141 B-VG): 4
- Complaints against administrative decrees (Article 144 B-VG): 417
(315 refused to be examined)

Important decisions

Identification: AUT-2001-1-001

a) Austria / b) Constitutional Court / c) / d) 02.03.2001 / e) W I-14/99 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

- 1.4.10 **Constitutional Justice** – Procedure – Interlocutory proceedings.
- 2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
- 2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
- 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.
- 3.25.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
- 3.25.2 **General Principles** – Principles of Community law – Direct effect.
- 5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Association agreement, EC, Turkey / Chamber of Labour / Election, plenary meeting / Ruling, preliminary / Worker, Turkish, electoral rights.

Headnotes:

The Court referred a question to the European Court of Justice (ECJ) regarding whether Article 10 of Decision no. 1/80 of the Association Council (established by the Association Agreement between the EEC and Turkey, of 19 September 1980) on the development of the Association is to be interpreted in a way that it contradicts a national law which excludes Turkish workers from eligibility to elections to the plenary meeting of a Chamber of Labour (*Arbeiterkammer*).

If Article 10 of Decision no. 1/80 is not consistent with the relevant law the Court asked whether Article 10 has direct effect in the Member States.

Summary:

The election to the Chamber of Labour of the *Land Vorarlberg* 1999 was challenged at the Court by an electoral group alleging unlawfulness of the election procedure because five Turkish nationals running for election and registered on the electoral group's list of candidates were cancelled from the list by the (main) electoral board (*Hauptwahlbehörde*) because they were not Austrian citizens. The electoral group argued in their challenge of the election that the exclusion of the Turkish workers from eligibility was contrary to Article 10 of Decision no. 1/80 which prohibits the discrimination of Turkish workers being part of the regular labour market of a Member State. The challenge was first brought before the Federal Minister of Labour, Health and Social Affairs who had dismissed it.

Other than the Federal Minister the Court is a court in the meaning of Article 234.3 EC. It regarded the questions raised as relevant for its decision. The Court held that with regard to the case law of the Court of Justice of the European Communities on the freedom of movement for workers it might be clear that workers of other Member States should have the right to stand for elections to the plenary meeting of Chambers of Labour. Yet, there may be doubts whether this is also the case for Turkish workers subject to the above-mentioned Decision no. 1/80. The relevant provision (Article 10) inhibits discrimination of Turkish workers in relation to other workers of the Community regarding salaries and other working conditions. Even considering the extensive interpreta-

tion of the words “other working conditions” in the case law of the Court of Justice of the European Communities it is not certain whether these words cover the passive franchise of Turkish workers for the elections to Chambers of Labour.

Supplementary information:

This is the Court’s third referral for a preliminary ruling under Article 234.3 EC.

Languages:

German.



Identification: AUT-2001-1-002

a) Austria / b) Constitutional Court / c) / d) 06.03.2001 / e) B 159/00/ f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
 2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
 5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Appeal, capacity / Appeal, instance, special / Act, direct administrative power, compulsion / Deceased / Relative, close / Succession, by law / Bondage / Gag.

Headnotes:

The Independent Administrative Tribunals in the *Länder* (*Unabhängige Verwaltungssenate*) were installed by Article 129a.1.2 of the Constitution as special appeal proceedings to decide on complaints by persons alleging an infringement of their rights through the exercise of direct administrative power and compulsion (so-called complaints against coercive measures; *Maßnahmenbeschwerde*).

If a person directly affected by such an act dies in the course of it the close relatives of the deceased are entitled (by succession) to file a complaint against the relevant measure and the Independent Administrative Tribunals have to exercise their jurisdiction.

Compulsory acts such as the use of bondage and a gag used during deportation – an act of direct administrative power and compulsion itself – are part of one event and must be seen as one act only.

Summary:

The Independent Administrative Tribunal of Vienna rejected a complaint filed pursuant to Article 129a.1.2 of the Constitution by which the complainant – a minor – contended that the (lethal) use of bondage and a gag, as well as the poor planning and handling of her father’s deportation, infringed not only the deceased’s but also her constitutionally guaranteed rights to life and freedom from torture and cruel and degrading treatment (Articles 2 and 3 ECHR). The Tribunal based its decision on two procedural grounds:

1. Due to the wording of Article 129a.1.2 of the Constitution, a complaint may be filed solely by the person who is directly affected by a measure. The right to file the complaint is not transferred to close relatives if the directly affected person has died.
2. As the (probably fatal) use of bondage and the gag started at the airport *Schwechat*, which is located in the *Land* Lower Austria, the Independent Administrative Tribunal of Vienna has no jurisdiction to decide on these separate acts regardless of the fact that the deportation started in Vienna.

The minor (represented by her mother) brought the case to the Constitutional Court. The Court rejected the authority’s legal opinion. It found the literal interpretation relied on by the authority was inappropriate. The constitutional legislator, when enacting Article 129a.1.2 of the Constitution in 1988,

had clearly intended for there to be an (*ex post*) ascertainment of whether an act of direct administrative power and compulsion was legal or illegal.

Article 129a.1.2 of the Constitution was inserted after both the European Commission and Court of Human Rights had already developed case law allowing applications (Article 34 ECHR) brought by applicants on behalf of their deceased close relatives (see the *Çaçan* Judgment of 28 March 2000, Appl. no. 33646/96). According to this case law the spouse, parents, children, and siblings of the deceased are acknowledged as close relatives.

As to the right to life, the Court argued that the entitlement of the (surviving) relative results from the specific character of this right. Otherwise a violation of this right could never be claimed.

Taking into account all these considerations the Court concluded that the constitutional legislator having installed a special instance of appeal for complaints against (coercive) measures could not have intended to exclude the possibility of a claim that a violation of the right to life by relatives if the person directly affected by a measure has died as a result of the measures.

Finally the Court stated that the deportation of the complainant's father had started in Vienna. The subsequent use of bondage and a gag were not separate acts but part of the deportation. The impugned Tribunal had therefore unlawfully rejected the complaint and violated the complainant's constitutionally guaranteed right not to be deprived of a fair hearing.

Supplementary information:

The circumstances of the deportation and the tragic death of the complainant's father caused some positive changes. In July 1999 a Human Rights Committee (*Menschenrechtsbeirat*) was installed by a constitutional provision (§ 15a) in the Act of Security Police (*Sicherheitspolizeigesetz*). This independent Committee, with the help of six (sub)commissions (established at the High Courts of Appeal), observes and reviews the activity of the police and other organs exercising coercive measures, reviews prison conditions (a recommendation of the Committee for the Prevention of Torture of the Council of Europe), publishes reports on its work and passes recommendations to the Federal Minister of the Interior, which are later evaluated by the Human Rights Committee.

Languages:

German.



Identification: AUT-2001-1-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 10.03.2001 / **e)** G 12/00, G 48-51/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.4.10.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – Limits of the legislative competence.

1.3.4.11 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of constitutional revision.

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

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

2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.

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

Keywords of the alphabetical index:

Administration, supreme organs / Body, independent, collegiate, with judicial character / Constitutional law, ordinary / Constitution, nucleus / Constitution, self-elimination / Constitution, suspension / Constitution, total revision.

Headnotes:

A constitutional provision, § 126a of the Federal Procurement Law (*Bundesvergabegesetz* - hereinafter *BVergG*) stipulating that all statutes of the *Länder* in force on 1 January 2001 and concerning the organisation and jurisdiction of organs established to review the awards of public contracts are to be considered as not contrary to Federal constitutional law, might be contrary to the Constitution and its principles governed by the rule of law.

The ordinary constitutional legislator might not have the power to suspend certain parts of the legal order, parts which are neither to be regarded as few in quantity nor as negligible in their economic importance, by an ordinary constitutional provision.

Constitutional provisions suspending the Constitution, so far they may be enacted at all, are presumably subject to a referendum as required by Article 44.3 of the Constitution.

Summary:

There were several cases pending in which the Court had entered partly *ex officio* partly on the application of the Administrative Court the review of a statute of the Public Procurement Law of the *Land Salzburg* (*Landesvergabegesetz*). In the Constitutional Court's (preliminary) legal opinion it might have been unconstitutional that the Public Procurement Review Senate (*Salzburger Vergabekontrollsenat*) being installed as an independent collegiate body with judicial character (*Kollegialbehörde mit richterlichem Einschlag*) should also have jurisdiction to review decisions taken by the supreme organs of the *Land* administration. Thus, the incriminated independent collegiate body would be unconstitutionally set over the supreme organs of administration. A legal opinion which was already settled by previous judgments of the Court (e.g. Telekom-Control Commission, see *Bulletin* 1999/1 [AUT-1999-1-002]; Private Broadcasting Board, see *Bulletin* 2000/2 [AUT-2000-2-005]; Federal Procurement Office, Judgment of 30 September 1999, G 44-46/99).

In the meantime the legislator enacted the (above quoted) provision § 126a *BVergG* in the rank of ordinary constitutional law.

The Court decided to stay the review proceedings concerning the *Land* statute and to start (again *ex officio*) the review of this relevant constitutional provision. It held that it was the evident intention of the constitutional legislator to restore the constitutionality of the *Land* statute under review and to exempt similar ones of the Court's review. The other intention was quite obviously to exclude the application of the Federal Constitution for some parts of the legislation of the *Länder*. This exclusion seems to include not only all Federal constitutional provisions concerning the state organisation but also the principles governing the rule of law as well as fundamental rights (especially the right to a hearing before a lawful judge, a decision by an independent and impartial tribunal and the principle of equality) and even Article 44.3 of the Constitution containing the procedure to be followed for a total revision of the Constitution (obligatory referendum).

Furthermore the Court held that it is fundamental to the Constitution not to authorise self-elimination. A suspension of that kind might therefore well be contrary to the rule of law according to which "all state organs must be based on law and after all on the Constitution" and "effective review proceedings must exist for the protection of this requirement". These principles seem to be a decisive element of the rule of law and their nucleus might not be at the disposal of the ordinary constitutional legislator.

Supplementary information:

This is the first time that the Court has reviewed ordinary constitutional law. The final decision is expected in autumn (press release of the Court of 19 March 2001).

Cross-references:

- Decision of 11.03.1999 (B 1625/98); see *Bulletin* 1999/1 [AUT-1999-1-002];
- Decision of 29.06.2000 (G 175-266/99); see *Bulletin* 2000/2 [AUT-2000-2-005];
- Decision of 30.09.1999 (G 44-46/99).

Languages:

German.



Azerbaijan

Constitutional Court

Important decisions

Identification: AZE-2001-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 23.01.2001 / **e)** 08/15-15 / **f)** / **g)** *Azerbaycan* (Official Gazette), *Azerbaycan Respublikasinin Konstitusiyası* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.2.1 **Constitutional Justice** – Jurisdiction – Type of review – Preliminary review.

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

4.7.4.1.3 **Institutions** – Courts and tribunals – Organisation – Members – Status.

5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.

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

Keywords of the alphabetical index:

Judge, judicial seniority / Judge, independence / Judge, remuneration / Council of Europe, recommendation / European Charter on the Statute of Judges.

Headnotes:

The guarantees for judicial independence are enshrined in the Constitution, the law and in a number of international instruments. In order to enable equal treatment and the attainment of the goal of judicial independence, if enacted the draft Law on Courts and Judges (“the law”) which provides that judges shall be paid an additional 15% of their salary for every five years of judicial seniority would apply retroactively.

Summary:

The Supreme Court asked for an interpretation of the law in relation to payment for judges’ judicial seniority before the law came into effect.

The Constitutional Court notes that the material security of judges is an integral part of the judicial independence envisaged in the Constitution. The state and society, which demand from judges fairness and competence, shall take such measures as are necessary to resolve issues connected with the judiciary’s material security. Judges are subordinated only to the Constitution and laws (Article 127 of the Constitution).

In accordance with the provisions laid down in the “Basic Principles Concerning the Independence of Judicial Bodies”, legislation shall properly guarantee the term of office of judges, their independence, security, salary and conditions of service.

Article 6.1 of the European Charter on the Statute for Judges provides, that judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thus impairing their independence and impartiality.

According to the Recommendation of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges, all necessary measures should be taken to ensure the proper exercise of judicial responsibilities by ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and the burden of their responsibilities.

According to Article 100 of the Law, judges are provided with material and social security in accordance with the post held. Article 106 of the law provides for an additional payment at the rate of 15% of the salary for every five years of judicial seniority.

While applying this provision some difficulties arose in connection with the additional payment to judges for their judicial service before the entry into force of the law.

The Court notes that according to Article 149.7 of the Constitution normative legal acts improving the legal status of individuals and legal persons have retroactive effect.

From this point of view, Article 106.2 of the law shall, without any restrictions, cover persons who have been working as judges for 5 or more years. Otherwise, the mentioned provision contradicts the principle, envisaged in Article 149.1 of the Constitution, according to which normative legal acts shall be based on law and justice (equal treatment of equal interests).

Thus, the Constitutional Court considers that the provisions of Article 106.2 of the law shall cover persons appointed on the basis of the Law, taking into account judicial seniority accumulated before the law entered into force.

Languages:

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



Identification: AZE-2001-1-002

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

Keywords of the systematic thesaurus:

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

4 Institutions.

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:

Labour Code / Correctional Labour / Right to rest / Right to leave / ILO, Convention no. 132.

Headnotes:

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

However, Article 10.2.3 of the Code on the Execution of Punishment (“the Punishment Code”) stipulated that, during the period of punishment, sentenced

persons shall have the right to paid leave. Article 96.5 of the Punishment Code provided that persons convicted to imprisonment and occupied by labour activity shall have the right for annual paid leave established by labour legislation. These provisions reflect the constitutional right to rest (Article 37 of the Constitution). The Court therefore declared Article 132.2 of the Labour Code null and void.

Summary:

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

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

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

the right for annual paid leave established by labour legislation.

An analysis of the above mentioned provisions of the Punishment Code shows that persons sentenced to correctional labour shall serve the conviction in the place the enterprise where they worked before, based on the same former post or job and according to the labour contract concluded with the employer. The regulations concerning the working time, rest time, standards of work, as well as the rules, procedures and guarantees of remuneration for labour provided by labour legislation are applied to those persons. As opposed to Article 132.2 of the Labour Code, the Punishment Code does not contain any limitation on the right to rest, which is enshrined in Article 37 of the Constitution, as regards convicted persons. Also the right of citizens to rest is enshrined in Article 24 of the Universal Declaration on Human Rights and Article 3 of the Convention of the International Labour Organisation on Paid Holidays.

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

Languages:

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



Identification: AZE-2001-1-003

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 27.04.2001 / **e)** 05/15 / **f)** / **g)** *Azerbaijan* (Official Gazette), *Azerbaijan Respublikasinin Konstitusiyası* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Police, law on police / Offence, administrative / Detention, administrative, terms.

Headnotes:

Article 21.3 of the Law on Police (“the law”) provided that the police could, in exceptional cases, immediately detain any person without a court ruling, for a term not exceeding 48 hours. According to Article 399.3 of the Code on Administrative Offences, a person suspected of an administrative offence can be detained for no longer than 24 hours.

The term of detention not exceeding 48 hours provided for in Article 21 of the law applies according to Article 148 of the Criminal Procedure Code to persons suspected of committing a crime; in relation to the detention of the persons for administrative offences, it is necessary to base time limits on Article 399 of the code.

Summary:

The Supreme Court asked the Constitutional Court for an interpretation of the provision of Article 21.3 of the law regarding the Terms of Administrative Detention.

The Constitutional Court notes that everyone has the right to freedom (Article 28 of the Constitution). The right to freedom may only be restricted where specified by law, by way of detention, arrest or imprisonment.

Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, freedom and security of the person.

According to Article 9.1 of the International Covenant on Civil and Political Rights everyone has the right to freedom and security of the person. No one shall be arrested or detained arbitrarily. No one shall be deprived of freedom except in cases determined by law.

The second principle of the code on the principles for the protection of all persons subjected to detention or imprisonment in any form, confirmed by the General Assembly of the United Nations provides that: “...arrest or detention shall be implemented only according to provisions of law and by competent officials or persons”.

At the same time, constitutional and international legal norms do not exclude the restriction of freedom in cases provided for by law. Reasonable terms for a person's immediate detention without a court ruling are determined by legislation.

Article 148 of the Criminal Procedure Code determines the grounds for detention of a person suspected of a crime without the court's ruling. The provisions in this article that, "detention of a person shall not exceed 48 hours" is congruent with the above-mentioned provisions of Article 21 of the law regarding terms of detention.

Articles 398 and 399 of the Code on Administrative Offences ("the code") regulate administrative detention and its terms.

According to Article 398.1 of the Code an administrative detention, that is to say the restriction of a natural person's freedom for a short term, is applied in exceptional cases when such a measure is recognised as necessary for ensuring the sound examination of an administrative offence in due time or for ensuring the implementation of the decision in regard to an administrative offence.

However, provisions of Article 399.2 of the code provide that, instead of the normal 3 hour long term of a person's detention, in such cases as a breach of the frontier regime, a 24 hour long term of detention of a person is allowed. In the absence of the person's identification documents, a 3 day long term of the detention can be imposed by a court ruling.

The Court held that it followed from an analysis of the code that the term of administrative detention without a court ruling shall not exceed 24 hours in any case. This is despite the 48 hour long term provided for in Article 21 of the Law.

Thus, when the police apply an administrative detention for a term not exceeding 48 hours provided for in Article 21 of the law it is necessary to base the term actually served on either the standard 3 hour long term in normal cases, or, in exceptional cases, a 24 hour long term according to Article 399 of the code.

Languages:

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



Belgium Court of Arbitration

Important decisions

Identification: BEL-2001-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 07.02.2001 / **e)** 10/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 01.03.2001 / **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.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.3 **General Principles** – Democracy.
- 3.18 **General Principles** – Margin of appreciation.
- 4.5.11.2 **Institutions** – Legislative bodies – Political parties – Financing.
- 4.5.12 **Institutions** – Legislative bodies – Status of members of legislative bodies.
- 4.9.4 **Institutions** – Elections and instruments of direct democracy – Eligibility.
- 4.9.6.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Candidacy.
- 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Political party / Extremism, right-wing / Racism / Xenophobia / Parliamentary immunity.

Headnotes:

A legislative provision whereby a political party can lose part of its annual financial allocation if it itself or any of its components displays manifest hostility towards rights or freedoms guaranteed by the European Convention on Human Rights (ECHR) or its protocols is not unconstitutional.

Summary:

Belgium's law of 4 July 1989 introduced rules on the financing of political parties. The law of 12 February 1999 inserted into that first law an Article 15ter, laying down that, on a complaint from a given number of members of parliament, a bilingual chamber of the highest administrative court could withdraw the funding of a political party which was found to display manifest hostility towards fundamental rights or freedoms guaranteed by the European Convention on Human Rights (ECHR) or its protocols.

Leaders of the right-wing extremist party *Vlaams Blok*, together with the association which received the allocation on the party's behalf, had applied to have the law of 12 February 1999 annulled on the ground of contravention of the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) and freedom of expression (Article 19 of the Constitution).

The Court held that it was for the legislature to introduce whatever measures it considered necessary or desirable for guaranteeing fundamental rights and freedoms, as Belgium had undertaken to do in particular in ratifying the European Convention on Human Rights. In appropriate cases the legislature could lay down penalties for threatening the basic principles of democratic society. The Court did not have discretionary or decision-making powers comparable to those of democratically elected legislative assemblies. It would be exceeding its jurisdiction if it substituted its own assessment of the matter for the policy decision which the legislature had made. It was, however, required to consider whether the system introduced was in any way discriminatory.

In the Court's view this was not the case: only a political party which "gave a number of manifest and concordant indications of hostility" towards guaranteed rights or freedoms was liable to lose, for a time, a proportion of its grant from the public authorities.

The Court nonetheless considered it important that the challenged provisions be interpreted strictly and not allow a party to be deprived of funding that had merely called for some rule in the European Convention on Human Rights or its protocols to be reinterpreted or revised or which had criticised the underlying philosophy or ideology of those international instruments. In this context "hostility" must be understood to mean incitement to contravene a legal provision in force (in particular, incitement to commit violence or oppose the aforementioned rules); it was also for the relevant upper courts to check that what the hostility was being directed at was indeed a

principle crucial to the democratic nature of the political system. Condemnation of racism or xenophobia was undoubtedly one such principle since if these tendencies were tolerated there was a danger (*inter alia*) of their leading to discrimination against certain sections of the community in the matter of rights, including political rights, on the ground of their origins.

A further point was that the challenged provisions did not interfere with the rights to stand as candidate, to be elected or to sit in a legislative assembly and could not be interpreted as interfering with the parliamentary immunity afforded by Article 58 of the Constitution. Article 15ter could therefore not be applied to an opinion expressed or a vote cast by a member of parliament. Subject to that, the measure was not disproportionate.

The Court concluded that there had not been any contravention of the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) as such, or even when taken together with the constitutional provision guaranteeing freedom of expression (Article 19 of the Constitution). With regard to freedom of expression the Court took into account Articles 10 and 17 ECHR and Article 19 of the International Covenant on Civil and Political Rights, together with the case law of the European Court of Human Rights (see, in particular, the judgments of 7 December 1976, *Handyside v. United Kingdom*, para. 49, *Special Bulletin ECHR* [ECHR-1976-S-003]; 23 September 1998, *Lehideux and Isorni v. France*, para. 55; and 28 September 1999, *Öztürk v. Turkey*, para. 64).

Further, a political party could lose its funding whether by its own actions or those of its component groups, its lists, its candidates or persons representing it in elective public office. The Court had no objection to the legislature's concerning itself with a party's members or component groups: political parties themselves generally did not have legal personality and it could be either the political party itself or one of its component elements that was doing the incitement, although in the latter case there must be no doubt as to the connection between such elements and the political party. The measure would, however, be manifestly disproportionate if it caused the party to lose some of its funding on account of such elements' expressing hostility within the meaning of Article 15ter.1 when the party itself had clearly and publicly disavowed the elements in question.

The Court rejected the appeal with the proviso that the provisions under challenge must be interpreted strictly, could not affect parliamentary immunity and

could not cause a party to lose funding which had clearly and publicly disavowed the group or member manifesting hostility within the meaning of Article 15ter.

Cross-references:

- *Handyside v. United Kingdom*, 07.12.1976, *Special Bulletin ECHR* [ECH-1976-S-003];
- *Lehideux et Isorni v. France*, 23.09.1998;
- *Öztürk v. Turkey*, 28.09.1999.

Languages:

French, Dutch, German.



Identification: BEL-2001-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 29.03.2001 / **e)** 40/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 18.04.2001 / **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.

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

4.8.5.1 **Institutions** – Federalism and regionalism – Distribution of powers – Principles and methods.

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

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

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

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

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

Keywords of the alphabetical index:

Work permit / Worker, permission to employ / European Union, member state, national / Foreigner, job / Foreigner, illegal residence / Refugee, recognised / Nationality / Powers, “horizontal” apportionment.

Headnotes:

The federal parliament, which was responsible for laying down the requirements governing employment of foreigners in Belgium, had not infringed the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) by making entry to the employment market conditional both on the employer’s first obtaining employment permission and the worker’s first obtaining a work permit, provided that the provision whereby the Crown could make exceptions was interpreted as requiring that the Crown exempt categories of foreigners who, by virtue of their nationality or status, could not be required to obtain a permit in order to work in Belgium, in particular nationals of European Union member states and refugees recognised in Belgium.

Summary:

The law of 30 April 1999 on employment of foreign workers laid down a new legal framework for regulating employment of foreign workers. Parliament adopted the approach of using a framework law so that the executive could speedily adapt the relevant provisions in response to unexpected situations and employment-market trends.

The non-profit “Movement against Racism, Anti-Semitism and Xenophobia” (*Mouvement contre le racisme, l’antisémitisme et la xénophobie*) petitioned to have the law of 30 April 1999 abrogated on the grounds that parliament had encroached on the regions’ areas of responsibility and had disregarded the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the constitution).

The Court held, first, that the federal legislature was competent to lay down provisions on employment of foreign workers. In particular it was competent to lay down requirements governing employment of foreign nationals in Belgium. Such requirements could include requirements governing admission of foreigners to Belgium and the requirement that, if the foreigner was entering the country for employment purposes, the employer be in possession of an employment authorisation. The regions’ responsibilities in the matter of provisions governing employment

of foreigners related solely to application of the legislation.

On the question of observance of the rules on equality and non-discrimination the Court observed that the law accorded identical treatment to foreign workers who differed in status in essential respects. Nationals of European Union member states and refugees recognised in Belgium were two cases in point. In respect of these two categories the provisions of the law seemed to disregard Belgium's international undertakings, which precluded its denying them access to the Belgium labour market. Another example was those foreign nationals whose status was such that their right to take up employment could not be made conditional on obtaining a permit. The Court did not annul the law, however, but opted for qualified rejection of it (as specified in the operative words of the judgment) by interpreting as an obligation the Crown's right to grant exemptions to specified categories of worker by reason of their nationality or status. It noted that the *travaux préparatoires* provided a basis for this interpretation.

The Court did not regard as discriminatory other differences of treatment which the appellant had raised. It took the view that legislative measures concerning foreigners entering the country to take up employment and which sought to discourage entry of foreign workers whose future employer had not yet applied for or obtained permission to employ them were justified and not disproportionate. The purpose of this was consistent with that of the law as a whole, which was to admit new workers only when the Belgium labour market could accommodate them.

Parliament had also widened the possibilities of appeal against refusal or withdrawal of a work permit, but solely in respect of foreign workers who were lawfully resident in Belgium. In the Court's view it was reasonable to exclude foreign workers who were unlawfully resident in Belgium: policy on admission of foreigners to Belgium and on foreign residence in Belgium would be undermined if the line were taken that the same requirements should apply to foreign workers unlawfully resident in Belgium as applied to those lawfully resident in Belgium. Not allowing appeal by foreign workers lawfully resident abroad and seeking employment in Belgium was justifiable on the same grounds.

Finally, the Court noted, without regarding it as necessary to consider whether Article 6 ECHR was applicable to the case, that decisions by "the competent authority" for purposes of the law of 30 April 1999 on employment of foreigners could give rise to appeals to have them set aside or appeals for stay of execution to the administrative section of the

Conseil d'Etat. Refusal or withdrawal of a work permit or of employment authorisation could therefore in all cases be challenged by the foreigner affected or by the employer before an independent tribunal.

Supplementary information:

In principle, no "horizontal" distribution of powers – whereby one entity is responsible for legislation and another for carrying it out – exists in federal Belgium. The distribution of powers as regards employment of foreigners is an exception to this.

Languages:

French, Dutch, German.



Identification: BEL-2001-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 18.04.2001 / **e)** 49/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 08.05.2001 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

5.4.1 **Fundamental Rights** – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Education, subsidy / Education, basic skills / Education, pedagogical philosophy / School, right to establish / Education, quality / Education, Steiner schools.

Headnotes:

A provision of a decree of the French Community which dealt extensively and in detail with the basic skills to be acquired in the first eight years of compulsory schooling was contrary to freedom of education (Article 24.1 of the Constitution) in that it did not allow the managing body of a school wishing to provide an education based on a particular educational philosophy (Steinerism) to request an exemption.

Summary:

Associations active in the education field, the headmaster of a primary school practising Rudolf Steiner's educational methods and parents of children attending a Steiner school appealed to the Court of Arbitration to annul a decree of the French Community of 26 April 1999 dealing with basic skills taught at school and with the functions of school. They argued that the decree laid down the basic skills in too much detail and thereby interfered with their freedom of education.

The Court ruled that the appeals were admissible and decided to entertain submissions from other schools affected by the decree.

One of the grounds of appeal was breach of Article 13 of the International Covenant on Economic, Social and Cultural Rights and of Article 2 Protocol 1 ECHR. The Court agreed to consider that head of appeal insofar as Article 24.3 of the Constitution referred to respect for fundamental freedoms and rights, including those contained in these two international agreements.

The Court noted that freedom of education as guaranteed by the Constitution included the right to organise – and therefore choose – schools based on a particular denominational or non-denominational philosophy. It also entailed that it be possible for private individuals, without prior permission and subject to respect for fundamental rights and freedoms, to make available an education that accorded with their own beliefs, with regard both to the form and content of that education, for example by setting up schools which were characterised by particular pedagogical or educational ideas.

If that freedom was not to remain purely theoretical it was also necessary for school managing bodies that were not part of the Community's official services to be able, on certain conditions, to apply to the Community for grants. The French Community, could, however, make entitlement to grants conditional on

meeting requirements that were in the general interest, such as the requirement to provide quality teaching or to comply with rules concerning the school population, provided that such requirements did not interfere in any essential respect with freedom of education.

The Court criticised the appendices to the decree for setting out the basic skills to be acquired by pupils so comprehensively and in such detail that they could no longer be said to provide mere guidance. The description of the learning approach was too constraining and did not give the managing bodies of school sufficient latitude to put their own educational ideas into practice. The decree consequently contravened freedom of education in so far as it did not provide any procedure whereby organisers providing or wishing to provide a schooling based on particular educational ideas could apply for limited exemptions.

The Court accordingly set aside the relevant provisions of the decree but allowed them to continue in force until the end of the school year – that is, until 30 June 2001.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Summaries of important decisions of the reference period 1 January 2001 – 30 April 2001 will be published in the next edition, *Bulletin* 2001/2.



Bulgaria Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

Number of decisions: 8

Important decisions

Identification: BUL-2001-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 22.03.2001 / **e)** 05/01 / **f)** / **g)** *Darzhaven Vestnik* (Official Gazette), 30, 28.03.2001 / **h)**.

Keywords of the systematic thesaurus:

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

4.5.3.4.2 **Institutions** – Legislative bodies – Composition – Term of office of members – Duration.

4.5.3.4.3 **Institutions** – Legislative bodies – Composition – Term of office of members – End.

Keywords of the alphabetical index:

Parliament, term of office, extension / Term of office, end.

Headnotes:

Parliament's term of office begins on the date on which the members of parliament are elected.

Summary:

Proceedings were instituted by 70 members of parliament, who asked for a binding interpretation of Article 64.1 of the Constitution to determine precisely when parliament begins to exercise its powers and, at the same time, exactly when its four-year term of office begins.

Article 64 of the Constitution stipulates that parliament is elected for a four-year term of office which may be extended only in times of war, state of siege or other exceptional circumstances. This article

also stipulates the period of time, after expiry of the previous parliament's term of office, within which a new parliament may be elected.

The Court held that parliament was elected by the people through the intermediary of the electorate. It was a form of constitutionally established people's representation. Parliament therefore began to exercise its powers and responsibilities on the day on which it was elected. The election was the only act delegating power to parliament. Neither the decisions establishing the lawfulness of the elections, nor the swearing-in of the members of parliament, nor the introduction of parliamentary rules of procedure conferred power on parliament.

Parliament was elected for a four-year period, which could only be extended in exceptional circumstances. This was why neither the period as such nor the time from which it began to run could be dissociated from the election itself. Parliament's powers and responsibilities began with its investiture.

The Court also considered it necessary to point out that, in Bulgarian constitutional history, except in cases where its term of office had been extended by law, parliament had never been dissolved after expiry of its term of office, which began on the day on which its members were elected.

In the light of the foregoing, the Court held that parliament's four-year term of office, stipulated in Article 64.1 of the Constitution, began from the time of its election.

The dissenting opinion of one of the judges noted that elections merely designated the persons who would hold seats and exercise powers in the parliament thus elected. Parliament, like all collective bodies, first had to be constituted. The constitutive act was its first sitting, during which members of parliament were sworn in. It was at this precise point in time that the collective body thus constituted began to operate. It should therefore be concluded that, as a collective, independent and permanent body, parliament began to operate as from the date of its first sitting and from the time its members were sworn in, and that this point in time should be considered separately from the date on which the members of parliament were elected.

Languages:

Bulgarian.



Canada Supreme Court

Important decisions

Identification: CAN-2001-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 18.01.2001 / **e)** 26980 / **f)** R. v. Latimer / **g)** *Canada Supreme Court Reports* (Official Digest), [2001] 1 S.C.R. 3 / **h)** Internet: <http://www.lexum.umontreal.ca/doc/csc-scc/en/index/html>; 150 *Canadian Criminal Cases* (3d) 129; 193 *Dominion Law Reports* (4th) 577; 264 *National Reporter* 99; [2001] S.C.J. no. 1 (*QuickLaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.

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

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

Keywords of the alphabetical index:

Punishment, cruel and unusual / Murder, second-degree / Mercy killing / Sentence, mandatory minimum / Necessity, defence.

Headnotes:

The mandatory minimum sentence of life imprisonment with no chance of parole for 10 years imposed on an accused convicted of second-degree murder after killing his severely disabled daughter did not amount to cruel and unusual punishment within the meaning of Section 12 of the Canadian Charter of Rights and Freedoms.

Summary:

The accused was convicted of second-degree murder following the death of his 12-year-old daughter, who had a severe form of cerebral palsy. The daughter was quadriplegic and her physical condition rendered her immobile. She was said to have the mental capacity of a four-month-old baby, and could communicate only by means of facial expressions,

laughter and crying. The daughter was completely dependent on others for her care. She suffered five to six seizures daily, and it was thought that she experienced a great deal of pain. She had to be spoon-fed, and her lack of nutrients caused weight loss. There was evidence that the daughter could have been fed with a feeding tube into her stomach, an option that would have improved her nutrition and health, and that might also have allowed for more effective pain medication to be administered, but the accused and his wife rejected this option. After learning that the doctors wished to perform additional surgery, which he perceived as mutilation, the accused decided to take his daughter's life. He carried her to his pickup truck, seated her in the cab, and inserted a hose from the truck's exhaust pipe into the cab. She died from the carbon monoxide. The accused at first maintained that his daughter had simply passed away in her sleep, but later confessed to having taken her life. He was sentenced to life imprisonment without parole eligibility for 10 years; the Court of Appeal upheld the accused's conviction and sentence, but the Supreme Court of Canada ordered a new trial. After the jury returned with a guilty verdict following the second trial, the trial judge explained the mandatory minimum sentence of life imprisonment, and asked the jury whether it had any recommendation as to whether the ineligibility for parole should exceed the minimum period of 10 years. The jury recommended one year before parole eligibility. The trial judge then granted a constitutional exemption from the mandatory minimum sentence, sentencing the accused to one year of imprisonment and one year on probation. The Court of Appeal affirmed the conviction but reversed the sentence, imposing the mandatory minimum sentence of life imprisonment without parole eligibility for 10 years. The Supreme Court of Canada affirmed that decision.

The trial judge was correct to remove the defence of necessity from the jury since there was no air of reality to any of the requirements for necessity. The accused did not himself face any peril, and his daughter's ongoing pain did not constitute an emergency in this case. The proposed surgery did not pose an imminent threat to the daughter's life, nor did her medical condition. It was not reasonable for the accused to form the belief that further surgery amounted to imminent peril, particularly when better pain management was available. Moreover, the accused had at least one reasonable legal alternative to killing his daughter: he could have struggled on, with what was unquestionably a difficult situation, by helping his daughter to live and by minimising her pain as much as possible or by permitting an institution to do so. Killing a person – in order to relieve the suffering produced by a medically

manageable physical or mental condition – is not a proportionate response to the harm represented by the non-life-threatening suffering resulting from that condition.

In applying Section 12 of the Canadian Charter of Rights and Freedoms, which provides that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment", the gravity of the offence, as well as the particular circumstances of the offender and the offence, must be considered. Here, the minimum mandatory sentence is not grossly disproportionate. Murder is the most serious crime known to law. Even if the gravity of second-degree murder is reduced in comparison to first-degree murder, it is an offence accompanied by an extremely high degree of criminal culpability. In this case the gravest possible consequences resulted from an act of the most serious and morally blameworthy intentionality. In considering the characteristics of the offender and the particular circumstances of the offence, any aggravating circumstances must be weighed against any mitigating circumstances. On the one hand, due consideration must be given to the accused's initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and his daughter's extreme vulnerability. On the other hand, the accused's good character and standing in the community, his tortured anxiety about his daughter's well-being, and his laudable perseverance as a caring and involved parent must be taken into account. Considered together the personal characteristics and particular circumstances of this case do not displace the serious gravity of this offence. Finally, this sentence is consistent with a number of valid penological goals and sentencing principles. Although in this case the sentencing principles of rehabilitation, specific deterrence and protection are not triggered for consideration, the mandatory minimum sentence plays an important role in denouncing murder. Since there is no violation of the accused's Section 12 right, there is no basis for granting a constitutional exemption.

Supplementary information:

The Court noted that the executive could elect to exercise the power to grant the accused clemency, using the royal prerogative of mercy provided for in the Criminal Code.

Languages:

English, French (translation by the Court).



Identification: CAN-2001-1-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 26.01.2001 / **e)** 27376 / **f)** R. v. Sharpe / **g)** *Supreme Court Reports* (Official Digest), [2001] 1 S.C.R. 45 / **h)** Internet: <http://www.lexum.umontreal.ca/doc/csc-scc/en/index/html>; 194 *Dominion Law Reports* (4th) 1; 146 *British Columbia Appeal Cases* 161; 150 *Canadian Criminal Cases* (3d) 321; 39 *Criminal Reports* (5th) 72; [2001] S.C.J. no. 3 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 **General Principles** – General interest.
 3.19 **General Principles** – Reasonableness.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
 5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Pornography, child, possession, prohibition.

Headnotes:

In its main applications, the Criminal Code prohibition of the possession of child pornography is a justifiable infringement of the right to freedom of expression.

Summary:

The accused was charged with two counts of possession of child pornography under Section 163.1.4 of the Criminal Code. Prior to his trial, the accused brought a preliminary motion challenging the constitutionality of Section 163.1.4, alleging a violation of his constitutional guarantee of freedom of expression protected by Section 2.b of the Canadian Charter of Rights and Freedoms. Both the trial judge and the majority of the Court of Appeal ruled that the prohibition of the simple possession of child pornography infringed the right to freedom of expression and was not a reasonable limit justifiable in a free and democratic society under Section 1 of the Charter. The Supreme Court of Canada overturned these decisions.

The possession of child pornography is a form of expression protected by Section 2.b of the Charter. The right to possess expressive material is integrally related to the development of thought, opinion, belief and expression as it allows us to understand the thought of others or consolidate our own thought. The possession of expressive material falls within the continuum of intellectual and expressive freedom protected by Section 2.b of the Charter.

Subject to two exceptions that should be read into the law, the prohibition of the possession of child pornography was a justifiable limit to the right to free expression under Section 1 of the Charter. In adopting Section 163.1.4, parliament was pursuing the pressing and substantial objective of criminalising the possession of child pornography that poses a reasoned risk of harm to children. The means chosen by parliament are rationally connected to this objective. The evidence establishes several connections between the possession of child pornography and harm to children: (1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders to offend; (3) it is used for grooming and seducing victims; and (4) children are abused in the production of child pornography involving real children. Criminalising possession may reduce the market for child pornography and the abuse of children it often involves. With respect to minimal impairment, when properly interpreted, the law does not catch much material unrelated to harm to children. However, the law does capture the possession of two categories of material that one would not normally think of as “child pornography” and that raise little or no risk of harm to children: (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused exclusively for private use. The bulk of the material falling within these two classes engages important values underlying the Section 2.b guarantee while posing no reasoned risk of harm to children. In its main impact, Section 163.1.4 is proportionate and constitutional. Nonetheless, the law’s application to materials in the two problematic classes, while peripheral to its objective, poses significant problems at the final stage of the proportionality analysis. In these applications the restriction imposed by Section 163.1.4 regulates expression where it borders on thought. The cost of prohibiting such materials to the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children. To this extent, the law cannot be considered proportionate in its effects, and the infringement of Section 2.b contemplated by the

legislation is not demonstrably justifiable under Section 1.

The appropriate remedy in this case is to read into the law an exclusion of the two problematic applications of Section 163.1. Carving out those applications by incorporating the proposed exceptions will not undermine the force of the law; rather, it will preserve the force of the statute while also recognising the purposes of the Charter. While excluding the offending applications will not subvert parliament's object, striking down the statute altogether would most assuredly do so. Accordingly, Section 163.1.4 should be upheld on the basis that the definition of "child pornography" in Section 163.1 should be read as though it contained an exception for: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.

A group of three judges held that Section 163.1.4 constitutes a reasonable and justified limit upon freedom of expression. Accordingly, the minority would have upheld the legislation in its entirety without reading in any exceptions.

Languages:

English, French (translation by the Court).



Identification: CAN-2001-1-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 15.02.2001 / **e)** 26129 / **f)** United States v. Burns / **g)** *Canada Supreme Court Reports* (Official Digest), [2001] 1 S.C.R. 283 / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/burns1.en.html>; 195 *Dominion Law Reports* (4th) 1; 85 *British Columbia Law Reports* (3d) 1; 151 *Canadian Criminal Cases* (3d) 97; 39 *Criminal Reports* (5th) 205; 265 *National Reporter* 212; [2001] S.C.J. no. 8 (QuickLaw); CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

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

Keywords of the alphabetical index:

Fundamental justice / Extradition / Death penalty, obtaining assurances against imposition.

Headnotes:

In extradition cases, where the offence for which extradition is requested is punishable by death under the laws of the requesting state and the laws of Canada do not permit such punishment for that offence, assurances that a fugitive in Canada will not face the death penalty in the requesting state are constitutionally required in all but exceptional cases.

Summary:

The respondents were each wanted on three counts of aggravated first-degree murder in the State of Washington. If found guilty, they would face either the death penalty or life in prison without the possibility of parole. The respondents, both Canadian citizens, were 18 years old at the time of the crimes. They were arrested in Canada and the United States authorities commenced proceedings to extradite them to the State of Washington for trial. The Minister of Justice for Canada ordered their extradition pursuant to the Extradition Act without seeking assurances from the United States under the extradition treaty between the two countries that the death penalty would not be imposed, or, if imposed, would not be carried out. The British Columbia Court of Appeal ruled that the unconditional extradition was unconstitutional. The Supreme Court of Canada, on different grounds, unanimously affirmed that decision.

This case is appropriately reviewed under Section 7 of the Canadian Charter of Rights and Freedoms because the extradition order would, if implemented, deprive the respondents of their rights of liberty and security of the person since their lives are potentially at risk. The issue is whether the threatened deprivation is in accordance with the principles of fundamental justice. The outcome of the appeal turns on an appreciation of these principles, which in turn are derived from the basic tenets of Canada's legal system. The application of these basic tenets must

take note of factual developments in Canada and in relevant foreign jurisdictions. Factors for and against extradition without assurances must be balanced under Section 7.

In this case, a number of factors may favour extradition without assurances: (1) individuals accused of a crime should be brought to trial to determine the truth of the charges (the concern being that if assurances are sought and refused, the Canadian Government could face the possibility that the respondents might avoid a trial altogether); (2) justice is best served by a trial in the jurisdiction where the crime was allegedly committed; (3) individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents; and (4) extradition is based on the principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice, subject to the principle that the fugitive must be able to receive a fair trial in the requesting state.

Countervailing factors, however, favour extradition only with assurances. First, in Canada, the death penalty has been rejected as an acceptable element of criminal justice. Capital punishment engages the underlying values of the prohibition against cruel and unusual punishment. It is final and irreversible. Its imposition has been described as arbitrary and its deterrent value has been doubted. Second, at the international level, the abolition of the death penalty has emerged as a major Canadian initiative and reflects a concern increasingly shared by most of the world's democracies. Canada's support of international initiatives opposing extradition without assurances, combined with its international advocacy of the abolition of the death penalty itself, leads to the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and should be stopped. While the evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty, it does show significant movement towards acceptance internationally of a principle of fundamental justice – namely, the abolition of capital punishment. International experience also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases is consistent with the practice of other countries with which Canada generally invites comparison, apart from the retentionist jurisdictions in the United States. Third, almost all jurisdictions treat some personal characteristics of the fugitive as mitigating factors in death penalty cases. Canada's ratification of various international instruments prohibiting the execution of

individuals who were under the age of 18 at the time of the commission of the offence supports the conclusion that some degree of leniency for youth is an accepted value in the administration of justice. Fourth, the avoidance of conviction and punishment of the innocent has long been in the forefront of the basic tenets of Canada's legal system. The recent and continuing disclosures of wrongful convictions for murder in Canada and the United States provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent. Lastly, the "death row phenomenon" is another factor that weighs against extradition without assurances. The finality of the death penalty, combined with the determination of the criminal justice system to try to satisfy itself that the conviction is not wrongful, inevitably produces lengthy delays, and the associated psychological trauma to death row inhabitants, many of whom may ultimately be shown to be innocent.

In the end, a review of all the factors indicates that the objectives sought to be advanced by extradition without assurances would be as well served by extradition with assurances. There is no convincing argument that exposure of the respondents to death in prison by execution advances Canada's public interest in a way that the alternative, eventual death in prison by natural causes, would not.

Extradition of the respondents without assurances cannot be justified under Section 1 of the Canadian Charter of Rights and Freedoms. While the government objective of advancing mutual assistance in the fight against crime is entirely legitimate, the Minister has not shown that extraditing the respondents to face the death penalty without assurances is necessary to achieve that objective.

Languages:

English, French (translation by the Court).



Croatia

Constitutional Court

Following the changes to the Constitution of November 2000 the Court consists of 13 judges (increased from 11). On 28 March 2001, Judge Velimir Belajec was relieved of office on his own request. The new judges, elected on the same day, are: Mrs Agata Račan and Messrs Mario Kos and Prof. Dr.Sc. Željko Potočnjak.

Important decisions

Identification: CRO-2001-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.01.2001 / **e)** U-I-496/1994, U-I-110/1998, U-I-262/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 10/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Chamber, obligatory membership.

Headnotes:

Article 43 of the Constitution which guarantees freedom of association, is not violated by the existence of the Croatian Chamber of Crafts, a public-law institution, the membership of which is obligatory for craftsman according to the Law on Crafts (*Narodne novine*, 77/93, 90/96). Its members are also free to organise other professional associations in order to protect their professional interests.

Summary:

By legal definition craftsmen are persons who independently and permanently exercise economic production, trade and services, either themselves or also as employers of other persons. The disputed provisions of the law prescribe that all craftsmen who deal with the same craft, or similar crafts, shall organise an association of craftsmen of that sort.

These associations, based on a profession, are also organised according to territories of one or more units of local government, and these are associated into regional territorial associations which all are associated into the Croatian Chamber of Crafts, an association of craftsmen on the state level. All members of regional associations are at the same time members of the Croatian Chamber of Crafts. They must pay membership fees, are submitted to the Chamber Statute and to the jurisdiction of the Chamber Tribunal.

The provisions of the law regulating the organisation of the Chamber were disputed as allegedly violating Article 43 of the Constitution. The issue before the Court was whether the constitutional provision, which guarantees freedom of association, but also includes freedom not to associate, was violated if an obligation to be a member of certain Chambers of associations is prescribed by law.

The Court differentiated two sorts of institutions. First, ones organised by citizens who exercise their constitutional right to freedom of association. That freedom is manifested in the organisation of trade unions and other associations (often called non-governmental organisations) in which members freely choose to join or leave. The very existence of such associations depends on the will of citizens, and nobody, not even the legislator, is allowed to restrict the rights of citizens concerning the organisation of such associations, except if their aim is a threat to the democratic constitutional order and independence, unity and territorial integrity of the Republic of Croatia.

The second sort of institutions are institutions of public law whose members are not "citizens" as such, but subjects of economic activities, who perform their profession. Such institutions are established by law and authorised by law to perform public powers. The Croatian Chamber of Crafts, which has existed since 1852, is of the second sort. It is defined by law as a public law legal person, an independent professional organisation of craftsmen, which represents them before state and other bodies in the land and abroad; the documents which are issued by the Chamber (attestations, certificates) are public documents. Membership in the Chamber does not exclude association in other professional associations, or the freedom for individual citizens to organise such associations in order to protect their professional interests.

The disputed provisions were thus constitutional.

Supplementary information:

The reasoning of the decision was also explained by the case of the European Court of Human Rights, *Le Compte, Van Leuven & De Meyere v. Belgium*, 1/1980/32/47-48, *Special Bulletin ECHR* [ECH-1981-S-001].

Languages:

Croatian.

*Identification:* CRO-2001-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.03.2001 / **e)** U-II-593/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 24/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Producer, preference / Entrepreneur, equal position on market.

Headnotes:

Local government has no right to specify the type of kiosk produced by a known producer as obligatory, but it has right to prescribe all requirements which determine the outward appearance of kiosks on its territory.

Summary:

The object of constitutional review was the Decision on Obligatory Types of Kiosks passed by a municipal assembly. The disputed provisions prescribed that on the seashore in that municipality only kiosks of the “Tibo” and “Euromodul” type may be installed.

The Court found that the decision puts the producer of the named types of kiosks, and also persons who exercise their business in these kiosks, in a

preferential position, thus violating commercial and industrial freedom.

The disputed provisions were repealed with suspended effect (3 months after the publication of Court's decision).

Languages:

Croatian.

*Identification:* CRO-2001-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.03.2001 / **e)** U-III-791/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 22/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
5.2 **Fundamental Rights** – Equality.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.

Keywords of the alphabetical index:

Victim, crime, family member / Amnesty, general, criminal procedure.

Headnotes:

States of mind like irritation and temper, with vengeance as their consequence, are not independent and sufficient reasons for the application of the Law on General Amnesty.

Summary:

The widow of the late J. R. K., killed on 1 July 1991, submitted the constitutional action. She applied to the

Constitutional Court after criminal proceedings against A. G., accused of killing her husband, were terminated by a decision of the Supreme Court. That decision was passed as an application of the Law on General Amnesty (*Narodne novine*, 80/96), according to that law general amnesty of criminal prosecutions and procedures shall be given to persons who committed criminal acts during aggression, military riots or military conflicts. The cited provision referred to acts committed during the period between 17 August 1990 and 23 August 1996. The aim of the law was to pacify political and national tensions, to diminish aggression and to create conditions for peaceful life and mutual tolerance.

The Constitutional Court first decided on the admissibility of the action submitted by the widow, who was not a party to the proceedings preceding the action before the Constitutional Court. The proceedings were started and conducted by the state attorney, who cannot submit constitutional actions in protection of the damaged party.

The Court held that the right to submit constitutional actions belongs to everyone who has a claim in relation to their constitutional rights. According to the Criminal Code, if a person who was damaged by a criminal act of the case or a person who acts as a private prosecutor dies, his spouse, children, parents, brothers, sisters, adopter and adoptee may continue the proceedings. From that it was concluded that a spouse of a person, who was the victim of crime in this case, has a possibility to protect her constitutional rights by constitutional action. Therefore the widow's constitutional action was admissible.

The next issue of the case was whether the constitutional procedure, which might be finalised by sending the case to the competent court for the renewal of the proceedings, could follow after the termination of the criminal proceedings. Article 31 of the Constitution provided that no one shall be tried anew or punished in criminal proceedings for a criminal act for which he has already been acquitted or sentenced in accordance with the law.

An additional paragraph was added to Article 31 of the Constitution in November 2000, as follows: "Cases and reasons for the renewal of proceedings referred to in paragraph 2 may only be stipulated by law, in accordance with the Constitution and international agreements."

The Court held that the decision of the Supreme Court by which criminal proceedings are terminated, but which does not deal with the merits of the case, is not a court decision after which one may not be tried again.

During the constitutional procedure it was established that the Supreme Court passed its decision without a hearing so the parties had no possibility in oral and adversarial proceedings expose each others' opinions.

Further it was held that the Law on General Amnesty should be interpreted in a way that the connection with aggression, military riots and military conflicts be direct and essential. In this case the criminal act of murder was performed in a period of time prescribed for the application of the mentioned law but other reasons for application of that law did not exist because states of mind like irritation and temper, and vengeance as their consequence, are not independent and sufficient reasons for the application of the Law on General Amnesty and are not decisive elements in establishing a connection of crime with aggression, military riots or military conflicts.

The Court found a violation of the principles of equality before the law and before the courts and a violation of the principles of a fair trial. The disputed decision was repealed and the case returned to the Supreme Court for a renewal of proceedings.

Languages:

Croatian.



Identification: CRO-2001-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.03.2001 / **e)** U-II-603/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 26/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.3.2.1 **Constitutional Justice** – Jurisdiction – Type of review – Preliminary review.

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

4.1.1 **Institutions** – Constituent assembly or equivalent body – Procedure.

Keywords of the alphabetical index:

Constitution, change.

Headnotes:

The subject matter of constitutional provisions is exclusively the matter of the body authorised to pass the Constitution. The Constitutional Court is authorised to review the procedure in which the Constitution was passed, but only after the procedure for changing the Constitution is finished. The Constitutional Court has no preventive control.

Summary:

Representatives of one chamber of parliament (*Županijski dom*, House of Counties) demanded a review of the Decision by which changes to the Constitution are initiated. The Court held that it is authorised to review the procedure for changing the Constitution, but only after it is finalised. Since the disputed Decision was only part of the procedure for changes to the Constitution, the demand was rejected.

Languages:

Croatian.

*Identification:* CRO-2001-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.04.2001 / **e)** U-I-732/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 36/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

4.5.3.4.1 **Institutions** – Legislative bodies – Composition – Term of office of members – Characteristics.

4.5.3.4.3 **Institutions** – Legislative bodies – Composition – Term of office of members – End.

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

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

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

Keywords of the alphabetical index:

Parliament, member, revocation.

Headnotes:

The imperative mandate is not constitutional. The representation of national minorities, whose share in the population is above 8%, as prescribed by the disputed Constitutional Law, is not discriminatory, neither towards the majority population nor towards other national minorities.

Summary:

The subject of the constitutional review was the Constitutional Law on Human Rights and Freedoms and the Constitutional Law on the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia (*Narodne novine*, 65/91, 27/92, 34/92, 51/00, 105/00).

The review of constitutionality was proposed by a political party. The review concerned the provisions according to which:

1. members of ethnic and national communities or minorities whose share in the population of the Republic of Croatia is above 8% are entitled to representation according to their proportion in the total population in the Croatian Sabor, the Government of the Republic and the highest bodies of judicial power, and
2. members of ethnic and national communities or minorities whose share in the population of the Republic of Croatia is below 8% are entitled to elect at least five and at most seven representatives in Croatian Sabor according to the Law on the Elections of Representatives to the Croatian Sabor.

The political party which proposed review of these provisions argued that the right to elect representatives to representative bodies belongs to the community of all citizens, and not to some special group which is only part of the nation. It further claimed that the cited provisions are not in accordance with Article 14.2 of the Constitution and that they violate the equality clause by differentiating on the grounds of national origin. Finally, it claimed that since the number of electors who elect representatives from national minorities is smaller than number in other electoral units, the disputed provisions also violate the constitutional principle of equal suffrage.

The proposal for constitutional review was dismissed.

The Court held that the disputed law was constitutional. Article 15.2 of the Constitution provided for the regulation of equality and protection of the rights of national minorities by the Constitutional Law. The Constitutional regulation shall be adopted by passing organic laws. The disputed law was found to be such a law.

The Court also held that beside the universal franchise, the law might ensure a special right to members of national minorities to elect their representatives into the Croatian Parliament. Thus the Court found no discrimination between majority and minority populations and between different minority communities, in the disputed provisions.

The reasons for the Court's ruling were also found in provisions of the Framework Convention for the Protection of National Minorities. According to these provisions the parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities and the measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination. (Article 4.3 of the Framework Convention).

Apart from the political party's proposal for review, the Court instituted *ex officio* proceedings to review the constitutionality of provisions or parts of the law (Article 17.3, 17.4 and part of Article 25) which dealt with the termination of office of representatives.

It was held that these provisions should be repealed. The reason for this is Article 74.1 of the Constitution, according to which representatives in the Croatian Sabor do not have an imperative mandate, but a representative one in which the representatives in their activities – in discussions, attitudes and in voting – may act independently of the views of their electors.

The Court also held that prescribing an imperative mandate for representatives of ethnic and national communities and minorities the legislator had put one category of representatives in an unequal position before the Constitution and laws. All the provisions referred to were repealed.

Languages:

Croatian.



Cyprus

Supreme Court

Important decisions

Identification: CYP-2001-1-001

a) Cyprus / **b)** Supreme Court / **c) / d)** 28.02.2001 / **e)** 6892 / **f) / g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

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

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:

Liability, criminal, determination, reasonable time.

Headnotes:

Deviation from the norms of a fair trial results in the annulment of the proceedings.

Article 30.2 of the Constitution stipulates that, in the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law.

Moreover, under Article 35 of the Constitution the legislative, executive and judicial authorities shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of the Constitution which safeguard fundamental rights and liberties.

Summary:

The appellant was found guilty by a Criminal Court on 12 counts for the commission of the offence of stealing by an agent. He was sentenced to

12 months' imprisonment, suspended for 3 years. The offences were committed in 1993 and the investigations were completed in January 1994. The indictment was filed in January 1995. The appellant appeared before the Court on 23 February and pleaded not guilty. Thereupon the case was fixed for hearing on 29 May 1995. No hearing took place on that day and the case was fixed for hearing in October 1995. Thereafter, the hearing of the case was adjourned repeatedly, before the commencement of the trial, either upon an application by the prosecution or by the Court of its own motion due to want of time. After the commencement of the trial the hearing of the case was spasmodic and repeated adjournments were the main characteristic of the proceedings. 49 more appearances before the Court took place before the completion of the trial which ended in February 2000.

Upon appeal against his conviction the appellant challenged the validity of his trial and sought its annulment because his criminal liability was not determined within a reasonable time as provided by Article 30.2 of the Constitution.

The Supreme Court allowed the appeal and set aside the conviction having held the following.

The prompt determination of the criminal liability of the appellant and of his civil rights constitutes, on the one hand, a fundamental human right and on the other hand a fundamental obligation of the state and pre-eminently of the judicial authorities as directed by Article 35 of the Constitution.

The criminal liability of the appellant was not determined within a reasonable time. In fact it was decided far beyond the time constitutionally required for its determination within a reasonable time.

The case was not complicated. There were only 7 prosecution witnesses and 4 defence witnesses. With suitable planning, the hearing could have been completed within a short time. Instead the case developed into an endless procedure ignoring the appellant's human right to know whether he is guilty or innocent of a matter so important to him. Deviation from the norms of fair trial as directed by Article 30.2 of the Constitution result in the annulment of the proceedings.

Whenever the defects in the administration of justice can be remedied by the resumption of the trial a retrial is ordered, but not where such a course is not feasible. For if the constitutional rights of the appellant are infringed by a failure to try him within a reasonable time he should not be obliged to prepare for a retrial which must necessarily be convened to

take place after an unreasonable time (see [1985] 2 All ER 585). The appeal is allowed. The conviction quashed.

Languages:

Greek.



Czech Republic Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

- Decisions by the plenary Court: 12
- Decisions by chambers: 54
- Number of other decisions by the plenary Court: 10
- Number of other decisions by chambers: 916
- Total number of decisions: 1 022

Important decisions

Identification: CZE-2001-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 14.01.2001 / **e)** Pl.ÚS 42/2000 / **f)** Volební zákon / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

4.5.11 **Institutions** – Legislative bodies – Political parties.

4.9.2 **Institutions** – Elections and instruments of direct democracy – Electoral system.

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, D'Hondt's method / Election, electoral coalition / Election, constituency, number / Election, threshold / Election, constituency, size.

Headnotes:

The increase of the number of constituencies to 35, setting the lowest number of mandates in a constituency to 4 and the method of calculating shares and allocating of mandates using a modified D'Hondt method distributing the mandatory share of seats to those receiving the greatest number of votes, can lead to disadvantaging small parties and to a

result incompatible with the basic right of electoral equality. Thus, if the framers of the constitution decided to apply proportional representation, they must at the same time observe the need to reflect the will of the highest possible number of voters.

The political system is based on free competition between political parties. There should be no obstacles preventing political parties from participation in electoral competition. Election deposits are a preventive measure which restrict free competition.

The legislature did not respect the previous judgment of the Constitutional Court concerning the payment for every vote cast.

Concerning coalitions, the legislature, in setting the level of the minimum vote clause for coalitions of political parties or movements, added 5% of votes cast for individual political parties together, which it abandons only in the case of a coalition of more than 4 political parties or movements, as the closing clause is always a maximum of 20% of the total number of valid votes. This was not unconstitutional.

Summary:

The Constitutional court received a petition from the president of the Republic asking for the annulment of certain provisions and annexes of the Act on the Elections to the Parliament of the Czech Republic due to alleged conflict with the Constitution and the Charter of Fundamental Rights and Freedoms (the "Charter"). Also, 33 senators petitioned the Constitutional Court to annul certain provisions.

The Chamber of Deputies stated its belief that the Act is not in conflict with either the Constitution or the Charter. The Senate of Parliament of the Czech Republic and the Ministry of the Interior also stated their opinions on the petition.

Under Article 18.1 of the Constitution the elections to the Chamber of Deputies are held by secret ballot on the basis of a universal, equal, and direct right to vote, according to the principle of proportional representation. Elections to the Senate are held by secret ballot on the basis of a universal, equal, and direct right to vote, according to the principle of majority rule. The Constitution differentiates between "proportional representation" and the "majority system". Other requirements for the exercise of the right to vote, organisation of elections and the extent of judicial review are provided by statute, but only within the bounds and limits of the above-mentioned institutions.

Every social concept is subject to the process of differentiation. The concept of "proportional representation" must be interpreted in relation to the inevitable process of continual changes and therefore with the mere possibility of approaching one or the other polar position. The restriction of differentiation when dividing mandates is admissible.

The purpose of voting is the differentiation of the electorate. The goal of elections is not only the expression of the political will of individual voters, but also the ability to accept such decisions based on the will of the majority. In the electoral process, in which mandates are distributed, the principle of differentiation collides with the principle of integration, as the elections are supposed to produce a Chamber of Deputies whose composition permits the formation of a political majority able to form a government and perform legislative activity. Therefore, from the point of view of representative democracy it is admissible to build certain integrative stimuli into the electoral mechanism. In this lies the admissibility of a restrictive clause. The clause restricting the parties that can be elected to those who received more than 10% of the vote (the minimum vote clause) could be considered as an interference in the proportional system that threatens its democratic substance. The Constitutional Court requested the opinion of the Czech Statistical Office.

By comparing the results of the 1998 elections to the Chamber of Deputies with results calculated on the basis of the amendment to the Elections Act, we can conclude that with a total number of 35 constituencies there would be a considerable increase in the entrance threshold enabling one to obtain at least 1 mandate. The increase in the minimum vote clause would range from 10.49% to 18.87%. The average is 14.69%. This leads to the conclusion that the amendment of the Electoral Act concerning the number of constituencies and the electoral divisor is in conflict with the principle of equality and is evidence of putting in doubt the will of the sovereign itself.

If the framers of the constitution decided to apply the principle of proportional representation, then it is necessary to also observe the need to reflect the will of the highest possible number of voters. The decisive element in the system of proportional representation is the size of constituencies. On the one hand, the larger the constituency, the more closely the electoral result approaches the principle of proportional representation; on the other hand, the smaller the constituency, the more markedly the electoral result diverges from this principle. Article 18 of the Constitution has in mind the global effect of proportional representation models, i.e. the election of

the Chamber of Deputies according to the principles of proportional representation as a whole. If the legislature intended a different effect, it would have to state this expressly.

The Court referred to the decision of the Bavarian Constitutional Court ref. Vf.5-V-92 of 24 April 1992. The separate application of the D'Hondt method, distributing the mandatory share of seats to those receiving the greatest number of votes, can lead, in individual constituencies, to disadvantaging small parties in the entire country and to a result which is incompatible with the basic right of electoral equality. A deviation of more than 1 seat should not arise for any party. The Court added that the electoral divisor beginning with the number 1.42 multiplies this divergence so that for individual parties it is more than the above-mentioned one seat.

Therefore the contested provisions are in conflict with Articles 1, 5 and 9.2 of the Constitution and Articles 18.1 and 22 of the Charter.

The Constitution does not contain any express provision about the formation of coalitions. The Constitution enshrines the principle of the free competition of parties and the Charter uses the term "political forces". In setting the minimum vote clause for coalitions of political parties or movements, the legislature adds 5% falling to every individual party together. The minimum vote clause is always a maximum of 20% of the total number of valid votes. This is not unconstitutional. The Court referred to foreign electoral acts and concluded that the resolution of this problem is left to the legislature, which is naturally bound by the minimum vote clause for one political party.

A confirmation of the payment of an election deposit is attached to the candidate list. A deposit is paid in all constituencies where a candidate list is filed, to a special account opened before the elections. The deposit is returned within 1 month from the announcement of election results, if the party advanced to the level required. Interest on deposits and amounts which are not refunded are income of the state budget.

The Court has dealt with the question of election deposits in its Judgment of dismissal Pl. ÚS 3/96. More than four and a half years later, what appears relevant to the Court is precisely what was then stated in the dissenting opinions of several judges. It is the duty of the state to permit all parties which were duly registered to take part in elections and to ensure full implementation of the Constitution. Setting deposits introduces *a priori* discrimination because, by setting property [financial] conditions, some parties

are prevented from taking part in elections, which are the most decisive stage for competition among political parties. The degree of representation is expressed by elections and their results. Effective integration stimuli in proportional representation systems are based on minimum vote clauses which have the advantage that they do not restrict the principle of free competition among political parties in elections and are only applied at the stage of the distribution of mandates. Election deposits, on the other hand, are a preventive and *a priori* measure.

The monetary amount is called a deposit, although it is obviously not a deposit. The essential requirements of a deposit include primarily a certain legal relationship on the one hand and a sufficiently clear express obligation on the other. There must be an objective and realistic ability to fulfil the obligation from the contractual relationship towards the other party. The "deposit" imposed by the contested Act does not meet any of these basic requirements. The issue in the considered relationships between a political party and the state is not a legal relationship. It is one of the primary duties of the state to create, in selecting its political representatives, such conditions for competing parties as will enable them to reach the constitutionally presupposed aim. The republic's political system is based on free competition between political parties. Other obstacles cannot prevent parties from participating in elections because they have already gone through the filter provided by the Act on Association in Political Parties and Political Movements. This provision is therefore in conflict with Article 5 of the Constitution and Article 22 of the Charter.

The Constitutional Court has also already dealt with the contribution to a party for every vote cast from the state budget in its Judgment file no. Pl. ÚS 30/98 (*Bulletin* 2000/1 [CZE-2000-1-002]). The percentage restriction for payment of a contribution to cover election costs of parties may not be the result of arbitrariness, or suitability assessed only from the point of view of established parties. The legislature must respect the fact that it has been given especially narrow limits in this field. Differential treatment of parties which is not based on a serious reason is forbidden. The purpose of an election contribution is not to restrict the freedom of election competition, but to ensure its seriousness. The Constitutional Court of Germany, for example, expressly stated that a 0.5% share of votes was proof of serious efforts in the election and is sufficient, making verification by other criteria unnecessary. The Court pointed out in its conclusion that it is a matter for parliament's consideration whether, for elections to the Chamber of Deputies, given the existence of election deposits, a certain threshold should also be retained, e.g. about

1% of votes received, as proof of the seriousness of parties' election intentions, and thereby also a condition for payment of the contribution to cover election costs.

The contested provision decreased the amount of payment for every vote cast. In the context of all relevant circumstances, even lowering the threshold from 3% to 2% cannot change the conclusion pronounced in the Court's previous judgment, that the cited provision is, even after the amendment of the Act, in conflict with Article 5 of the Constitution and Article 22 of the Charter. That judgment was clearly not respected by the legislature.

The dissenting opinions on the formation of coalitions emphasised that it is up to legislature whether it permits their formation. The admissibility of coalitions generally expresses the will to mitigate for small parties the artificially set threshold for entry into parliament, which is not a problem for big parties. At the present time political parties have a monopoly on participation in elections to the Chamber of Deputies. This should have led the legislature to proper legal regulation which would promote political pluralism and also have an integrating effect. If the legislature's intent was to exclude coalitions, it should have done so directly. The linear additive model which the legislature chose in the contested amendment is not used by any other country. The Court has stated in a number of its judgments that the legislature cannot act arbitrarily. The additive method used indicates arbitrariness so that annulling this provision was appropriate.

Languages:

Czech.



Identification: CZE-2001-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 17.01.2001 / **e)** I.ÚS 281/97 / **f)** Compensation of damages caused in 1969 / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

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

5.1.4 **Fundamental Rights** – General questions – Emergency situations.

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

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:

Res judicata, conditions / *Pacta sunt servanda*, moral dimension / Prosecution, criminal, obligation.

Headnotes:

The complainant sought compensation for damage caused in 1969 when he stood in front of his home and was seriously wounded by the gunfire of emergency units taking action against a demonstration. Although Czechoslovakia was already bound by the International Convention on Civil and Political Rights, the general courts handled his claim for compensation in 1975-1977 in a manner which violated the principles of a fair trial.

The state should protect the right of a citizen to life and personal inviolability, but this did not happen, as seen in the fact that criminal prosecution, at least of an "unknown offender", was not begun, and as a result the injured party's claims could not be exercised in the appropriate time. The limitation period for the offence did not begin to run until 30 December 1989, under the Act on the Illegality of the Communist Regime and Resistance Against It. Even before the expiration of the limitation period the Ministry of the Interior admitted its responsibility for the damage caused and promised to compensate its consequences. Therefore, criminal prosecution was not begun and as a result the limitation period for the crime expired.

In 1994 the claims were denied because of the former adjudication of 1977. This violated the right to a fair

trial. In 1977 the court's decision was in conflict with the obligations of the Convention. Therefore, it was necessary to consider whether the *res judicata* principle could be applied to a court verdict which violated fundamental rights binding on the court at the time of the verdict. The verdict on which the objection of *res judicata* is based in this case cannot be understood otherwise than as a politically motivated act of defence by the totalitarian state against claims raised by the victims of its activities.

Summary:

The complainant states in his constitutional complaint that demonstrations against the occupation of Czechoslovakia by the Soviet Army took place in 1969. Police emergency units used armed force against the demonstrations. The complainant was seriously wounded when he was hit by a bullet. After surgery the bullet was removed and, on orders, given to a body of the STB [State Security Police]. The complainant's complaint at that time against the Czechoslovak state was denied.

The complainant's claims for compensation were subsequently recognised by the Ministry of the Interior (the "Ministry") by an agreement of 1991, and partially paid. In a second agreement the Ministry undertook to pay an allowance as a supplement to the complainant's low disability pension, but this allowance was not paid to the complainant. Therefore the complainant turned to the court, but the courts relied on the *res judicata* principle to reject his claim.

The Supreme Court dismissed his appeal, as it concluded that even the extra-judicial agreement between the plaintiff and the Ministry, on the basis of which the Ministry acknowledged its responsibility and provided partial performance, had no influence on the effects of the verdict of 1997.

When firearms are used, the intervention of police forces carries an increased danger of damage to health and therefore also creates an increased liability for damages. The liability for damages caused by police officers by using firearms must be understood as objective liability. The shooting of the complainant was an illegal act. The Ministry recognised its responsibility for this act, although it did not do so formally or legally. This created the paradoxical situation where appropriate compensation could not be provided for damage caused, even though the legal entity liable for the damages recognised its liability, because it simultaneously objected that the extra-judicial agreement was not legally binding. The verdicts of both of the courts of the previous regime, which did not award compensa-

tion to the complainant in 1975 and 1977, stand in the way of providing compensation.

The complainant's case is *sui generis*. Both agreements on compensation caused to health could be concluded only after the fall of the totalitarian regime. The agreement by which the Ministry recognised its responsibility in 1991 established the complainant's confidence in a state which is able to acknowledge its responsibility and willing to at least partially make up for the damage perpetrated by it. Thus, the agreements objectively assumed a kind of substitute role instead of a verdict which, under the old regime, could not be anything other than negative. The remedy provided was understood as voluntary payments without legal foundation, as both verdicts pronounced under the old regime denied the Ministry's liability.

The Supreme Court stated that the complainant in this case did not challenge the bar on estoppels by judgment but the material correctness of the final verdict in 1977. It was ascertained from the files of the general courts that the objection of estoppels by judgment was the subject of dispute. The Supreme Court's opinion that the extra-judicial agreement with the Ministry, recognising the Ministry's responsibility for damage caused, does not affect the legal effect of the contested decision, is legally correct. However, the Supreme Court also relied on the fact that the complainant sought evaluation of the matter "from the point of view of later regulations" which indicates an infringement of the prohibition on retroactivity. This is not so, because the complainant also seeks evaluation of the case from the point of view of the former Constitution, as well as international agreements by which Czechoslovakia was bound at the time.

The opportunity for the complainant to seek fair evaluation of the matter arose only after the collapse of the communist regime. It can be concluded from the manner and nature of court decisions in 1975 and 1977 that the complainant suffered not only damage to health, but also subsequent damage caused by the fact that the court avoided a decision on liability and compensation, and thereby caused the complainant later difficulties in exercising his claim. This circumstance was not taken into account later by any of the courts.

The construction of the judgments is purposely aimed at putting in doubt the responsibility of Ministry bodies. The testimony of the witnesses unambiguously confirmed that the shooting came from the uniformed armed units. Thus, the court breached not only the rules of ethics for judicial decision-making, but also basic procedural guarantees for the fair

determination of “material truth”. The court thereby acted in conflict with the International Convention on Civil and Political Rights, which entered into force for the Czech Republic on 23 March 1976.

In terms of substantive law, the Convention introduced into the law a new concept, in which a citizen is to obtain, *vis-à-vis* the state, autonomy in value and decision-making and cease to be a mere object of state manipulation. It was not decisive that the material content of the Convention was completely denied in political practice.

The Czechoslovak state was obliged to observe the Convention and to protect the right of a citizen to life and personal inviolability. However, this did not happen, as criminal prosecution was not begun. Even before the expiration of the limitation period, the Ministry recognised its responsibility for the damage caused and promised compensation. Therefore, starting criminal proceedings seemed to be redundant, and subsequently the limitation period for the crime expired. Because of this the right of the citizen to protection of life and personal inviolability, a right of the citizen *vis à vis* the state which the state is required to guarantee, was ignored.

In terms of procedural law, the right to a fair trial was violated. The court at the time decided in conflict with an obligation under the valid Convention, which, by its nature, takes precedence over statutes. Therefore, it was necessary to evaluate in the matter whether, in view of the specific nature of this case, the principle of *res judicata* can be applied to a court verdict which violated fundamental rights which were binding on the court at the time of the verdict. The Constitutional Court believes that the verdict on which the objection of *res judicata* relies in this case cannot be substantively understood otherwise than as a focused, politically motivated act of defence by the totalitarian state against the claims raised by the victims of its activities. The Court was required to respect the Convention in 1977. Now it is also necessary to respect both Article 36.3 of the Charter of Fundamental Rights and Freedoms and Article 6.1 ECHR. Therefore it is not possible to accept the objection of the Supreme Court that the complainant sought evaluation of the matter under later legal regulations. On the contrary, the general courts were already at that time required to comply with concluded and duly promulgated international agreements.

In 1991 the complainant believed the state, which declared that it was responsible for the damage caused to him, and did not use all available legal means to secure his claims in time and in a formal legal manner. The Ministry's actions and behaviour in relation to the injured party also represented the

degree of a democratic state's credibility for its own citizens. The entire matter thus acquires an additional moral dimension, as a democratic state must, in the interests of its own credibility, fully respect the principle *pacta sunt servanda*.

The complainant understood the Ministry's express, written statement as “redress” of the illegal verdicts from 1975 and 1977, and as an adequate guarantee that compensation for damage caused would be duly and appropriately assessed.

If the state makes a statement acknowledging the claims of its citizens only in a manner that enables it to slip out of fulfilling its own promises for formal legal reasons, this is undoubtedly an inauspicious sign to the citizens, which endangers the state's credibility and recommends, for reasons of prevention, that they not trust their own state.

Therefore the Court annulled the contested decisions of the general courts.

Languages:

Czech.



Identification: CZE-2001-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 22.01.2001 / **e)** II.ÚS 502/2000 / **f)** Protection of telephone communications / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of communications.

Keywords of the alphabetical index:

Evidence, illegally obtained / Telephone, conversation, confidentiality / Telephone tapping, evidence / Telephone, mobile, hacking.

Headnotes:

Article 13 of the Charter of Fundamental Rights and Freedoms protects everyone's privacy not only concerning the content of telephone communications but also concerning the data related to numbers called, the date and time of a call, its duration and, for mobile telephones, the base stations used in making calls. This protection may be breached only in the interest of protecting democratic society, possibly in the interest of the constitutionally guaranteed fundamental rights and freedoms of others, and the interference must be necessary.

It is possible to obtain or acquire "other" data, following the rules set for telephone tapping and recording of telecommunications.

Summary:

The complainant objects that the evidence of extracts from telephone bills was obtained in conflict with the Criminal Procedural Code. The Court ascertained that a list of calls made in a certain time period, including the numerical codes of base stations through which the calls were made, date and start time of calls, the length of calls in seconds, the number of the base station where the call started and the number of the base station where the call ended, was sent to the Police.

The right to protection of the secrecy of telephone communications by its nature and significance is a fundamental human right and freedom. It concerns the personal sphere of an individual whose integrity must be respected and rigorously protected as an entirely necessary condition for the individual's dignified existence and the development of human life.

In this case the extract from the complainant's telephone bill was obtained without his approval. The Court agrees with the judgment of the European Court of Human Rights, in the matter of *Malone v. United Kingdom* of 2 August 1984 (*Special Bulletin ECHR* [ECH-1984-S-007]). The above-mentioned data, and especially the numbers called, must be considered an inseparable part of telephone communications.

Article 13 of the Charter also establishes the protection of the secrecy of numbers called and other related data. If the constitutional order of the state allows a breach in this protection, it is done only and exclusively in the interest of protecting democratic society, or possibly in the interest of the constitutionally guaranteed rights of others. This includes primarily the general interest in the protection of society against crime. Interference in fundamental human rights or freedoms by the state is acceptable only if the interference is necessary in the above-mentioned sense. In order not to exceed the limits of necessity, there must be a system of adequate and sufficient guarantees consisting of appropriate legal regulations and effective supervision of their observance. This legal regulation must be precise in its formulation, in order to give citizens sufficient information of the circumstances and conditions under which state bodies are authorised to interfere in privacy; the powers conferred on the relevant bodies and the manner in which they are implemented must also be precisely defined, in order to protect individuals against arbitrary interference. If these rules are not respected by the state, interference in the cited fundamental right is barred, and if it occurs it is unconstitutional.

Current legal regulations do not recognise the institution of providing or obtaining evidence of telecommunications operations for the purposes of criminal prosecution or performing the job of the police. This does not mean that the relevant state bodies are not entitled, under any circumstances, to obtain or request this evidence. There are rules for tapping and recording telecommunications operations by these bodies, and therefore it is possible to also use these rules when obtaining or acquiring "other" data (tracking telecommunications operations). Thus, when obtaining or acquiring records of telecommunication operations, criminal prosecution bodies, or the police before criminal prosecution begins, are required to proceed appropriately under § 88 of the Criminal Procedural Code, in such a way that the term "record" also relates to the data obtained by tracking telecommunication operations in relation to a particular person or persons. This constitutional interpretation of the cited provisions makes it possible to achieve effective control against unauthorised interference by state bodies in the given fundamental right, where at the same time the ability of these bodies to obtain a type of evidence often undoubtedly necessary for performing their jobs is not ruled out.

The evidence in question has been obtained illegally for the purposes of criminal proceedings, and therefore it is constitutionally inadmissible.

The settled case law of the Court indicates that under Article 36 of the Charter of Fundamental Rights and Freedoms, a basic prerequisite for the proper administration of justice in a democratic state governed by the rule of law is the observance of not only constitutional but also statutory limits for obtaining and presenting evidence. Therefore, the conduct of any body active in criminal proceedings which deviates from the framework of procedural regulations in this respect is in conflict with the constitutionality of the state and its consequences also devalue the very purpose of criminal proceedings.

Therefore the Court annulled the contested decision.

Languages:

Czech.



Identification: CZE-2001-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 14.02.2001 / **e)** PI.ÚS 45/2000 / **f)** Government Order on sugar / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.

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

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

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

Keywords of the alphabetical index:

Production, restrictions.

Headnotes:

The right of everybody to engage in commercial and economic activity guaranteed by Article 26 of the Charter of Fundamental Rights and Freedoms is not directly applicable, and can be relied on only within the limits of the law, but providing any limits of such enterprise or activity is reserved for a statute.

The legislature cannot delegate to the executive the sphere of regulation of relationships intended to be regulated by statute, thus resigning from its legislative duty. Therefore, the executive power cannot itself adopt the right to such regulation with reference to a statute which evidently has a different purpose and meaning.

Summary:

The Court received a constitutional complaint against an order of the Ministry of Agriculture setting special individual sugar quotas for the 2000/2001 year, together with a petition to annul Government Order no. 51/2000 Coll.

The complainant stated that she leased a sugar refinery at a time when no restriction existed. She invested financial resources into production. The regulation created, by an administrative route, a preferred category of sugar producers, which resulted in inequality in rights. The government did not have statutory authorisation to issue the order.

According to the government's statement, it is authorised to issue orders for the implementation of a law even without express authorisation. The regulation does not have discriminatory effects on any sugar beet growers or sugar producers.

Concerning the objection of inadmissibility of the complaint due to failure to exhaust procedural remedies, the Court, in its judgment published as no. 243/1999 of the Official Gazette, stated the principle that the Court cannot accept the objection of failure to exhaust legal remedies in a complaint whose significance considerably exceeds the complainant's own interests.

The disputed government order is intended to implement the Act on Agriculture. The contested government order states in § 1 that its subject is the regulation of the state's role in creating conditions to ensure and maintain the production of sugar beet and sugar and stabilise the sugar market in the territory of the state. Section 10 provides that sugar produced above the limit of an individual or special individual quota cannot be introduced in the national market or in countries where sugar imports are not permitted or are limited by an international treaty by which the Czech Republic is bound. Annex 1 indirectly provides individual quotas for "strategic producers of sugar".

The Court pointed to its Judgment PI. ÚS 17/95 in which it stated that under Article 78 of the Constitution the government is authorised to issue orders to implement statutes within their bounds. Thus, it does not need express delegation in the relevant statute,

but on the other hand the order may not be *praeter legem*. It has to remain within the limits of the statute, which are either stated expressly or follow from the meaning and purpose of the statute. The Court also stated that generally the executive branch never has entirely free discretion as it is always limited by the Constitution, international treaties and general legal principles.

In its Judgment Pl. ÚS 32/95 the Court stated that “economic, social and cultural rights” are made expressly specific only by the relevant statute, and can be claimed only on its basis and within its bounds. These rights are therefore not directly applicable, but require the interaction of other factors for their implementation. The Court decided on the basis of the same principles in its Judgment Pl. ÚS 35/95 (*Bulletin* 1996/2 [CZE-1996-2-006]), where it stated that the legislature cannot rid itself of the duty of statutory definition of the content, extent and manner of providing a fundamental right by authorising an executive body to issue provisions of lesser legal force than a statute which would define, instead of the statute, the limits of these fundamental rights or freedoms.

From the constitutional point of view bodies with legislative powers are entitled and obliged to issue legal orders in the form prescribed for them. The form prescribed for the government, under Article 78 of the Constitution, is an order. Under this provision the government may issue an order to implement a statute within its bounds. Thus, the existence of the statute is sufficient, but within its framework there must be room for the government’s legislative activity. The fact that in some cases the legislature expressly authorises the government to issue an order does not change this. The government then has to act *secundum et intra legem*.

From a theoretical point of view an order has to meet the requirement of being general and thus affecting an indefinite group of subjects.

The constitutional definition of the executive branch's derived creation of provisions rests on the following principles:

- an order has to be issued by an authorised subject,
- an order cannot intervene in matters reserved to a statute (therefore it cannot set primary rights and obligations),
- the intent of the legislature to provide regulation over the statutory standard must be clear (thus there must be room open for the sphere of the order).

Article 26.1 of the Charter guarantees to everybody the right to engage in commercial and economic activity, and a statute can set conditions and restrictions for the performance of certain professions or activities. This is a fundamental right although it is not directly applicable and can be claimed only within the bounds of the law, but on the other hand limiting such enterprise or activity can only be done by statute.

The order in question contains a number of provisions which infringe on the sphere of free enterprise. If the government derives its authority to proceed this way from the Act on Agriculture, then however much the Court observes the principle of a looser relationship between the law and the order, it is forced to state that that a grammatical, systematic or logical interpretation, even with the greatest degree of extensive approach, does not indicate that the cited statutory provision could be used to derive the regulation of production connected to agriculture or to restrict the sale of produced goods in a certain market.

The cited Act on Agriculture is aimed quite clearly at the sphere of primary production, and if it authorises the government to issue orders, it is quite evident that this is regulation aimed at different spheres. If the legislature wanted to authorise the executive to regulate the conduct of business by production quotas, it would undoubtedly do so expressly.

The contested government order violates the reservation of certain areas to statutes provided in Article 26 of the Charter and restricts free enterprise in a manner which the law does not envisage nor generally regulate. If the Court annulled sub-statutory regulations for the reason that the limits created by the legislature for legislative activity by the executive are uncertain, it must do so all the more in a sphere where the law does not envision the legislative initiative of the government at all. This excess is sufficient reason to annul the contested legal regulation, without it being necessary to address further objections in detail.

The Court is, of course, aware that in the meantime another statute has come into effect which regulates production quotas and authorises the government to issue orders. However, this fact cannot change the fact that the contested Government Order no. 51/2000 was issued outside the bounds of the law.

Therefore the Plenum of the Court decided to annul Government Order no. 51/2000 Coll.

Languages:

Czech.

*Identification:* CZE-2001-1-005

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27.02.2001 / **e)** Pl. ÚS 53/2000 / **f)** Political party – finance / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

4.5.11.2 **Institutions** – Legislative bodies – Political parties – Financing.

4.10.1 **Institutions** – Public finances – Principles.

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

Keywords of the alphabetical index:

Political force, competition / Political party, parliamentary / Political party, non parliamentary / Political party, competition, freedom / Political party, contributions, mandate / Venice Commission, political parties, financing, report.

Headnotes:

The constitutional order contains the basic principles of the political system, among which free competition of political parties is the guarantee of political pluralism. It prohibits discrimination, in particular the preferential treatment of some political parties over others. It seeks to maintain equal opportunities in political competition, especially in elections, and influences the conditions and structure of the financing of political parties, including forms of direct state funding.

Free competition of political parties is based above all on the fact that all political parties are governed by the same rules specified in advance, which are based on these basic principles. At the same time, there is no doubt that direct state funding is in the hands of the legislature, which directly influences its amount and direction. But its decision-making may not be arbitrary, it must respect the constitutional principles that are part of the basic principles of the constitutionally guaranteed political system. If the risk of

arbitrariness were not ruled out, and even mere circumvention of these regulations were possible, this would undoubtedly always lead to a violation of the constitutional order, its purpose and meaning. This would force the intervention of the Constitutional Court, which is, under Articles 83 and 87 of the Constitution, the judicial organ for the protection of constitutionality and legality.

Summary:

The Court received a petition from the President of the Republic for the annulment of some provisions of the Act on the Association in Political parties and Political Movements and on Elections to the Parliament of the Czech Republic. The contested provision of the Electoral Act has already been annulled by a Judgment of the Constitutional Court of 24 January 2001, file no. Pl. ÚS 42/2000 [CZE-2001-1-001].

The Chairman of the Chamber of Deputies had given an opinion on the constitutional complaint. He stated that the current legal regulation of the financing of political parties and movements does not give preferential treatment to any political entities, nor does it increase the differences between parliamentary and non-parliamentary parties in favour of parliamentary ones. The President exercised his right under Article 50 of the Constitution concerning both Acts, but the Chamber of Deputies insisted on them.

The Senate left it to the Constitutional Court to judge and decide this question. The government proposed that the petition be rejected. The Court has analysed the petitions above all in terms of the principles enshrined in the Constitution and in the Charter of Fundamental Rights and Freedoms.

Determining a contribution and its amount undoubtedly belongs to the legislature. It is responsible for assessing the adequacy of these funds in view of the principles established by the Constitution. The funding of political parties is also partly regulated by the Electoral Act. Although the Court annulled the part of the Electoral Act which regulates the contribution per vote cast, it clearly stated in the reasoning of its judgment that this contribution cannot restrict the free competition of political parties. Comparing the amount of the contribution per vote cast with other forms of funding political parties supports the opinion of the Court that there is a clear tendency against free competition of political forces, as increasing the support of parliamentary parties is accompanied by simultaneous restriction of less successful parties. Thus disproportions arise which are in conflict with the purpose and aim of funding

political parties from public resources, i.e. with facilitating free competition.

The inequality of division of financial resources to political parties can be demonstrated by the situation where one political party receives 2% of votes cast in elections to the Chamber of Deputies (e.g. 100,000) and another party 6% (300,000). While the first party receives from the state a contribution for votes cast for the entire subsequent electoral period of only 3 million crowns, the other party, with three times the success, receives roughly 77 million crowns in the same period (contribution for votes 9 million crowns, regular annual contribution 5 million crowns, i.e. a total of 20 million and a regular contribution for mandates which, given the probable count of 12 seats, is 12 million a year, i.e. a total of 48 million crowns). Compared to its less successful competitor, this party receives roughly 25 times more from the state budget.

The reasoning for increasing the contribution for a mandate, in the opinion of the Chamber of Deputies, is inconsistent with the purpose of state financial contributions for political parties. Parties should be anchored in the society, not in the state. A state contribution is only intended to facilitate the task which the parties fulfil for the state by their participation in the elections, because a democratic state is based upon the political will arising from free electoral competition. Under Article 22 of the Charter of Fundamental Rights and Freedoms, any statutory regulation of all political rights and freedoms must make possible and protect free competition among political parties in a democratic society. The free competition among political parties is thus undoubtedly a value which must also be given priority by the statutory regulation of the financing of political parties by the state and which is under the protection of the Constitution and the Charter.

The opinion of the Chamber of Deputies recognises that the legislature cannot be arbitrary, but insists that "...the amount of this contribution must correspond to the realistic and appropriate costs of political parties, necessary to ensure their activity". In fact the opposite should hold true – the amount of the contribution must not fully correspond to the real and appropriate costs of political parties, because the real and appropriate costs of political parties may not be financially covered by the state, but it must have its basis in the support of members and voters.

In the amendment of the Act on Political Parties, the reduction of the electoral contribution per vote cast from 90 crowns to 30 crowns was accompanied by an increase of the contribution per mandate, which, in contrast, gave greater value to positions achieved

and occupied in the state, and indirectly strengthened the disproportion in the basic criterion.

Annulment of the electoral contribution by Court Judgment Pl. ÚS 42/2000 [CZE-2001-1-001] created a situation in which keeping the contribution of 1 million crowns for each mandate of a senator or deputy would further increase the existing disproportion. Therefore by annulling the contribution per mandate the Court is also creating room for parliament to apply a completely new approach to the funding of political parties by the state in such a way that the proportion between positions attained through subsidies and subsidies for success in electoral campaigns will change markedly to the favour of appreciating the number of votes gained in the elections.

The current increase of the contribution per mandate was aimed at financial support of big parties already established in parliament at the expense of small ones. The concentration of state financial assistance only for parties represented in parliament restricts the economically equal participation of parties in electoral competition and does not respect the principle contained in Article 20.4 of the Charter of Fundamental Rights and Freedoms regulating the separation of parties from the state. Raising the threshold for a contribution for a mandate neglects the basic criterion for state support, i.e. the number of votes received by parties, and concentrates public funding for parliamentary activity in a constitutionally unacceptable way.

Under the original wording of the Act, a political party was entitled to a regular contribution if it reached 3% of votes cast in one election. Under the amendment the party does not receive the contribution if it does not exceed the closing clause for entrance into the Chamber of Deputies. This leads to discrimination against some parties compared to other parties or movements and a fundamental negative influence on the free competition of political parties, intended in Article 5 of the Constitution and Article 22 of the Charter of Fundamental Rights and Freedoms.

The overall concept indicates a fundamental intention to strengthen the role of big parties which could easily form coalitions after the elections and promote their programmes without taking into account the opinions of other parliamentary parties, which is hidden under the concept of increasing stability in the decision making process of the legislative and executive powers. Of course, increasing stability here need not result in a higher degree of democracy, but also weakening its principles and reducing its efficiency. If the free competition of political parties under equal conditions is not respected and if there is the attempt

to create different conditions for big or bigger parties and thus directly or indirectly form the parties with a better or worse position, and thus also citizens with different conditions for movement within the political system, such steps cannot be described as constitutional. The Court cannot overlook the fact that a democratic society is characterised by the free competition of political parties, whose activities in the administration of public affairs is derived from the free election performed by voters.

The Court also pointed to the Report on Funding Political Parties prepared by the Venice Commission of the Council of Europe in Strasbourg, which states that there are countries where the financing of political parties relies mainly on members contributions and this concept is observed. In the older democracies political parties are an enormous machine constantly requiring considerable staff, extensive premises and increased operating expenses which cannot be covered by the often low membership contribution. (In the Federal Republic of Germany, state assistance is inversely proportional to the financial capacity of each party and it is determined by what is necessary to ensure the proper functioning of public power.)

The report of the Venice Commission favourably evaluates the countries which also tie state assistance to parties to their success in elections and to revenues from membership contributions. In this sense standards are formulated for the distribution of state contributions. In the first place these are the successes which a party had with voters in the elections, then the total sum of party contributions and to a limited degree the extent of gifts which the party received. The results of the Commission's work are directly related to current legislative themes in the Czech Republic and should not be overlooked.

Languages:

Czech.



Denmark

Supreme Court

Important decisions

Identification: DEN-2001-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 16.02.2001 / **e)** I 67/2000 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 2001, 1057; CODICES (Danish).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 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:

Property, enjoyment / Housing, temporary residence ban.

Headnotes:

It was not expropriation to temporarily ban a person from residing in his own property.

Summary:

A. was banned from residing on a property he owned. A. was a member of “*Bandidos*” and his property was made into a so-called biker fortress. The ban was issued in accordance with the “*Biker Law*”. The purpose of the law was to prevent clashes between the two rivalling biker gangs, “*Bandidos*” and “*Hells Angels*”, by banning the gang members from residing in biker fortresses.

In the proceedings before the Danish Supreme Court A. did not claim that the conditions for issuing the ban were not fulfilled, but in accordance with the Constitution he claimed compensation because he alleged the ban had to be regarded as expropriation.

The Supreme Court found that the ban would presumably be lifted after a while, and that the ban did not involve any other limitations on A's rights as owner of the property. He was free, for example, to sell the property or rent it out.

Moreover the purpose of the law was to protect the life and health of the general public in connection with the extremely violent internal clashes between biker gangs, and A. had indeed arranged and used his property as a typical biker fortress. The property was therefore a likely focus for a clash between biker gangs. On these grounds the Supreme Court decided that the ban issued against A. was not a measure that justified compensation. Neither Article 73 of the Constitution concerning expropriation measures, nor Article 8 ECHR or Article 1 Protocol 1 ECHR were violated.

Cross-references:

- Case 248/1998, Judgment of 16.08.1999, *Bulletin* 1999/3 [DEN-1999-3-010].

Languages:

Danish.



Estonia

Supreme Court

Important decisions

Identification: EST-2001-1-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 08.02.2001 / **e)** 3-4-1-1-01 / **f)** Review of the petition of Tallinn Administrative Court to review the constitutionality of Section 1 of Regulation no.215 of the Government of the Republic, dated 20 August 1996 / **g)** *Riigi Teataja III* (Official Gazette), 2001, 5, Article 49 / **h)** CODICES (English, Estonian).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Land / Pre-emption / Foreigner / Application form, legality.

Headnotes:

The term “property” used in Article 32 of the Constitution also includes the right of pre-emption of real estate. Restrictions on the right of aliens to acquire real estate can only be imposed by law.

Summary:

According to Article 32.3 of the Constitution the law may provide that some types of property may be acquired in Estonia only by Estonian citizens. Parliament has enacted the Act on Restrictions on Transfer of Immovable Property Ownership to Aliens, Foreign States and Legal Persons (hereinafter the Restrictions Act). In most cases ownership of a plot of land may be transferred to an alien with the permission of the county governor of the place where the plot of land is located. The Restrictions Act empowered the government to approve the

application form for permission to transfer real estate to aliens, foreign states and legal persons. According to the application form approved by the government only the person who owned or was in possession of the property could submit the request. An alien who, using his or her right of pre-emption, wanted the ownership or possession of the real estate to be transferred, could not submit the request. The Restrictions Act, however, did not contain any provisions for who would have the right to submit the request.

An alien wishing to use his right of pre-emption submitted a request to the Harju county governor. The governor refused to grant the request, since according to the application form only the person who owned or was in possession of the property could submit the request. The alien submitted a complaint to the Tallinn Administrative Court. The Court found that the governmental regulation by which the application form had been approved was unconstitutional. The Court initiated constitutional review proceedings with the Supreme Court.

The Constitutional Review Chamber of the Supreme Court stated that the term "property" used in Article 32 of the Constitution also includes the right of pre-emption of real estate. Further, the Court concluded that the text of the application form restricted the aliens' right to acquire real estate, in comparison with the Restrictions Act. This additional restriction enacted by the government was unconstitutional, since according to Article 32.3 of the Constitution, restrictions on property shall be provided by law (i.e. an act of parliament).

The Court also found that the application form contradicted Article 87.6 of the Constitution. According to this provision the government shall issue regulations on the basis and for the implementation of laws. The government may issue regulations if there is a delegation norm in a law. A regulation which exceeds the purpose, content or extent of the authority delegated by a law is not in conformity with the Constitution. The government may, within the authority delegated to it, specify in its regulation the restrictions of fundamental rights established by law, but it may not establish additional restrictions.

The Court declared the contested provision of the regulation invalid.

Languages:

Estonian, English (translation by the Court).



Identification: EST-2001-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 22.02.2001 / **e)** 3-4-1-4-01 / **f)** Review of the petition of Tallinn Administrative Court to review the constitutionality of Section 231.6 of the Code of Administrative Offences / **g)** *Riigi Teataja III* (Official Gazette), 2001, 6, Article 63 / **h)** CODICES (English, Estonian).

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.
- 3.10 **General Principles** – Certainty of the law.
- 3.15 **General Principles** – Proportionality.
- 3.16 **General Principles** – Weighing of interests.
- 3.17 **General Principles** – General interest.
- 3.19 **General Principles** – Reasonableness.
- 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.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Offence, administrative / Offence, parking.

Headnotes:

The right of a person to a fair trial in the case of parking offences may be restricted in order to ensure an economic and effective procedure. Any person upon whom a parking fine has been imposed, however, have a possibility to challenge the decision concerning him in a court.

Summary:

A person subjected to a fine for a violation of parking regulations filed a complaint with the Tallinn Administrative Court, requesting the annulment of the

fine. He argued that the fine was unlawful, since no report had been drawn up concerning the violation of parking regulations and he had not been invited to take part in the hearing of his case. According to the complainant Section 231.6 of the Code of Administrative Offences was in conflict with Article 6 ECHR and the Constitution. Section 231.6 of the Code of Administrative Offences provided that in the case of parking offences no report of an administrative offence shall be drawn up but an official shall draw up a notice concerning the offence. The notice shall include *inter alia* data concerning the official, the agency on behalf of which he is acting, the description of the parking offence, data concerning the vehicle and the amount of the fine. Tallinn Administrative Court requested the Supreme Court to review the constitutionality of Section 231.6 of the Code of Administrative Offences. The Court found that this section of the code was in conflict with Articles 11, 12 and 14 of the Constitution, and with the principle of legal clarity. Section 231.6 of the code was found to enable the official not to observe the ordinary procedural provisions for hearing an administrative offence case (applicable in the case of other offences). The Administrative Court found this to violate the constitutional principle of equality (Article 12 of the Constitution). The Court also found that Section 231.6 of the code does not guarantee the enjoyment of the rights and freedoms of the offenders and is in conflict with Article 14 of the Constitution. The unclear wording was also found to violate the principle of legal clarity.

The Constitutional Review Chamber of the Supreme Court did not agree with the Tallinn Administrative Court. The Court was of the opinion that a fine is substantially a punishment for an administrative offence, which is issued without the ordinary procedure for administrative offences. The Court weighed the competing interests – the interest of the person to be heard and the public interest to cope effectively with a large number of similar offences. The Court noted that parking offences are committed frequently, they are usually minor and simple in terms of facts, but cause serious problems in some locations. It is difficult to establish the person of the offender, thus, it is presumed that the offender is the owner of the vehicle. The Court found this presumption to be justified. As a rule, the person does not have the possibility to submit explanations and objections before the decision to punish is made. Thus, the right to a fair trial is restricted, but this restriction is justified by the need for economic and effective proceedings in cases of parking offences. The Court concluded that Articles 11 and 14 of the Constitution had not been violated.

The Court also found that Article 6 ECHR had not been violated. A minor administrative offence may be decided and the offender may be punished by an official, given that the punished person has a right to appeal to a court. In this case the punished person could contest the notice with the Administrative Court.

The Court noted, however, that the procedure for making the decisions in parking offence cases should be improved and it should be ensured that persons upon whom a parking fine is imposed are informed of their punishment.

The Court rejected the alleged violation of Article 12.1 of the Constitution, the principle of equality. Different procedures for handling different administrative offences do not proceed from the person of the offender, but from the nature of the offence. A simplified procedure with regard to parking offences is reasonable and proportional. The Court found that the alleged unclarity of the provision of the Code of Administrative Offences can be overcome by way of interpretation. The Court rejected the request of the Tallinn Administrative Court.

Cross-references:

European Court of Human Rights:

- *Engel and Others v. the Netherlands*, 08.06.1976, *Special Bulletin ECHR* [ECH-1976-S-001];
- *Öztürk v. Germany*, 21.02.1984, *Special Bulletin ECHR* [ECH-1984-S-001];
- *Kadubec v. Slovakia*, 02.09.1998.

Languages:

Estonian, English (translation by the Court).



Identification: EST-2001-1-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 05.03.2001 / **e)** 3-4-1-2-01 / **f)** Review of the petition of Tallinn Administrative Court to declare Sections 12.5 and 12.6 of the Aliens Act invalid / **g)** *Riigi Teataja III* (Official Gazette), 2001, 7, Article 75 / **h)** CODICES (English, Estonian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Foreigner, residence permit / National security / Security service.

Headnotes:

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

Summary:

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

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

J. Grigorjev submitted a complaint to the Tallinn Administrative Court. He claimed that Section 12.4.10 of the Aliens Act is in conflict with Article 11 of the Constitution, since the law does not enable a choice of legal consequences when it is applied. Sec-

tion 12.4.10 does not observe the principle of proportionality. The Administrative Court initiated constitutional review proceedings with the Supreme Court, finding that Sections 12.5 and 12.6 of the Aliens Act do not comply with Articles 10 and 11 of the Constitution.

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

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

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

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

The Court ruled that Sections 12.4.10 and 12.5 of the Aliens Act are unconstitutional to the extent that they do not allow any exceptions concerning the issue or extension of a residence permit to an alien who has served or there is a good reason to believe has served in the intelligence or security service of a foreign country. The provisions established by the legislator, which restrict the fundamental right established by Article 27.1 of the Constitution are not in conformity with the principle of proportionality enshrined in Article 11 of the Constitution.

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

Cross-references:

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

Languages:

Estonian, English (translation by the Court).

Finland

Supreme Court

Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 2001 – 30 April 2001.



France

Constitutional Council

Statistical data

1^{er} January 20001 – 30 April 2001

Number of decisions: 10

Important decisions

Identification: FRA-2001-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 10.01.2001 / **e)** 2000-438 DC / **f)** Organic law to improve the fairness of elections to the Assembly of French Polynesia / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.01.2001, 784 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.5.3 **Institutions** – Legislative bodies – Composition.

4.9.3 **Institutions** – Elections and instruments of direct democracy – Constituencies.

4.9.5 **Institutions** – Elections and instruments of direct democracy – Representation of minorities.

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

Keywords of the alphabetical index:

Election, population distribution.

Headnotes:

An assembly elected by direct universal suffrage must be elected essentially on the basis of population distribution. However, limited exceptions are permissible to accommodate the imperative of public interest attaching to effective representation of the most sparsely populated and remote localities.

Summary:

The Act raises from 41 to 49 the number of seats in the Assembly of French Polynesia and redistributes

them so as to reduce the disparities of representation according to population distribution, while taking account of the need for representation of the most sparsely populated and remote island groups possessing genuine cultural specificity.

Cross-references:

For elections by indirect universal suffrage, see Decision no. 2000-431 DC of 06.07.2000 concerning the Senate elections, *Bulletin* 2000/2 [FRA-2000-2-007].

Languages:

French.



Identification: FRA-2001-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 10.01.2001 / **e)** 2000-440 DC / **f)** Act introducing various provisions to adapt Community law in the transport sector / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 17.01.2001, 855 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Monopoly, business / Shipping broker.

Headnotes:

Loss of a business monopoly cannot be equated to deprivation of ownership.

Furthermore, where the legislator has prescribed appropriate compensation arrangements, breach of equality in respect of public burdens cannot be invoked either.

Summary:

In order to harmonise domestic legislation with Community law, the bill forwarded by the Senate was to abolish the special business advantages held by shipping brokers in France.

Cross-references:

- Implicit solution: Decision no. 84-182 DC of 18.01.1985.

Languages:

French.



other French or foreign legal entities having archaeological research services.

Summary:

The Act sets up a national public institution of an administrative nature, covering all aspects of archaeology (diagnosis, digging operations, dissemination of discoveries).

The applicants claimed that the establishment of this institution and the monopoly granted to it interfered with freedom of enterprise.

Languages:

French.

*Identification:* FRA-2001-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 16.01.2001 / **e)** 2000-439 DC / **f)** Act relating to preventive archaeology / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.01.2001, 931 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.17 **General Principles** – General interest.

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

Keywords of the alphabetical index:

Public body / Archaeology, preventive / Monopoly.

Headnotes:

The legislator can subject freedom of enterprise to limitations linked with constitutional requirements or justified by the public interest, provided they do not cause interferences disproportionate to the aim pursued.

The legislator was acting in the public interest with the aim of preserving archaeological heritage assets, and could thus legitimately confer sole rights on the public institution. This monopoly is not absolute, as the law invites the institution in question to call on

Germany

Federal Constitutional Court

Important decisions

Identification: GER-2001-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 20.12.2000 / **e)** 2 BvR 591/00 / **f)** **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

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

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

5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to examine witnesses.

Keywords of the alphabetical index:

Evidence, value / Evidence, evaluation / Informant / Evidence, indirect / Undercover agent / Witness, hearsay.

Headnotes:

The right to a fair trial can be affected if proceedings are conducted in a way that is contrary to a process that aims at ascertaining the truth, and thus, contrary to a fair judgment.

A constitutionally relevant violation only occurs, however, if an overall survey of all circumstances unequivocally shows that requirements that are indispensable from the point of view of the rule of law were not met.

Summary:

I. In 1998 the complainant was convicted by the Higher Regional Court in Frankfurt am Main on account

of her participation in the hijacking of the Lufthansa aircraft “Landshut” to Mogadishu in October 1977. The Higher Regional Court found that evidence proved the complainant had transported the weapons that had been used in the hijacking from Algiers to Palma de Mallorca, where they were handed over to the hijackers. The court essentially based its findings regarding the complainant's participation in the hijacking on the statement of S., another participant in the crime. S., who was in custody in Beirut, could not be examined at the trial because the Lebanese authorities refused to transfer him to Germany for examination. On account of a request for assistance, S. had, however, made detailed statements as an accused to the Lebanese police in Beirut. In these interrogations, two officers of the Federal Office of Criminal Investigation (*Bundeskriminalamt*) had been present, who during the trial gave evidence as witnesses to the Higher Regional Court about the circumstances in which S.'s statement was made and about the contents of the statement.

The Higher Regional Court regarded S.'s statement, presented in this manner, as credible because it was confirmed by other important pieces of evidence. One corroborating piece of evidence was the statement given by the witness P., a senior official in the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*). P. stated that several documents existed that confirmed the complainant's plane journey from Algiers to Palma de Mallorca. P. claimed that, in the interest of protecting his informants, he could neither name the persons from whom the BfV had received the documents nor disclose the documents themselves, as this would involve the risk of revealing the identity of the person who had procured the documents.

The witness G., a former head of criminal investigation at the Federal Office of Criminal Investigation, stated in the trial that he had received, from a reliable source, documents that confirmed that the complainant was identical to the person who had taken arms to Mallorca. G. also stated that he could neither submit the documents nor name his sources.

The Higher Regional Court was unsuccessful in its efforts to obtain from the Federal Ministry of the Interior permission for both hearsay witnesses to make more expansive statements.

Along with other circumstances and evidence presented at the trial, the Higher Regional Court also based its findings regarding the complainant's participation in the crime on the statement of the witness B., a former member of the terrorist group Red Army Faction (*Rote Armee Fraktion – RAF*), who had been examined at the trial. B. stated that he had

seen the complainant in Baghdad during the preparatory stages of the hijacking. The Court held that B.'s statement was an additional refutation of the complainant's claim that she had not left Aden. At the same time, B.'s statement was consistent with the statement of S. who had participated in the crime.

When her appeal was unsuccessful, the complainant, by way of a constitutional complaint, alleged that the conviction constituted a violation of the principle of a fair trial and of the prohibition of arbitrariness. The complainant also alleged that her conviction was inconsistent with Articles 6.1 and 6.3 ECHR, as the conviction had fundamentally been based on hearsay evidence and on the testimony of informants which cannot be confirmed because it was obtained in the framework of criminal investigation and of intelligence service activities. The complainant is of the opinion that, for these reasons, the conviction had, to a considerable degree, been based on sources that had remained anonymous. The Higher Regional Court concluded that this anonymous evidence compensated for the deficiencies of S.'s statements. The evidentiary value of S.'s statements was deficient because the statements were obtained in this specific interrogation situation, namely that S. was also a suspect to the crime and being held by the authorities with whom he might seek to curry favour by providing evidence against the complainant. In the complainant's opinion, this conclusion failed to meet the requirements that the Constitution places on the production of evidence in criminal proceedings. The complainant argued that the cumulative effect of the court's reliance on several pieces of hearsay evidence – the genesis of which cannot be autonomously assessed by the parties to the legal action – is in no way compatible with the case-law of the Federal Constitutional Court.

II. The Third Chamber of the Second Panel did not admit the case for decision, giving, in essence, the following reasons:

The right of access to the sources which serve as the basis for the findings of fact follows from the right to a fair trial. A constitutionally serious violation of this principle occurs only if an overall survey of all circumstances unequivocally shows that requirements that are indispensable from the point of view of the rule of law were not observed. The challenged judgments, however, meet the requirements of the right to a fair trial, although only just to a sufficient extent. They also fulfil the standards arising under Articles 6.1 and 6.3 ECHR, which are taken along with the case law of the European Court of Human Rights and of the Federal Court of Justice (*Bundesgerichtshof*) as a guide to the interpretation of this provision of the Basic Law. The relevant standards

have been met even though the administration of procedural law by the court that presided over the case can be regarded as being situated at the borderline of what the Constitution permits as regards the organisation of proceedings.

As regards their evidentiary value, statements that originate from informants who are not examined during the trial are, as a general rule, not sufficient for the formation of judicial findings unless other important aspects and indicia confirm them. Therefore, increased care is required of the court presiding over the case if – as in this case – police or intelligence service informants cannot be heard as witnesses for the sole reason that the competent authority refuses to disclose their identities or to give them permission to testify. In such a case, it is the executive that prevents an exhaustive inquiry into the facts and makes it impossible for the parties to the legal action to verify the personal credibility of the informant whose identity remains in the dark.

The evidence on which the challenged judgment is based, is, however, not limited to the evaluation of (1) the testimony given by the police hearsay witnesses; (2) the statements of S., who is also an accused in the proceedings, which are contained in the testimony of the police hearsay witnesses; and (3) the statements of several police and secret service informants, agents and an "informants' leader", all of whom operate undercover in foreign countries. Rather, the Higher Regional Court relied in its evaluation of evidence, apart from the statements by the complainant herself, above all on the testimony of the (direct) witness B. The witness refuted, to the court's satisfaction, the complainant's statement that at the material time, she did not stay at the place of the criminal offence but exclusively in Aden. The Higher Regional Court also regarded this as a further confirmation of S.'s statement, which had been conveyed by the Federal Office of Criminal Investigation officials. The Higher Regional Court supported its conclusion that S.'s statements and the statements given by other sources were correct with the results of further investigations of the participating agencies. These further investigations were performed by the participating agencies on the basis of and in order to review the information provided by their sources. Under these circumstances, and in the framework of the required consideration of all the factors, the process employed by the Higher Regional Court cannot be criticised.

If, for these reasons, the proceedings regarded as a whole were fair according to the standards set by the Basic Law, the opinion of the Federal Court of Justice that the standards of fairness stipulated by Article 6.1

ECHR were not violated, is not objectionable from the constitutional point of view.

Languages:

German.



Identification: GER-2001-1-002

a) Germany / b) Federal Constitutional Court / c) Third Chamber of the First Panel / d) 01.04.2001 / e) 1 BvR 355/00 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

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

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Child, support, static / Child, support, dynamic / Support, statutorily mandated / Factual basis / Child, support, conversion.

Headnotes:

If a statute can be interpreted in various ways, and some of the interpretations lead to the result that the statute is unconstitutional while others show that the statute is in conformity with the Basic Law, the courts must, pursuant to Article 3.1 of the Basic Law, interpret the respective statute in conformity with the Basic Law.

Summary:

I. Up to mid-1998, the Civil Code stipulated that the support a parent must pay for his or her child was calculated according to the parent's economic

situation and that the amount of the support was determined as a static contribution. If the parent's economic situation changed, existing support claims could only be adapted by a new decision that fixes the amount of the support payment.

With the enactment of the Child Support Act in July 1998, the parliament introduced a so-called dynamic child support system. This system fixes the support claim as a percentage of the minimum statutory support to which the child is entitled. The statutorily mandated amount of support is laid down in the Statutory Support Regulation. As, pursuant to § 1612a of the German Civil Code, the amounts of the statutorily mandated support are raised every two years, the entitlement to support established by the dynamic system increases accordingly without the necessity of court proceedings.

The prerequisite of this simplified procedure for determining the amount of the support is that the child who is entitled to support, pursuant to § 645.1 of the Code of Civil Procedure, does not live in the same household as the person who is supposed to pay support and that the child requests the simplified procedure. The simplified procedure, however, may not be applied if the periodic support payments exceed 150% of the statutorily mandated amount of support as established by the Statutory Support Regulation Act.

Child support orders that originated before July 1998 (i.e., the previous static support system), if application for a conversion is made, can be converted into new, dynamic support claims by a court registrar who will then apply the simplified procedure. Some courts, however, have interpreted the provisions of the *Kindesunterhaltungsgesetz* that regulate this procedure in such a way that conversion from the previous system to the new, simplified procedure is impermissible if the amount of support is above the 150% threshold. This threshold was established, in July 1998, by § 645.1 of the Code of Civil Procedure, as the limit for the application of the simplified procedure for newly filed claims for support.

On the basis of this opinion, the responsible local court rejected requests for the application of the simplified procedure from three minors. The three minors were entitled, respectively, to support in the amounts of 300%, 165% and 180% of the statutorily mandated amount of support, and they sought the conversion of their support claims to the new, dynamic support system.

When their appeal was unsuccessful, the minors lodged a constitutional complaint, alleging that the

decision violated the right to equal treatment guaranteed by the Basic Law.

II. The Third Chamber of the First Panel reversed and remanded the challenged decisions on account of a violation of Article 3.1 of the Basic Law for the following reasons:

The principle of equality before the law is violated if two groups of persons who are addressed by a specific statute are treated differently although there are no differences, the nature and weight of which could justify the unequal treatment, between the two groups.

In the concrete case, the local court's interpretation of the Act treats children, whose support claims are at or below 150% of the statutorily mandated amount of support, differently from children whose support claims exceed 150%. The latter are denied the opportunity of participating in the dynamic support system with its simplified procedure.

The Court could not find any factual basis justifying such unequal treatment. The reasons that justify the limited application of the simplified procedure only to first-time claims for support that are only slightly above the child's minimum subsistence, are not applicable when older claims that pre-date the amendment of the Act are converted to the new, dynamic system. With respect to determination of the amount of a support claim for the first time, parliament intended the simplified procedure, which provides fewer possibilities for defending one's rights, is only applied when the amount of the support does not considerably exceed the child's subsistence minimum. Contrary to this, disputed support claims that are markedly above the child's subsistence minimum are supposed to be dealt with exclusively by way of judicial decision.

This reason for a differentiation, however, does not exist when older support claims are converted, the amount of which had already been determined and been paid out for years without objection, even if it is markedly above minimum subsistence.

What is therefore required is an interpretation of the Child Support Act that is in conformity with the Basic Law, pursuant to which it is possible to convert older, static claims to dynamic ones in a simplified procedure without regard to their amount. The Chamber held that such an interpretation is consistent with the wording, purpose and history of the origins of the Basic Law.

Languages:

German.



Identification: GER-2001-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 25.04.2001 / **e)** 1 BvR 132/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.4.3 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings.

1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.

5.3.5.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Prohibition of forced or compulsory labour.

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

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

Keywords of the alphabetical index:

Complaint, extraordinary, justification / Forced labour, indemnification / Appeal, late filing / Legal aid / Legal position, value, asset.

Headnotes:

In order to allege a violation of Article 14.1 of the Basic Law, the complainant must plausibly assert that he or she holds a protected asset, which would be detrimentally impaired by the act of state power that is the subject of the constitutional complaint.

Summary:

I. The Foundation Act (*Stiftungsgesetz*), enacted on 2 August 2000, established a German foundation called the Foundation for Remembrance, Responsibility and Future (*Erinnerung, Verantwortung und Zukunft*). The objective of the foundation is to provide, via partner organisations, financial resources for the payment of benefits to former forced labourers and

other persons affected by injustice in the Nazi era. Within the foundation, a fund named Remembrance and Future (*Erinnerung und Zukunft*) was established. The permanent objective of the fund, drawing primarily from the proceeds derived from the resources assigned to the foundation, is the promotion of the following projects: international understanding, the interests of survivors of the Nazi regime, youth exchange, social justice, the remembrance of the threat that emanates from totalitarian systems and tyranny, and international humanitarian co-operation. In remembrance and in the honour of those victims of Nazi injustice who have not survived, the funds are also intended to promote projects that are in the interest of their heirs.

Pursuant to § 16.1 of the Foundation Act, persons who have suffered injustice under the Nazi regime can only apply for benefits from public funds, including the social security system, as well as for benefits from German enterprises in accordance with the terms of the Act. Possible further claims in connection with Nazi injustices are excluded. This applies also to cases in which claims have been transferred to third parties by operation of law or a legal transaction and to claims directed against former manifestations of German sovereign authority that are valid against the Federal Republic of Germany as the present manifestation of German sovereign authority.

II. The complainant, a Ukrainian citizen who was born in 1922, was, according to her statement, brought in collective transport from her native country to Germany in 1942. In Germany, she was assigned to a plant of the S. AG, where she worked as a forced labourer until the end of the war in 1945. The complainant brought before the competent civil-law court a suit in which she sought from S. AG the payment of compensation of approximately DM 45,000 for the forced labour she performed during the Second World War. At the same time, the complainant applied for legal aid, due to her lack of means, in order to be able to enforce her claims.

The Regional Court denied the complainant legal aid. After an unsuccessful appeal before the Higher Regional Court, the complainant challenged the legal aid decision with a "further appeal" to the Federal Court of Justice. The Federal Court of Justice dismissed the appeal as inadmissible. With the present constitutional complaint, the complainant challenges the denial of legal aid. Moreover, she directly challenges the constitutionality of the Foundation Act (*Stiftungsgesetz*), the law establishing the German foundation called the Foundation for Remembrance, Responsibility and Future, alleging that the Foundation Act "deprived" her of her private-law claims against the S. AG.

III. The First Chamber of the First Panel did not admit the constitutional complaint for decision for formal reasons (late filing and insufficient justification of a violation of a fundamental right).

As the Chamber explained, the Higher Regional Court decision regarding the application for legal aid exhausted the legal remedies as to that issue. Pursuant to established case law, no further possibility to invoke the jurisdiction of the Federal Court of Justice exists, which means that the service of the Higher Regional Court decision to the complainant exceeded the one-month time-limit for filing a constitutional complaint. The time limit for filing a constitutional complaint runs for one month from the date of the final decision of the matter, in this case the decision of the Higher Regional Court. The complaint was filed after the expiration of this time limit. It is irrelevant, with respect to determining whether a constitutional complaint is timely, that the constitutional complaint was lodged after the Federal Court of Justice's decision finding an appeal to that court patently inadmissible.

To the extent that the complainant directly challenges the Act that establishes the Foundation for Remembrance, Responsibility and Future or, respectively, challenges the fact that the Act, in § 16, precludes possible further claims, the complainant did not sufficiently justify the constitutional complaint. In particular, the complainant did not plausibly state that she possesses possible further claims the preclusion of which could constitute a violation of the fundamental right to property guaranteed by Article 14 of the Basic Law. To date, not a single non-appealable court decision is known that deems a forced labourer's claim for compensation as justified. In view of this fact, the complainant, who was represented by a lawyer, would have had to have stated, with support of established case-law, that the Foundation Act does not grant her, on a new legal basis, individual claims for the first time but encroaches upon legal positions that already exist and that are not barred by a statute of limitations. The complainant did not do this. Moreover, she did not state in the required manner whether the factual and legal requirements for possible claims are met and on what legal basis she bases these claims. Substantiated statements about facts that justify the claim in her concrete case are also lacking.

Languages:

German.



Greece Council of State

Summaries of important decisions of the reference period 1 January 2001 – 30 April 2001 will be published in the next edition, *Bulletin* 2001/2.



Hungary Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

- Decisions by the plenary Court published in the Official Gazette: 8
- Decisions by chambers published in the Official Gazette: 3
- Number of other decisions by the plenary Court: 35
- Number of other decisions by chambers: 11
- Number of other (procedural) orders: 26

Total number of decisions: 83

Important decisions

Identification: HUN-2001-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 17.01.2001 / **e)** 2/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/6 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Local government, competences / Local authority, law-making power / Tolerance zone, designating / Sexual offence.

Headnotes:

A legislative amendment giving the Interior Minister the right to decree the location of so-called tolerance zones, areas where prostitution would be permitted, is unconstitutional.

Summary:

The President of the Republic asked the Constitutional Court for a preliminary review of the constitutionality of the amendment authorising the Interior Minister to designate tolerance zones for prostitutes. A law on organised crimes, enacted in June 1999, obliged local governments of bigger localities to designate tolerance zones for prostitutes within six months. However, since then, none of them implemented that obligation. An amendment to the law adopted in September 2000 authorised the Interior Minister to designate the zones for five years, if the localities failed to do so by the deadline. In the President's view, designating the tolerance zone is a local affair. If this right is entrusted to the Interior Minister, then the powers of local authorities will be curtailed.

According to the Court, the disputed regulation formally left legislative jurisdiction with the local government but *de facto* withdrew it under certain conditions. It was essentially a tool that could significantly limit local autonomy, by, in effect, overruling local government decrees. Consequently such a regulation violated the rule of law and the certainty of law.

Supplementary information:

Four Justices attached concurring opinions to the decision.

Languages:

Hungarian.

*Identification:* HUN-2001-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.03.2001 / **e)** 6/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/30 / **h)**.

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.

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

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.

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

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

Keywords of the alphabetical index:

Association, registration / Court proceedings, length.

Headnotes:

The possibility for citizens to form a legal entity to act collectively is one of the most important aspects of the right of freedom of association. The disputed registration system did not violate the basic right of free association, since when deciding on whether to enter an association into the register the judge may only establish whether an association has met the formal conditions prescribed by law. At the same time, it is indispensable to have legal guarantees to avoid lengthy court proceedings.

Summary:

The petitioner requested the constitutional review of Article 4.1 of Act no. II of 1989 on Freedom of Association. In the petitioner's view, the provision under which associations acquire legal personality on registration infringes Article 63.1 of the Constitution (freedom of association). This constitutional provision guarantees that everyone has the right to establish organisations for any purpose not prohibited by law and the right to join such organisations.

The Court rejected the petition and held that the judicial registration of associations in itself is not unconstitutional. The Act on Freedom of Association prescribes mandatory registration of associations. In this way, an association becomes a legal entity. From the day of its registration the organisation may begin to operate as an association. The judge issues a decision on the entry of an association into the register. In such a decision, however, the judge may only establish whether an association has met the formal conditions prescribed by law. The main purpose of such a system is to avoid having associations operating contrary to law. Since the judge cannot refuse to register an association that

has already met the formal conditions prescribed by law, the registration is not a restriction of the right of freedom of association. The Court referred to the decision of the European Commission of Human Rights in the case of *Lavisse v. France*, in which the Commission held that Article 11 ECHR does not ensure legal personality of associations. Therefore in those countries where the registration is a prerequisite for having legal personality, a refusal of the authorities to register an association does not necessarily involve an interference with the rights of the association under Article 11 ECHR.

After refusing the petition, the Court *ex officio* examined whether parliament has fulfilled its legislative tasks concerning the fundamental right of freedom of association. Neither the preliminary proceedings ensured by the Act on Freedom of Association, nor that provision of the Code on Civil procedure under which civil proceedings must be finished within a reasonable time meant there were sufficient legal guarantees of freedom of association. Therefore, because of the unsatisfactory regulation, the Court held that parliament failed to comply with its legislative tasks concerning freedom of association.

Supplementary information:

Five Justices attached separate opinions to the decision. According to these opinions, the Court should not have declared that the parliament had failed to fulfil its legislative tasks, leading to unconstitutionality. The regulations of the Act on Freedom of Association and the Code on Civil Procedure currently in force provided sufficient guarantees to avoid lengthy court proceedings when registering associations.

Languages:

Hungarian.



Identification: HUN-2001-1-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.03.2001 / **e)** 7/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/30 / **h)**.

Keywords of the systematic thesaurus:

- 3.4 **General Principles** – Separation of powers.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 4.12 **Institutions** – Ombudsman.
- 4.12.5 **Institutions** – Ombudsman – Relations with the legislature.

Keywords of the alphabetical index:

Ombudsman, powers / Authority, notion / Law, unclear, ambiguous wording.

Headnotes:

It is contrary to the certainty of law that those provisions of the Act on the Parliamentary Commissioner for Civil Rights that determine the scope of the Parliamentary Commissioner's competence are not sufficiently unambiguous. Therefore the relation of the office of the Parliamentary Commissioner with the legislature, judicial organs and the organs deciding legal disputes with binding force outside of court are not clear.

Summary:

Under Article 32/B.1 of the Constitution, it is the task of the Parliamentary Commissioner for Civil Rights to have abuses of constitutional rights of which they become aware investigated or to investigate them personally, and to initiate general or specific measures in order to redress them. The office of the Parliamentary Commissioner can conduct investigations and can make recommendations if the decision, the procedure or the omission of some public authority or public service provider violates or jeopardises constitutional rights. Article 29 of the Act on the Parliamentary Commissioner for Civil Rights determines that for the purposes of this Act, an authority is *inter alia* (a) an organ fulfilling a task of state power, (f) an organ of justice – except for the courts, (h) an organ deciding legal disputes with binding force outside of the court. According to the Court, the phrase “organ fulfilling a task of state power” is a phrase of the previous regime, which cannot be applied any more. It is not clear which state organs it refers to, therefore it violates the principle of legal certainty. It is convenient to assume that it is within the competence of the Parliamentary Commissioner's to examine the procedure of parliament. Obviously, the Parliamentary Commissioner's must not review laws enacted by parliament. Because of their vagueness and ambiguity paragraphs (f) and (h) of Article 29 also violate the certainty of law, as their meaning is not clear enough.

Supplementary information:

Two Justices attached separate opinions to the decision. In their view, not only those three points of the challenged provision were unclear, ambiguous and therefore unconstitutional, but the whole provision should have been declared null and void.

Languages:

Hungarian.



Identification: HUN-2001-1-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 12.04.2001 / **e)** 10/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/43 / **h)**.

Keywords of the systematic thesaurus:

3.24 **General Principles** – Market economy.
5.2 **Fundamental Rights** – Equality.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Economy, state regulation / Stakeholder, discrimination.

Headnotes:

The law, which obliged agricultural cooperatives to convert members' assets into shares and buy assets from non-active members, violated the right to own property as it obliged cooperatives to pay the nominal value for business stakes regardless of their market value. In addition, the law discriminated against certain groups of stakeholders and farm cooperatives.

Summary:

The Act on Business Stakes in Agricultural Cooperatives adopted in December 2000 was designed to regulate reimbursement of those holding stakes in agricultural cooperatives originally set up under the previous economic system, should those owners wish to sell. The legislation was considered necessary

because many individuals with inheritable stakes had no active involvement in the operations of the farming cooperatives.

In the opinion of the Court, the Act violated the principles of private property, as it required cooperatives to buy a stake if so requested by a holder of that stake, while fixing the price the cooperatives had to pay at the stake's face value. In addition, the legislation discriminated amongst different groups of stakeholders and farm cooperatives, depending on, for example, whether or not the holders were actually working in the cooperative.

The Court also held that the aim of the legislation, i.e. to buy assets from non-active members was not unconstitutional in itself. Therefore parliament can purchase from the central budget stakes from stakeholders who want to sell their stakes, so that the agricultural cooperatives are not heavily burdened by compensation and can maintain normal operations.

Languages:

Hungarian.



Israel

Supreme Court

The decisions can be found in Hebrew at the following internet address: http://www.court.gov.il/mishpat/html/verdict/index_23.html.

Important decisions

Identification: ISR-2001-1-001

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 23.03.1993 / **e)** H.C. 6163/92 / **f)** Eizenberg v. Minister of Construction and Housing / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 47(2), 229; *Israel Law Reports*, I, 11 (2001) / **h)**.

Keywords of the systematic thesaurus:

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

1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.

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

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

3.19 **General Principles** – Reasonableness.

4.6.4.1 **Institutions** – Executive bodies – Composition – Appointment of members.

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

Keywords of the alphabetical index:

Public service, public trust / President, pardon / Offender, rehabilitation, duty / Offender, re-integration / Administrative evidence, principle / Jurisdiction, concurrent / Civil servant, criminal record.

Headnotes:

In considering a person's criminal past as a bar to public service appointment, the government must consider the need to rehabilitate offenders and help re-integrate them into society as well as the importance of public trust in the public service.

It would be unreasonable to appoint a candidate who has committed criminal offences under grave circumstances to a senior office in the public service.

The principle of "administrative evidence" allows the government to infer a criminal past based on proof upon which any reasonable person would have relied. A presidential pardon does not preclude the government from considering a candidate's criminal past for purposes of public service appointments.

Summary:

Two citizens petitioned the Supreme Court, sitting as the High Court of Justice, against the nomination of Y. G. (the respondent) to the position of Director General of the Ministry of Construction and Housing. They claimed that the government illegally exercised its discretion in appointing the respondent to the post, in light of offences he committed in the past.

As a General Security Services (GSS) agent, the respondent was involved in an incident in which two Palestinian hijackers of a civilian bus were captured alive but later shot to death, while in custody, by GSS agents. The respondent was also involved in covering up the role of the GSS in the deaths. He received a presidential pardon for his role in the case. In a separate incident, the respondent headed a GSS interrogation team whose members used illegal methods to interrogate a prisoner suspected of treason. He also committed perjury before a military tribunal that convicted the prisoner. A commission that studied the incident recommended that the perpetrators not be indicted, in part because of the damage it would cause the GSS. The respondent was not tried for his involvement in the incident.

The Court rejected claims by the respondent that the District Labour Court had exclusive jurisdiction over the petition, holding that the High Court of Justice had concurrent jurisdiction over the petition. Section 15.c of the Basic Law, concerning the judiciary, gives the High Court broad jurisdiction to review the legality, correctness, and reasonableness of actions by public authorities. The fact that the Labour Court was given specific jurisdiction over claims involving hiring does not derogate from the jurisdiction of the High Court over those issues. The High Court retains discretionary authority to hear cases such as this in exceptional circumstances in which its intervention is warranted. The outcome of this case, the Court held, raises a legal problem of first instance with profound ramifications for the rule of law and public confidence in the state. Thus, the Court decided to hear the petition.

The Court held that while there is no statutory norm barring the government from appointing a candidate with a criminal past, it must consider the criminal past in making an appointment. In considering a person's criminal past as a bar to public service appointment, the government must consider the need to rehabilitate offenders and help re-integrate them into society as well as the importance of public trust in the public service. It should consider the nature and severity of the offence, whether it was committed for personal gain or in service to the state, the age of the offender at the time of the offence, whether the offender expresses regret, the amount of time that has passed since the offence, the nature of the position for which the offender is being considered, and whether other candidates could fill the same position.

Reasonableness lies at the essence of the rule of law. It requires a governmental authority to exercise discretion to find the appropriate balance among the values, principles and interests of a democratic society. The government's elevated position as the state's executive branch does not empower it to act unreasonably. If the government makes an unreasonable decision, the Court must invalidate it.

The Court held that it would be unreasonable to appoint a candidate who has committed offences under grave circumstances to a senior public service office. Such a candidate would not set a good example for subordinates, would have a hard time meeting the basic standards demanded of every public servant, and would not project integrity and trust to the public at large. Although the respondent was not convicted of a crime, "the principle of administrative evidence" allows the government, for the purposes of deciding an appointment, to infer a criminal past using proof upon which any reasonable person would have relied for drawing conclusions. A presidential pardon does not preclude the government from considering the respondent's criminal past.

The Court held that the respondent's past offences – perjury, obstructing legal procedures, and violating individual liberty – undermined the basic foundations of the social structure and of the judicial or quasi-judicial institution's ability to do justice. The 11 years that passed since the respondent's last offence were insufficient to heal the wounds caused by those incidents. Other candidates could fill the position. The Court therefore found the government's appointment of the respondent to be manifestly unreasonable, as it failed to properly balance the relevant considerations. The government failed to accord the correct weight to the damage that the respondent's appointment would cause to the public service.

The Court issued an order barring the appointment.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-002

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 25.08.1993 / **e)** H.C. 4481/91 / **f)** Bargil v. The Government of Israel / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 47(4), 210; *Israel Law Reports*, I, 141 (2001) / **h)**.

Keywords of the systematic thesaurus:

- 1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 3.4 **General Principles** – Separation of powers.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.6.2 **Institutions** – Executive bodies – Powers.

Keywords of the alphabetical index:

Political question, review / Justiciability / Issue, dominant character.

Headnotes:

A petition challenging the government's settlement policies in the occupied territories is not justiciable because it does not present a concrete dispute. The issue is a political question, and considering it would violate the principle of separation of powers.

The Court will not hear abstract political arguments but rather only defined and specific disputes and conflicts.

In determining whether an issue is justiciable, the Court should decide whether the dominant character of the issue in dispute is legal or political.

Summary:

Peace activists petitioned the Supreme Court, acting as the High Court of Justice, to issue an injunction barring the state from using public and quasi-public funds to construct buildings, roads and other types of infrastructure in territories held by the Israeli army by virtue of belligerent occupation, except for infrastructure needed for security reasons.

The petitioners alleged that settlement activity in the occupied territories, other than that required for security, violates:

1. international law, particularly the Geneva Convention Relating to the Protection of Civilian Persons in Time of War 1949 and the Hague Convention Respecting Laws and Customs of War on Land 1907, which prohibit transferring civilian populations to occupied land and establishing a new public order in occupied land;
2. Israeli administrative law prohibiting administrative activity that is tainted with an improper purpose; and
3. Israeli constitutional law, because settlement activity negates Israel's fundamental principles as a state guided by norms of equality and democracy.

The Court dismissed the petition as not justiciable for three reasons: First, considering the petition would violate the principle of the separation of powers by deciding issues that are under the authority of the executive and legislative branches of government. Second, the petition does not present a concrete dispute, but rather attacks a general governmental policy. Third, the dominant character of the issue is political.

The Court held that it will not hear abstract political arguments but rather only defined and specific disputes or conflicts. The Court cannot make foreign policy decisions, but it can rule on which branch of government should decide the issue. In determining justiciability, the Court should decide whether the dominant character of the issue in dispute is legal or political.

In partly concurring opinions, Justice E. Goldberg held that while the petitioners have standing to address the issue, the Court must defer to the political process, which is better equipped to decide the issue in dispute. Ruling on the petition would shake the public's confidence in the impartiality of the judiciary. Justice T. Or held that a petition that fails to address a specific set of facts and circumstances is not justiciable.

Languages:

Hebrew, English (translation by the Court).

*Identification:* ISR-2001-1-003

a) Israel / **b)** Supreme Court / **c)** Civil Appeals / **d)** 24.11.1993 / **e)** C.A. 506/88 / **f)** Shefer v. The State of Israel / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 48(1), 87; *Israel Law Reports*, I, 157 (2001) / **h)**.

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Weighing of interests.
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
 5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
 5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Euthanasia / Right to die / Pain, prevention / Suicide, assisted, crime / Intent, presumed, doctrine / Medical treatment, refusal.

Headnotes:

In ruling on issues like euthanasia, Israeli courts must synthesise democratic values of personal autonomy and individual freedom with Jewish values of the sanctity of human life.

Life cannot be assessed by only considering its quality or expected length. The interest in preventing pain and suffering, and the patient's wishes are also relevant considerations. However, a right to die may become an obligation to die, if terminally ill patients feel pressured to refuse treatment in order to spare their relatives pain or expense.

A person's right to ownership over her body is subservient to the state's interest in protecting human life. Interfering in the life of a child who is in a vegetative state but is not in pain and is able to cry when uncomfortable would contradict the values of a Jewish and democratic state.

Summary:

A minor child, via her mother, petitioned the Tel Aviv-Yaffa District Court for a declaratory judgment allowing the child to refuse to accept medical treatment for neurological degeneration caused by Tay Sachs disease, a genetic disease that kills children by the age of three. On appeal, the Supreme Court affirmed the District Court judgment refusing the request.

The Supreme Court based its decision on the Basic Law, concerning Human Dignity and Freedom, which protects both human life and human dignity as supreme values. Those values must be interpreted according to the values of the state of Israel as a Jewish and a democratic state. After an extensive survey of Jewish rabbinical rulings on medical treatment for terminally ill patients, the Court established that Jewish law puts primary importance on the sanctity of life. This is the point of departure in Jewish law for discussing euthanasia. Under Jewish law, life cannot be assessed only by considering its quality or expected length. The interest in preventing pain and suffering and the patient's wishes can also be considered.

In contrast, democratic values put a priority on personal autonomy and individual freedom, to be balanced by the state's interest in preserving human life and the integrity of the medical profession, and the pain and suffering of the patient. The Court held that the synthesis between these Jewish and democratic values forbids active euthanasia – actions intended to hasten a patient's death. Further, these combined values give people the right to cling to life so long as it has any value whatsoever. The Court noted that a right to die may become an obligation to die, if terminally ill patients feel pressured to refuse treatment in order to spare relatives pain or expense.

Under Israeli penal law, murder and assisted suicide are among the most severe crimes, suggesting that a person's ownership over her body is subservient to the state's interest in protecting the sanctity of life. The Court noted that Israeli precedent has refused to recognise mercy killing as valid under Israeli law (D.C. (T.A.) 555/75, *State of Israel v. Hellman*).

The Court held that while Israel's Capacity Law recognises the doctrine of "presumed intent" in

allowing parents to make decisions on behalf of their minor children, in applying that doctrine to parental refusal of medical treatment on behalf of their children, courts run the risk that such decision will reflect the wish of the child's relatives, not the child herself. Furthermore, the Capacity Law's presumption that one parent agrees with the actions of another unless the contrary has been shown does not apply to such a fateful decision as the right to refuse medical treatment. For issues that serious, the clear and express agreement of both parents is necessary. In any event, in this case the presumption of consent is overcome by the behaviour of the father, who did not appear before the Court but who visited the child daily and told the child's doctor that he still hoped his daughter's condition would improve.

The child was terminally ill and in a vegetative state but was able to cry out when uncomfortable and was not in pain. In such a condition, the child's dignity was preserved, such that the sole determining value was the sanctity of her life, although it was terminal. Encroachment on that life would contradict the values of a Jewish and democratic state. For these reasons, the Court dismissed the petition.

In a concurring opinion, Justice H. Ariel said that in principle, a terminally ill person, including a minor, can petition the court to refuse futile medical treatment in order to spare herself pain, suffering or degradation. Relatives or friends can also petition the court on behalf of the patient. The Capacity Law does not prevent one parent from requesting the right to refuse medical treatment on behalf of a minor, although the consent of both parents is required. The legislature should create clear and detailed criteria outlining the circumstances under which a person can refuse medical treatment.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-004

a) Israel / **b)** Supreme Court / **c)** Three Judge Panel / **d)** 10.04.1995 / **e)** H.C. 1074/93 / **f)** Attorney General et. al. v. National Labour Court in Jerusalem et. al. / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 49(2), 485 / **h)**

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.

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

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

5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.

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

Keywords of the alphabetical index:

Strike, political / Strike, economic.

Headnotes:

The right to strike is a fundamental principle in Israeli law and is entrenched in the Basic Law, concerning Human Dignity and Liberty. However, purely political strikes are illegal while economic strikes are legal.

In between purely political and purely economic strikes is an additional form of workers' protest, primarily directed at the Sovereign power known as a "quasi-political strike". The "quasi-political strike" relies heavily on the dominant purpose test, as the employees are striking over a matter that is not directly connected to their work conditions in a narrow sense, but affects them directly nonetheless. The "quasi-political strike" confers the right to engage in a short protest strike only.

Summary:

A strike by employees of the Bezeq phone company was directed at a pending amendment to the telecommunications law which sought to open the Israeli economy to competition and privatisation.

The question is whether the work sanctions undertaken by the employees in this case should be deemed a "strike", within the definition of this term under labour law. The right to strike is securely enshrined in the Israeli legal system and is now incorporated in Sections 1, 2, and 4 of the Basic Law, concerning Human Dignity and Liberty. However, a distinction has traditionally been made between economic strikes which are aimed at the employer and deemed to be legal and a purely political strike which is aimed at the Sovereign and are illegal. These two polarised forms of strike are joined by an additional form of workers' protest, known as a quasi-political strike, which is primarily directed at the Sovereign power.

An economic strike is generally directed at an employer seeking to impair the rights of its workers, or who refuses to improve their working conditions. Such a strike may also be directed at the Sovereign when the latter acts in the capacity of an employer, or uses its sovereign powers to intervene in order to change existing employer-employee arrangements, or to prevent such agreements from being reached.

At the other end of the spectrum lies the pure political strike, directed at the Sovereign, not in its capacity as employer, but as the body responsible for determining overall economic policy. Such a strike is deemed illegitimate since it seeks to undermine the sovereign's ability to set economic policy and apply broad public welfare considerations. Instead force is applied to get it to submit to the particular demands of the employees. This is a strike designed to interfere with the legitimate legislative process and is illegal.

Finally, a quasi-political strike is situated at the midpoint between these two extremes. In these cases, the test of the "dominant purpose" becomes increasingly important. If it is determined that the dominant purpose of the strike concerns the employees' rights, even a strike directed at the Sovereign shall be deemed a "quasi-political strike". This confers the right to engage in a short protest strike only.

In the present case, the strike is not economic in nature. If the employees wish to benefit from the protections conferred on economic strikes they bear the burden of persuading the Court that the policy according to which different fields in telecommunication will be open to competition, as proposed in the Government Bill, is liable to directly harm them and their working conditions in the narrow sense. No convincing evidence that restricting Bezeq's monopoly may cause direct and immediate harm to Bezeq employees was presented. Thus, this strike is at most a "quasi-political" strike, which may only continue for a short duration.

Justice M. Cheshin concurred but expressed two reservations. First, the traditional dichotomy that classifies the strike as either an "economic strike", understood within the narrow confines of the employer-employee relationship, and the "political strike" is increasingly falling into disuse. We are in a period of transition. It is suggested that the Court adopt the terminology of "quasi-political" strike which appears to be appropriate as a model for this case. This having been said, it is best to refrain from adopting a single model for all cases. In this case, the strike exceeds the scope of a strike that may be recognised as legitimate. It would harm the democratic character of the state. While the right to strike is

one of the cherished pillars of the Israeli legal system, it is not self-evident that the freedom to strike is derived from “human dignity”, enshrined in the Basic Law, concerning Human Dignity and Liberty. Justice Ts. A. Tal concurred but also emphasised that this strike would harm the democratic character of the state. He left open the issue of whether the right to strike is entrenched in the Basic Law.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-005

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 13.04.1997 / **e)** H.C. 50196/96 / **f)** Horev v. The Minister of Transportation / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 41(4), 1; to be published in *Israel Law Reports* / **h)**.

Keywords of the systematic thesaurus:

- 3.12 **General Principles** – Legality.
- 3.16 **General Principles** – Weighing of interests.
- 3.17 **General Principles** – General interest.
- 3.19 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Religious coercion / Religious sensibility, protection / Road, closure during prayer times / Tolerance, threshold.

Headnotes:

An administrative authority may take religious sensibilities into account in deciding whether to open or close roads to traffic, so long as such consideration does not amount to religious coercion. Restricting human rights in order to protect religious sensibilities may only be done when the offence to sensibilities exceeds the “threshold of tolerance” that every

individual in a democratic society is expected to withstand. Freedom of movement may be restricted to protect religious sensibilities only if the harm to religious sensibilities is severe, grave, and serious, if the probability that such harm will materialise is nearly certain, and if such protection serves a substantial social interest.

The harm to the religious sensibilities of ultra-Orthodox residents caused by vehicular traffic in the heart of their neighbourhood on the Sabbath exceeds the level of tolerance that individuals in a democratic society are expected to endure.

Summary:

A group of citizens, politicians, and political and civic organisations petitioned the Supreme Court, acting as the High Court of Justice, to block an order by the Minister of Transportation to close Bar-Ilan Street, a major Jerusalem road, to vehicular traffic during prayer times on the Jewish Sabbath. The issue had sparked violent clashes between ultra-Orthodox Jewish residents of the area who claimed that the movement of motor vehicles on the Sabbath, in violation of Orthodox Jewish law, offended their religious sensibilities, and secular residents, who claimed the street’s closure would infringe on their freedom of movement. Numerous attempts at compromise, including proposals by governmental committees, failed.

The Court held that the Transportation Ministry may take religious sensibilities into account in exercising its administrative authority to open or close roads to traffic, so long as such consideration does not amount to religious coercion. Such consideration is in accordance with Israel’s values as a Jewish and a democratic state, values that attained constitutional status with the passage of the Basic Law, concerning Human Dignity and Freedom. Restricting human rights, however, can be justified only when the offence to hurt feelings exceeds the “threshold of tolerance” that every individual in a democratic society is expected to withstand.

The Court held that freedom of movement may be restricted to protect religious sensibilities only if the harm to religious feelings is severe, grave, and serious, the probability that the harm will materialise is nearly certain, such protection serves a substantial social interest, and the extent of harm to freedom of movement does not exceed that which is necessary to protect religious sensibilities.

The Court found that the harm to ultra-Orthodox residents from vehicular traffic in the heart of their neighbourhood on the Sabbath is severe, grave,

serious, and nearly certain. The prevention of such harm is a proper public purpose. The Court also found that closing the street to through traffic during prayer times did not exceed the measure necessary to protect religious sensibilities, particularly as it would delay drivers forced to use alternate routes by less than two minutes. Thus, the Court concluded, the Minister of Transportation's decision to close the street during prayer times was a reasonable restriction on freedom of movement for drivers seeking to use it as a through street. The reasonableness of such closure is subject to three conditions:

1. that alternate routes remain open on the Sabbath;
2. that the street remain open on the Sabbath during non-prayer times; and
3. that the street remain open to security and emergency vehicles even during prayer times.

If the violence were to continue, rendering the street impassable to cars even during non-prayer times, the balance would be undermined, and Bar-Ilan Street would have to be re-opened to traffic during the entire Sabbath.

The Court determined, however, that in deciding to close the street, the Minister of Transportation did not adequately consider the needs of secular residents living near the street who depend on the road to reach their homes. Therefore, the Court quashed the Minister's order closing the street during prayer times until the Minister addressed the plight of secular residents and their guests who would not be able to reach their homes during the closures.

Two justices concurred in the decision, three justices held that the street should be open during the entire Sabbath and one justice held that it should be closed during the entire Sabbath.

Concurring, Justice S. Levin noted that the Court was not asked to decide what arrangement it would choose but rather whether the decision reached by the current Transportation Minister was a reasonable exercise of administrative discretion. Justice E. Mazza noted that closing the street during prayer times depended on the availability of alternative routes, and that if those routes were to be closed, too, it would have to be re-opened.

Dissenting, Justice T. Or held that in determining traffic arrangements, the Minister of Transportation must give primary consideration to facilitating traffic, and only secondary consideration to general interests like the protection of religious sensibilities. The offence to religious sensibilities created by vehicular traffic on the Sabbath does not exceed the level of tolerance that ultra-Orthodox residents are expected

to endure. The street should remain open during the entire Sabbath to avoid violating the right to freedom of movement. Justice M. Cheshin held that the Transportation Minister exceeded his authority. An administrative body cannot give religious considerations primary status in making a decision unless authorised to do so by parliament. In addition, closing the street amounts to confiscating public property, which also requires statutory authorisation. Furthermore, the Transportation Minister interfered with the independence of the Traffic Administrator by co-opting his authority over street closures, rendering the decision to close the street invalid. Justice D. Dorner held that parliament has the authority to restrict human rights in consideration of religious sensibilities, but administrative bodies may do so only if explicitly authorised. The Transportation Minister acted without authorisation, in a random response to violence. His decision should therefore be quashed.

In a separate dissenting opinion, Justice T. Tal argued that a counter-petition requesting closure of the street during the entire Sabbath should have been accepted. Closing the street on the Sabbath did not violate the right to freedom of movement, but rather caused a minor inconvenience to secular residents, in contrast to the religious residents' right to the Sabbath, which is nearly absolute. Closing the street during prayer times did not unreasonably burden secular residents of the area, who could drive to their homes during non-prayer times.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-006

a) Israel / **b)** Supreme Court / **c)** Nine Judge Panel / **d)** 06.09.1999 / **e)** H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99 / **f)** Public Committee Against Torture in Israel et. al. v. State of Israel et. al. / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 53(4), 817 / **h)**.

Keywords of the systematic thesaurus:

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

3.12 **General Principles** – Legality.

3.15 **General Principles** – Proportionality.

4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.

4.11.3 **Institutions** – Armed forces, police forces and secret services – Secret services.

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

5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Interrogation, methods / Suspect, physical pressure against / Necessity, defence / Terrorism, fight.

Headnotes:

The authority which allows a state security or police officer to conduct an investigation does not allow for torture, cruel, inhuman or degrading treatment. The law does not sanction the use of interrogation methods which infringe on the suspect's dignity for an inappropriate purpose or beyond the necessary means.

The "necessity" defence in Article 34.11 of the Penal Law does not constitute a basis for allowing interrogation methods involving the use of physical pressure against a suspect. The defence is available to an officer facing criminal charges for the use of prohibited interrogation methods. It does not authorise the infringement of human rights.

The fact that an action does not constitute a crime does not in itself authorise police or state security officers to employ it in the course of interrogations.

Summary:

The petitioners brought suit before the Supreme Court (sitting as the High Court of Justice), arguing that certain methods used by the General Security Service ("GSS") – including shaking a suspect, holding him in particular positions for a lengthy period and sleep deprivation – are not legal. An extended panel of nine judges unanimously accepted their application and held that the GSS is not authorised, according to the present state of the law, to employ investigation methods that involve the use of physical pressure against a suspect.

The Court held that GSS investigators are endowed with the same interrogation powers as police investigators. The authority which allows the investigator to conduct a fair investigation does not

allow him to torture a person, or to treat him in a cruel, inhuman or degrading manner. The Court recognised that, inherently, even a fair interrogation is likely to cause the suspect discomfort. The law does not, however, sanction the use of interrogation methods which infringe upon the suspect's dignity, for an inappropriate purpose, or beyond the necessary means. On this basis the Court held that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position, force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation.

Additionally, the Court held that the "necessity" defence, as it appears in Article 34.11 of the Penal Law (which negates criminal liability in certain circumstances), cannot constitute a basis for allowing GSS investigators to employ interrogation methods involving the use of physical pressure against the suspect. A GSS investigator may, however, potentially avail himself of the "necessity" defence, under circumstances provided by the law, if facing criminal charges for the use of prohibited interrogation methods. The Attorney General may instruct himself with respect to the circumstances under which charges will not be brought against GSS investigators, in light of the materialisation of the conditions of "necessity." At the same time, the "necessity" defence does not constitute a basis for authorising the infringement of human rights. The mere fact that a certain action does not constitute a criminal offence does not in itself authorise the GSS to employ this method in the course of its interrogations.

The judgment relates to the unique security problems faced by the State of Israel since its founding and to the requirements for fighting terrorism. The Court highlights the difficulty associated with deciding this matter. Nevertheless, the Court must rule according to the law, and the law does not endow GSS investigators with the authority to apply physical force. If the law, as it stands today, requires amending, this issue is for the legislature (*Knesset*) to decide, according to democratic principles and jurisprudence. Therefore, the court held that the power to enact rules and to act according to them requires legislative authorisation, by legislation whose object is the power to conduct interrogations. Within the boundaries of this legislation, the legislature may express its views on the social, ethical and political problems connected to authorising the use of physical means in an interrogation. Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects, suspected of involvement in hostile terrorist activities, thereby harming the latter's dignity and liberty, raises basic questions of

law and society, of ethics and policy, and of the rule of law and security. The question of whether it is appropriate for Israel to sanction physical means in interrogations, and the scope of these means is an issue that must be decided by the legislative branch. It is there that various considerations must be weighed. It is there that the required legislation may be passed, provided, of course, that a law infringing upon the suspect's liberty is "befitting the values of the state of Israel", enacted for a proper purpose, and to an extent no greater than is required (Article 8 of the Basic Law, concerning Human Dignity and Liberty).

In a partly concurring opinion, Justice Y. Kedmi suggested the judgment be suspended for a period of one year. During that year, the GSS could employ exceptional methods in those rare cases of "ticking time bombs", on the condition that explicit authorization is given by the Attorney General.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-007

a) Israel / **b)** Supreme Court / **c)** Five Justice Panel / **d)** 08.03.2000 / **e)** H.C. 6698/95 / **f)** Ka'adan v. Israel Land Authority / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 54(1), 258 / **h)**.

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.

5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.

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

5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.

Keywords of the alphabetical index:

Land, allocation, principles / Discrimination, third party / Settlement, communal, establishment.

Headnotes:

The principle of equality prohibits the state from allocating land directly to its citizens on the basis of religion or nationality. The state may not indirectly discriminate against its citizens by allocating land to a third party who will in turn distribute it on the basis of religion or nationality.

Summary:

The petitioners were an Arab couple who live in an Arab settlement. They sought to build a home in Katzir, a communal settlement in the Eron River region. This settlement was established in 1982 by the Jewish Agency in collaboration with the Katzir Cooperative Society, on state land that was allocated to the Jewish Agency (via the Israel Land Authority) for such a purpose. The Katzir Cooperative Society only accepts Jewish members. It refused to accept the petitioners and permit them to build their home in the communal settlement of Katzir. The petitioners claimed that the policy constituted discrimination on the basis of religion or nationality and that such discrimination is prohibited by law with regard to state land.

The Court examined the question of whether the refusal to allow the petitioners to build their home in Katzir constituted impermissible discrimination. The Court's examination proceeded in two stages. First, the Court examined whether the state may allocate land directly to its citizens on the basis of religion or nationality. The answer is no. As a general rule, the principle of equality prohibits the state from distinguishing between its citizens on the basis of religion or nationality. The principle also applies to the allocation of state land. This conclusion is derived both from the values of Israel as a democratic state and from the values of Israel as a Jewish state. The Jewish character of the state does not permit Israel to discriminate between its citizens. In Israel, Jews and non-Jews are citizens with equal rights and responsibilities. The state engages in impermissible discrimination even if it is also willing to allocate state land for the purpose of establishing an exclusively Arab settlement, as long as it permits a group of Jews, without distinguishing characteristics, to establish an exclusively Jewish settlement on state land ("separate is inherently unequal").

Next, the Court examined whether the state may allocate land to the Jewish Agency knowing that the Agency will only permit Jews to use the land. The answer is no. Where one may not discriminate directly, one may not discriminate indirectly. If the state, through its own actions, may not discriminate on the basis of religion or nationality, it may not

facilitate such discrimination by a third party. It does not change matters that the third party is the Jewish Agency. Even if the Jewish Agency may distinguish between Jews and non-Jews, it may not do so in the allocation of state land.

The Court limited its decision to the particular facts of this case. The general issue of use of state land for the purposes of settlement raises wide-ranging questions. This case is not directed at past allocations of state land.

The Court stated that there are different types of settlements, for example, *kibbutzim* and *moshavim*. Different types of settlements give rise to different problems. The Court did not take a position with regard to these types of settlements. Special circumstances, beyond the type of settlement, may also be relevant. The decision of the Court is the first step in a sensitive and difficult journey. It is wise to proceed slowly and cautiously at every stage, according to the circumstances of each case.

With regard to the relief requested by the petitioners, the Court noted various social and legal difficulties and ordered that the state was not permitted, by law, to allocate state land to the Jewish Agency for the purpose of establishing the communal settlement of Katzir on the basis of discrimination between Jews and non-Jews. It was further ordered that the state must consider the petitioners' request to acquire land for themselves in the settlement of Katzir for the purpose of building their home. This consideration must be based on the principle of equality, and considering various relevant factors - including those factors affecting the Jewish Agency and the current residents of Katzir. The state must also consider the numerous legal issues. Based on these considerations, the state must determine with deliberate speed whether to allow the petitioners to make a home within the communal settlement of Katzir.

President A. Barak filed an opinion in which Justices T. Or and I. Zamir joined. Justice M. Cheshin concurred in the judgment and filed an opinion. Justice Y. Kedmi dissented in the judgment and filed an opinion.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-008

a) Israel / **b)** Supreme Court / **c)** Nine Judge Panel / **d)** 12.04.2000 / **e)** F.H. 7048/97 / **f)** Plonim v. Ministry of Security / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 54(1), 721 / **h)**.

Keywords of the systematic thesaurus:

- 3.15 **General Principles** – Proportionality.
- 3.16 **General Principles** – Weighing of interests.
- 3.17 **General Principles** – General interest.
- 5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
- 5.3.13.2.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts – *Habeas corpus*.

Keywords of the alphabetical index:

Detention, administrative, bargaining chip / Soldier, missing in action, negotiations / National security, threat.

Headnotes:

The principles of human dignity and freedom mandate that a person who does not pose a threat to national security may not be placed in administrative detention for later use as a “bargaining chip” in exchange for soldiers missing in action or prisoners of war. Even if the principles of human dignity and freedom did not so mandate the principle of proportionality would dictate that the state demonstrate detention was likely to lead to the release of soldiers and prisoners of war.

Summary:

Between the years of 1984-1987, a number of Lebanese civilians were detained and tried in a court of law. Each was sentenced to prison for a fixed number of years. After the Lebanese prisoners had served their sentences in an Israeli prison, they were not released. Rather, the Minister of Defence ordered that they be held in administrative detention (“preventive detention”). The reason for the prisoners’ detention was the negotiations between Israel and various organisations suspected of holding Israeli soldiers missing in action and prisoners of war, or suspected of having information regarding the

soldiers' whereabouts. The prisoners themselves posed no threat to national security. The sole purpose for their detention was for use as "bargaining chips" in the context of those negotiations.

According to the 1979 Law of Emergency Powers (detentions), when the country is in a state of emergency, the Minister of Defence is authorised to hold a person in administrative detention if the Minister is convinced that "the interest of national security or public safety mandates that a person be held in detention" (Article 1079.2 of the Law of Emergency Powers (detentions)). The detention may be for up to six months, after which time it may be continuously extended for six month periods. According to the 1979 Law of Emergency Powers, after 48 hours from the time the person is detained and after every three months of detention, the arrest warrant is reviewed by the President of the District Court. His decision may be appealed to the Supreme Court.

In 1994, after the President of the District Court extended their administrative detention for another six months, a number of Lebanese prisoners submitted an appeal to the Supreme Court. The prisoners argued that the law of emergency powers does not give the Minister of Defence the authority to place a person in administrative detention who does not himself pose any threat and where the sole purpose of his detention is the desire to use him as a "bargaining chip" during negotiations.

The Supreme Court, sitting as a panel of three judges, rejected the prisoners' appeal by a vote of 2-1. The Court accepted the Minister of Defence's position, by which the "interest of national security" referred to in the second clause of the 1979 Law of Emergency Powers included the supreme interest of the return of prisoners of war and soldiers missing in action. Therefore, the Minister of Defence is authorised to detain the Lebanese civilians in administrative detention. The dissent argued that the authority granted by law does not include the detention of a person who does not himself pose any threat where the only purpose of his detention is to hold him as a bargaining chip.

The prisoners submitted an application for a further hearing. The case was heard by an extended panel of nine judges. The Supreme Court reversed the District Court's judgment and its own previous judgment. In a 6-3 vote, the Court held that the Minister of Defence does not have the authority to place a person in administrative detention when the person does not pose a threat to national security and the sole purpose for his detention is to use him as a "bargaining chip". The majority held that protecting

human dignity and freedom and the proper balance between the rights of citizens and national security, is such that the law must be interpreted in such a way that does not give the Minister of Defence the power to place someone in administrative detention when that person does not pose a threat to national security. Such an interpretation is also required by international law. Moreover, the prisoners' detention was illegal, even if the Minister of Defence had the aforementioned authority. The use of administrative detention was not proportional because it was not based on sufficient evidence to prove that holding the prisoners in administrative detention would lead to the release of prisoners of war and soldiers missing in action. On the basis of these two arguments, the Supreme Court held that the prisoners must be released immediately.

The dissent held that the authority granted by law to the Minister of Defence includes the power to place a person in administrative detention who does not himself pose a threat to national security. This is because the "interest of national security" referred to in the second clause of the 1979 Law of Emergency Powers includes the return of prisoners of war and soldiers missing in action. As long as there was a chance that the prisoners of war and soldiers missing in action might be returned, there is justification for holding the prisoners in administrative detention. Moreover, the dissent argued that the administrative detention in this particular case was proportional because there was sufficient evidence to prove that holding the prisoners in administrative detention would lead to the release of prisoners of war and soldiers missing in action.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2001-1-009

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 18.06.2001 / **e)** H.C. 1514/01 / **f)** Gur Aryeh v. Channel Two Television and Radio Authority / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 55(4), 267 / **h)**.

Keywords of the systematic thesaurus:

- 3.3 **General Principles** – Democracy.
 3.16 **General Principles** – Weighing of interests.
 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Religious practice, coercion / Religious belief / Religious sensibility, respect / Television, broadcasting / Tolerance, level.

Headnotes:

A corporation created by statute must exercise its discretion in accordance with the principles of Israeli public law. The protection of freedom of speech takes priority over protections for religious sensibilities unless the offence to religious sensibilities is nearly certain, actual, and severe.

Broadcasting interviews with religious Jews on the Sabbath is an offence to their religious sensibilities, but it does not exceed the level of tolerance that individuals are expected to endure as the price of living in a pluralistic, democratic society. Nor does it violate their right to freedom of religion because it does not prevent them from fulfilling the customs or commandments of their religion or from living according to their religion.

Summary:

Four Orthodox Jews petitioned the Supreme Court, sitting as the High Court of Justice, to order a quasi-public broadcasting corporation be prevented from airing, on the Sabbath, interviews given by the petitioners. Orthodox Jewish law prohibits Jews from watching or broadcasting television programmes on the Sabbath. The petitioners claimed that the broadcast would offend their religious sensibilities and violate their right to freedom of religion by forcing them to take part in a Sabbath television broadcast.

The petitioners were interviewed for a documentary film to be shown as part of a weekly documentary programme created by a private television company and broadcast on Israel's Channel Two Television and Radio Authority (the Authority), a quasi-public

corporation created by statute. The Court found that there had been no agreement not to broadcast the programme on the Sabbath. The petitioners claimed that such broadcast would force them to participate in the desecration of the Sabbath, against their religious beliefs. The Authority claimed it had no weekday time slot in which to broadcast the programme.

The Court noted that Israeli society is based on both Jewish and democratic values and protects public sensibilities in general, and religious sensibilities in particular. A pluralistic, democratic society cannot exist without mutual tolerance of diverse beliefs, including protections for religious sensibilities. Against these protections stand several variations of the right to freedom of speech. The Authority has a right to freedom of speech as both a speaker and a platform for speech, the company that created the documentary and the documentary's director and producer have an artistic right of expression, and the public has a right to know.

The Court ruled that as a corporation created by statute, the Authority must exercise its discretion in accordance with principles of Israeli public law.

The Court held that in balancing between protecting the petitioners' religious sensibilities and defending the respondents' freedom of speech, freedom of speech takes precedence unless the offence to religious sensibilities is nearly certain, actual, and severe, such that it exceeds the level of tolerance that holders of religious beliefs are expected to endure as the price of living in a pluralistic, democratic society. The Court found that while the offence to religious sensibilities was certain, it was not severe enough to limit the respondents' right to freedom of speech. The Court suggested that religious Jews wishing to avoid this kind of injury to their religious sensibilities can condition their participation in television programmes on a guarantee that the programme will not be broadcast on the Sabbath.

The Court also found that broadcasting the interviews on the Sabbath would not violate the petitioners' right to freedom of religion. Freedom of religion protects the right to believe, to act according to one's beliefs, and not to be forced to act against one's religious beliefs. It includes the right to express oneself by dressing according to one's religious principles and other freedoms that allow a person to express his/her religious identity. Broadcasting the interviews on the Sabbath does not violate a person's right to religious beliefs, nor his/her freedom to act according to them. The right to freedom of religion is violated only when a person is prevented from fulfilling the commandments of his/her religion and beliefs, or from living his/her life as a religious person. The Court warned

that unfettered expansion of the right to freedom of religion would ultimately cheapen religious freedom and empty it of its content.

The Court dismissed the petition and noted that the respondents agreed to air the programme with subtitles explaining that interviews with the petitioners had been filmed on a weekday.

In a dissenting opinion, Justice Dalia Dorner held that airing the interviews on the Sabbath violated the petitioners' right to freedom of religion. A rabbi consulted by the petitioners ruled that participation in a television programme to be aired on the Sabbath would violate Jewish law. The dissent found that it is up to individual holders of religious beliefs, not the Court, to decide what constitutes a violation of religious law. If petitioners believe that airing the programme on a Saturday would implicate them in the desecration of the Sabbath, the dissent held, such broadcast would violate the petitioners' right not to be forced to act against their religious beliefs. The dissent also found that granting the injunction would only minimally infringe on the Authority's freedom of speech because the Authority could air the programme during the week. Therefore granting the injunction would appropriately balance the petitioners' right to religious freedom and the Authority's right to freedom of speech

Languages:

Hebrew.



Identification: ISR-2001-1-010

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 03.07.2001 / **e)** H.C. 9070/00 / **f)** Livnat v. Rubinstein / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 55(4), 800 / **h)**

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.

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

3.3 **General Principles** – Democracy.

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

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

4.5.4 **Institutions** – Legislative bodies – Organisation.

4.9.6.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Candidacy.

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:

Parliament, committee, hearing / Parliament, action, internal / Restraint, judicial.

Headnotes:

In a constitutional democracy, parliamentary actions are subject to the rule of law, including judicial review. Courts must be cautious in exercising review over internal parliamentary actions and can review internal parliamentary actions only if they cause actual harm to the fabric of democratic life.

Postponing a committee hearing on elections, which had the effect of making it difficult for a political candidate to make plans to run for office, did not constitute a harm to the fabric of democratic life.

Summary:

A member of parliament (*Knesset*) petitioned the Supreme Court, acting as the High Court of Justice, to order the chairman of parliament's Constitution, Law and Justice Committee to accelerate the date for committee hearings over different bills calling for new governmental elections. The petitioner claimed that a delay in the hearings prevented her from competing for her party's candidacy for prime minister. The petitioner would only run for prime minister if parliament approved a certain bill that had the effect of barring a rival's candidacy. The petitioner claimed that the delay in holding hearings undermined her right to run for office and the public's right to vote.

The Court ruled that in a constitutional democracy, parliamentary actions are subject to the rule of law, including judicial review. However, the status of parliament as the elected representative of the people requires the Court to apply caution and restraint in exercising judicial review of internal parliamentary actions. The scope of judicial review over parliamentary action depends on the nature of the action; courts exercise broader judicial review over final acts of parliament, like statutes, than they do over internal parliamentary activities, like the schedule for committee hearings. Internal parliamentary activities are subject to judicial review only in exceptional cases in which they cause actual harm to the fabric of democratic life.

The Court held that postponing the committee hearing would not harm the fabric of democratic life or the structural foundations of a democratic regime. The harm to the petitioner lay in the lack of coordination between the parliamentary hearings and the petitioner's party's internal elections. The Court suggested that the solution, in this case, is not judicial intervention but rather a change in the internal timetable of the petitioner's party. The Court dismissed the petition.

Languages:

Hebrew.



Italy Constitutional Court

Important decisions

Identification: ITA-2001-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13.11.2000 / **e)** 508/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 49/29.11.2000 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Religion, religious denominations, protection / State, Church, concordat / Religion, state.

Headnotes:

The Constitutional Court has derived the principle of the secular state from the system of constitutional standards, elevating it to the status of "supreme principle" (Judgments nos. 203 of 1999, 259 of 1990, 195 of 1993 *Bulletin* 1993/2 [ITA-1993-2-008] and 329 of 1997). This makes Italy a pluralist secular state, in which different religions, cultures and traditions can coexist freely and on an equal basis (Judgment no. 440 of 1995, *Bulletin* 1995/3 [ITA-1995-3-014]).

In accordance with the fundamental principles of the equality of all citizens without distinction as to religion (Article 3 of the Constitution) and the equality of freedom of all religious denominations before the law (Article 8 of the Constitution), the state must maintain an equidistant and impartial attitude to such denominations regardless of any quantitative data on membership of a given religion (Judgments nos. 925 of 1988, 440 of 1995 *Bulletin* 1995/3 [ITA-1995-3-014] and 329 of 1997) or the extent of any social reactions that might be caused by infringement of the

rights of any such group (see again Judgment no. 329 of 1997).

The aforementioned constitutional principles also require equal protection for the conscience of every individual who identifies with a religion, whatever his/her denomination of affiliation (on this matter see again Judgment no. 440 of 1995, *Bulletin* 1995/3 [ITA-1995-3-014]), subject to the possibility of a bilateral, and therefore differentiated settlement of relations, in accordance with their specific features, between the state and the Catholic Church through the concordat (Lateran Pacts) (Article 7 of the Constitution) and between the state and other religious denominations under special agreements (Article 8 of the Constitution).

Summary:

The Constitutional Court declares unconstitutional, on the grounds of infringement of Article 3 of the Constitution (which sets out the principle of equality of all citizens without distinction as to religion) and Article 8 of the Constitution (which establishes the equal freedom of all religious denominations before the law), the article of the Penal Code which lays down a prison sentence of up to one year for “anyone publicly insulting the state religion”, i.e. the Catholic religion.

The impugned provision, which was enacted in 1930, and all the others that establish special protection for the state (Catholic) religion are explained by the fact that political circles at the time considered Catholicism as a factor of the national’s moral unity. The Catholic religion was the “only” state religion (according to the wording of Article 1 of the *Albertino* Statute, subsequently incorporated into the 1929 concordat between the Holy See and Italy), and was therefore specially protected, even within the framework of state interests.

This legislative approach was subsequently abandoned. On the one hand the additional protocol to the Agreement amending the Lateran Pact specified that the Catholic religion was no longer the sole state religion, and on the other, in the context of agreements concluded with non-Catholic denominations as laid down in Article 8 of the Constitution, equal penal protection was ensured (agreement with the Union of Italian Jewish Communities), or else direct penal protection was renounced (agreements with the Waldenses, the Assemblies of God in Italy and the Italian Baptist Evangelical Christian Union).

Therefore, the article of the Criminal Code providing for a prison sentence of up to one year for “anyone publicly insulting the state religion” is an anachronism

which, in view of the legislator’s inertia, must be eliminated by the Constitutional Court. In the criminal law field, equality can only be restored by eliminating the offence formerly created, because the Court has rejected any “additive” approach extending protection under criminal law to other hitherto excluded religions.

The only obstacle is the legislature’s exclusive power to create offences as established by the Constitution vis-à-vis offences and penalties, requiring parliament to define any new categories of offence.

Cross-references:

On Judgment no. 440 of 1995 (*Bulletin* 1995/3 [ITA-1995-3-014]), quoted a number of times in the text, and other decisions on the subject of relations between the state and religious institutions, see the special issue of the *Bulletin on Freedom of Religion and Beliefs*.

Languages:

Italian.



Identification: ITA-2001-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 16.03.2001 / **e)** 71/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 12/21.03.2001 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Reasonableness.
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
 4.6.10.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
 4.8.5.4 **Institutions** – Federalism and regionalism – Distribution of powers – Co-operation.

Keywords of the alphabetical index:

Activity, educational and scientific / Hospital, university / Administration, proper functioning / Agreement, region, university / University, medical staff.

Headnotes:

Clinical work and educational and scientific activities as entrusted by current legislation to university medical staff are inextricably interlinked because of the joint theoretical and practical nature of medical studies, whether at university or post-university level. This interlinking is confirmed by the latest Community legislation on mutual recognition of medical degrees in European Union countries, which has now also become applicable in the Italian system.

The fact of this functional link between clinical work and educational and research activity does not prevent the legislature from using its discretionary power to adapt the scope of and arrangements for clinical work by university medical staff, and it can even influence the age-limits applicable to the latter; on the other hand, the two sectors of activity can under no circumstances be completely separated without violating the principles of rationality and proper functioning of the administration (both of which are protected by the Constitution), because this would result in creating categories of teacher-doctors assigned exclusively to teaching, which would thus be deprived of support from the necessary clinical activities.

The impugned rule, which stipulates that clinical work, which is vital for the productive implementation of the teaching and research activities of university medical staff, must be governed by specific agreements between universities and regions, is not contrary to the principle of the legislature's exclusive powers (in the university field). This principle cannot be interpreted as allowing the legislature to restrict the absolute independence of universities, which is secured under the Constitution. Nor does this legislative provision, *a fortiori*, infringe the constitutional provisions on delegation, because the matters consigned to the aforementioned agreements are basically of a technical nature.

Summary:

This decision declared unconstitutional part of a provision (Article 15.2) of a legislative decree to the effect that university medical staff should discontinue their general activities in the field of providing clinical assistance in hospitals and directing clinical structures before the retirement age stipulated for university teachers, despite the absence of any provision on this matter in the agreements between universities and regions (see Headnotes). Such agreements are mentioned in the same provision with a view to regulating the arrangements for and limits on the use of university medical staff for specific

hospital activities alongside their teaching and research activities.

The Court therefore ruled that the discontinuation of general hospital activities by university medical staff was subject to a specific provision in the aforementioned agreements.

Cross-references:

With regard to interlinking between clinical work in hospitals and teaching and scientific activities carried out by university medical staff, the Court referred to its Judgments nos. 136 of 1997, 126 of 1981 and 103 of 1997. In connection with the fact that the legislature's exclusive powers to legislate in the university field cannot be interpreted as permitting a restriction on the absolute independence of universities, the Court referred to Judgment no. 383 of 1998, *Bulletin* 1998/3 [ITA-1998-3-010].

Languages:

Italian.

*Identification:* ITA-2001-1-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 19.03.2001 / **e)** 73/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 13/28.03.2001 / **h)** CODICES (Italian).

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 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources.
 5.1.1.3.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
 5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Detention, arrangement / Convention on the Transfer of Sentenced Persons.

Headnotes:

The governmental power to establish special arrangements for enforcing the sentence of a person transferred to an administering state (enforcing the sentence) under the Convention on the Transfer of Sentenced Persons must comply with the general system established by the Convention. This system gives precedence to the administering state's legal system, and in particular to its constitutional principles and rules.

The challenge to the unconstitutionality of the article of the law implementing the Convention that provides for the possibility of concluding an agreement between the sentencing and administering states, preventing the sentenced person from enjoying the advantages provided for by the system in force in the administering state must therefore be declared unconstitutional.

Summary:

The Rome sentence enforcement Court (*Tribunale di sorveglianza*) challenged the constitutionality of Article 2 of Law no. 334 of 25 July 1988. This is the law implementing the Convention on the Transfer of Sentenced Persons adopted in Strasbourg on 21 March 1983. The impugned part of this article provides for the possibility of concluding an agreement between the state that delivered the sentence and the state which is to enforce this sentence preventing the sentenced person from enjoying the advantages provided for by the system in force in the state enforcing the sentence (the administering state).

The judge to which the case in point was transferred held that under Article 3.1.f of the Convention on the Transfer of Sentenced Persons the agreement concluded between the United States of America and Italy the latter country could not postpone, for serious medical reasons, enforcement of the sentence of Ms Silvia Baraldini, who was seriously ill and had been sentenced to imprisonment under two judgments, handed down in the United States of America and recognised in Italy. It was argued on these grounds that the law implementing the Convention on the Transfer of Sentenced Persons violated the constitutional principles prohibiting penalties involving treatment contrary to human dignity (Article 27.3 of

the Constitution) and protecting health as a basic right of the individual (Article 32.1 of the Constitution).

The incorporation into the Italian system of both generally recognised standards of international law and convention-based international standards has limits which are aimed at safeguarding its identity and which therefore mainly derive from the Constitution.

In some cases the Constitution itself provides a specific foundation for the incorporation of international law, assigning a particular legal value to the rules introduced into the Italian system. This is the case of Article 10.1 of the Constitution, which lays down that the Italian system "shall conform" with the generally recognised principles of international law, and Article 11 of the Constitution, which mentions the founding treaties and standards of international organisations ensuring "peace and justice between nations". However, in both cases the incorporation of such standards into the domestic legal system is subject to respect for the "fundamental principles of the constitutional system" and the "fundamental human rights".

On the other hand, where there is no specific constitutional basis, convention-based international legal standards take on the legal force of the domestic implementing instrument in the national system. Consequently, when the Court is asked to consider the constitutionality of the law introducing the treaty into the domestic system, it will do so as it would with any other piece of domestic legislation.

Analysis of the constitutionality of the law implementing the treaty provides a good idea of the constitutionality of the treaty itself (see e.g. Judgments nos. 183 of 1994, 446 of 1990 and 20 of 1966), and can lead to a declaration of unconstitutionality vis-à-vis the part of the implementing law that introduces rules incompatible with the Constitution into the domestic legal system (Judgments nos. 128 of 1987 and 210 of 1986).

The Convention on the Transfer of Sentenced Persons, adopted in Strasbourg on 21 March 1983 and made enforceable in Italy by Law no. 334 of 25 July 1988, does not stipulate that the Italian Government can draw on Article 3.1.f of the Convention to establish with the government of another state signatory to the Convention special personalised conditions for enforcing prison sentences in a manner varying from legislative and constitutional principles, which conditions are to be applied by the judicial authority to the transferred person.

But Articles 9 and 10 of the Convention are unambiguous: the sentence must be enforced in accordance with the legal system prevailing in the administering state by means of any practical measures it might consider appropriate. Furthermore, in the event of disparities between the systems in force in the sentencing and administering states, the Convention lays down that the passing and enforcement of the sentences should correspond as far as possible, prioritising the requirements of the administering state's system.

In the spirit of the Convention the sentencing state can use its discretion to give or withhold its consent to the transfer of the sentenced person depending on whether it considers that the legal regulations for enforcing sentences in the potential administering country are similar to those provided for in its own legal system.

The administering state is in turn bound by the legal nature and duration of the sentence as provided for by the system in force in the sentencing state. However, the administering state must remain within certain limits if it is not to cause a breakdown in its own system. Therefore, it is vital for the administering state to be able to make adjustments in the interests of protecting its own system.

What is absolutely excluded by the Convention (and the principles of the rule of law make any explanation of this exclusion superfluous) is the possibility of a transferred person being subject to a fully-fledged special, personalised method of sentence enforcement, relating to his/her rights and duties as a prisoner. Article 3.1.f of the Convention provides that the sentencing and administering states must agree to the prisoner's transfer to the state of which he/she holds the nationality. Moreover, even if these provisions are interpreted as authorising the governments of these states to agree on special conditions relating to the transfer, the governmental power to establish special arrangements for enforcing the sentence must comply with the general system established by the Convention. This system is established in particular by the aforementioned Articles 9 and 10, which give precedence to the administering state's legal system, and in particular to its constitutional principles and rules.

Therefore, the challenge to the constitutionality of Article 2 of Law no. 334 of 25 July 1988 implementing the Convention on the Transfer of Sentenced Persons must be declared unfounded. This challenge was raised in respect of Articles 2, 3.1, 25.2, 27.3 and 32.1 of the Constitution.

Languages:

Italian.



Identification: ITA-2001-1-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 10.04.2001 / **e)** 105/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 16/18.04.2001 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – General interest.
- 3.19 **General Principles** – Reasonableness.
- 5.1.1.2.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.13.2.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts – *Habeas corpus*.

Keywords of the alphabetical index:

Expulsion / Immigrant / Judicial authority, intervention, necessity / Residence, permit / Foreigner, forcible removal / Foreigner, detention.

Headnotes:

The detention of a foreigner in “temporary residence and assistance centres” is a measure affecting personal freedom and must be accompanied by the safeguards laid down in Article 13 of the Constitution. The content of this measure is such that it comprises, at the very least, one of the “other (measures restricting) one's personal liberty”, even if it is not expressly mentioned in the aforementioned constitutional provision. Even when the detention is aimed at assistance, the individual involved suffers infringement of his/her human dignity. An individual's human dignity is infringed whenever he/she is

physically subjected to someone else's power, and such infringement shows that there is a link between the said measure and personal freedom.

The constitutional safeguards aimed at protecting personal freedom must not be restricted in respect of foreigners in such a way as to infringe inviolable constitutional rights. Despite the fact that a wide variety of public interests are at stake in the immigration field and that uncontrolled migration raises serious problems of security and public order, government measures cannot be allowed to infringe the universality of personal freedom. The latter freedom, like the other rights declared inviolable under the Constitution, pertains to individuals regarded not as part of a specific polity but as human beings. This is why judicial authorities must be notified of any detention measure adopted by the law enforcement agencies within 48 hours and, if this measure is not ratified in the ensuing 48 hours, it must be nullified.

In the framework of the administrative expulsion procedure, detaining a foreigner in a "temporary residence and assistance centre" is the means of organisation chosen by the legislator to make possible, in formally specified circumstances, the removal of the foreigner from the national territory; the expulsion decision stipulating that the person must be forcibly removed, which must in all cases be supported by reasons, is the precondition for the measure in question, which means that it must be supervised by the judicial authority. Suffice it to say in this context that the removal of illegal immigrants falls within the constitutional field of protecting personal freedom because this measure is immediately coercive. According to the Court's established case-law, such coercion is a feature of any restriction on personal freedom, differentiating such restrictions from measures solely affecting freedom of movement.

The requisite judicial review of the lawfulness of a foreigner's detention cannot be confined to the expulsion procedure itself: it must extend to the grounds on which the administration has ordered the foreigner's removal from the territory. Such removal is both the immediate cause of the restriction on personal freedom and the basis for the subsequent detention measure.

Let us consider a case where the court has declared unfounded or ill-founded the reasons for which a law enforcement agency has ordered the expulsion to be carried out by forcibly removing the foreigner rather than simply by issuing an expulsion order. The refusal to ratify such a measure would nullify the detention order against the foreigner and his/her removal from the territory by the police. This is because despite the

stipulation, aimed at protecting personal freedom, that the judicial authority must give reasons for ratifying police decisions, it cannot be held that such an act of coercion as removal from the national territory, which has a direct impact on personal freedom and is the precondition for the detention measure, should be considered by the police as perfectly lawful and enforceable, where a court has declared it unlawful, basing its refusal to ratify the decision on this very fact.

The maximum period of 20 days, which the Police Commissioner can extend by a further 10 days, laid down in legislation in order to remove obstacles to the enforcement of the expulsion order, after which the detention order becomes ineffective, is not unreasonable. Moreover, the whole period does not necessarily have to lapse, because of the legislative provision that the foreigner must be detained "for the length of time strictly needed" and therefore, if all the conditions are fulfilled, the restrictive measure must be discontinued before the expiry of the second (10-day) time-limit.

Summary:

In this judgment (dismissing the challenge before it, and interpreting this dismissal), the Court declared unfounded the constitutional challenge to the regulation set out in Legislative Decree no. 286 of 25 July 1998 (consolidated legislation on regulations governing immigration and rules on the status of foreigners). These regulations relate in particular to the detention in "temporary residence and assistance centres" of foreigners subject to the police measures of forcible removal from the territory, under the administrative expulsion procedure. The said challenge was issued on the basis of Article 13.2 and 13.3 of the Constitution vis-à-vis court supervision of measures restricting personal freedom.

Milan district court issued a number of orders referring the challenge to the Court. It contended that the challenged regulation failed to provide that non-ratification of the detention order against the foreigner where the preconditions stipulated in legislation were not fulfilled annulled the effects of the (forcible) removal order, and, further, that it failed to provide for the compulsory transmission of the latter order to the judicial authority for ratification within the ensuing 48 hours. Nevertheless, the Court rejected Milan district court's interpretation of the challenged regulation. It considered first that ratification is compulsory in all cases and second that where the conditions for the foreigner's detention are not fulfilled the effects of the removal order lapsed. This interpretation makes the challenged regulation compatible with Article 13 of the Constitution.

The Court also considered unfounded the challenge issued by the same judge to the effect that the maximum period of twenty days, extendable by 10 days, laid down for detaining the foreigner was unconstitutional, still in the light of Article 13.2 and 13.3 of the Constitution. The Court pointed out that the time-limit was fully reasonable and justified (see Headnotes).

Cross-references:

The Court, with reference to measures affecting personal freedom, recalled Judgment no. 2 of 1956 (its first year of operation). This judgment relates to the transfer of the person to be repatriated, with accompanying document.

On the other hand, in the more recent Judgment no. 210 of 1995, the Court held that the repatriation order did not violate the said freedom because such an order, while compulsory, was not coercive. The Court drew on the distinction between the concepts of “purely compulsory nature” and coercion contained in Judgment no. 194 of 1996. The point at issue concerned cases where the police had to instruct vehicle drivers who were in a state of physical or mental deterioration caused by the use of narcotics or psychotropic substances to accompany them for the requisite toxicological testing. The Court held that if such a procedure was not to affect personal freedom, the person involved should have the right to refuse to accompany the police officers, even if this course of action exposed him/her to the risk of criminal proceedings and sanctions.

Lastly, in its Judgment no. 62 of 1994 the Court held that the forcible removal by the police of a foreigner detained on remand or facing a maximum three-year prison sentence, even where only part of the sentence remained to be served, was a measure affecting personal freedom. The transition from being detained to being subject to another coercive measure betokened a difference of degree but not of nature, because both measures had an identical effect on the constitutional right in question, namely personal freedom.

Languages:

Italian.



Kazakhstan Constitutional Council

There was no relevant constitutional case-law during the reference period 1 January 2001 – 30 April 2001.



Latvia

Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

Number of cases: 2

Important decisions

Identification: LAT-2001-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 13.03.2001 / **e)** 2000-08-0109 / **f)** On Compliance of the Law On State Social Insurance with Articles 1 and 109 of the Constitution and Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 41, 14.03.2001 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

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

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

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

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:

Insurance, social, state / Contribution, compulsory, payment / Social assistance, individual character.

Headnotes:

The constitutional right of employees to social security is not dependent on the willingness of the employer to pay mandatory contributions on behalf of

the employee or from the state institutions ability to ensure that employers pay mandatory contributions.

Summary:

The case was initiated by 20 members of the parliament (*Saeima*) who questioned the conformity of Paragraph 1 of the Transitional Provisions of the Law On State Social Insurance with Articles 1 and 109 of the Constitution (*Satversme*) and Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights.

According to the Law On State Social Insurance (the “Social Insurance Law”) a person is socially insured and compulsory contributions shall be paid for him/her from the date when he/she acquired the status of an employee or a self-employed person. Originally, according to the transitional provisions of the law, this legal provision should take effect from 1 January 2002. Until this date, only those for whom contributions are actually paid are considered as socially insured persons. In 1999, the date was changed to 1 January 2004.

The applicant pointed out that Article 109 of the Constitution guaranteed the right to social security for old age, disability, unemployment and other cases for every inhabitant of Latvia without exceptions on the basis of payment or non-payment of compulsory contributions.

In Latvia, the right to social security is of constitutional value. Although the nature of the social rights is distinctive from that of civil and political rights, if the right to social security is protected by Article 109 of the Constitution, it is not only of declarative effect.

When deciding about the social security system after the renewal of independence, the Latvian Parliament chose the state social insurance system. The insurance is of a compulsory nature. The basic principles of insurance, the scope of the insured persons, the risks of it and the procedure for the formation of assets are determined by the Social Insurance Law. This law implements the right to social security provided by the Constitution.

Employees are the only people among all those covered by mandatory social insurance who do not pay compulsory contributions directly, but do so through their employer. Therefore the Court held that the disputed provision should be reviewed in connection with this group only.

According to the Social Insurance Law, all employees should be covered by social insurance. Employers

have the obligation to calculate salary, deduct mandatory social contributions, and pay deducted sums into the social budget. The employee cannot influence this process: he/she can neither prevent the employer from deducting contributions, nor make the payment himself/herself directly. The law does not provide the possibility for the employee to control the employer.

If the employer violates the law and does not make compulsory payments on behalf of his/her employees, state institutions are authorised to act. The persons to be insured need not suffer just because others do not fulfil their mandatory obligations determined by law.

When adopting the disputed provision, the legislator admitted the possibility that some employers could avoid fulfilling their mandatory obligations. Thus the constitutional right to social security finally depends on the decision of the employer to fulfil his/her mandatory obligations or to avoid doing so, or from the ability of the state institutions to prevent such a situation. Thus, to guarantee the rights of persons covered by the mandatory social insurance, payments shall not be linked to the obligations of others.

The Court rejected the view that the right to social security was not violated if a person could receive social assistance instead of social security benefits. Social assistance is provided for persons who are not able to provide for themselves, are in extreme difficulties of life, and do not receive aid from other persons. Social assistance is granted to a person individually, taking into account his/her economical conditions of life.

The Court decided that Paragraph 1 of the Transitional Provisions of the Law On State Social Insurance was incompatible with Article 109 of the Constitution and null and void from the date of its publication with regard to persons who made mandatory social insurance contributions through other persons or for whom the contributions were made by other persons.

As the disputed provision was not compatible with the Constitution, it was not necessary to decide about its compliance with the International Covenant on Economic, Social and Cultural Rights.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2001-1-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 03.04.2001 / **e)** 2000-07-0409 / **f)** On Compliance of the Regulation On the Order of Trade in Markets, Fairs, Street Market and Travelling Shops with the Law On Entrepreneur Activity, Article 91 of the Constitution, GATT, the Law on the Structure of the Cabinet of Ministers, and the Free Trade Agreement between Estonia, Latvia and Lithuania on Trade with Agricultural Products / **g)** *Latvijas Vestnesis* (Official Gazette), 54, 04.04.2001 / **h)** CODICES (English, Latvian).

Keywords of the systematic thesaurus:

2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
 3.20 **General Principles** – Equality.
 4.5.8 **Institutions** – Legislative bodies – Relations with the executive bodies.
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Market place.

Headnotes:

Market trading rules that favoured the weakest participants in the market (farmers, individual companies, self-employed persons, and natural persons) did not violate the constitutional principle of equality.

On the basis of a general provision of Article 14 of the Law on the Structure of the Cabinet of Ministers, the Cabinet of Ministers may issue regulations without powers of delegation within the laws, only concerning the implementation of laws, they may not adopt provisions which rightly fall within the field of competence of the legislator.

Summary:

The case was initiated by 20 members of parliament (*Saeima*) who questioned the conformity of Paragraph 1.1 of the Cabinet of Ministers Regulation

Amendments to the Regulation On the Order of Trade in Markets, Fairs, Street Market and Travelling Shops (“the disputed provision”) with the Law On Entrepreneur Activity, Article 91 of the Constitution, Article 3.4 of GATT, Article 14 of the Law on The Structure of the Cabinet of Ministers, and Article 3 of the Free Trade Agreement between Estonia, Latvia and Lithuania on Trade with Agricultural Products.

According to the disputed provision, fruits, berries and vegetables should be sold only in closed stationary places of trade. This provision did not apply to persons entitled to value added tax exemptions, that is, farmers, individual companies, self-employed persons, and natural persons, selling their own grown fruits, berries and vegetables. The petitioner argued that the requirement of using closed stationary places of trade created an unjustified restriction on business activities and caused discrimination on the grounds of the form of entrepreneurial activity.

The Court held that the principle of equality, following from Article 91 of the Constitution, prohibited the adoption of a different attitude without reasonable justification to legal and natural persons in similar conditions. Farmers, individual companies, self-employed persons and natural persons were the least protected participants of the market. They are therefore entitled to certain privileges which should not be regarded as a violation of the principle of equality.

The disputed provision concerns domestic and imported products equally. It was not regarded by the Court as a quantitative restriction on imports and is not in conflict with the international trade agreements referred to.

The Court did not find a violation of the Law on Entrepreneurial Activity. Article 32 of the law concerns the licensing of some types of entrepreneurial activity and it could not be applied to the maintenance of order in markets.

The Court, analysing the Law On Agriculture, refused to accept the argument that the order of trade in markets was already established by the Law On Agriculture and therefore could not be regulated by a regulation of the Cabinet of Ministers. The law establishes only general principles regarding the sale of agricultural products and does not concern order in market places.

The Cabinet of Ministers issued the disputed provision on the basis of Article 14.3 of the Law on the Structure of the Cabinet of Ministers, which provides that the Cabinet of Ministers can adopt regulations if the issue is not regulated by law. When

interpreting Article 14 of the law, one should take into account Article 64 of the Constitution, according to which only parliament and the people have the right to legislate, and Article 81 of the Constitution, which concerns the delegation of the right to legislate to the Cabinet of Ministers. Thus, on the basis of Article 14 of the Law on the Structure of the Cabinet of Ministers, the Cabinet of Ministers may not adopt regulations on issues falling within the competence of the legislator. Under the procedure for this law the Cabinet of Ministers may only issue provisions that contain more detailed regulation in the fields already covered by laws, or provisions concerning the implementation of laws. Establishing the order in market places is within the competence of parliament, and in 1993 the Supreme Council of Latvia adopted the resolution “On Order in the Markets of Latvia”. Therefore the Cabinet of Ministers has exceeded its competence and has interfered in the sphere of parliamentary legislation.

The Court decided the disputable provision regarding “closed stationary trade places” was incompatible with Article 14 of the Law on the Structure of the Cabinet of Ministers and was thus null and void from the moment of its adoption.

Languages:

Latvian, English (translation by the Court).



Liechtenstein State Council

Important decisions

Identification: LIE-2001-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 19.02.2001 / **e)** StGH 2000/27 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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, examination by both parties / Criminal procedure.

Headnotes:

In criminal procedure, reading out the record of a hearing of witnesses conducted in the absence of the accused does not, in principle, contravene the European Convention on Human Rights (ECHR) or the Constitution. However, the special rule laid down in Article 115.3 of the Code of Criminal Procedure (StPO) – that, in the interests of the investigation, and in particular where there is a risk of serious procedural delays or obstacles to discovery of the truth, the defendant or his/her counsel need not participate in the hearing of a witness – gives rise to certain difficulties in the light of Article 6 ECHR. Even under Article 115.3 of the Code of Criminal Procedure, the possibility cannot be excluded that the defence's lack of opportunity to examine a witness may occur as a result of obvious negligence on the part of the court and a statement obtained without the defendant's participation may be the sole or principal piece of

prosecution evidence. Where conviction rests exclusively on a witness statement obtained in the absence of the defendant or his/her counsel, use of that statement is in breach of Article 6.3 ECHR and, in consequence, Article 33.3 of the Constitution.

Summary:

The applicant had been convicted at first instance of offences under Article 23.1 of the Federal Law on Temporary and Permanent Residence of Foreigners, which lays down penalties for facilitating illegal entry of foreigners. The court had found him not guilty of further charges of accepting payment for trafficking and doing so as part of a group, ruling that there was insufficient evidence for conviction under Article 23.2 of the law. Witness statements made to the police were not used in court, and the witnesses were not summoned because of their origin and because their whereabouts were unknown. Having regard to the principle of establishing the facts, the Appeal Court (*Obergericht*) ruled that the failure to make use of the recorded statements contravened an essential procedural rule and referred the case for further proceedings. The essential points of this decision were confirmed at last instance by the Supreme Court (*Oberster Gerichtshof*), which, in reference to the court's duty to establish the facts, justified its own decision by declaring that the principle of immediacy was only valid in so far as it was practicable.

The State Council allowed the appeal against this last decision on the ground that it contravened Article 6.3 ECHR and Article 33.3 of the Constitution.

Languages:

German.



Lithuania

Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

Number of decisions: 7 final decisions.

All cases – *ex post facto* review and abstract review.

The main content of the cases was the following:

- Retroactive validity of laws: 1
- Procedures of parliament: 1
- Right to have an advocate: 1
- Right of the prosecutor to appeal to court: 1
- Restoration of citizens' rights of ownership to the land lying in a town: 1
- Limitations on the acquisition of a permit to keep and bare a hunting weapon: 1
- Taxes: 1

All final decisions of the Constitutional Court were published in the Lithuanian *Valstybės Žinios* (Official Gazette).

Important decisions

Identification: LTU-2001-1-001

a) Lithuania / b) Constitutional Court / c) / d) 11.01.2001 / e) 7/99-17/99 / f) On the retroactive validity of laws / g) *Valstybės Žinios* (Official Gazette), 5-143, 17.01.2001 / h) CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.10 **General Principles** – Certainty of the law.
 3.14 **General Principles** – Publication of laws.
 5.3.36.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Lex benignior retro agit.

Headnotes:

Article 7.2 of the Constitution provides that only laws which are promulgated shall be valid. This constitutional provision means that laws are not valid and may not be applied unless they are officially promulgated. The official promulgation of laws in pursuance with the procedure established in the Constitution and laws is a necessary condition for the validity of laws to ensure subjects of legal relations know what laws are valid, the content of those laws, and therefore whether they might follow those laws.

Article 7.2 of the Constitution also reflects the legal principle that the validity of promulgated laws is directed to the future and that these laws are not retroactively valid (*lex retro non agit*). Thus, laws are applied to facts and effects which take place after the laws come into effect. The requirement that the validity of promulgated laws be directed to the future and that these laws should not be retroactively valid is an important precondition of legal certainty and an essential element of the rule of law and a law-governed state.

The legal principle of non-retroactivity is linked with the constitutional principles of justice and humanity. Laws abolishing punishment or mitigating responsibility for a deed have retroactive validity (*lex benignior retro agit*).

Summary:

The petitioners – the Panevezys Regional Court and the Panevezys City District Court – doubted whether Article 7.2 of the Criminal Code was in conformity with the Constitution. The article provides that “a law, abolishing the criminality of a deed, mitigating punishment or otherwise ameliorating the legal situation of a person who has committed the deed, shall be retroactively valid, i.e. it shall be applicable to persons who had committed respective deeds before the said law went into effect, as well as to persons serving the sentence and to those who have a previous record”.

The Constitutional Court held that the provisions of Article 7 of the Criminal Code are in line with provisions of international law whereby no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. The Constitutional Court ruled that Article 7.2 of the

Criminal Code was in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2001-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 12.02.2001 / **e)** 15/99-34/99-42/2000 / **f)** On the right to have an advocate / **g)** *Valstybės Žinios* (Official Gazette), 14-445, 14.02.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

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

Keywords of the alphabetical index:

Lawyer, choice, restriction.

Headnotes:

Article 31.6 of the Constitution provides that, from the moment of arrest or the first interrogation, persons suspected or accused of a crime shall be guaranteed the right to defence and legal counsel.

The right to have an advocate entrenched in Article 31.6 of the Constitution means that a person has the right to choose an advocate by himself, as well as the right to have an advocate appointed by the state. The right of a person to have an advocate also presupposes the right of a person to be clearly informed that he is entitled to have an advocate from the moment of arrest or first interrogation.

The right of persons to a defence as well as the right to have an advocate is absolute: it may not be denied nor restricted on any grounds, nor may any conditions be imposed on it. The right of a person suspected of the commission of a crime as well as that of the accused to defence is one of the guarantees of human rights. This right is a necessary condition for every person who has committed a crime to be justly punished and for innocent persons not to be convicted.

However, the right to choose any advocate of his pleasure, unlike the right to have an advocate, is not absolute.

Summary:

The petitioners – the Alytus Local District Court, the Vilnius City Court and the Kaunas Regional Court – doubted whether Article 26.3 and 26.4 of the Law on the Bar was in conformity with the Constitution. Article 26.3 provided that “an advocate may not act as a representative nor counsel for the defence in court in cases when he previously worked at the same court as a judge provided three years have not expired from the end of his said work”. Article 26.4 of the same law provided that “an advocate may not act as a representative nor counsel for the defence in court cases when his or her spouse (including former spouse), children (including adopted children), parents (including foster-parents), brothers, sisters (including step-brothers and step-sisters), cousins, grandparents or grandchildren work in the same court as judges”.

The Constitutional Court noted that the right to choose an advocate of his pleasure, unlike the right to have an advocate, is not absolute. For instance, the advocate himself may not act as counsel for the defence of two or more persons suspected of the commission of a crime or two or more accused in cases when the interests of the defence of one of those persons conflicts with those of the other. Laws may provide that in cases when the exercise of the defence of a person faces real difficulties, the court may suggest that the person choose another advocate.

The Court also emphasised that in attempting to ensure the impartiality and independence of judges and courts, laws may also establish such legal regulation which would remove preconditions raising doubts concerning the impartiality of judges and courts. The preconditions raising the said doubts may appear in cases when an advocate acts as a representative or counsel for the defence in court cases when he previously worked at the same court as a judge provided three years have not expired

from the end of his said work and when an advocate acts as a representative or counsel for the defence in court cases when his or her spouse, children, parents, brothers, sisters, cousins, grandparents or grandchildren work in the same court as judges. There may occur preconditions for doubts concerning the impartiality of the court due to the fact that the advocate is linked with a certain judge of the same court by kinship ties or because he is a spouse of the judge.

The Constitutional Court ruled that Article 26.3 and 26.4 of the Law on the Bar was in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2001-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 22.02.2001 / **e)** 19/99 / **f)** On the right of the prosecutor to appeal to court / **g)** *Valstybės Žinios* (Official Gazette), 18-561, 28.02.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – General interest.
4.7.4.3 **Institutions** – Courts and tribunals – Organisation – Prosecutors / State counsel.

Keywords of the alphabetical index:

Prosecutor's office, requests / Interrogative body, activities, supervision.

Headnotes:

Article 118.1 of the Constitution establishes the functions of prosecutors, i.e. prosecution of criminal cases on behalf of the state, carrying out criminal prosecutions, and supervision of the activities of interrogative bodies. Under the Constitution, only prosecutors may prosecute criminal cases on behalf of the state, carry out criminal prosecutions, and supervise the activities of interrogative bodies.

The procedure for the appointment of public prosecutors and their status shall be established by law. Establishing the status of prosecutors, taking account of the functions of prosecutors entrenched in Article 118.1 of the Constitution, the legislator has the competence to determine the place of prosecutors in the system of state institutions, to establish powers of prosecutors, to regulate the arrangement of prosecutors' activities and procedures, as well as to regulate the professional and other requirements for prosecutors, to establish guarantees of their activities etc. In this area the legislator enjoys discretion within the limits of the Constitution.

Summary:

The petitioner (Šiauliai Regional Court) doubted whether the provision stating that "in cases provided for by laws the prosecutor ... may appeal to court with a petition so that the rights and interests of the state and other persons safeguarded by laws would be protected" of Article 55.1 of the Code of Civil Procedure and Articles 15.2, 15.3 and 32.2.1 of the Law on the Prosecutor's Office, which deal with related questions, were in conformity with the Constitution. The petitioner argued that the functions of prosecutors, i.e. the prosecution of criminal cases on behalf of the state, the carrying out of criminal prosecutions, and the supervision of the activities of interrogative bodies, are established by Article 118.1 of the Constitution and they cannot be expanded.

The Constitutional Court noted that the legislator is entitled to establish the limits of public interest in particular relations, thus, without violating the Constitution, laws may provide for situations and procedures where authorised institutions and officials may defend the public interest in court. The disputed provision of Article 55.1 of the Code of Civil Procedure provides that "in cases provided for by laws" the prosecutor may appeal to court with a petition so that the rights and interests of the state and other persons safeguarded by laws would be protected.

The Court ruled that the disputed provisions were in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2001-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 02.04.2001 / **e)** 18/99 / **f)** On the restoration of citizens' rights of ownership to the land lying in a town / **g)** *Valstybės Žinios* (Official Gazette), 29-938, 04.04.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
 3.16 **General Principles** – Weighing of interests.
 3.17 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Property, restitution in kind / Property, seizure, adequate compensation.

Headnotes:

Article 23 of the Constitution provides that property shall be inviolable, that rights of ownership shall be protected by law, that property may only be seized for the needs of society according to procedure established by law, and that there must be adequate compensation for such seizure.

The legislator has the duty to pass laws protecting owners' rights of ownership from any unlawful encroachment. The Constitution guarantees that no one may seize property in an arbitrary manner not based on law.

The seizure of property for the needs of society is an individual decision concerning the seizure of private property which is made in every concrete case according to procedure established by law.

Article 23.3 of the Constitution indicates the needs of society, for which property may be seized according to the procedure established by law and must be adequately compensated for. These are interests of either the whole or part of society. The state, while implementing its functions, is constitutionally obligated to secure and satisfy such interests. When property is seized for the needs of society, one must strive for the balance between various legitimate interests of society and its members.

The needs of society, for which property is seized under Article 23.3 of the Constitution, are always particular and clearly express the needs of society for

a concrete object of property. Under the Constitution, it is permitted to seize property (with adequate compensation) only for such public needs which would not be objectively met if a certain concrete object of property were not seized.

One must establish fair compensation for the property seized for the needs of society. This provision of Article 23.3 of the Constitution also means that the person whose property is being seized for the needs of society has the right to demand that the established compensation be equivalent in value to the property seized.

Summary:

The petitioner – a group of members of the *Seimas* (parliament) appealed to the Court with the request to investigate whether some provisions of the Law on the Restoration of Citizens' Rights of Ownership to the Existing Real Property (“the law”) were in compliance with the Constitution and with Articles 15 and 21 of the Law on Land, and also with Article 8 of the Constitutional Law on the Subjects, Procedure, Terms, Conditions and Restrictions of the Acquisition into Ownership of Land Plots provided for in Article 47.2 of the Constitution.

The petitioner argued that Article 5.2, 5.3, 5.4, and 5.5 of the law do not provide for the return of the land in kind, which, prior to 1 June 1995, was situated within the territories attributed to towns, to the owners who hold houses or other buildings by the right of ownership. They also argued that it does not provide for the return of land in kind in cases when it is vacant, unused, used to satisfy non-public needs or when it is planned to be used for residential construction, the common use of residents or for other public needs in the future according to planning projects of vacant territories. It is impossible to base the non-return of land in kind on public needs as other persons acquire this land for personal use. Therefore, the petitioner doubted whether Article 5.2, 5.3, 5.4 and 5.5 of the law are in compliance with Article 23.1 and 23.2 of the Constitution. Under the provisions of Article 4 of the Law, in the course of restoration of the rights to the land lying in a rural area, vacant land used for non-public needs or that which is planned to be utilised for residential construction, public use of residents, or public needs in the future, as well as the land, which is used or leased by natural and legal persons or personal enterprises for exploitation of buildings (under construction or already built), buildings in places of rest (under construction or already built) which they hold with ownership right, is returned in kind to the owners, however the land of the same status lying in a town is not returned.

The Court ruled that Article 5.2 of the law conflicts with Article 23.3 of the Constitution, to the extent that it provides that vacant land is not returned in kind if the citizen does not have a residential house or other structure adjoining the land previously held by him with the right of ownership, even though there is not any particular need of society for this vacant land. Article 12.3 of the law conflicts with Article 23.3 of the Constitution to the extent that it provides that the portion of land which remains after the utilised plot of land (not exceeding 1 or 1,5 hectares respectively) adjoining the residential house or other structure has been transferred to the citizen without payment is bought out i.e. not transferred to the citizen even though there is not any particular need of society for this vacant land.

The Court ruled that the other disputed provisions were in compliance with the Constitution and the Constitutional Law.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2001-1-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 12.04.2001 / **e)** 33/99 / **f)** On limitations of acquisition of the permit to keep and bear a hunting weapon / **g)** *Valstybės Žiniuos* (Official Gazette), 33-1108, 18.04.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Weighing of interests.
 4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Hunting, right / Weapon, circulation, control / Weapon, acquisition, permit.

Headnotes:

Under the Constitution, institutions of state power and administration have a duty to ensure public safety and public order, to protect individuals from attempts against their lives or health, to protect human rights and freedoms.

Arms and ammunition may be dangerous to public order and public safety, and to people's lives and health. Therefore, the legislator, taking account of the necessity of ensuring public safety and public order, and protecting human rights and freedoms, is empowered to establish conditions and a procedure of control over arms and ammunition in civil circulation.

Summary:

The petitioner – the Higher Administrative Court – doubted whether Article 19.8.9 of the Law on Arms and Ammunition Control which provides that permits to acquire civil weapons shall not be issued to the persons who “have been entered into police preventive or operational record files” and Items 14.9 and 57.2 of the Rules on Hunting Arms Circulation approved by Resolution no. 436 “On Approving the Rules on Hunting Arms Circulation” of the government were in conformity with the Constitution.

The Court noted that the legislator, taking account of the necessity to ensure public safety and public order, and human rights and freedoms, is empowered to establish conditions and a procedure of arms and ammunition regulation providing for permits for the acquisition of weapons.

The Court ruled that the disputed norms were in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Malta Constitutional Court

Summaries of important decisions of the reference period 1 January 2001 – 30 April 2001 will be published in the next edition, *Bulletin* 2001/2.



Moldova Constitutional Court

Important decisions

Identification: MDA-2001-1-001

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 11.01.2001 / **e)** 1 / **f)** Constitutionality review of Article 183 under the Code of Criminal Procedure / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

2.1.1.4.6 **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.

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

5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

Keywords of the alphabetical index:

Officer, high ranking, definition / Employee, functions of an economic-organisational nature, private sector.

Headnotes:

Under Article 183 of the Code of Criminal Procedure, a high ranking officer is a person who, within a public body, a company, an institution or an organisation, regardless of the type of ownership and legal form of organisation, is granted, provisionally or permanently, under the law, through an appointment, election or by being entrusted with a task, certain rights and obligations in order to discharge the duties of a public authority or a company with administrative or economic liabilities.

A high ranking officer is a person whose appointment and election is regulated by the Constitution and organic laws. Persons to which the aforementioned high ranking officers have delegated their powers are viewed as officials holding a high ranking office as well.

Summary:

The petition was referred to the Court by members of parliament who challenged the constitutionality of Article 183 of the Criminal Procedure Code, in particular the phrase “regardless of the type of ownership”.

After considering the arguments laid down in the complaints, the Court noted that Article 183 of the Criminal Procedure Code defines the notion of a high ranking officer.

The Court held that the phrase in question “regardless of the type of ownership and legal form of organisation” had to be examined within the framework of Article 183 of the Criminal Procedure Code, but that in order to reveal the content of the disputed provisions it was quite appropriate to examine them in the light of Articles 184-189, Chapter VIII of the Code of Criminal Procedure. The offences enshrined in Chapter VIII of the Code of Criminal Procedure could be committed not only within state enterprises, institutions or organisations, but also within commercial organisations and private sector enterprises.

The penal sanction imposed for this kind of offence, pursuant to Article 183 of the Criminal Procedure Code, is applied where these offences were committed by a high ranking officer in a public body or by a person entrusted with rights and obligations with a view to discharging administrative duties, or economic-organisational tasks within a company, institution or organisation, regardless of the type of ownership or the legal form of organisation. Thus, the meaning of Article 183 of the Criminal Procedure Code emphasises that any person who, within a public body, a company, an institution, a state or private organisation, is granted, provisionally or permanently, under the law, through an appointment, election or by being entrusted with a task, certain rights and obligations with a view to discharging the duties of a public body, or of a company with administrative or economic-organisational liabilities, may be held responsible for an offence committed by a high ranking officer.

From the point of view of constitutional regulation, the legitimate provision sanctioned in Article 183 of the Criminal Procedure Code, is deemed to be up-to-date

and is determined by socio-economic facts, as well as by the criminological state of affairs within the state and private sector of the economy.

The arguments brought forward by the legislator in Article 183 of the Criminal Procedure Code, according to which public servants who perform certain functions within a company, institution or organisation from the private sector may also be prosecuted, do not in the Court's point of view run contrary to the Constitution.

The statement made by the applicants, that the fact that a high ranking officer as understood in Article 183 of the Criminal Procedure Code can be held liable for an offence committed goes contrary to Articles 4, 9 and 126 of the Constitution, has no legal basis.

Under Article 126 of the Constitution and Article 8 of the International Covenant on Economic, Social and Cultural Rights, the state is assigned the task of protecting the economic interests of any person, increasing the number of people employed, securing the inviolability of natural and legal persons' investments, including those of foreign persons, and setting up proper conditions for enhancing standards of living.

Within the scope of these regulations, the ruling out of the phrase “regardless of the type of ownership and legal form of organisation” laid down in Article 183 of the Code of Criminal Procedure, without an additional legal ruling may have as a result the curtailing of the legal interests and rights of legal persons and citizens brought together in social organisations, and which pursue a social activity, a business related activity, or any other legal activity.

This state of facts can lead to the appearance of illegal deeds on the part of high ranking persons, which might be considered as in contradiction with Articles 16 and 54.1 of the Constitution, Article 7 of the Universal Declaration of Human Rights, and Article 26 of the International Covenant on Civil and Political Rights.

Exercising its power of constitutional jurisdiction enforcement, the Court held that Article 183 of the Code of Criminal Procedure was constitutional.

Languages:

Romanian, Russian.



Identification: MDA-2001-1-002

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 13.02.2001 / **e)** 3j / **f)** Constitutionality review of Articles 82 and 223 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

4.7.4.3 **Institutions** – Courts and tribunals – Organisation – Prosecutors / State counsel.

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

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

5.3.13.2.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts – *Habeas corpus*.

5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Suspect / Defendant / Criminal investigator / Prosecutor / Decision / Cancellation, change, preventive measure / Arrest, warrant.

Headnotes:

Article 82 of the Code of Criminal Procedure provides that, where necessary, a preventive measure can be either cancelled or replaced by a more or less severe measure, where this is required by the circumstances of the case, and is put into operation through a reasoned decision of the person who carries out the penal investigation, the person in charge of the penal investigation or the prosecutor, or through a reasoned decision of a court of law.

Under Article 223 of the Code of Criminal Procedure, during the hearing a court of law is entitled through a decision to introduce, change or cancel a preventive measure imposed on an indicted person.

Summary:

During a hearing in the court of appeal the prosecutor and the counsel for the defence submitted a request to initiate a proposal to the Supreme Court of Justice to petition the Constitutional Court.

The Supreme Court of Justice lodged a complaint with the Court seeking a review of the constitutionality of Articles 82 and 223 of the Code of Criminal Procedure.

The contested Articles 82 and 223 of the Code of Criminal Procedure regulate the enforcement of preventive measures.

The person who conducts the penal investigation or the person in charge of the penal investigation is not allowed to cancel or change the preventive measure imposed by the prosecutor, or on his/her behalf, without the prosecutor's consent.

A preventive measure which has been decided by a court of law may not be cancelled or changed by the person who conducts the penal investigation, the person in charge of the penal investigation or the prosecutor.

A preventive measure in the form of an arrest warrant may be cancelled or changed by the judge upon a motion by the person who conducts the penal investigation, the person in charge of the penal investigation, the prosecutor, the suspect or the defendant, the defence counsel or the legal representative of the suspect or the defendant. Considering the motion, the judge issues a decision cancelling or changing the arrest warrant, or refusing to revoke or change it.

Where the period of detention fixed by the judge in the arrest warrant or in the decision on the extension of the period of detention has expired, and a request for a new extension has not been submitted, the prosecutor issues without delay the release warrant of the detained person.

Pursuant to Article 223 of the Code of Criminal Procedure, during the hearing a court of law is entitled, through a decision, to introduce, change or revoke the preventive measure imposed on the defendant.

Individual freedom and personal safety are inviolable (Article 25.1 of the Constitution). The International Covenant on Civil and Political Rights provides that any individual person has the right to liberty and security. No one shall be subjected to arbitrary arrest

or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The constitutional right to individual freedom and physical integrity presupposes that no one can be detained in custody or arrested unless on the basis of an arrest warrant.

The defence of individual freedom and physical integrity is secured by the constitutional right to appeal and verify in the relevant court of law the lawfulness of the judicial decisions on the enforcement of the arrest warrant (Article 20.1 of the Constitution – free access to justice).

Any problems which arise during the hearing are settled by a decision delivered by a court of law (Article 219.1 of the Code of Criminal Procedure).

The contested Articles 82 and 223 of the Code of Criminal Procedure which provide for the issue or replacement of an arrest warrant, but which do not allow the possibility to appeal the judgments issued by the lower court on the enforcement and changing of the arrest warrant, are in breach of the constitutional rights and freedoms of the citizens.

Exercising its power of constitutional jurisdiction enforcement, the Court held that the parts of Articles 82 and 223 of the Code of Criminal Procedure which, pursuant to the meaning ascribed by the judicial experience, do not provide the right to appeal the decisions on the issue and replacement of the preventive measure are unconstitutional.

Languages:

Romanian, Russian.



Identification: MDA-2001-1-003

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 19.04.2001 / **e)** 21 / **f)** Decision on the constitutionality of Article 30.5 under the Law on the Public Service no. 443-XIII of 4 May 1995 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

4.6.11.4 **Institutions** – Executive bodies – The civil service – Personal liability.

5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

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

5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

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

Keywords of the alphabetical index:

Public body, head, obligation to denounce, offence / Civil servant, salary, suspension / Civil servant, function, suspension.

Headnotes:

The head of a public body must dismiss a public servant from office and suspend the public servant's salary in response to a decision passed by the bodies of penal investigation (Article 30.5 of the Law on the Public Service).

Article 135 of the Criminal Procedure Code stipulates that where a high ranking officer has been charged with an offence and has to be dismissed from office, the person in charge of the penal investigation issues to this end a writ which subsequently has to be sanctioned by the prosecutor or by his/her deputy.

The issued writ is sent off for execution to the defendant's place of work.

Summary:

The petition was referred to the Court by a group of members of parliament challenging the constitutionality of Article 30.5 of the Law on the Public Service, which provides that where a public servant's conduct while discharging his/her duties, displays elements of an offence, the head of the public body is under an obligation to provide the bodies of penal investigation with access to the relevant files, and following their decision to dismiss from office the public servant and suspend his/her salary.

In the applicants' opinion the aforesaid provisions are contrary to the principle of the presumption of innocence, as well as to Articles 6 and 114 of the

Constitution on the separation of state powers and the principle that justice can only be carried out by the courts of law. The principle of equality before the law is violated as well.

The period during which the public servant is removed from office cannot exceed that laid down by the law for the penal investigation or the case examination (Article 30.6 of the Law on the Public Service). The temporary suspension of the public servant from office is not viewed as a penal sanction, as claimed by the applicants, but rather, a measure imposed by the body of penal investigation aimed at depriving the public servant of the possibility of pursuing any activity related to an offence in the exercise of his/her duties. The aforesaid measure, as provided for by the law, is also imposed with a view to ensuring the proper conduct of the penal investigation. It is enshrined within the constitutional provisions and it does not run counter to the principle of the presumption of innocence.

Taking into account the important tasks of the public service and the fact that the public servant's office implies rights, obligations and special responsibilities, the Court held that the suspension of the public servant from office for a preliminary investigation does not infringe the principle of equality before the law, and that the contested ruling does not restrict free access to justice, since the decision issued by the body of penal investigation and the prosecutor concerning the dismissal from office can be appealed in a court of law.

Simultaneously, the public servant enjoys certain guarantees. If, after the penal investigation the decision on the dismissal from office is found to be unlawful, the latter is rendered null and void, and the public servant is paid the monthly average salary for the whole period of suspension (Article 30.7 of the Law on the Public Service). The public servant also enjoys the same guarantees on the basis of the law on ways of compensating for damage caused by the illegal actions of bodies of penal and preliminary investigation, the prosecutor's office and courts of law, which foresees that, in the case of a penal investigation or trial, pecuniary and non-pecuniary damages can be compensated whether the latter was caused to a natural person following an illegal dismissal from office, or where the case was discontinued (Articles 1 and 4 of the same law).

Exercising its power of constitutional jurisdiction implementation, the Court held that Article 30.5 of the Law on the Public Service was constitutional.

Languages:

Romanian, Russian.



Netherlands Supreme Court

Summaries of important decisions of the reference period 1 January 2001 – 30 April 2001 will be published in the next edition, *Bulletin* 2001/2.



Norway Supreme Court

Statistical data

1 January 2000 – 31 December 2000

Total number of decisions: 143

- Civil cases: 75
- Penal cases: 68

Important decisions

Identification: NOR-2001-1-001

a) Norway / **b)** Appeals Selection Committee of the Supreme Court / **c)** / **d)** 19.01.2001 / **e)** 2000/1219 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2001, 85 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Surtax, administrative.

Headnotes:

Administrative imposition of surtax is no obstacle to subsequent criminal proceedings.

Summary:

Despite statements made by the Supreme Court in a plenary decision of 23 June 2000, the Court of Appeal dismissed a criminal prosecution against two private

individuals charged with breach of tax legislation on the grounds that it would be contrary to Article 4.1 Protocol 7 ECHR – the *non bis in idem* principle – to convict them of a criminal offence after the tax authorities had already imposed an administrative surtax on them.

The prosecution appealed to the Appeals Selection Committee of the Supreme Court, which found that the Court of Appeal had erred in its application of law. The Appeals Selection Committee referred to the wording and purpose of Article 4.1 Protocol 7 ECHR. It also referred to the intention behind the two-track penalty system upon which Norwegian law is based, and which assumes that both criminal penalties and administrative surtaxes can be imposed for the same count of tax evasion. It also alluded to statements of the Supreme Court in its plenary decision of 23 June 2000. Further, it referred to a decision of the Swedish Supreme Court of 29 November 2000 which concerned the same issue as in the present case, where the Swedish Supreme Court concluded that the administrative imposition of surtax was no obstacle to subsequent criminal proceedings. Reference was also made to the decision of the European Court of Human Rights in *R.T. v. Switzerland* (appl. no. 31982/96) wherein R.T.'s complaint was found to be “manifestly ill-founded”.

The Appeals Selection Committee concluded that criminal proceedings could be pursued in the Court of Appeal.

Languages:

Norwegian.



Identification: NOR-2001-1-002

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.03.2001 / **e)** 2000/793 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2001, 428 / **h)** CODICES (Norwegian).

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.

4.6.11.1 **Institutions** – Executive bodies – The civil service – Conditions of access.

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.

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

Keywords of the alphabetical index:

Criminal record, access / Remedy, effective / Compensation, requirement.

Headnotes:

The unauthorised gathering of information from the Register of Criminal Records constituted a breach of Article 8 ECHR. The establishment of the fact of breach was sufficient to satisfy the right to an effective remedy in Article 13 ECHR. There was no requirement in Article 13 ECHR for the court had to make an award of compensation.

Summary:

In 1997, A. applied for the post of head of the execution and enforcement department of a District Court. After an interview with A., the chief judge suspected that A. had a criminal record. He asked A. whether this was the case, but A. refused to answer. The chief judge then contacted the Court Department of the Ministry of Justice. He spoke with a civil servant who was under the impression that the Ministry had the necessary authority to obtain information from the Register of Criminal Records. The civil servant then contacted KRIPOS, the National Criminal Investigation Service, and was given information over the telephone of the details registered against A's name. She passed the information on to the chief judge over the telephone, who in turn passed the information on to the appointments committee. A. was not given the job.

In the summer of 1997, A. took the matter up with the Ministry of Justice. In its reply, the Ministry acknowledged that it did not have the requisite authority to obtain information from the Register of Criminal Records, and apologised for what had happened. In the autumn of 1998, A. filed a civil suit against the chief judge and the Ministry of Justice on behalf of the State, claiming damages for economic and non-economic loss. In a decision of 15 March 2000, the Court of Appeal found in favour of the chief judge and

the State. The chief judge died just seven days later. A. appealed against the decision of the Court of Appeal, directing the appeal against both the state and the chief judge's estate. The Appeals Selection Committee granted leave to appeal only in so far as the appeal was directed against the State, and only in respect of the claim for damages for non-economic loss. In the Supreme Court, the claim for damages for non-economic loss was based on Sections 3.5 and 3.6 of the Damages Act and Articles 8 and 13 ECHR. In the Supreme Court, the state argued that the authority that the civil servant at the Ministry of Justice believed she had to obtain information from the Register of Criminal Records was not tenable, but that the Ministry had an alternative tenable authority.

The Supreme Court found that the Register of Criminal Records contains sensitive information and that the gathering and transmission of information from the Register must be deemed to be an interference in the right to respect for private life protected by Article 8 ECHR. Reference was made to the decision of the European Court of Human Rights 26 March 1987 in *Leander v. Sweden* (Series A, no. 116, *Special Bulletin ECHR* [ECH-1987-S-002]) paragraph 48. The pertinent issue was therefore whether the interference was justified in accordance with Article 8.2 ECHR.

The Supreme Court found that the Ministry did not have the necessary authority to obtain information from the Register of Criminal Records, and that the Ministry's action therefore constituted a breach of Article 8 ECHR. However, the Court was of the opinion that the transmission of the information did not constitute an unlawful defamation, since the purpose of the action was to provide the appointments committee with the best possible basis upon which to determine whether A. was a suitable candidate for the post, and the Ministry had proceeded as cautiously and carefully as possible. On these grounds, the Court found that the state was not liable to pay damages for non-economic loss pursuant to Section 3.6 of the Damages Act. Nor was it proven on a balance of probabilities that there was causation between the Ministry's unauthorised action and damage to A's person, and the Court therefore also found in favour of the state in the claim for non-economic loss pursuant to Section 3.5 of the Damages Act. In view of the Court's finding, it was unnecessary to consider the scope of the State's enterprise liability pursuant to these provisions.

With regard to the claim for compensation pursuant to Article 13 ECHR, the Supreme Court found that in order to satisfy A's right to an effective remedy, it was sufficient that the Supreme Court had made a finding that there had been a breach of the Convention.

There was therefore no cause to award damages pursuant to this Article.

Although the appeal was unsuccessful, the Supreme Court awarded A. costs for that part of the case concerning the Ministry's authority to obtain information from the Register of Criminal Records, and whether as a consequence of this had been a breach of the European Convention on Human Rights. The Court found that this was necessary in order to give A. an effective remedy in respect of the question of whether there had been a breach of the Convention.

Cross-references:

- *Leander v. Sweden*, 26.03.1987, *Special Bulletin ECHR* [ECH-1987-S-002].

Languages:

Norwegian.



Identification: NOR-2001-1-003

a) Norway / b) Supreme Court / c) / d) 28.03.2001 / e) 2001/83 / f) / g) *Norsk Retstidende* (Official Gazette), 2001, 468 / h) CODICES (Norwegian).

Keywords of the systematic thesaurus:

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

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

2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.

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

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

Keywords of the alphabetical index:

Prosecution, unjustified / Criminal procedure, hearing.

Headnotes:

A person who claims damages for unjustified prosecution is entitled to an oral hearing pursuant to Article 6 ECHR.

Summary:

A. was arrested on 5 September 1997, suspected of being in possession of alcoholic drinks in breach of Section 10.1.2 of the Alcohol Act. The Court of Examination and Summary Jurisdiction ordered his release from custody. The prosecution appealed to the Court of Appeal, and a stay of execution was ordered. On 10 September 1997, he was again remanded in custody by the Court of Appeal, initially subject to a prohibition against receiving mail and visitors. The prosecution agreed to his release on 2 October 1997. In May 1999, the prosecution dropped the case due to lack of evidence.

A. then brought a claim for damages for economic and non-economic loss on the grounds of unjustified prosecution. After having considered the written proceedings, the Court of Examination and Summary Jurisdiction found in favour of the State. A. appealed, and the Court of Appeal quashed the decision of the lower court on the grounds that A's counsel had not had sufficient opportunity to prepare the case before the court had reached its decision. At the rehearing in the Court of Examination and Summary Jurisdiction, A. requested oral proceedings. Section 449.3 of the Criminal Procedure Act provides that the court may decide to conduct oral proceedings concerning such claims, and A's request was initially granted but later turned down by a court order. Thereafter, A. limited his claim to a claim for compensation pursuant to Section 444 of the Criminal Procedure Act. The Court of Examination and Summary Jurisdiction again found in favour of the State. A. appealed to the Court of Appeal and claimed that the order of the Court of Examination and Summary Jurisdiction should be quashed on the grounds of a procedural error, and that the case referred back to the lower court. Alternatively, A. claimed that the Court of Appeal should pronounce a declaratory judgment for damages. The Court of Appeal dismissed the appeal. In dealing with the alternative claim, the Court of Appeal stated that, like the Court of Examination and Summary Jurisdiction, it considered it unnecessary to conduct oral proceedings. A. appealed against the finding of the Court of Appeal to the Appeals Selection Committee of the Supreme Court.

The jurisdiction of the Appeals Selection Committee was limited to trying the Court of Appeal's interpretation of the law and procedure. A's appeal concerned the Court of Appeal's interpretation of the law. A. asserted that the Court of Appeal had erred in its interpretation of Section 449.3 of the Criminal Procedure Act, Section 3 of the Human Rights Act, and Article 6.1 ECHR. Section 449 was subordinate to the minimum requirements contained in Article 6.1 ECHR. The primary rule in Norwegian law whereby written proceedings shall be the norm, is contrary to Article 6.1 ECHR, which entitles a person who brings a claim for damages of the kind in question here, to oral proceedings.

The Appeals Selection Committee found that the Court of Appeal had correctly assumed that the right to a fair trial was fundamental in cases concerning damages for unjustified prosecution. In considering whether oral proceedings should be held in connection with a claim pursuant to Section 449.3 of the Criminal Procedure Act, the objective was to ensure that the case was dealt with fairly and properly. This had been expressed in various ways in the preparatory stages of the Act and in connection with other law reforms. The Appeals Selection Committee stressed that, in recent years, greater emphasis had been placed on the importance of oral proceedings in connection with such claims. Nevertheless, the Committee conceded that the Criminal Procedure Act had not as yet been interpreted such that it entitles a person who makes such a claim to oral proceedings in connection with the claim.

In the view of the Appeals Selection Committee, however, Article 6 ECHR and the practice of the European Court of Human Rights entitled the claimant to oral proceedings. The Committee pointed out that, in Norwegian law, a claim for damages for unjustified prosecution is by nature a civil claim, notwithstanding that it is dealt with in accordance with the rules of criminal procedure. The Committee found that such a claim must be deemed to be a "civil right" within the meaning of the Convention. The European Court of Human Rights had arrived at the same conclusion for similar claims in its Judgment of 21 March 2000 in *Asan Rushiti v. Austria* (paragraphs 22 and 23) with references to earlier decisions.

Pursuant to the first sentence of Article 6.1 ECHR, a person who makes such a claim is entitled to a "public hearing". The Appeals Selection Committee found that the Convention's requirement of a public hearing entails that the hearing must be held in open court with oral proceedings, except in cases covered

by the rule of exception in Article 6.1 ECHR, second sentence.

The Appeals Selection Committee referred to several decisions of the European Court of Human Rights where the Court had found that there had been a breach of the right to a public hearing, including *Rushiti*, which also referred to the Judgment of 24 November 1997 in *Werner v. Austria*.

The Committee underlined that the right to oral proceedings was particularly important in cases such as this where charges were dropped in the course of the investigation, so that there were not even oral proceedings in the criminal case, and additionally where oral proceedings had been requested.

The Committee remarked that the European Convention of Human Rights is directly applicable as a matter of Norwegian law pursuant to Section 2 Human Rights Act no. 30 of 21 May 1999. In the event of conflict, the Convention shall be given precedence over other legislation, (Section 3 of the Act). The right to oral proceedings can therefore be founded directly upon the Convention. However, the Committee pointed out that the rule whereby the provisions of the Criminal Procedure Act shall apply subject to such limitations as are recognised in international law or which derive from any agreement made with a foreign State, was introduced by statutory amendment to the former Criminal Procedure Act as early as 13 April 1962 and is now embodied in Section 4 of the current Act. Thus, even though Section 449.3 of the Criminal Procedure Act is phrased as a dispensable rule (the court "may" decide to conduct oral proceedings), it must be interpreted such that the court is obliged to conduct oral proceedings, since the applicant is entitled to oral proceedings pursuant to Article 6.1 ECHR.

The interlocutory orders of both the Court of Appeal and the Court of Examination and Summary Jurisdiction were quashed on the grounds that the respective courts had erred in their application of the law.

Languages:

Norwegian.



Poland Constitutional Tribunal

Statistical data

1 January 2001 – 30 April 2001

I. Constitutional review

Decisions:

- Cases decided on their merits: 18
- Cases discontinued: 2

Types of review:

- Ex post facto review: 20
- Preliminary review: 0
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 15
- Courts referrals ("legal questions"), Article 25 of the Constitutional Tribunal Act: 5

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 17
- Cases on the legality of other normative acts under the Constitution and statutes: 3

Findings:

- Statutes in question declared wholly or partly unconstitutional: 5
- Provisions declared compatible with the Constitution: 15

Precedent decisions: 3

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 20
- Motions requesting such interpretation rejected: 0

Judge Ferdynand Rymarz finished his term of office in February 2001. The parliament appointed judge Janusz Niemcewicz on his place.

Important decisions

Identification: POL-2001-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.11.2000 / **e)** SK 18/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7, item 258; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 101, item 1091 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Education, access / Education, higher education, system / Education, free / Education, fee.

Headnotes:

Provisions of the Law on Higher Education interpreted as an authorisation for the introduction of fees for certain studies are compatible with the right to education guaranteed by the Constitution and the constitutional principle of free education in public schools.

Summary:

The Tribunal examined the case as a result of a constitutional claim in which it was argued that the provisions of the Law on Higher Education (“the law”) introduced fees for education other than daily studies, and thus limited the right to education and access to higher education.

The Tribunal found that education at public schools constitutes one of the elements of the right to education guaranteed by the Constitution. The guarantee of free education in public high schools cannot be, however, understood as absolute and unlimited. Access to free education in high schools must be limited and take into account the availability of public finances. In the Tribunal’s opinion the law cannot be interpreted as a rule that definitely prevents the possibility of studies in any other mode (for example studies in tuition courses).

The disputed provisions of the law providing for fees constituted one of the sources of obtaining finances for a university, and excluded the levying of fees for

lessons in the daily system of studies at public universities. It meant that public high schools are authorised to collect fees for studies in the tuition course system, evening studies system and the university extension system. The Tribunal noted that the provisions examined cannot be understood as granting public schools a freedom to introduce fees for lessons to the extent to which costs are covered from public measures being at the school’s disposal. In the Tribunal’s opinion, the authorisation for the collection of fees for lessons only applies to those forms of activity of the school which exceed the basic scope of activity of a high school. The Tribunal found that the guarantee of free education in public high schools must be weighed up alongside other constitutional values such as the right to education, or common access to the education system. The guarantee of free education in public high schools cannot be understood in a way which would result in a conflict with the basic constitutional right to education. The fulfilment of this right may have different forms including fee-paying education services.

Languages:

Polish.



Identification: POL-2001-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04.12.2000 / **e)** K 9/2000 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 8, item 294; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 109, item 1164 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Social security / Activity, profitable / Pensioner.

Headnotes:

Provisions of the Law on Social Security obliging pensioners performing certain forms of profitable activity to pay pension insurance are concordant with constitutional equality and social justice.

Summary:

The Tribunal examined the case as a result of a motion filed by the Ombudsman, who challenged the provisions of the Law on Social Security ("the law") obliging pensioners carrying out some form of profitable activity to pay pension security. The Ombudsman claimed that the foregoing provisions are of a discriminatory nature.

The Tribunal affirmed that the equality rule orders all subjects of law who have the same substantial features to be treated equally. It meant that there should be neither favourable nor discriminatory treatment. At the same time, the foregoing rule assumes different treatment of subjects of law who do not have common substantial features. The Tribunal mentioned that the obligation concerning pension security covers all persons receiving income from work and some categories of persons receiving income from public measures. It derives from a construction of the social security obligation that the undertaking of profitable activity constitutes the relevant feature of addressees of the challenged provision. This feature is also relevant for professionally active pensioners. In the Tribunal's opinion, all subjects of law who share the same substantial features are treated equally. Differentiation of the legal situation of similar subjects is more likely to be treated as concordant with the Constitution if it complies with the principle of social justice.

The Tribunal held that specific features of each form of professional activity and different needs of persons performing them constitute grounds for differentiation of the pension system for certain professional groups. Differences in the security status of citizens are justified and do not conflict with the principles of equality and social justice.

Cross-references:

- Decision of 11.02.1992 (K 14/91);
- Decision of 03.09.1996 (K 10/96), *Bulletin* 1996/3 [POL-1996-3-013];
- Decision of 25.02.1997 (K 21/95), *Bulletin* 1997/1 [POL-1997-1-006].

Languages:

Polish.

*Identification:* POL-2001-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.12.2000 / **e)** K 10/2000 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 8, item 298; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 114, item 1196 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Weighing of interests.
 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons.
 5.2 **Fundamental Rights** – Equality.
 5.3.37.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Ownership, premises / Land, perpetual joint use.

Headnotes:

Provisions of the Law on the Transformation of a Perpetual Usufruct Right into an Ownership Right provided for the transformation of the perpetual usufruct right in a plot of land connected with the ownership of premises only if all perpetual joint users become exclusive co-owners of the whole property. These provisions were incompatible with the constitutional equality right.

Summary:

The Tribunal examined the case as a result of a motion filed by the Ombudsman, who claimed that the relevant provisions violated the constitutional equality rule because they differentiated between perpetual joint users of the land.

The Tribunal recalled that the equality rule means all subjects of the law with the same substantial features should be treated equally. However, a deviation from

equal treatment does not, in itself, mean the impugned provisions are unconstitutional.

It is clear, in the Tribunal's opinion, that subjects with common substantial features existed in this case. The group covered all natural persons who own premises (purchased from the state Treasury or local self-government bodies), where their ownership right is connected with perpetual joint use of a land. The differentiation introduced by the legislator consists in the fact that those who file a motion for the transformation of the perpetual usufruct right will be able to transform that right into an ownership right, whereas other natural persons complying with these conditions will not be able to do it because they would not become exclusive co-owners of the whole property.

In the Tribunal's opinion there are no legal obstacles which would limit the possibility of the existence of co-ownership of property between natural persons and the state Treasury or local self-government bodies. The Tribunal also does not see any direct and necessary relation between the need for the protection of ownership rights and the independence of units of local self-government, and introducing a differentiation within a group of natural persons owning premises and entitled to a share in the perpetual usufruct of the land. Only this kind of relation, in the Tribunal's opinion, would justify an allegation of breach of the constitutional equality right.

Cross-references:

- Decision of 05.11.1997 (K 22/97), *Bulletin* 1997/3 [POL-1997-3-023];
- Decision of 12.05.1998 (U 17/97);
- Decision of 12.12.1994 (K 3/94).

Languages:

Polish.



Identification: POL-2001-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.01.2000 / **e)** SK 30/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 1, item 3; *Dziennik Ustaw*

Rzeczypospolitej Polskiej (Official Gazette), 2001, no. 7, item 63 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Civil partnership / Partnership, benefit, performance / Tax, partners' taxation, rules.

Headnotes:

Provisions of the Law on the Income Tax of natural persons, excluding remuneration and other benefits paid to one of the partners of a civil partnership (or a spouse of a partner) for work performed for the benefit of the partnership are compatible with the constitutional equality right and the right to freedom of work.

Summary:

The Tribunal examined the case as a result of a constitutional claim.

The Tribunal recalled that limitations to the right to freedom of work can be introduced by law. However, limitations must be both necessary and pursue the protection of constitutional values. In the Tribunal's opinion, the challenged provisions do not limit the right to freedom of work directly. An employment contract between the partnership and one of the partners or his/her spouse is valid and legally effective. The challenged provisions only describe the tax consequences of performing work by one of the partners or his/her spouse for the benefit of the partnership and make employment of such persons less beneficial than employment of third persons under the same conditions. In the Tribunal's opinion, this kind of limitation is not excluded by the Constitution.

With respect to the constitutional equality rule, the Tribunal recalled that equal persons should be treated equally and similar persons treated similarly. In the Tribunal's opinion, there is no similarity in the tax situation of a partner (or his/her spouse) and a third person performing work for the benefit of the

partnership. Incomes from the participation in a company without legal personality are taxed separately in relation to each partner, according to his participation. The partner performing work for the benefit of the civil partnership, according to tax law, acts directly to achieve his/her own profit. This is not the case in relation to third persons.

The challenged provisions are addressed to all partners and all partners are taxed according to the same rules. The fact that, in practice, the foregoing regulation is used only in relation to some of the partners of the civil partnership does not change the assumption that it covers all its addressees to the same extent.

Cross-references:

- Decision of 16.12.1997 (K 8/97);
- Decision of 12.05.1998 (U 17/97);
- Decision of 20.12.1999 (K 4/99), *Bulletin* 2000/1 [POL-2000-1-003].

Languages:

Polish.



Identification: POL-2001-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.01.2001 / **e)** K 17/2000 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 1, item 3; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 11, item 90 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.5 **General Principles** – Social State.
- 3.16 **General Principles** – Weighing of interests.
- 4.10.7 **Institutions** – Public finances – Taxation.
- 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.
- 5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social security system / Gross remuneration.

Headnotes:

The legislator had not exceeded the freedom to impose financial burdens on a citizen by the introduction of an obligation on employers to award a universal increase in remuneration as it was acting in accordance with the rules of democracy and freedom of economic activity and did not limit the ownership right of employers.

Summary:

The Tribunal examined the case as a result of a motion filed by the Confederation of Polish Employers, which claimed that the new rules on social security system violate the rule of social justice, since their introduction results in unexpected increases of employers' costs. In the applicant's opinion, an automatic and universal increase of income from work, independently from any distinction between employees, for example on the basis of their qualification, was also unacceptable.

The Tribunal recalled that the Law on the Social Security System introduced new rules of financing social security. Instead of uniform social insurance premiums transferred by the employer on behalf of employees to the Social Insurance Institution, four new kinds of social insurance were introduced: pensions, retirement pay, sickness and accident benefits. The employer pays part of the social security premium and the employee pays the other part from his gross pay.

In the Tribunal's opinion, an analysis of the introduced changes demonstrates that there is not sufficient justification for the applicant's claim that the introduction of gross remuneration resulted in unreasonable pressure on employers. The employer's obligations towards the employee cannot be limited to a payment of monthly remuneration. Such obligations as the employee's social security, which covers the costs of the social security reform system, so long as the scope of the costs does not violate the constitutional rights of employees, also constitutes an obligation of the employer towards the employee.

The applicant also claimed that the challenged provisions violate economic freedom, which constitute a fundamental basis of a social market economy. However, he omits the fact that the Constitution provides for three bases of the social market economy: freedom of economic activity, private

property and solidarity, dialogue and co-operation of the social partners. These values are treated by the legislator as complementary. It is not sufficient to claim a violation of any one of these constitutional values. It is necessary to check whether and to what extent the violation has been made in order to maintain a necessary balance between the remaining constitutional values.

Cross-references:

- Decision of 11.02.1992 (K 14/99).

Languages:

Polish.



Identification: POL-2001-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 31.01.2001 / **e)** P 4/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy* (Official Digest), 2001, no. 1, item 5; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 14.02.2001, item 91 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
 3.10 **General Principles** – Certainty of the law.
 3.19 **General Principles** – Reasonableness.
 5.2 **Fundamental Rights** – Equality.
 5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.

Keywords of the alphabetical index:

Farm, agricultural / Succession, rules / Successor, equal treatment.

Headnotes:

Provisions of the Civil Code limiting the circle of statutory successors inheriting an agricultural farm, in so far as they relate to estates transferred after the date of the announcement of this decision of the Constitutional Tribunal in the Journal of Laws, are

incompatible with the constitutional protection of the right to succession and ownership.

Summary:

The Tribunal examined the case as a result of questions of civil courts examining cases concerning the confirmation of an acquisition of an estate, and as a result of a motion of the Ombudsman. The questions also related to provisions with a binding force that had already expired but were still used in relation to estates transferred before the entry into force of the provisions of the Civil Code in its current wording.

According to the challenged provisions, a circle of statutory successors of agricultural farms may be narrower than a circle of entities inheriting a particular estate on the basis of general rules, and it may also cover persons who are not entitled to the statutory succession of the rest of the particular estate. In the Tribunal's opinion, the fact that different persons are entitled to the inheritance of an agricultural farm from those entitled to inherit the rest of the property, especially where members of the same family have an entitlement, is not a breach of the Constitution. The legislator cannot, however, violate the rule of equal legal for the protection of all successors.

In the case of the challenged provisions, the following conditions provided by the Constitution have been breached. First, the provisions in question result in the unequal treatment of successors. This occurs not only to statutory successors but also refers to the different treatment of statutory successors in relation to successors inheriting on the grounds of a last will. Second, the circle of persons appointed by the legislator is not based on grounds concordant with the Constitution. The Tribunal mentioned that the challenged provisions do not lead to a constitutionally justified aim, i.e. to assure a particular size of farm reasonable and economic development. Third, the adopted resolution deprives statutory successors of equal protection, without any relevant justification. The division of an estate into an agricultural farm and other uses result in the unequal treatment of both groups with respect to property issues.

While appraising the compliance of the challenged provisions with the Constitution, the Tribunal had to decide whether its decision could result in cancellation of the substantive effects of the provisions which took place before this decision of the Tribunal. Here the Tribunal followed the Polish Succession law principle, that a successor acquires the estate, by virtue of the law, on the moment of the death of the testator. Additionally, the interim provision says that the acquisition of an estate is subject to the binding

law at the moment of the death of the testator, it being irrelevant when court decisions confirming an acquisition of the estate were issued. An approach that a new law, entering into force after the transfer of the estate is effective in relation to a description of a circle of the successors, or to the amounts of their shares, would lead to a violation of property rights of persons being successors according to the provisions of law binding at the moment of the transfer of the estate. The Tribunal emphasised that provisions of the Constitution referring to ownership and other property rights protect the rights acquired through succession.

The Tribunal also considered the effect of its decision that the challenged provisions were incompatible with the Constitution before the announcement of the Decision in the Journal of Laws. The Tribunal stated that an appraisal of estates transferred before the foregoing date according to the challenged provisions would lead to a conflict with constitutional rules protecting the aforementioned values, in particular, legal certainty, and confidence in the law. The Tribunal took into account the practical consequences of the ascertained discordance, which are sufficient especially in a situation where a person being a successor according to the impugned provisions has already taken over the agricultural farm. Thus, the Tribunal decided to refer its decision to a specific period of time, in which the challenged provisions cannot be eliminated from the legal order.

Cross-references:

- Decision of 25.02.1999 (K. 23/98), *Bulletin* 1999/1 [POL-1999-1-005].

Languages:

Polish.



Identification: POL-2001-1-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.02.2001 / **e)** K 27/2000 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 29; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 12, item 99 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Weighing of interests.
- 3.17 **General Principles** – General interest.
- 4.6.9.2.2 **Institutions** – Executive bodies – Territorial administrative decentralisation – Structure – Municipalities.
- 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.

Keywords of the alphabetical index:

Development planning / Land, use, plan / Land ownership, limitation.

Headnotes:

Provisions of the act amending the Planning Development Law introducing the possibility of the determination of plots of land to be used for the construction of multi-storey buildings in a local plan are compatible with the admissible limitations of rights and freedoms provided for in the Constitution.

Summary:

The case was examined before the Tribunal as a result of a motion filed by the President, who claimed that the amendments to the Development Planning Law create a number of situations in which an ownership right, irrelevant of its type, can be limited as a result of the adoption of a local plan.

The Tribunal found that the challenged provisions provide for the possibility of a determination of plots to be used for the construction of multi-storey buildings in a local plan. Municipal authorities may decide not to exercise this power and not destine any of the plots for the construction of multi-storey buildings. The new provisions do not significantly change the freedom of municipal authorities to determine the content of the local plan. The legal situation of an owner of property located on an area not covered with by plan and owners of properties located on plots generally designated by the plan for trade and services use may be changed.

The Tribunal emphasised that the Development Planning Law still assures the municipal authority a wide freedom to exercise their planning powers. The Tribunal did not agree with the applicant's opinion, that an interference of public authorities in the ownership right, with the purpose of counteracting the negative results of particular actions on the labour market, communication, existing trade networks and

for the purposes of satisfying the needs and interests of consumers is not covered by values mentioned in the Constitution. In the Tribunal's opinion, the interference caused by the aforementioned serves the protection of rights and freedoms of others. In the instant case, the applicant has not proved that limitations of the ownership right introduced by the challenged provisions go beyond the scope of admissible limitations of freedoms and rights provided by the Constitution.

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].

Languages:

Polish.



Identification: POL-2001-1-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.02.2001 / **e)** K 19/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 30; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 14, item 143 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.15 **General Principles** – Proportionality.
 3.17 **General Principles** – General interest.
 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Fiscal control / Telecommunication, duty to provide.

Headnotes:

Provisions of the Law on Fiscal Control, in so far as they impose on the controlled entity a duty to perform activities described in the Law, are discordant with the constitutional principles of proportionality and legal certainty.

Summary:

The Tribunal examined the case as a result of a motion filed by the Ombudsman. He claimed that as a consequence of the binding force of the provisions in question, a new rule providing for liability for citizens in the costs of public administration activities when the creation of such costs were independent of the citizen's will and created without his fault has been introduced.

The Tribunal recalled that limitations of constitutional rights and freedoms can only be introduced by law and only in situations when it is necessary for security, public order or the protection of the environment, health, public morality or the rights and freedoms of others. These limitations cannot, however, interfere in the nature of rights and freedoms. The Tribunal considered whether the challenged "gratuitous duties" complied with these conditions.

In the Tribunal's opinion, the obligation to provide telecommunication does not directly correspond with the tax obligation. This results in the participation of a citizen in the costs of public administration activities in cases when the creation of such costs were independent from the citizen's will and even made without his fault. Additionally, the concepts of "means of telecommunication" and "technical means" are too general and do not allow for their precise and unequivocal interpretation. The same applies to the duty of gratuitous copying of documents, which should be treated as an interference. Wording of both the gratuitous duties, i.e. "availability of the means of the telecommunication" and "copying the documents" has been considered by the Tribunal as inconsistent with the constitutional principles of proportionality and legal certainty.

Cross-references:

- Decision of 19.06.1992 (U 6/92);
- Decision of 10.11.1998 (K 39/97), *Bulletin* 1998/3 [POL-1998-3-018].

Languages:

Polish.



Identification: POL-2001-1-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.03.2001 / **e)** P 11/2000 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 33; *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 17, item 207 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.

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.

Keywords of the alphabetical index:

Right and freedom, statutory limitation, requirement.

Headnotes:

Provisions of the Ordinance of the Ministry of Development Planning and Construction providing for the location and technical conditions that buildings must comply with, in so far as they provide for the approval of an owner of a neighbouring plot of a building on the border of a plot, are discordant with the Construction Law, which gives a relevant ministry an authorisation to issue technical-construction provisions concerning buildings, connected facilities and other construction objects.

Summary:

The Tribunal examined the case as a result of a legal question filed by the Main Administrative Court. The Court questioned whether provisions of the Ordinance providing for the approval of an owner of a neighbouring plot for the location of a building directly on the border with the plot are based on an authorisation to issue the Ordinance granted by the provisions of the Construction Law. The Court claimed that the provisions in question are not limited to issues covered by the delegation but enter into an area of so called “neighbour law” covered by the civil law.

The Tribunal referred to its earlier decisions concerning a delegation to issue secondary

legislation. In that decisions, the Tribunal emphasised that an ordinance of a minister is a secondary act issued on the basis of a law in order to execute provisions of the law. An ordinance that does not comply with the foregoing conditions is, without doubt, incompatible with the Constitution.

Provisions of the Construction Law granted authorisation to a relevant ministry to issue technical-construction provisions concerning buildings, connected facilities and other construction sites. The law gives a clear definition of the technical-construction provisions. In the Tribunal’s opinion, even a broad interpretation of these provisions would not provide a ground for authorisation to interfere in an ownership right.

Furthermore, the Tribunal found that none of the provisions of the Construction Law create an obligation on buildings located on the border with the neighbouring property to gain the approval of the neighbour for such construction. Any limitations of an ownership right, including ones concerning construction on the border with the neighbouring property owned by a third person and a condition of the approval from this person, shall be regulated by law. The introduction of the aforementioned limitation, without any authorisation by the Construction Law, constitutes a breach of the requirement that any limitations of rights and freedoms, in particular the ownership right, must be introduced by law.

Cross-references:

- Decision of 11.05.1999 (P 9/98), *Bulletin* 1999/2 [POL-1999-2-014];
- Decision of 12.01.1999 (P 2/98), *Bulletin* 1999/1 [POL-1999-1-002].

Languages:

Polish.



Portugal Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

Total: 148 judgments, of which:

- Abstract *ex post facto* review: 6 judgments
- Appeals: 77 judgments
- Complaints: 98 judgments
- Property and income declarations: 1 judgment
 - Political parties' accounts: 2 judgments

Important decisions

There was no relevant constitutional case-law during the reference period 1 January 2001 – 30 April 2001.



Romania Constitutional Court

Statistical data

1 January 2000 – 31 December 2000

Total: 459 referrals, leading to:

- Decisions and judgments: 326, as follows:
 - applications allowed: 13
 - partially allowed: 2
 - dismissed: 311

Important decisions

Identification: ROM-2001-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 25.10.2000 / **e)** 208/2000 / **f)** Decision on a charge of unconstitutionality brought in respect of Act no. 105/1997 (amended by Government Order no. 13/1999) for the resolution of objections, disputes and complaints concerning sums calculated and levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance / **g)** *Monitorul Oficial al României* (Official Gazette), 695, 27.12.2000 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.
- 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.

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

Keywords of the alphabetical index:

Administration, internal administrative appeals / Tax, assessment, objection / Constitutional Court, legislative role.

Headnotes:

1. The statutory establishment of an administrative appeals procedure is not in itself unconstitutional.

2. Use of the preliminary administrative appeals procedure, as laid down in Sections 2-7 of Act no. 105/1997, to resolve objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance, is contrary to the principle of “reasonable time” set out in the first sentence of Article 6.1 ECHR. The provisions of Sections 2-7 of Act no. 105/1997 are therefore unconstitutional.

3. The rules governing the Court’s jurisdiction specify that it is not expected to play a “proactive” legislative role. Legislators, however, while exercising their constitutional powers, may make regulatory changes to preliminary quasi-judicial procedure.

Summary:

By an interlocutory Judgment of 8 March 2000, the administrative disputes section of the Supreme Court of Justice brought a question of unconstitutionality before the Constitutional Court in respect of Act no. 105/1997 for the resolution of objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance.

It was claimed that the provisions of Act no. 105/1997, which established an internal administrative appeals procedure to resolve objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance, breached Articles 11, 16.2, 21, 24, 48.1, 48.2 and 49 of the Constitution and Article 6 ECHR, in that the administrative appeals procedure delayed to an unacceptable degree the period during which a party could complain to a court concerning

violation of his rights. Consequently, there was no guarantee that judgment would be delivered within a reasonable time.

I. The Plenary Assembly of the Court ruled in its landmark Decision no. 1 of 8 February 1994 that the establishment of administrative appeals procedures did not breach constitutional provisions.

The Court also found that the existence of a preliminary internal administrative appeals procedure was accepted, with reference to Article 6 ECHR, in the case-law of the European Court of Human Rights (case of *Le Compte, Van Leuven and De Meyere v. Belgium*, 1981).

II. From the standpoint of the guarantee as to the delivery of judgment within a reasonable time, however, the Court observed that the administrative appeals procedure introduced through Sections 2-7 of Act no. 105/1997 was unconstitutional.

Under the terms of Articles 11 and 20.2 of the Constitution, this procedure contravened the first sentence of Article 6.1 ECHR.

In this connection, concerning the application of Article 6 ECHR, the Court found as follows: it had been established in the case-law of the European Court of Human Rights that the requirement to settle cases “within a reasonable time” included the length of such procedures prior to referral to a court, and that the expression “reasonable time” referred to the period until the *dies ad quem*, ie the final decision in the case.

Delivery of a judgment which did not also establish the precise amount of a monetary sum was not deemed to be the final settlement of a case.

The guarantee of “reasonable time” did not extend to procedures for a judgment’s implementation. The “reasonable time” requirement attached considerable importance to the circumstances in which penalties were collected on the monetary sum in dispute.

Finally, the Court found that the expression “reasonable time” was to be understood as also signifying “as reasonably appropriate”.

From a different standpoint, in accordance with paragraphs 10.1 and 10.2 of Government Order no. 11/1996, subsequently amended, in most cases collection of tax debts is enforced before preliminary administrative appeals procedures are exhausted. As a result, when agencies of the Ministry of Finance implement these procedures, the legal person lodging the objection, claim or complaint has already been

deprived, as the case may be, of sums seized from his bank account or other fixed or moveable property identified for execution by force.

III. The Court is not expected to play a legislative role, nor is it expected to take the place of the legislative bodies by partly or totally replacing the unconstitutional provisions of Sections 2-7 of Act no. 105/1997 or determining which of the three legal instruments governing the three stages of the preliminary administrative appeals procedure should be declared unconstitutional.

Correspondingly, the legislator is empowered under the Constitution to draft new regulations governing the procedure prior to referral to the courts, thereby ensuring that cases are settled "within a reasonable time".

Supplementary information:

Act no. 105/1997 was subsequently repealed by Emergency Government Order no. 3/2001.

Cross-references:

- *Le Compte, Van Leuven and De Meyere v. Belgium*, 23.06.1981, *Special Bulletin ECHR* [ECH-1981-S-001].

Languages:

Romanian, French (translation by the Court).



Identification: ROM-2001-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.11.2000 / **e)** 225/2000 / **f)** Decision on a charge of unconstitutionality brought in respect of the provisions of Section 20 of Act no. 25/1969 governing the status of aliens / **g)** *Monitorul Oficial al României* (Official Gazette), 40, 23.01.2001 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Expulsion / Law, predating the Constitution, repeal, declaratory finding.

Headnotes:

1. The provisions of Section 20 of Act no. 25/1969 governing the status of aliens, which may be used to expel a foreign national, breach Article 19.3 of the Constitution, according to which expulsion is decided by the courts.

2. Section 20 of Act no. 25/1969 (a normative instrument predating the Constitution) is unconstitutional and was therefore no longer in force, in accordance with Article 150.1 of the Constitution.

Summary:

By an interlocutory Judgment of 5 May 2000, the administrative disputes section of the Supreme Court of Justice brought a question of unconstitutionality before the Constitutional Court in respect of Section 20 of Act no. 25/1969.

It was claimed that Section 20 of Act no. 25/1969 breached Article 19.3 of the Constitution, which provides that expulsion or extradition is decided by the courts. It was further claimed that this section was no longer in force, in accordance with Article 150.1 of the Constitution.

Section 20 of Act no. 25/1969 governing the status of aliens provided as follows:

"The Minister of the Interior may terminate or restrict the right to temporary residence in Romania of a foreign national who has not complied with Romanian law or whose attitude or behaviour has been damaging to the Romanian State".

The Court found that the sanction of expulsion presupposes the State's right to prohibit a foreign national from remaining in the country by compelling him to leave the territory of the state in which he is resident. In this context, international law places

certain conditions on the State's exercise of its right to expel foreign nationals, for example in Article 13 of the International Covenant on Civil and Political Rights, which Romania ratified by decree no. 212/1974.

The Court also found that although the section in question did not use the term "expulsion", Section 21.3 of the same act permitted the Minister of the Interior to order the "expulsion" of a foreign national who did not comply with the order to leave the country.

Accordingly, the Court ruled that Section 20 of Act no. 25/1969 could be used to expel a foreign national, which was in breach of Article 19.3 of the Constitution.

Section 20 of Act no. 25/1969 (a normative instrument predating the Constitution) was therefore no longer in force in accordance with Article 150.1 of the Constitution.

Languages:

Romanian, French (translation by the Court).



Identification: ROM-2001-1-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 27.02.2001 / **e)** 70/2001 / **f)** Decision on a charge of unconstitutionality brought in respect of the final provisions of Section 19.3 of Act no. 85/1992 (republished) governing the sale of housing and other property built with public money or with that of state economic or budgetary entities / **g)** *Monitorul Oficial al României* (Official Gazette), 236, 27.02.2001 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Housing / Sale, contract / Nullity, absolute / Expenditure, recovery / Expenditure, adjustment / Interest, compensation, non-payment / *Restitutio in integrum*.

Headnotes:

The final part of Section 19.3 of Act no. 85/1992, concerning the non-payment of interest and the non-adjustment of recovered expenditure following a ruling that a housing sale contract is null and void *ab initio*, is unconstitutional and breaches the first sentence of Article 41.2 of the Constitution, according to which private property enjoys equal protection irrespective of its owner.

Summary:

By an interlocutory Judgment of 21 September 2000, the civil section (Section IV) of Bucharest Court of Appeal brought a question of unconstitutionality before the Constitutional Court in respect of the final provisions of Section 19.3 of Act no. 85/1992 governing the sale of housing and other property built with public money or with that of state economic or budgetary entities.

Section 19 of Act no. 85/1992 renders null and void *ab initio* contracts of sale of housing or other property which are concluded in breach of the provisions of this Act and of Legislative Decree no. 61/1990.

Section 19.3 provides that nullity is determined by the courts, which also rule on restoration of the former position and on restitution of the sale price, less any rent received during the period between conclusion of the contract and recovery.

It was alleged that the final part of Section 19.3 of the Act was unconstitutional. According to this provision recovered expenditure did not include interest or other adjustments.

It was claimed that these provisions breached Articles 16.1, 16.2, 41.1, 41.2, 135.1, 135.2 and 135.3 of the Constitution. While only one of the contracting parties had failed to comply with the civil law, the other was penalised although not guilty of non-compliance and despite the fact that all civil sanctions are founded on the notion of liability attaching to the parties to a legal relationship.

On examining the text in question in the light of Article 41.1 and 41.2 of the Constitution, the Court held that terminating a contract of sale by declaring it null and void *ab initio* required a return to the position prior to the date on which the contract was concluded and application of the principle of *restitutio in integrum*. This implied that everything transferred by virtue of the annulled contract would be restored to each party in full and at its real value. The final part of Section 19.3 of the Act conformed to this principle only as regards the rights of vendors which were also commercial companies, which recovered both the property and any rent, while the purchaser received only the unadjusted price paid, less the rent for the period in question. The purchaser had no entitlement to unrealised earnings in the form of interest for the period during which this money was not accruing.

Accordingly, the Court found that the final part of Section 19.3 of Act no. 85/1992 favoured state private-property ownership above individual property-owners and consequently breached the first part of Article 41.2 of the Constitution, according to which “private property shall be equally protected by law, irrespective of its owner”.

In accordance with Article 20.1 of the Constitution and Article 1.1 Protocol 1 ECHR, the Court found that the constitutional principle that private property should be protected equally, as laid down in Article 41.1 and 41.2, must be honoured whatever the property rights and “possessions” concerned.

In this connection, in the case of *The former King of Greece and others v. Greece*, Judgment of 23 November 2000, the European Court of Human Rights ruled that the notion of “possessions” was not limited to ownership of moveable assets, and that certain property rights and interests served to constitute a “right of property” and were consequently “possessions”.

Similarly, in the case of *Pressos Compania Naviera S.A. and others v. Belgium*, 1995, it was decided that the right to compensation was generated when damage occurred. A claim for damages of this sort constituted a “possession” and was therefore a right of property within the meaning of the first sentence of Article 1.1 Protocol 1 ECHR.

The Court found that this provision applied in the case in question. It therefore ruled that the charge of unconstitutionality was well-founded and must be accepted.

Cross-references:

- *Pressos Compania Naviera and others v. Belgium*, 20.11.1995, *Bulletin* 1995/3 [ECH-1995-3-019];
- *The former King of Greece and others v. Greece*, 23.11.2000.

Languages:

Romanian, French (translation by the Court).



Russia

Constitutional Court

Statistical data

1 September 2000 – 31 December 2000

Total number of decisions: 3

Categories of cases:

- Rulings: 3
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state bodies: 3
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:

- Claims by state bodies: 2
- Individual complaints: 1
- Referral by a court: 2
(some cases were joined)

Statistical data

1 January 2001 – 30 April 2001

Total number of decisions: 7

Categories of cases:

- Rulings: 7
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state bodies: 7
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:

- Claims by state bodies: 0
- Individual complaints: 6
- Referral by a court: 4
(some cases were joined)

Important decisions

Identification: RUS-2001-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.04.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 27.04.2000 / **h)**.

Keywords of the systematic thesaurus:

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

1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.

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

1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.

3.6 **General Principles** – Federal State.

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

4.7.1.3 **Institutions** – Courts and tribunals – Jurisdiction – Conflicts of jurisdiction.

4.7.2 **Institutions** – Courts and tribunals – Procedure.

4.7.4.3 **Institutions** – Courts and tribunals – Organisation – Prosecutors / State counsel.

4.8.5.1 **Institutions** – Federalism and regionalism – Distribution of powers – Principles and methods.

Keywords of the alphabetical index:

Law, federal / Law, regional / Law, inapplicable.

Headnotes:

An ordinary court can, upon application by the prosecutor, rule that the law of a subject (constituent entity) of the Federation is contrary to federal law and therefore inapplicable, thereby requiring that it be made to comply with federal law by the legislature of the constituent entity of the Federation. This does not affect the right to apply to the Constitutional Court for verification of the constitutionality of the law of the

constituent entity of the Federation. If the latter is ruled unconstitutional, it becomes null and void and must be regarded as having been repealed.

Summary:

Under the 1992 Federal Law on the *Prokuratura*, the latter was responsible for supervising compliance with the law by measures enacted by the legislatures of the constituent entities of the Federation and for applying to the court to have them declared null and void where appropriate.

In its application to the Constitutional Court, the Civil Division of the Supreme Court asked the following question: Is the prosecutor entitled to ask an ordinary court to declare a law of a constituent entity of the Federation null and void because it contradicts federal law and does the ordinary court have jurisdiction in such cases ?

First, the Constitutional Court noted that the federal legislature could grant the prosecutor power to make application to the court and in particular to ask it to verify the conformity with federal law of a law of a constituent entity of the Federation. However, in granting this power to the prosecutor, thereby confirming the corresponding power of the court, the federal law on the *Prokuratura* did not define the manner of its exercise.

The Constitution did not specifically empower the ordinary courts to deal with cases involving verification of the conformity with federal law of laws of constituent entities of the Federation and to take decisions concerning the annulment of laws of constituent entities of the Federation.

The primacy of the Constitution and the supremacy of federal laws as components of a single principle were one of the foundations of the constitutional regime and must be guaranteed by the judicial system, not only through constitutional proceedings, but also by means of other judicial proceedings.

According to Article 125 of the Constitution, verification of the constitutionality of legislative measures and their annulment if they are contrary to the Constitution were effected through constitutional court proceedings. However, the compliance with federal law of the laws of constituent entities of the Federation, where their constitutionality was not at issue, was verified by the ordinary courts, which were responsible for guaranteeing the primacy of federal laws in carrying out their function of applying the law.

The federal legislature could provide for the verification by the ordinary courts of the compliance with federal law or with other major legislation other than the Constitution, of lesser legislative measures (including the laws of constituent entities of the Federation). This doctrine had been stated previously in the Constitutional Court's decisions of 16 June 1998 and 30 April 1997. However, as the Constitutional Court had stated, the ordinary courts could not declare laws of constituent entities of the Federation unconstitutional and hence without legal force. According to Article 125 of the Constitution, this was the exclusive prerogative of the Constitutional Court. An ordinary court, having reached the conclusion that a law of a constituent entity of the Federation did not comply with the Constitution, must not apply it in an actual case but must apply to the Constitutional Court for verification of the law's constitutionality.

Article 22.3.3 of the federal law on the *Prokuratura*, both literally and as interpreted in practice, enabled republic, territorial and regional courts, after examining a case at the request of the prosecutor, to declare a legislative measure, including a law of a constituent entity of the Federation, null and void, having no legal effect as from its enactment and hence not needing to be repealed by its enacting body.

However, that went beyond the bounds set by the Code of Civil Procedure. According to the code, once the court's decision finding all or part of the legislative measure illegal had acquired legal force, that measure or part of a measure must be regarded as inapplicable.

A law could lose its legal force, as followed from Article 125.6 of the Constitution and from the Federal Constitutional Law on the Constitutional Court of the Russian Federation, only after it had been declared unconstitutional. Such a declaration, pronounced in constitutional court proceedings, had direct effect; for that reason repeal of the unconstitutional law by its enacting body was not necessary since it was considered repealed, i.e. null and void, as from the pronouncement of the Constitutional Court's decision.

The difference in legal consequences between declaring a law of a constituent entity of the Federation null and void or inapplicable occurred due to the difference between its being contrary to the Constitution and contrary to federal law.

The ordinary court's examination of a case concerning the conformity of a law of a constituent entity of the Federation, as a result of which it could be declared contrary to federal law, did not preclude subsequent consideration of its constitutionality in

constitutional court proceedings. Consequently, the ordinary court's decision declaring the law of a constituent entity of the Federation contrary to federal law did not in itself constitute confirmation of the law's nullity or its repeal by the court, still less its loss of legal force from the very moment of its promulgation, but simply recognition of its inapplicability. The law could be deprived of its legal force only by a decision of its enacting body or through constitutional court proceedings.

Most of the examined provisions of the federal law on the *Prokuratura* were not contrary to the Constitution.

Article 22.3.3 provided that, if a law of a constituent entity of the Federation contradicted federal law, the ordinary court, at the prosecutor's request, had to declare the law null and void; this was not in accordance with the constitutional principles of the exercise of the power of the people through the legislature, the separation of powers and the guaranteeing of the primacy of the law and Constitution by the judicial system.

Articles 5.3, 66.1 and 66.2 of the Constitution, which defined the federal structure, justified the hierarchy of laws which was the basis for determining the cases in which a law of a constituent entity of the Federation was contrary to federal law and the federal law was applicable, or in which the contradiction could not serve as a basis for declaring the law of a constituent entity of the Federation inapplicable.

According to Article 72.1 of the Constitution, ensuring conformity between the laws of constituent entities of the Federation and federal laws was the joint responsibility of the federation and its constituent entities. The settlement of public law disputes between the federal organs of state power and those of the constituent entities of the Federation had to be based primarily on the interpretation of the rules of competence contained in the Constitution through constitutional court proceedings.

An ordinary court's declaration that a law of a constituent entity of the Federation was null and void was at variance with its constitutional function of asking the Constitutional Court to verify the constitutionality of a law. However, a decision by an ordinary court declaring a law of a constituent entity of the Federation inapplicable did not rule out the possibility of verification by the Constitutional Court of the constitutionality of the federal law and the law of a constituent entity of the Federation.

The Constitutional Court had jurisdiction to examine such cases referred to it by the relevant authorities of constituent entities of the Federation, by the courts or,

where the public law dispute over the division of powers between different levels of state authority affected constitutional rights and freedoms, by ordinary citizens. The Constitutional Court acted in such cases as a judicial body making final rulings on such public law disputes.

At the same time, alongside the above-mentioned constitutional jurisdiction of the Constitutional Court, the legislature could make additional provisions in the federal constitutional law to regulate the prerogatives not only of the ordinary courts, but also of the (statutory) constitutional courts of the constituent entities of the Federation in matters relating to verification of conformity between the laws of constituent entities of the Federation and federal law.

Languages:

Russian.



Identification: RUS-2001-1-002

a) Russia / b) Constitutional Court / c) / d) 22.11.2000 / e) / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 05.12.2000 / h) CODICES (Russian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
 2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
 2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.
 3.6 **General Principles** – Federal State.
 3.15 **General Principles** – Proportionality.
 3.16 **General Principles** – Weighing of interests.
 4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.
 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

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

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

Keywords of the alphabetical index:

Media, privatisation / Real property / Property, types / Federation, entity, property, protection / Municipality, property, protection.

Headnotes:

The transfer to mass media and publishing houses of ownership of the premises they possess or enjoy the use of, as provided for by the federal law on privatisation of the mass media and publishing, can apply only to federal property. It cannot be applied to the property of constituent entities of the Federation or municipal entities, or to private property.

Summary:

This case was examined at the request of the Higher Court of Arbitration and the administrative authorities of Ulyanovsk Region, which contested the constitutionality of Article 5.3 of the Federal Law on State Support for the Mass Media and the Publishing Industry.

The above-mentioned provision transferred economic management of the premises they possessed or enjoyed the use of to the mass media, publishing houses, news agencies and radio and television broadcasting companies.

The applicants argued that this provision, by allowing that the use of property owned by the State, a municipality or a private individual could be enjoyed without the owner's consent violated the provisions of the Constitution concerning equal protection of all forms of property and the autonomy of local government.

The Court noted that the contested law had been enacted in connection with the privatisation under way in the mass media and the publishing industry. The state financial and economic support provided for was intended from the outset to achieve the constitutionally important objective of freedom of speech and mass information. At the same time, it directly affected the constitutional right to own property, which obliged the legislature to strike a fair balance between these constitutionally protected values, on the basis of the criteria laid down in the Constitution.

According to the Constitution, federal state property and its management belonged to the Federation. It followed that the federal legislature was entitled to determine the volume and extent of the exercise of ownership rights (possession, enjoyment and disposal) over federal property. From this point of view, the contested provision complied with the Constitution of the Russian Federation.

At the same time, premises in private ownership were not covered by this provision. Consequently, it could not be interpreted as requiring private owners to transfer to anyone else the ownership of the premises they owned. Any other interpretation would enable premises already in private ownership to be privatised subsequently, which was not legally logical.

At the same time, taken literally, this provision allowed for its application in cases where premises were not in federal ownership, but owned by constituent entities of the Federation or municipalities. This was precisely how the provision was interpreted by those applying the law, considering that premises in the ownership of constituent entities of the Federation or municipal entities must also be transferred, regardless of whether their owners agreed.

Thus, the contested provision, as interpreted in practice, allowed property to be transferred without the owner's consent in the case of a constituent entity of the Federation or a municipal entity, and thus amounted to a restriction of property rights.

However, according to the Constitution not only the right to private property, but also the property rights of constituent entities of the Federation and municipal entities, could be restricted only by a federal law and only if it was necessary for the protection of constitutional values and proportionate to that aim.

However, the transfer of premises belonging according to property law to constituent entities of the Federation and municipal entities without their consent, if effected without reasonable compensation, went beyond the principles of Article 55.3 of the Constitution and corresponding provisions, as well as Article 1 Protocol 1 ECHR. Accordingly, it was not an appropriate means of achieving the objective it set. It also placed disproportionate restrictions on the constitutional rights and legal interests of the constituent entities of the Federation and municipal entities, putting them in an unequal position in relation to the Federation as the owner of federal property and upset the balance between two constitutional values, *viz.* the right to information and the right to property, to the detriment of the latter.

Furthermore, when examining relevant disputes, the courts of arbitration did not establish the owners (Federation, constituent entity of the Federation or municipal entity) of the disputed premises. Failure to take into account the circumstances detailed above prevented complete realisation of the judicial protection of property, which was guaranteed by the Constitution.

The Court therefore ruled that the contested provision did not comply with the Constitution inasmuch as it allowed, through the way it was interpreted in practice, the transfer of premises owned by constituent entities of the Federation or municipal entities without the owners' consent, and inasmuch as such transfer was effected without appropriate compensation.

Languages:

Russian.



Identification: RUS-2001-1-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 30.11.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 05.12.2000 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.

3.6 **General Principles** – Federal State.

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.

4.8.1 **Institutions** – Federalism and regionalism – Basic principles.

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

Keywords of the alphabetical index:

Local authority, free administration / Local government, powers.

Headnotes:

A Regional constitution (Statute) cannot restrict the autonomy and local self-governing rights laid down by the Federal Constitution and the federal legislation enacted to implement it.

Summary:

The state Duma had asked the Constitutional Court to verify the constitutionality of several provisions of the Statute of Kursk Region, which it alleged were contrary to constitutional provisions governing local self-government and the division of powers between the Federation and its constituent entities.

The Constitutional Court found that all the contested provisions were contrary to the Constitution, including:

- the provision allowing certain state powers to be transferred to local government not by a law, but by a decision of the district organ of state power;
- the provisions allowing powers which must be exercised only by the organs of local self-government or directly by the population of the municipal entity to be handed over to the organs of state power;
- the provisions allowing the population of the municipal entity, by a majority of votes in a referendum, to waive their right to organise local self-government in a part of the territory of a constituent entity of the Federation;
- the provisions introducing additional conditions for the organisation and introduction of local self-government in the region, which were open to arbitrary interpretation and restricted the citizens' right to practice local self-government in a specified territory of the region, at the discretion of the region's organs of state power;
- the provision laying down 5 years as the term of office of elected representatives to the region's organs of local self-government, as the term of office of elected local government bodies and officials is determined, according to federal law, by the statutes of the municipal entities;
- the provisions governing supervision by the state over the activities of local self-government bodies insofar as they enabled the limits of state control over the activities of local self-government bodies to be broadened arbitrarily for the solution of local issues.

Languages:

Russian.



Identification: RUS-2001-1-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 25.01.2001 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 13.02.2001 / **h)** CODICES (Russian).

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.

4.7.2 **Institutions** – Courts and tribunals – Procedure.

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

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

Keywords of the alphabetical index:

Judicial error / Judge, guilty / Damage, fair compensation.

Headnotes:

The provision of the Civil Code whereby damage occasioned by the administration of justice (in the settlement of a substantive dispute) must be made good if the court's judgment finds misconduct by the judge, cannot be relied upon to refuse compensation for damage in other cases (where the dispute is settled as to the merits) if the judge's misconduct is established by some other judicial means.

Summary:

The Constitutional Court examined constitutional complaints by several citizens against Article 1070.2 of the Civil Code. According to this article, compensation for damage occasioned by the administration of justice must be awarded where misconduct by the judge was established by a binding court judgment. Applying this rule, the courts had held that in the absence of a binding judgment in respect of the judge, actions against the state for damages could not be entertained. The applicants argued that their constitutional rights to the protection secured by the Constitution and to compensation for damage were thereby violated.

The Court noted that according to the Constitution everyone was entitled to compensation from the state for harm caused by unlawful actions (or failure to act) of the organs of state authority or their representatives (Article 53 of the Constitution); that the rights of the victims of crimes and abuses of power were protected by the law and that the states guaranteed them access to justice and compensation for the damage caused (Article 52 of the Constitution).

The fact that these provisions made no mention of the guilt of the person responsible or the persons purporting to represent the organ of authority as a necessary condition did not signify that the damage must be repaired by the state regardless of responsibility.

The reference in the Civil Code to the judge's guilt must not in itself be regarded as contradicting the state's obligation to award compensation for damage caused by a court in the administration of justice.

The Civil Code prescribed, as the general basis of liability for damages, that the burden of proof as to the absence of responsibility lay on the author of the damage. However, the provision in question was an exception to this rule inasmuch as it was related to the particular features of the functioning of the judicial system, as laid down in the Constitution. The procedure for reviewing court judgments took the form of special procedures of appeal, cassation or supervision. Review of a court judgment by means of an action for compensation for damage caused in the administration of justice ran the risk of turning into further proceedings to verify the lawfulness and the merits of court's judgment. That was unacceptable as a matter of principle as otherwise the victim would not only enter an appeal but also institute compensation proceedings and the judge would on every occasion be obliged to prove his absence of liability. In that situation, dealing with the problem of the burden of proof and the admissibility of evidence of the responsibility of the author of the damage, which was normally done during examination of liability for tort, could completely paralyse the supervision and review of the administration of justice for fear of generating disputes over compensation for the damage caused.

The specific nature of the contested provision as an exception to the general rules governing compensation for damage also justified the conclusion that "administration of justice" must be understood to mean not the administration of justice as a whole but only that part of it concerned with the adoption of judgments on the merits.

Given the particular features of civil procedure, the legislature was justified in linking state liability for

damage caused in the administration of justice (i.e. in the resolution of a case on the merits) according to civil procedure, with criminal conduct by the judge. On this point, the contested provision was not contrary to the Constitution.

Court judgments which did not deal with the merits of a case did not form part of the 'administration of justice' within the meaning of this term in the contested provision. Such judgments dealt mainly with legal issues of the case, from receipt of the application to execution of the judgment, including decisions to discontinue proceedings and to close a case without trial.

Consequently, the provision concerning the responsibility of the judge as found by the court could not hinder compensation for damage caused by the actions (or omissions) of the judge if he pronounced an unlawful judgment (or committed a criminal omission) on legal issues. In such cases, including unlawful action by the judge (failure to complete proceedings within a reasonable time, other serious procedural defects), his responsibility could be established not only by a court judgment, but also by some other judicial decision.

The procedure for compensation for damage caused in all such cases, as in cases where damage was occasioned by civil proceedings and criminal proceedings against the judge had lapsed on non-rehabilitating grounds, fell to be governed by legislation. Accordingly, it was for the Federal Assembly to determine, bearing in mind the cases mentioned, the instances of, and procedure for, reparation by the state of damage caused by the unlawful actions (or omissions) of the court (or the judge), and also jurisdiction in such matters.

The Constitutional Court noted in particular that questions of compensation for damage caused by violation of everyone's right to a fair trial were governed by Articles 6 and 41 ECHR and Article 3 Protocol 7 ECHR. It followed from these provisions that the state must assume liability for the court's error which led to the judgment and to ensure that the unlawfully convicted person was compensated, regardless of the judge's responsibility. However, the Convention did not oblige states themselves to compensate on the same terms (i.e. for any judicial error, regardless of the judge's responsibility) damage caused in the administration of justice in civil proceedings.

The contested provision must be examined and applied strictly in accordance with the provisions of the Constitution. When examining actions for reparation of damage caused by the unlawful actions

(or omissions) of the courts in civil proceedings, if such actions did not relate to the adoption of decisions on the merits, the courts must not absolutely link the constitutional right to compensation by the state to personal responsibility on the part of the judge as established by a court judgment. Unlawful actions or omissions by a judge (including unlawful seizure of property, failure to adhere to reasonable time-limits in court proceedings, improper disclosure of procedural documents, unlawful delay in executing a judgment) must, in accordance with the present decision and with Articles 6 and 41 ECHR, be regarded as a violation of the right to a fair trial, entailing compensation for the person concerned.

Languages:

Russian.



Identification: RUS-2001-1-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 30.01.2001 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 15.02.2001 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
 3.10 **General Principles** – Certainty of the law.
 3.21 **General Principles** – Prohibition of arbitrariness.
 4.8.4 **Institutions** – Federalism and regionalism – Budgetary and financial aspects.
 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.

Keywords of the alphabetical index:

Public finance, sales tax / Tax, regional / Region, taxation.

Headnotes:

In establishing a regional tax, the federal legislature must provide a clear and complete definition thereof as a territorial tax and determine the taxable object, the taxpayers subject to the tax and other substantive elements of the tax liability.

Summary:

This case was considered at the request of the Court of Arbitration of Chelyabinsk Region and numerous businessmen. The applicants contested the addition to Article 20 of the Law on the Basis of the Taxation System of the Russian Federation of a paragraph 1e) introducing a sales tax and allocating 40% of the corresponding revenue to the budgets of the constituent entities of the Federation and 60% to local budgets, on condition that it be used for the social needs of low-income sections of the population. A further objection concerned the new paragraph 3 of the same article which determined the payers of the sales tax and certain substantive elements thereof, including the object of the tax and the tax base, and the rights of the constituent entities of the Federation concerning the establishment and actual introduction of the tax in their territories.

The applicants argued that the provisions in question and the legislation of some constituent entities of the Federation based on them or incorporating them did not satisfy the constitutional requirements of the lawful establishment of a tax and infringed the principle of equality before the law and the courts, the constitutional guarantees of the right to property and other provisions of the Constitution.

The Constitutional Court noted that the general principles governing the imposition of all regional taxes were laid down by federal law, in accordance with the Constitution.

In accordance with the Court's doctrine regarding regional taxes, only taxes established by the legislative bodies of the constituent entities of the Federation in accordance with the general principles laid down by federal law may be regarded as "lawfully established". The list of regional taxes, the taxpayers subject to them, and the substantive elements of each such tax, including the object of the tax, the tax base and the maximum rate, must be governed by federal law.

The enactment of the federal law on the regional tax granted the constituent entities of the Federation the right to establish and introduce this tax, by their own legislation, on condition that it did not increase the tax

burden nor worsen the situation of taxpayers in relation to what was provided for by the federal law.

Accordingly, the addition of the sales tax to the list of regional taxes, having regard to the principle of separation of powers, was not in itself contrary to the Constitution.

As stated by the Constitutional Court, the laws governing taxes must be concrete and comprehensible. The imprecision of tax provisions could result in arbitrary conduct by state bodies and officials, contrary to the principle of the rule of law, in their relations with taxpayers, and in violation of citizens' equality before the law. Tax legislation must be so formulated that everyone knew exactly what taxes he must pay, when and how.

According to the general rules of the Tax Code, the sale of goods and the performance of works and services were subject to the sales tax.

However, the contested law stated that the object of the sales tax also included the cost of goods, works and services provided wholesale or retail and paid for in cash. The federal legislature had not specified in which domains (consumption or production) the sales or works and services were effected and had extended the tax to goods subject to excise duty, without regard to the specific nature of certain sales.

The federal legislature was under an obligation to determine the object of the tax concisely and unequivocally. Instead, it had introduced poorly defined notions which made no legal sense and could be variously interpreted, *viz.* "wholesale marketing of goods", "costly merchandise", "non-essential goods", "essential items". Furthermore, it had arbitrarily enumerated only some goods whose sale was taxable. Consequently, the object of the tax could not be considered to have been clearly defined.

The Constitution required that for the lawful establishment of a tax, including a sales tax at regional level, the federal legislature must determine exhaustively and without discrimination the taxpayers subject to the tax. However, the contested law defined the persons subject to the tax according to forms of payment and arbitrarily and without explanation assimilated payment by bill or cheque to cash payment, which created inequality between corporate bodies which made their purchases by book transfer and individual businessmen whose payments by bill or cheque were assimilated to cash payments, by reason of the difference in the legal form in which their business was organised. Consequent uncertainty as to the classification of sales-tax payers gave rise to the possibility of

arbitrary application of the tax. Consequently, this tax could not be regarded as lawfully established and adequately defined as a whole by the law.

According to the Constitutional Court's doctrine, it was not possible to establish regional taxes which could be used to make up the budgets of certain territories to form the tax revenue of other territories or to transfer the burden of tax payment to taxpayers resident in other regions. However, the contested provisions of the law did not qualify this tax as territorial, i.e. they had not resolved the question of the tax jurisdiction of the regions. That being so, the possibility remained of tax being levied more than once on the same cash sales of goods, including interregional sales.

The impugned law had granted the constituent entities of the Federation the possibility of adding to the list of items subject to sales tax. Granting such a power to the constituent entities of the Federation over the extension of tax liability at regional level was contrary to the Constitution.

In addition, by reproducing the imprecise provisions of the contested federal law, the contested laws of the constituent entities of the Federation arbitrarily extended the tax liability of taxpayers, which constituted a violation of the general principles of taxation enshrined in the Constitution.

In view of the foregoing, the Constitutional Court found as follows:

1. That the contested Federal Law was not contrary to the Constitution where the inclusion of the sales tax in the list of regional taxes was concerned.
2. That the contested provisions of federal and regional legislation were contrary to the Constitution inasmuch as they did not regulate the sales tax with a sufficient degree of precision, having regard to the possibility of misinterpretation.

The contested provisions must be made to conform to the Constitution and would become null and void not later than 1 January 2002.

Languages:

Russian.



Identification: RUS-2001-1-006

a) Russia / b) Constitutional Court / c) / d) 25.04.2001 / e) / f) / g) / h) CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Accident, road / Accident, scene, driver, avoidance / Driver, responsibility / Motor traffic, safety.

Headnotes:

The obligation of the driver of a motor vehicle who has violated road traffic rules to remain at the scene of a motor accident, as provided for in criminal law, does not infringe his constitutional right not to give evidence against himself.

Leaving the scene of an accident in such circumstances is a specific offence separate from the actual road traffic offence. Accordingly, the principle of *ne bis in idem* does not apply.

Summary:

The case was examined on the basis of a complaint by a citizen who had been convicted of offences under Article 264 (road traffic offences) and Article 265 (leaving the scene of a motor accident) of the Criminal Code.

The applicant argued that Article 265 of the Criminal Code introduced criminal liability for refusal to assist in the investigation of motor accidents, obliging the driver to supply the law enforcement agencies with evidence of his own guilt; this was contrary to Article 51.1 of the Constitution whereby no-one could be convicted twice for the same offence. Furthermore, the contested provision was contrary to Article 50.1 of the Constitution because it introduced liability for the same facts as Article 264 of the Criminal Code, which resulted in a double penalty for one and the same offence.

The Constitutional Court noted that the Constitution laid down the fundamental principles governing relations between the state and the individual, including in the field of criminal law. While respecting

these principles, the legislature was justified in establishing criminal liability for socially dangerous actions which, because of their widespread nature, caused substantial harm and could not be prevented by other legal means. Furthermore, the introduction of criminal liability was justified by the need to pursue the objectives of the protection of health, morality and the legal rights and interests of others.

The contested provision established criminal liability for leaving the scene of a motor accident in the case of a driver who had infringed road traffic rules, where he had caused death or serious or moderate damage to human health.

The criminal law, by obliging the driver to remain under threat of punishment in such cases at the scene of the accident related that obligation to the interests of all road users and to the need to ensure their performance of the mutual obligations arising out of the very fact of the road accident. That was due to the nature of the relationship formed between the driver of a vehicle as a source of serious danger and other road users, and was not contrary to the constitutional right whereby the exercise of fundamental human and citizens' rights and freedoms must not violate the rights and freedoms of others. At the same time, the state was carrying out its constitutional obligation to protect human dignity, rights and freedoms, including the right to life and health, to safeguard the rights of the victims of the offence and reparation of the damage caused by the offence. Having regard to the basis of liability in criminal law, as determined by the Constitution, the criminalisation of such action could not be regarded as an unacceptable restriction of the right to freedom and the inviolability of persons guilty of causing a road accident.

The driver's obligation to remain at the scene of the accident under Article 265 of the Criminal Code did not prevent him from refusing to give evidence against himself (Article 51.1 of the Constitution) which must be guaranteed at all stages of criminal proceedings. This right signified that the driver could refuse to make a statement and to supply evidence of his guilt.

Bearing this in mind, when establishing the circumstances of a road accident and starting criminal proceedings, the public officers concerned were required to explain to a driver who had remained at the scene of the accident his right to refuse to make a statement or provide other evidence. Evidence obtained by force could not be relied upon to draw conclusions and reach decisions in criminal proceedings.

According to Article 50.1 of the Constitution, no-one could be convicted twice for one and the same offence, i.e. it was not possible to convict a person for the same action as if for several separate offences. A driver's violation of road traffic rules, thereby carelessly causing serious consequences (Article 264 of the Criminal Code) and leaving the scene of a road accident (Article 265 of the Criminal Code) constituted two separate offences and establishing liability for each consequently did not constitute a violation of Article 50.1 of the Constitution.

Accordingly, Article 265 of the Criminal Code was not contrary to the Constitution. Determining the criminal-law classification of the offence and assessing the factual circumstances and the driver's motives for leaving the scene of the road accident were matters for the ordinary courts.

Languages:

Russian.



Slovakia

Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 2
- Decisions on the merits by the panels of the Court: 11
- Number of other decisions by the plenum: 4
- Number of other decisions by the panels: 80

Important decisions

Identification: SVK-2001-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenary / **d)** 11.01.2001 / **e)** Pl. ÚS 22/00 / **f)** / **g)** *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

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

4.9.2 **Institutions** – Elections and instruments of direct democracy – Electoral system.

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

5.3.39 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Election, electoral threshold / Election, association / Elected offices, equal access, right / Competition, political forces.

Headnotes:

If the legislature is not obliged by the Constitution to establish either the same or different electoral thresholds for political parties and coalitions of political parties, the Court could oppose any

inequality in their status only if such status would disregard the principle of free political competition and flagrantly violate the legitimate aims thusly pursued therein.

Summary:

Parliament amended the Act on the Elections to the National Council of the Slovak Republic so as to establish a 7% electoral threshold for two or three party coalitions, and a 10% electoral threshold for at least four party coalitions.

The petitioner, a faction of 35 members of parliament, challenged the amendment at the Court, arguing that it amounted to discrimination of political parties running on a separate ballot, as these parties were required to acquire a larger percentage of votes in order to pass the respective threshold (5%) than were parties running on a coalition ballot. According to the petitioner, the amendment therefore violated the right to equal access to elected offices. The petitioner also suggested that a fair solution would be to establish the electoral threshold for coalitions by multiplying the electoral threshold for parties running separately by the number of parties running within a coalition.

The Court found against the petitioner. First, it pointed out that the very right relied upon by the petitioner, i.e. the right to equal access to elected offices, was not an absolute right and that its exercise could be made subject to constitutionally permissible restrictions. In this vein, the Court also noted that equal access to elected offices did not mean there was an absolute equality of opportunity in acquiring parliamentary mandates with respect to the number of cast votes or their possible “under-representation”.

Most importantly, the Court stated that the Constitution neither prescribed a particular electoral system, nor imposed upon the legislature an obligation to take into account the factual inequality between parties running separately and those running within a coalition, e.g. by requiring the latter ones to acquire a larger percentage of votes than the former. Interpreting the matter at hand in light of the constitutional principle of free political competition (anchored in Article 31 of the Constitution), the Court held that the respective regulation was both implemented for a legitimate aim, i.e. to allow for parliamentary representation of a broad spectrum of political conceptions, and within the space of the legislature’s regulatory prerogatives. According to the Court, the adverse implications for equal access to elected offices of the differences in the respective electoral thresholds do not outweigh the positive aspects that this differentiation has brought about in terms of public interest in free electoral competition.

Languages:

Slovak.

*Identification: SVK-2001-1-002*

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 31.01.2001 / **e)** III. ÚS 64/00 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.

5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.

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

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

Keywords of the alphabetical index:

Canon law, internal regulation / Canon law, self-administration / Law, applicable / Legal basis, norm, cogent.

Headnotes:

The right to pursue one's rights in a legally sanctioned way before an independent and impartial tribunal entails the duty of such a tribunal to adjudicate on the basis of the legal order of the Slovak Republic, or on the basis of rules allowed by this legal order.

Summary:

The petitioner, a Catholic priest, contested before the courts of general jurisdiction the decision of the respective clerical authorities not to remunerate him for the period of time during which he was suspended in his capacity as an operative priest. Both the first-instance and the appellate courts have held that it was outside of their jurisdiction to assess the validity of that suspension, as it fell within the competence of

the Catholic Church and was regulated by Canonical Law. Accordingly, both courts denied the petitioner's claim for financial remuneration.

The petitioner subsequently filed with the Constitutional Court a petition alleging that several of his constitutional rights were violated by means of the failure of the respective ordinary courts to base their decisions in the Slovak law in force instead of the internal regulations of the Catholic Church. The petitioner argued that the contested judicial decisions infringed the ban on discrimination, his freedom of speech, the right to remuneration for labour, the right of access to a court and the right to equal treatment in judicial proceedings.

The Court found a violation of the petitioner's right of access to a court as well as to remuneration for labour, but dismissed the remaining claims. The Court conceded that churches or other religious entities could perform certain activities independently from the government, but simultaneously held that they were bound in any and all of their activities by the legal order of the Slovak Republic in its entirety. Accordingly, the relationship within which a priest performs clerical activities falls under the scope of the relevant regulations of the Slovak legal order, and any attending internal regulations of churches or other religious entities are applicable only if in accordance with the general regulatory framework.

Since the respective ordinary courts have taken the canonical regulations to be an issue of law rather than an issue of fact, according to the Court they have thus applied rules that were not part of the Slovak legal order. In doing so, they have violated the petitioner's right of access to a court, as this right entails the obligation of a court to adjudicate on the basis of the law in force in the Slovak Republic, or on the basis of rules applicable through an express delegation anchored in such law. The Court held that since the subject matter of the respective judicial proceedings was the petitioner's right to work for remuneration, the violation of his right of access to a court in these proceedings also amounted to the violation of his right to work for remuneration.

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 January 2001 – 30 April 2001

The Constitutional Court held 19 sessions (12 plenary and 7 in chambers). There were 404 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 468 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 January 2001). The Constitutional Court accepted 95 new U- and 175 new Up-cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 79 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 26 decisions and
 - 53 rulings;
- 52 cases (U-) joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 131.

In the same period, the Constitutional Court resolved 103 (Up-) cases in the field of the protection of human rights and fundamental freedoms (6 decisions issued by the Plenary Court, 97 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-2001-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 08.03.2001 / **e)** U-I-Up-13/99 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 28/2001; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), IX, 2000 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (English, Slovenian).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 2.1.3.2.3 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Other international bodies.

- 3.15 **General Principles** – Proportionality.
 3.17 **General Principles** – General interest.
 4.7.1.3 **Institutions** – Courts and tribunals – Jurisdiction – Conflicts of jurisdiction.
 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:

Constitutional complaint, limits of review / Immunity, judicial, foreign state / Customary law, international / Fundamental value, Europe / War, violence, victims.

Headnotes:

Judicial immunity reflects the principle of the equality of States and thereby respect for the independence and integrity of another State. The rule *par in parem non habet jurisdictionem*, according to which legal entities with the same positions cannot leave a decision in a dispute to the court of one of them, derives from this principle. This goal is constitutionally legitimate and the exclusion of judicial protection is necessary for achieving this goal. The goal can only be achieved by the exclusion of court jurisdiction in another State. The exclusion of judicial protection in the Republic of Slovenia is also proportionate to the importance of the pursued goal. Respect for the principle of sovereign equality is necessary for preserving international cooperation and cohesion between the States.

Summary:

The case involved an action, by the applicant, for compensation for damage during the Second World War for time spent in a concentration camp, mental anguish due to the death of his parents, loss of happiness in his life and destruction of property by the occupier's authorities. There was a rational link between the complainant's case and the Republic of Slovenia. Therefore, the exclusion of judicial protection before a Slovenian court would entail an interference with the right to judicial protection (Article 23 of the Constitution). However, the rejection of the action against the Federal Republic of Germany due to the activities performed during the Second World War by its armed forces is a justified interference with the right to judicial protection.

The district court decided that Slovenian courts had no jurisdiction to decide on the dispute and rejected the complainant's action. The appeal and the review by the Supreme Court were dismissed. The

complainant had filed the action against the Federal Republic of Germany, in which he claimed damages for the activities the defendant allegedly performed during the Second World War. The complainant suggested that the Constitutional Court annul *ab initio* the challenged rulings and decide that the courts of the Republic of Slovenia have jurisdiction to decide on his claim.

The Constitutional Court cannot, within the framework of constitutional-complaint proceedings, review the substantive-law correctness of the challenged decisions and the weighing of evidence by the courts. In conformity with Article 50 of the Constitutional Court Act (Official Gazette RS, no. 15/94 – hereinafter ZUstS), while examining a constitutional complaint, it is limited to the review of whether the disputed decision is based on a legal position unacceptable from the standpoint of the protection of human rights, or whether it is so erroneous and without sound legal reasoning that it can be considered arbitrary or self-willed (see, e.g., Ruling no. Up-103/97 dated 26 February 1998 – DecCC VII, 118).

The petitioner argued the court had incorrectly applied the law on the rule of substantive international law concerning court jurisdiction in cases in which a foreign state was sued before a Slovenian court. Such an assertion could lead to the annulment of the challenged rulings only if it is demonstrated that the findings of the courts are not only erroneous but so evidently erroneous and without sound legal reasoning that they can be considered arbitrary or self-willed. The findings of the courts that a foreign state can successfully claim judicial immunity when it is sued before a court of another state for reason of activities performed in the framework of *iure imperii* are not such.

Pursuant to Article 26 of the Civil Procedure Act (ZPP-77), which applied in Slovenia at the time of the complainant's case, international law applied to the trial of foreign States. Treaties, international customary law, and general legal principles recognised by civilised nations are sources of international law. Judicial decisions and the positions of distinguished international-law experts are considered auxiliary means for recognising the law (Article 38 of the Charter of the Hague International Tribunal).

There is no treaty that applies to Slovenia in this case. Furthermore, there is no general convention which regulates the question of state immunity. The practice of States is developing away from the rule of absolute immunity to accepting the rule of relative or limited immunity. Furthermore, the group of cases in

which a state is not granted any immunity is growing. Such development reflects changes concerning the function of a State: while it appeared in the nineteenth century predominantly as sovereign, in particular after the Second World War it began to participate in the economic field. Theory states that a majority of States have abandoned the rule of absolute immunity, however in the framework of established state practice immunity still exists as a general rule. As regards exceptions there are (partial) differences between States and individual legal circles. The differentiation between the State's activities as sovereign (*acta iure imperii*), for which immunity is granted, and private or commercial activities (*acta iure gestionis*), for which immunity is not granted, is widely accepted. Certain other developments in international law have served to narrow the exceptions. The technique of determining a rule and stating specific exceptions has been developed to deal with the difficulties in differentiating between different types of activities. The European Convention on State Immunity (hereinafter "ECSI") adopted within the framework of the Council of Europe, and the Draft Articles on Judicial Immunities of States and their Property, adopted by the United Nations International Law Commission at its forty-third session in 1991 (hereinafter "Draft Articles"), are such examples.

These two documents do not support the conclusion that this rule as an international customary law rule would be applicable in the complainant's case. The ECSI explicitly determines that exceptions from immunity determined by the Convention are not applied to the activities of the armed forces of a certain state on the territory of another state (Article 31 ECSI). The Draft Articles, which do not yet belong to the rules of public international law, are not applied to proceedings commenced before they take effect.

The theoretical positions from the field of international law, efforts to codify such, and adopted conventions substantiate the conclusion that the Supreme Court's decision that States may claim immunity before the courts of another state for activities performed within the framework of *iure imperii* cannot be evaluated as arbitrary. The Constitutional Court concluded that the mentioned cases show a trend in the future development of international law towards the limitation of judicial state immunity before foreign courts. In any case the above-mentioned cases cannot serve as proof of a general practice recognised of law and thus as the creation of a rule of international customary law, which would in the case of violations of the cogent norms of international law in the area of human rights protection as a consequence of state activities in the framework of *iure*

imperii allow Slovenian courts to try foreign States in such cases.

Having found that the decision of the courts on the rule of international law concerning judicial immunity in cases in which a foreign state is sued before a Slovenian court was not arbitrary and thus not inconsistent with the guarantee of the equal protection of rights (Article 22 of the Constitution), it is necessary to review the first complainant's objection summarised in Point 9 of the reasoning of this decision. The complainant asserted that the position of the courts according to which a foreign state may claim judicial immunity when it is sued before a court of another state due to the activities performed within the framework of *iure imperii* was contrary to the right to judicial protection ensured in Article 23 of the Constitution and Article 6.1 ECHR.

Pursuant to Article 23 of the Constitution, everyone has the right to have any decision regarding his rights and duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. In the context of the present case, the constitutional provision guarantees the right to a meritorious decision on an individual right.

The extent of the right to judicial protection ensured in Article 6.1 ECHR is similar. The European Court of Human Rights considers the right of access to courts a composite part of the right to judicial protection. The right is not absolute but the state in regulating this right may determine limitations in conformity with the needs and abilities of groups and individuals. Limitations are admissible if they do not interfere with the essence of the right, if they pursue a legitimate goal and if there exists a rational relation between the applied means and the pursued goal.

Pursuant to a general rule in damage suits, a court of the Republic of Slovenia is not competent only in cases in which the defendant permanently resides on the territory of the Republic but also when the damaging activity was performed on the territory of the Republic or a detrimental consequence occurred on its territory (See Article 55 of the Private International Law and Procedure Act). Such a connection with the Republic is demonstrated in the complainant's case. Since a rational relation between the complainant's case and the Republic is demonstrated, the exclusion of judicial protection before Slovenian courts entails an interference with the right to judicial protection.

An interference with the right to judicial protection is allowed if it is in conformity with the principle of proportionality. This means that the limitation must be necessary for reaching a pursued legitimate goal and

in proportion to the importance of this goal (Article 15.3 of the Constitution). The considered interference is not impermissible for the reasons stated below.

The complainant is not deprived by the challenged rulings of all judicial protection, but only of judicial protection before domestic courts. According to general rules on jurisdiction (*actor sequitur forum rei*), the complainant may sue the Federal Republic of Germany before its courts, where an argument in favour of judicial state immunity has no value. The Constitutional Court also considered, in reviewing proportionality in the narrow sense, that the matter concerned the state in which general standards on human rights protection and the principles of a state governed by the rule of law have been adopted in the framework of the Council of Europe, and that the decisions of its courts are subject to review by institutions which operate at the level of this international organisation.

Accordingly, the argument on the violation of the right to judicial protection (Article 23 of the Constitution and Article 6.1 ECHR) is not substantiated. Therefore, the Constitutional Court dismissed the constitutional complaint.

Supplementary information:

Legal norms referred to:

- Articles 15, 22, 23, 25, 153 of the Constitution;
- Article 26 of the Civil Procedure Act (ZPP-77);
- Article 11 of the European Convention on State Immunity (EKID);
- Article 6.1 of the European Convention of Human Rights (ECHR);
- Articles 50, 59.1 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2001-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 01.12.2000 / **e)** CCT 25/2000 / **f)** Allan Aubrey Boesak v. The State / **g)** 2001 (1) *South African Law Reports* (Official Gazette) 912 (CC) / **h)** 2001 (1) *Butterworths Constitutional Law Reports* 36 (CC); 2001 (1) *South African Criminal Law Reports* 1 (CC); CODICES (English).

Keywords of the systematic thesaurus:

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

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.

4.7.1 **Institutions** – Courts and tribunals – Jurisdiction.

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

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

5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

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:

Appeal, jurisdiction / Constitutional matter / Right to silence, negative inference / Evidence, circumstantial.

Headnotes:

The Constitutional Court is the highest court in “constitutional matters”, while the Supreme Court of Appeal (SCA) is the highest court in all other matters. Though not decisive, a “constitutional matter” is a threshold requirement for leave to appeal to the Constitutional Court to be granted. An assertion that

the SCA was merely incorrect on the facts does not raise a “constitutional matter”.

Summary:

The applicant was convicted on one count of fraud and three counts of theft in the High Court and sentenced to six years imprisonment. On appeal, the SCA set aside one count of theft, altered the amount involved in another count of theft and reduced the sentence to three years imprisonment. The applicant then applied for special leave to appeal to the Constitutional Court, alleging that his conviction violated his constitutional rights not to be deprived of freedom and security without just cause (Section 12.1.a of the Constitution) and to be presumed innocent, to remain silent and not to testify (Section 35.3.h of the Constitution).

In terms of Sections 167.3.a and 168.3 of the Constitution, the Constitutional Court is the highest court in “constitutional matters”, while the SCA is the highest court of appeal in all other matters. Therefore, in deciding whether leave to appeal should be granted from the SCA to the Constitutional Court, a threshold question was whether the case raised “constitutional matters”. Section 167.3.c of the Constitution leaves it to the Court to determine whether a matter is a “constitutional matter”.

Deputy President Langa, writing for a unanimous Court, drew some guidelines in this regard. If the SCA develops, or fails to develop, or applies a common-law rule inconsistently with rights or principles in the Constitution, that may raise a “constitutional matter”. But a challenge to a decision of the SCA solely on the basis that it is wrong on the facts is not a “constitutional matter”. To hold otherwise would be to make all criminal cases “constitutional matters”, making the constitutional differentiation between the Constitutional Court and the SCA illusory.

The Court applied these principles to the case. On two of the counts, the SCA had relied on the contents of a letter (purportedly written and signed by the applicant) to the donor.

Applicant’s counsel first argued that the authenticity of the letter had not been proved and therefore the SCA ought to have had a reasonable doubt as to his guilt. Accordingly, it was contended that the applicant’s conviction violated his constitutional right to be presumed innocent (Section 35.3.h of the Constitution). The Court noted that it was not argued that the SCA had applied some standard other than the usual criminal *onus*. The question whether a court ought to have had reasonable doubt is a factual matter and, as such, does not raise a “constitutional matter”.

Applicant’s counsel further noted that the SCA had given significant weight to their failure to challenge the authenticity of the letter and, moreover, drawn inferences from the applicant’s failure to testify on the matter. This, counsel argued, violated the applicant’s right to silence (Section 35.3.h of the Constitution). The Court held that in the absence of other evidence a court may rely upon circumstantial evidence. This is precisely what the SCA did in this case. Whether the evidence as a whole (including the negative inference) is sufficient, is a factual question and not a “constitutional matter”.

With regard to the negative inference drawn from applicant’s silence, the Court held that the fact that an accused is under no obligation to testify does not mean that no consequences attach to the decision to remain silent. If there is evidence calling for an answer which the accused chooses not to explain, a court is entitled to conclude that the unchallenged evidence is sufficient. Whether such a conclusion is justified depends on the facts of the case and is not a “constitutional matter”.

In relation to the further charge of theft, it was first argued that as the evidence did not support the SCA’s conclusion, the applicant’s constitutional right to be presumed innocent was violated. The argument was not that the SCA had misapplied or misinterpreted the criminal *onus*, but only that it had erred in its assessment of the evidence. The Court dismissed this as an attempt to clothe a non-constitutional challenge in constitutional garb. A final argument was that the applicant’s conviction deprived him of freedom without just cause (Section 12.1.a of the Constitution). The Court held that this right contains both a substantive and a procedural element. On a substantive level, it was universally accepted that theft of a serious nature was a sufficient reason to deprive accused of their liberty. On a procedural level, no unfairness in the trial had been established. Accordingly, the Court concluded that there was substantive and procedural just cause for the applicant’s imprisonment.

The application for leave to appeal was refused.

Cross-references:

Leave to appeal: *Brummer v. Gorfil Brothers Investments (Pty) Ltd and Others*, 2000 (2) SA 837 (CC), 2000 (5) BCLR 465 (CC).

Presumption of innocence: *S v. Manamela and Another (Director-General of Justice Intervening)*, 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), *Bulletin* 2000/1 [RSA-2000-1-005]; *S v. Baloyi (Minister of Justice and Another Intervening)*, 2000

(2) SA 425 (CC), 2000 (1) BCLR 86 (CC), *Bulletin* 1999/3 [RSA-1999-3-011]; *Scagell and Others v. Attorney General, Western Cape and Others*, 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC), *Bulletin* 1996/3 [RSA-1996-3-017]; *S v. Bhulwana*; *S v. Gwadiso*, 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), *Bulletin* 1995/3 [RSA-1995-3-008].

Right to silence: *Osman and Another v. Attorney-General, Transvaal*, 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), *Bulletin* 1998/3 [RSA-1998-3-008].

Deprivation of Freedom: *S v. Coetzee and Others*, 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC), *Bulletin* 1997/1 [RSA-1997-1-002]; *Bernstein and Others v. Bester and Others NNO*, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC), *Bulletin* 1996/1 [RSA-1996-1-002]; *De Lange v. Smuts NO and Others*, 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004].

Languages:

English.



Identification: RSA-2001-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 04.12.2000 / **e)** CCT 53/2000 / **f)** Sonderup v. Tondelli and Another / **g)** 2001 (1) *South African Law Reports* (Official Gazette) 1171 (CC) / **h)** 2001 (2) *Butterworths Constitutional Law Reports* 152 (CC); CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Child, right of access / Child, international abduction / Contractual relations / International request.

Headnotes:

A mother who failed to return her child to Canada by the time stipulated in a Canadian court order, was ordered to return the child for final resolution in a Canadian court.

Summary:

The parties, parents of a four year old girl were married in South Africa in 1989. They emigrated to Canada where they separated in 1998 and divorced in 2000. In 1999 the parties had entered into an agreement which was made an order of court and which granted the mother sole custody of the child and the father access rights. They were granted joint guardianship.

The agreement further provided that neither of the parties should remove the child from the Province of British Columbia without a further court order or written agreement of the parties, except that either party would be permitted to travel outside of British Columbia with the child once a year for a period not exceeding 30 days. Should the agreement be breached by either party, the child would have been wrongfully removed from Canada in contravention of the Hague Convention on the Civil Aspects of International Child Abduction (the Act).

In June 2000, the first respondent brought an urgent order restraining the appellant from removing the child from British Columbia. The matter was settled on the basis that an investigation would be conducted to resolve issues of custody and access rights. It was further ordered that the appellant could travel with the child to South Africa on condition that the first respondent would be granted sole custody of the child in the event the child was not returned to British Columbia within a month.

The appellant and the child left for South Africa and when they failed to return by the agreed date, the respondent approached the Supreme Court of Columbia and obtained an order without notice to the appellant. In terms of the order the respondent was granted sole custody of the child and the appellant ordered to deliver the child to him immediately. The appellant would moreover be arrested should she breach the order.

The respondent, acting in terms of the Convention, requested the Family Advocate in South Africa to expedite the return of the child to him. The Family Advocate then lodged an application in the High Court for the return of the child in terms of Article 12 of the Convention. The Court held that it was in the

best interest of the child to grant the application and ordered the return of the child to British Columbia.

The appellant then appealed to the Constitutional Court as a matter of urgency. In this Court she argued that the provisions of the Convention did not apply in the present case, and if they did, they were nevertheless inconsistent with the Constitution. The appellant argued that neither the removal nor the retention were wrongful because the respondent does not possess any rights of custody as defined in the Convention.

Justice Goldstone, writing for the unanimous Court, concluded that the rights of custody referred to in Article 3 of the Convention arise by court order or by agreement having a legal effect under the law of the requesting state. The judge further indicated that the failure to return the child on the agreed date was a breach of the father's rights under the order, and concluded that the Convention was applicable.

On the constitutionality of the Convention and the effect of Section 28.2 of the Constitution, the appellant argued that any order to the effect that the child should be returned to British Columbia would contravene the Section 28.2 of the Constitution requirement that the best interest of the child be taken into account. The Court assumed without deciding that the Convention might have been inconsistent with Section 28.2 of the Constitution. On that premise, the Court went further to deal with whether the inconsistency was justifiable under Section 36 of the Constitution. The Court concluded that it was justifiable because the Convention requires that the best interest of the child in question should be considered by the appropriate Court.

The Court ordered that the minor child be returned forthwith to the British Columbia. The order was granted subject to the requirement that the respondent seek the withdrawal of the warrant of arrest for the appellant. The appellant was awarded interim custody of the child pending final adjudication of the issues of custody and access by the Supreme Court of British Columbia. Further orders relating to the return of the child were also made.

Cross-references:

Limitations: *De Lange v. Smuts*, 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004]; *S v. Makwanyane and Another*, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 SA (CC), *Bulletin* 1995/3 [RSA-1995-3-002].

Languages:

English.



Identification: RSA-2001-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.12.2000 / **e)** CCT 51/2000 / **f)** Dikgang Moseneke and Others v. The Master of the High Court / **g)** 2001 (2) *South African Law Reports* (Official Gazette) 18 (CC) / **h)** 2001 (2) *Butterworths Constitutional Law Reports* 103 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
 1.6.5.4 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
 4.7.8.1 **Institutions** – Courts and tribunals – Ordinary courts – Civil courts.
 5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
 5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.
 5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.

Keywords of the alphabetical index:

Administrative powers / Appeal, procedures / Deceased estate, administration.

Headnotes:

Legislation which prohibited the Master of the High Court from dealing with intestate estates of black people differentiated on the grounds of race, ethnic origin and colour, and as such constituted unfair discrimination in breach of Section 9 of the Bill of Rights and was therefore unconstitutional.

Summary:

This case concerned the discrimination between black and white people in the administration of deceased estates. According to laws enacted in the past, when a white person died without leaving a will

his or her estate had to be administered by the Master of the High Court (the Master). When a black person died intestate, his or her estate had to be administered by a magistrate. Section 23.7.a of the Black Administration Act 38 of 1927 (the Section) provided that letters of administration from the Master would not be necessary in, nor would the Master or any executor appointed by the Master have any power in connection with, administration and distribution of the estate of any black who had died leaving no valid will. Regulation 3.1 (the regulation), which was promulgated under the Black Administration Act reads: "All the [designated] property in any estate [of a black person who dies leaving no valid will] ... shall be administered under the supervision of the magistrate in whose area of jurisdiction the deceased ordinarily resided and such magistrate shall give such directions in regard to the distribution thereof as shall seem to him fair and shall take all steps necessary to ensure that the provisions of the Act and of these regulations are complied with".

The appellants, the widow and sons of late Sedise Samuel John Moseneke, (the family) brought an application to the Transvaal High Court requesting an order declaring the Master's refusal to register and administer the estate unconstitutional. The family's legal representatives asked for and were granted an order declaring the regulation invalid.

Justice Sachs, writing for a unanimous Court, held that the Section and the regulation both impose differentiation on the grounds of race, ethnic origin and colour, and as such constitute unfair discrimination in breach of the Bill of Rights. The Court held that although the magistrate might provide practical advantages to those of limited means in areas far from a Master's office, the racial discrimination is an affront to all in a non-racial society. Furthermore, the procedures of the Black Administration Act impacted on matters of great practical day-to-day importance.

The question arose whether the Court was empowered to deal with the invalidation of a regulation, as is required with legislation, in confirmation proceedings. This was dealt with by allowing the Minister of Justice to appeal against the High Court order declaring the regulation invalid.

It was also pointed out that the judgment of the Court *a quo* had not dealt with the constitutionality of the Section, and had only invalidated the regulation. In order to bring the validity of the Section into consideration, the Court therefore granted the family direct access to the Court on this point.

The Constitutional Court decided that to strike down the Section and the regulation with immediate effect

without making practical alternative arrangements could create confusion and lead to new injustices. The Court held that the answer was to suspend the invalidity of the regulation for two years so as to give parliament a chance to harmonise and de-racialise the laws dealing with deceased estates in an effective manner.

The Women's Legal Centre was admitted as *amicus curiae*. It was argued that in the case of intestate estates of deceased Africans, race, gender and culture interacted in a way which discriminated indirectly against African widows. The Court held that if the foundational value of creating a non-sexist society was to be respected, proper consideration had to be given to the effect of the measures on the dignity of widows and their ability to enjoy a rightful share of the family's worldly goods. The Court concluded that there was not enough material before the Court, however to justify an investigation into those aspects in this case.

In the result the Court declared the Section unconstitutional and upheld the order of the High Court declaring the regulation invalid. The invalidity of the regulation was suspended for two years.

Cross-references:

Leave to appeal: *Parbhoo and Others v. Getz NO and Another*, 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC), *Bulletin* 1997/3 [RSA-1997-3-009].

Direct access: *Christian Education South Africa v. Minister of Education*, 1999(2) SA 83 (CC), 1998 (12) BCLR 1449 (CC) *Bulletin* 2000/2 [RSA-2000-2-010]; *S v. Zuma and Others*, 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), *Bulletin* 1995/3 [RSA-1995-3-001].

Right to dignity: *Ex parte Western Cape Provincial Government and Others; In Re: DVB Behuising (Pty) Ltd v. North West Provincial Government and Another*, 2000 (4) BCLR 347 (CC).

Languages:

English.



Identification: RSA-2001-1-004

a) South Africa / b) Constitutional Court / c) / d) 05.04.2001 / e) CCT 1/2001 / f) Buzani Dodo v. The State / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
 3.15 **General Principles** – Proportionality.
 4.7.1 **Institutions** – Courts and tribunals – Jurisdiction.
 4.7.8.2 **Institutions** – Courts and tribunals – Ordinary courts – Criminal courts.
 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Criminal proceedings, sentencing / Sentencing, discretion / Sentencing, judicial function / Sentencing, mandatory.

Headnotes:

Legislation obliging courts, in the absence of “substantial and compelling circumstances”, to impose a life sentence for certain serious offences does not violate: (a) the constitutionally protected separation of powers; (b) the protection against “cruel, inhuman or degrading” punishment (Section 12.1.e of the Constitution); or, (c) the right to be tried before an ordinary Court (Section 35.3.c of the Constitution).

Summary:

Section 51.1, read with Section 51.3.a, (the provision) of the Criminal Law Amendment Act, 105 of 1997 (the Act) obliges high courts to sentence people convicted of certain serious offences to life imprisonment, unless “substantial and compelling circumstances” justify the imposition of a lesser sentence.

The Eastern Cape High Court declared the provision to be constitutionally invalid on the basis that it was inconsistent with both the constitutionally required separation of powers and the right of every accused person to be tried before an ordinary Court (Section 35.3.c of the Constitution). The declaration of invalidity was referred to the Constitutional Court for confirmation in terms of Section 172.2 of the Constitution.

Justice Ackermann, writing for a unanimous Court, declined to confirm the order of the High Court and found the provision to be constitutionally valid. It was argued that the provision violated the separation of powers principle as it represented a usurpation by the legislature of the judicial function of imposing criminal sentences. In rejecting this argument, the Court held that both the legislature and the executive share important interests in punishments imposed by courts. It cannot therefore be said that the imposition of punishment falls within the exclusive domain of the judiciary. The separation of powers is not rigid and an overlapping of functions is permissible. This also accords with the position in other democratic jurisdictions. However, the legislature’s power to prescribe sentences is not unlimited, and has to be appropriately balanced with the power of the judiciary. While the nature of this balance cannot be formulated in the abstract, as a matter of principle the legislature ought not to oblige the judiciary to impose punishments inconsistent with the Constitution, and in particular with the Bill of Rights. This would have been the case if the provision obliged courts to pass sentences which unjustifiably violated either an accused’s right not to be sentenced to a punishment which is “cruel, inhuman or degrading” (Section 12.1.e of the Constitution), or an accused’s fair trial rights (Section 35.3 of the Constitution).

The Court held that the length of a sentence would be “cruel, inhuman or degrading” if it was *grossly* disproportionate to the crime. However, on a recent interpretation placed on the provision by the Supreme Court of Appeal in *S v. Malgas* (as yet unreported) (a construction endorsed by the Court), courts retain the power to impose a lesser sentence well before such gross disproportionality is reached. The provision thus did not violate provision 12.1.e of the Constitution.

In relation to an accused’s fair trial rights, counsel for the applicant argued that the provision violated Section 35.3.c of the Constitution, in that it deprived courts of their usual sentencing power to such an extent that they could no longer be described as “ordinary courts”. The Court held that this would only occur if the provision materially affected the independence of courts or deprived them of an exclusively judicial function. This was not the case.

The Court refused to confirm the declaration of unconstitutionality and referred the case back to the Eastern Cape High Court to be dealt with accordingly.

Cross-references:

Separation of powers: *South African Association of Personal Injury Lawyers v. Heath and Others*, 2001

(1) SA 883 (CC), 2001 (1) BCLR 77 (CC), *Bulletin* 2000/3 [RSA-2000-3-017]; *De Lange v. Smuts NO and Others*, 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC), *Bulletin* 2000/3 [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 and Others NNO*, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC), *Bulletin* 1996/1 [RSA-1996-1-002].

Sentencing discretion: *S v. Dzukuda and Others*; *S v. Tshilo*, 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), *Bulletin* 2000/3 [RSA-2000-3-012].

Cruel, inhuman or degrading punishment: *S v. Makwanyane and Another*, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002].

Languages:

English.



Identification: RSA-2001-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.04.2001 / **e)** CCT 44/2000 / **f)** The State v. Russell Mamabolo / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Weighing of interests.
 4.6.8 **Institutions** – Executive bodies – Relations with the courts.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Contempt of court / Court, authority and impartiality / Judicial decision, criticism.

Headnotes:

The crime of scandalising the Court (a species of contempt of court) does limit freedom of expression. Such a limitation is reasonable and justifiable in an open and democratic society in order to preserve the administration of justice provided that the crime is appropriately narrowly defined.

The summary procedure in cases of scandalising adopted in the High Court unjustifiably limits a number of constitutionally protected fair trial rights. Offences of scandalising the Court should be prosecuted in the normal way.

Summary:

This case concerned the constitutional validity of the conviction and sentence of the appellant, a spokesperson for the Department of Correctional Services for the offence of scandalising the Court. A high court judge granted a prisoner bail and the appellant issued a statement to the effect that the bail had been wrongly granted and that the prisoner would not be released. The Judge ordered the appellant and the Director-General of the Department to appear before him to explain and justify what they had said. They filed affidavits and were represented by counsel. The Director-General was ultimately discharged but the appellant was convicted of contempt of Court for bringing the dignity, honour and authority of the Court into discredit and sentenced to a fine and suspended imprisonment.

On appeal the appellant, supported by the Freedom of Expression Institute, *e tv and Business Day* as *amici curiae*, argued that the appellant's constitutional rights to freedom of expression and to a fair trial had been infringed. Appellant's counsel contended that the offence of scandalising i.e. contempt of Court by way of statements not made in court or relating to pending proceedings, could no longer be recognised in the light of the Bill of Rights. The argument for the *amici* was that the recognition of the right to freedom of expression limits scandalising to cases of clear and imminent danger to the administration of Justice. The state supported the validity of both the crime and procedure adopted.

The Court found that the crime of scandalising the Court (a species of contempt of court) does limit freedom of expression. Such a limitation is reasonable and justifiable in an open and democratic society in order to preserve the administration of justice provided that the crime is appropriately narrowly defined. The Court noted that the courts in many such societies have this power for this purpose. It held that

freedom of expression must be weighed against public confidence in courts.



The majority (per Justice Kriegler) held that because the Constitution regards human dignity, equality and freedom as foundational and recognises the importance of the dignity of the judiciary and demands that it be protected, conduct or language which is likely to damage the administration of justice is punishable as scandalising. Freedom of expression, on the other hand is not accorded the same weight. In a separate judgment, Justice Sachs disagreed with the majority of the Court as to how the balance is to be struck and expressed the view that something more than this is required to justify limits on freedom of speech – in order to constitute a crime, the conduct must pose a real and direct threat to the administration of justice.

The Court found that the summary procedure as adopted in the High Court, in cases of scandalising unjustifiably limits a number of constitutionally protected fair trial rights. Offences of scandalising the Court should be prosecuted in the normal way.

Contrary to the perceptions of the Judge, in the Court *a quo*, there had, in fact, been no defiance of the court order. Furthermore, appellant's public utterances did not constitute the crime of scandalising the Court. The appellant's conviction and sentence were accordingly set aside.

Cross-references:

Contempt of court: *Coetsee v. Government of the Republic of South Africa; Matiso and Others v. Commanding Officer, Port Elizabeth Prison, and Others*, 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC), *Bulletin* 1995/3 [RSA-1995-3-005].

Justification: *S v. Manamela and Another (Director-General of Justice intervening)*, 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), *Bulletin* 2000/1 [RSA-2000-1-005].

The right to fair trial: *S v. Dzukudza and Others; S v. Tshilo*, 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), *Bulletin* 2000/3 [RSA-2000-3-012]; *S v. Zuma and Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401, *Bulletin* 1995/3 [RSA-1995-3-001].

Languages:

English.

Identification: RSA-2001-1-006

a) South Africa / b) Constitutional Court / c) / d) 29.05.2001 / e) CCT 55/2000 / f) Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

- 3.12 **General Principles** – Legality.
- 3.16 **General Principles** – Weighing of interests.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.10.8 **Institutions** – Public finances – State assets.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.
- 5.3.24 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.
- 5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Administrative decision, unlawful / Administrative procedure, fairness / Law, as a source of executive authority.

Headnotes:

The government as owner of land, has the same rights as any other landowner, and when deciding to exercise those rights and its powers under the Constitution on its own land, where no legislation applies, its decision and actions are not *ultra vires*.

Summary:

This case concerns challenges to the validity of certain decisions taken by a Presidential committee, and in particular, the decision to establish a transit camp on the Leeuwkop prison farm. The challenge was brought by a residents' association representing the interests of residents in Kyalami Township, which is situated in the vicinity of Leeuwkop prison.

In the summer of 2000, floods occurred in various parts of South Africa causing extensive damage and rendering many people homeless. A Presidential committee, chaired by a deputy minister, was

appointed to co-ordinate the government's response to the floods, and R557 million was made available to it for this purpose. One of the projects undertaken by the committee was to establish a transit camp on the Leeuwkop prison farm for the accommodation of flood victims from Alexandra Township.

The Kyalami residents alleged that the establishment of a transit camp would adversely affect the value of their properties and the environment in which they lived (infringement of Section 24 of the Constitution). They contended that there was no authorising legislation for the action taken by the government in response to the floods, and that the action was accordingly invalid. They contended further that their rights under township, environment and other land legislation had been infringed, that the consent of certain functionaries required under relevant legislation had not been obtained, and that they had not been consulted by the government before the decision was taken. The High Court set aside the decision to establish the transit camp at Leeuwkop, directing the government to reconsider its decision after proper consultation with the residents and after having given consideration to the environmental impact of the establishment of the camp and the provisions of applicable laws to the proposed development.

The government appealed to the Constitutional Court. In a unanimous decision written by Chaskalson P., the appeal was upheld and the order of the High Court set aside. This Court held that as owner of the land on which the Leeuwkop prison is situated, the government has the same rights as any other landowner. In asserting these rights it acted within the framework of the Constitution, and absent any binding legislation, it acted lawfully. In response to the allegation that the establishment of a transit camp on the Leeuwkop prison farm would contravene environmental, land and township legislation, the Court held that there was no such applicable legislation. In relation to the question of consent, the Court held that where the consent of an authorised functionary was necessary, such consent would only be necessary after the decision was taken, and not before. Consent was only necessary at the stage of implementing the decision.

In deciding whether a fair administrative procedure (as required by Section 33 of the Constitution) had been observed, the Court held that various factors should be taken into account. These factors included the nature of the decision, the rights affected by it, the circumstances in which it was made, and the consequences attaching to it. It was found that the factors had, in fact, been considered. In considering these factors, the Court found that the Alexandra

flood victims had a constitutional right to be given access to housing (Section 26 of the Constitution). The Court also held that if all persons with an interest in the choice of the site for the transit camp were to be heard, the process would almost certainly have been contentious and drawn out. In addition, there was a need for a decision to be taken quickly in order to address the plight of the flood victims who were living in deplorable conditions.

The Court affirmed the finding it made in the *Grootboom* case that within its available resources, the government has a constitutional duty to provide relief to people who have no roof over their heads and who are in crisis because of natural disasters such as floods. It held that the provision of relief to victims of natural disasters is an essential role of government in a democratic state. In the present case, funds had been made available for this purpose and the government would have failed in its duty to flood victims had it done nothing.

Cross-references:

Rule of law: *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 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]; *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].

Separation of powers: *South African Association of Personal Injury Lawyers v. Heath and Others*, 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC), *Bulletin* 2000/3 [RSA-2000-3-017]; *De Lange v. Smuts NO*, 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004]; *Ex Parte Speaker of the Western Cape Provincial Legislature: In Re Certification of the Constitution of the Western Cape*, 1997 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC), *Bulletin* 1997/3 [RSA-1997-3-007]; *Ex Parte Chairperson of the Constitutional Assembly, In Re Certification of the Constitution of Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), *Bulletin* 1996/3 [RSA-1996-3-016]; *Executive Council, Western Cape Legislature and Others v. President of the Republic of South Africa and Others*, 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC), *Bulletin* 1995/3 [RSA-1995-3-006].

Procedural fairness: *Janse van Rensburg NO & Another v. Minister of Trade & Industry NO & Another*, 2001 (1) SA 29 (CC), 2000(11) BCLR 1235(CC), *Bulletin* 2000/3 [RSA-2000-3-014]; *Premier, Mpumalanga and Another v. Executive Committee, Association 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

Summaries of important decisions of the reference period 1 January 2001 – 30 April 2001 will be published in the next edition, *Bulletin* 2001/2.



Sweden

Supreme Court Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 2001 – 30 April 2001.



Switzerland

Federal Court

Important decisions

Identification: SUI-2001-1-001

a) Switzerland / **b)** Federal Court / **c)** Court of Cassation (criminal Section) / **d)** 05.12.2000 / **e)** 6S.425/2000 / **f)** Martin Stoll v. Zurich District Authority / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 IV 236 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.16 **General Principles** – Weighing of interests.
3.17 **General Principles** – General interest.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Secret, official proceedings, publication / Journalist, information, source / Media, secret, publication.

Headnotes:

Publication of secret official proceedings (Article 293 of the Criminal Code); freedom of opinion and freedom of the press (Article 10 ECHR).

The offence of publishing secret official proceedings relates to secrets in the formal sense (recital 2; confirmation of precedent).

The scope of this offence is not to be defined by measuring the importance of the secrets or the superiority of the competent authority's interest in discretion compared with the public's interest in being informed. Freedom of the press cannot justify action which constitutes the offence. It is for the legislator to determine, as appropriate, the expediency of reviewing this criminal law provision, which is binding on courts (recital 4).

Protection of information sources does not preclude convicting the journalist of publishing secret official proceedings (recital 6).

In the instant case, the journalist's conviction is not contrary to Article 10 ECHR (recital 5) and the authority's interest in discretion prevailed over the public's interest in being informed (recital 9).

Summary:

The "Sonntagszeitung" newspaper published on 26 January 1997 an article by Martin Stoll with the headline "Ambassador Jagmetti insults the Jews". The journalist referred to a report classified as confidential which the Swiss Ambassador to the United States had presented to the Swiss Federal Council (government) during discussions concerning the unclaimed Jewish assets.

On a complaint by the Federal Foreign Affairs Department, the journalist was found guilty of infringing Article 293 of the Criminal Code and fined 800 CHF. Under this provision, it is a punishable offence to make public in part or in full, without being entitled to do so, documents which are secret according to law or to a decision taken by the public authority within the limits of its competence. The Zurich Cantonal Court upheld the ruling made at first instance. In an appeal on points of law to the cassation division of the Federal Court, Stoll sought to have his conviction overturned. In particular, he invoked freedom of the press and its function in a democratic society. The Federal Court dismissed the appeal. Publication of official records is punishable under Article 293 of the Criminal Code where they are secret according to a law or an official decision. The concept of secrecy is to be construed in its formal sense. The Ambassador's report was intended for the Federal Council alone. Even if a material construction was placed on the concept of secrecy, the publication in question would be punishable having regard to the circumstances of the case, namely discussion of a delicate matter which was highly controversial at the material time.

The appellant stressed the special function of the media in a democratic society and the fact that in the instant case the public had a special interest in learning the content of the Swiss Ambassador's report. The Federal Court and the authorities are nonetheless required to enforce Federal laws and international law. Not to apply Article 293 of the Criminal Code simply because the public has an alleged interest in receiving certain information kept secret by the administrative authorities would contradict an interpretation in keeping with the Constitution and the Convention. Thus, freedom of

the press cannot justify action which constitutes a criminal offence. Article 10.2 ECHR does not preclude in general terms the imposition of a fine on a journalist for infringing a criminal law provision, even if the journalist's action is warranted by a public interest within the meaning of Article 10.2 ECHR.

The right of journalists not to disclose their information sources, deriving from freedom of the press and set out in the new Article 27bis of the Criminal Code, is furthermore no object to the enforcement of the criminal law provision at issue and the imposition of a fine on a journalist.

Languages:

German.



Identification: SUI-2001-1-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.02.2001 / **e)** 1P.248/2000 / **f)** J. X. v. Public Prosecutor, Assize Court and Court of Cassation of Zurich Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 1 / **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.
 4.7.4.2 **Institutions** – Courts and tribunals – Organisation – Officers of the court.
 4.7.15 **Institutions** – Courts and tribunals – Legal assistance and representation of parties.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.
 5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
 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.

Keywords of the alphabetical index:

Expert, official / Expert, private, hearing, participation / Expert, confrontation of experts.

Headnotes:

Article 6.1 and 6.3.d ECHR; Articles 29.2 and 32.2 of the Federal Constitution (respectively; right to be heard, and right of a person to be informed of the charges against him or her and rights of the defence); second sentence of Article 237 of the Code of Criminal Procedure of Zurich Canton; confrontation of the official experts with the private expert during an Assize Court hearing.

The principles of fair trial and equality of arms were not violated by the fact that the official experts were able to make a pronouncement on the findings of the private expert while the latter was not allowed to enter a "rejoinder". It was sufficient that the accused or his counsel were able to comment on the official experts' statements regarding the private expert's report.

In preventing the private expert from submitting a "second report", the court did not violate the rights of the defence or the right of the accused to be heard.

Summary:

J. X. was accused of poisoning his wife R. X. According to the indictment, on the morning of 24 August 1993 he gave her a takeaway drink containing arsenic. That afternoon, his wife felt ill and vomited. During the night of 24-25 August 1993, J. X. allegedly gave her another drink to which he had added arsenic. His wife died the next day. J. X. denied the charges.

The Assize Court of Zurich Canton found J. X. guilty of murder and sentenced him to twenty years of imprisonment. The Court of Cassation of Zurich Canton dismissed the appeal on points of law filed by J. X. He then challenged his conviction in a public law appeal on grounds of violation of constitutional and treaty rights. In particular, he complained of violation of the principle of fair trial and of his right to be heard and to make his defence; he contended that the private expert whom he commissioned did not have the opportunity to make submissions in an adequate manner. The Federal Court rejected the public law appeal.

In the course of the proceedings, the Assize Court had appointed two experts, Professor B. and Dr I. The accused had engaged a private expert, Professor K. All three experts acknowledged that Mrs R. X. had

died on 25 August 1993 of a heart attack of circulatory origin caused by arsenic poisoning. They also agreed that the victim's ingestion of the fatal dose of arsenic had occurred before she was taken ill on the afternoon of 24 August 1993. However, they disagreed as to whether the victim had ingested a second dose of arsenic on the evening or during the night of 24 August 1993. This was asserted by the Assize Court experts and denied by the private expert. The issue was of definite importance since, during the evening or the night of 24 August 1993, only the accused J. X. could have committed the crime. This constituted strong circumstantial evidence for holding J. X. responsible for the (first) ingestion of arsenic, the cause of his wife's death. The Assize Court examined the two judicial experts B. and I. on the question of the second dose of arsenic believed to have been ingested during the evening or the night of 24 August 1993. They gave explanations concerning the regurgitation and absorption of the poison and the time at which the latter had occurred. The private expert, for his part, submitted and explained a contrary version of the facts and answered the questions put by the court. The court experts were then able to comment on the testimony of the private expert, and one of them summed up the findings of the investigation. The private expert was not able to make any further statement. The Code of Criminal Procedure of Zurich Canton contains a provision to the effect that if a court-appointed expert and a private expert disagree, the former may comment on the latter's opinion, whereas the reverse is not possible. The Assize Court thus acted in accordance with the Code of Criminal Procedure. Nor did it violate the European Convention on Human Rights. The appellant could not effectively rely on Article 6.3.d ECHR, since this provision only refers to the prosecution witness and does not apply to the statements of an expert appointed by a court. This case should therefore be considered in the light of the fair hearing secured by Article 6.1 ECHR. In that respect, it should be observed that the function and the position of an official expert differ radically from those of a private expert. The former does not act on the instructions of a party, and is not the prosecution expert either, but proceeds on behalf of the court. He must therefore meet the requirements of impartiality and may be challenged by the parties. The private expert, however, is commissioned by and at the service of the party, and is therefore not subjected to the requirements of impartiality; his report is deemed part of the pleadings made by the accused and the defence lawyer. These features therefore justify a difference in the treatment of experts which does not infringe the right to a fair trial. The complaints concerning violation of the rights of the defence also prove unfounded. The private expert could attend all the hearings and ask questions, and availed himself

of this right. He subsequently assisted the appellant and was able to suggest to him questions directed at the official experts. The final decisive argument is that the accused and his counsel were allowed to comment on the findings of the experts appointed by the Assize Court.

Languages:

German.



Identification: SUI-2001-1-003

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 22.03.2001 / **e)** 1P.103/2001 / **f)** P. v. Basel University Psychiatric Clinic and Psychiatric Appeals Board of Basel City Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 6 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 3.15 **General Principles** – Proportionality.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
- 5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.
- 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Medication compulsory / Confinement for purposes of assistance / Hospitalisation, protracted.

Headnotes:

Forced medicinal treatment in a psychiatric clinic during confinement for purposes of assistance; Articles 7, 10, 13 and 36 of the Federal Constitution (concerning respectively, human dignity, personal freedom, protection of privacy and restrictions to fundamental rights); Articles 3 and 8 ECHR; Article 7 of the International Covenant on Civil and Political Rights.

Legal basis for forced medication; Law of Basel City Canton on treatment and internment of persons suffering from mental illness (Law on psychiatry; recitals 2a, 4 and 7a). Extent of personal freedom according to Article 10.2 of the Federal Constitution as compared with the old unwritten right and with the special guarantees secured by other constitutional provisions; scope of protection of human dignity under Article 7 of the Federal Constitution; fundamental rights secured by international law in relation to forced medicinal treatment (recital 5).

Examination of the conditions of a course of medicinal treatment according to the Law on psychiatry, with regard to inability to exercise discernment, presumed volition, and urgency (recital 7).

Overriding interests justifying forced treatment (recital 8).

Determination of the proportionality of the interference with the fundamental right, under the terms of the Law on psychiatry and Article 36 of the Federal Constitution (recital 9).

Summary:

P., born in 1971, suffers from schizophrenia and over the last few years has been repeatedly admitted to the Basel University Psychiatric Clinic either of his own volition or in a situation of confinement for purposes of assistance. During these admissions, he has been treated largely by means of neuroleptic drugs. In some instances he consented to this medication and in others it was imposed. In December 2000, P. was readmitted to the clinic at the request of the cantonal medical officer. He appealed to the Psychiatric Appeals Board of Basel City Canton, which confirmed the order to intern him for purposes of assistance and authorised the clinic to treat him with medicines even against his will.

In a public law appeal, P. asked the Federal Court to set aside the authorisation to administer forced medication, but did not challenge his confinement for

purposes of assistance. In particular, he invoked personal freedom and human dignity. The Federal Court dismissed the public law appeal.

Federal law does not regulate the type of treatment to be administered in a context of confinement for purposes of assistance, and does not afford a legal basis permitting forced application of treatment with therapeutic intent. The challenged decision is thus founded solely on cantonal law. In the instant case, it is the Law on psychiatry of Basel City Canton which governs the conditions of care for the mentally ill. This law requires any medical examination or treatment to have the patient's consent. Where patients are incapable of discernment, medication against their will is permitted, if it is absolutely necessary and does not infringe personal freedom as seriously as the measures which would otherwise be required. Treatment to preserve the patient's life is possible in urgent cases. Forced medication constitutes grave interference with the personal freedoms defined in Article 10 of the new Federal Constitution; it significantly affects the patient's physical and mental condition. Forced treatment of a patient arouses in him a sense of subjection to another person's will and thus impinges on human dignity as provided for in Article 7 of the Federal Constitution. The medication complained of also affects the rights deriving from Article 8 ECHR and Article 7 of the International Covenant on Civil and Political Rights. Conversely, in so far as it is applied on therapeutic grounds and in accordance with the rules of medical practice, it does not violate Article 3 ECHR. The Law on psychiatry forms a sufficiently clear legal basis for imposing medication, and permits interference with the aforementioned constitutional rights. It is justified by overriding public interests. Application of the contested therapy is subjected by law to the condition that the patient must be incapable of discernment. Having regard to all circumstances of the case, this condition is fulfilled, but the appellant's ambivalent attitude and his refusal of the medication recommended by the doctors do not in themselves allow him to be deemed incapable of discernment. The proportionality of the treatment is to be assessed in the light of both cantonal law and the Federal Constitution. Considering the appellant's severe state of schizophrenia, the dangers of possibly fatal catatonic shock (stupor), and the beneficial effect of previous medication, it can be accepted that the therapy was appropriate to the situation. Nor did this treatment violate personal freedom any more than other measures such as isolation in a special cell or protracted hospitalisation. Human dignity is injured in the event of medication against the patient's will, but also when the patient is left untreated to suffer mental anguish in an isolation ward. The decisive consideration is that the medical treatment, notwithstanding the

secondary effects, should have no irreversible consequences and can eventually be suspended, at the request of the patient himself or herself, by then capable of discernment.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Statistical data

1 January 2000 – 31 December 2000

I. Structure of cases as regards the type of acts disputed (number of petitions)

- Review of the constitutionality of laws: 103
- Review of statutes (by-law of local self-government units): 14
- Review of collective agreements: 7
- Review of government regulations: 35
- Review of acts of municipalities: 38
- Review of acts of undertakings and other entities: 1
- Requests for protection of human rights and freedoms: 9
- Reassessment of Court rulings: 6
- Review of acts of public undertakings: 10
- Review of acts of neighbourhood communities: 2
- Review of other acts: 3

Total: 228

II. Structure of cases as regards the type of petitioner

- Citizens: 181
- Political parties: 6
- Government: 1
- Enterprises and other organisations: 7
- Local self-government units: 4
- Public service: 12
- Associations of citizens: 8
- Other bodies and associations: 11

Total: 230

Important decisions

Identification: MKD-2001-1-001

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 07.02.2001 / e) U.br.186/2000 / f) / g) / h) CODICES (Macedonian).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Weighing of interests.
- 3.17 **General Principles** – General interest.
- 4.6.11 **Institutions** – Executive bodies – The civil service.
- 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
- 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
- 5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Civil servant, disciplinary measure / Civil service, exercise / Civil service, impartiality / Civil service, independence / Conviction, political / Political sign, exposition / Public service, access.

Headnotes:

State administrative bodies perform duties within their competence, independently and by virtue of the Constitution and laws. A state official is obliged to exercise his/her work impartially and free from influence from political parties. He/she should not be governed by his/her political convictions or personal financial interests and has to maintain and safeguard the dignity of his/her office. A state official must not display a political party's symbols in the office.

Summary:

The Court did not uphold the alleged unconstitutionality of Articles 18.2, 28.3 and 28.4 of the Law on State Officials.

Article 18.2 contains several prohibitions on state officials whilst they are performing their jobs. State officials must not be influenced by political parties, personal political convictions or financial interests. A state official must not abuse his/her status and position, and is obliged to safeguard the dignity of

his/her office. According to the second disputed provision, a state official must not display a party's symbols in the office.

Bearing in mind the content of the provisions at stake, the Court found that they refer to the conflict between two values: the need to safeguard non-politicised state administration and freedom of political conviction and activity. The Court considered the proportionality of the disputed provisions with respect to the relevant constitutional rights.

Article 16.1 of the Constitution guarantees freedom of conviction, conscience, thought and public expression of thought. Article 20 of the Constitution guarantees citizens the freedom to set up associations and political parties, including the freedom to join them or resign from them. Articles 95.2 and 96 of the Constitution ban political organisation and activity within state administrative bodies, which perform the activities under their jurisdiction independently and by virtue of the Constitution and laws.

Taking the aforementioned into consideration, the Court did not sustain the alleged unconstitutionality of the provisions in issue. The provisions aim to safeguard and strengthen the principles of legality and the impartiality of state administration. The law does not restrict a state official's right to have political beliefs or financial interests, but rather states that they are not and cannot be relevant for his/her work. The influence of these elements would violate the principles of legality, equality and non-discrimination.

The ban on the display of a party's symbols in the offices of state officials is justified by the need to protect the dignity and status of an office of the state, which is governed on behalf of the state, and not on behalf of a political party. This prohibition does not restrict the freedom of political conviction, expression and activity of a state official, but it is a condition for exercising the state office free from elements of ideological and political proselytising.

Languages:

Macedonian.



Identification: MKD-2001-1-002

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 28.02.2001 / **e)** U.br.45/2000; U.br.61/2000 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 23/2001 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Weighing of interests.
 3.17 **General Principles** – General interest.
 4.5.11.2 **Institutions** – Legislative bodies – Political parties – Financing.
 5.2 **Fundamental Rights** – Equality.
 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Asset, private property / Competition, economic, protection / Market entity, equal legal position.

Headnotes:

An imprecise statutory provision provides wide margins for different interpretations and applications in practice which can hinder the rule of law. Political parties are civil, not trade associations. They attain objectives of global, not partial, social interest. Political parties cannot raise funds from trade activities, which are beyond political exercise, because it would violate the freedom of market and entrepreneurship and would jeopardise the equal legal position of all market entities.

Summary:

The Democratic Alliance from Skopje lodged a petition with the Court challenging the constitutionality of Article 28.1 of the Law on Political Parties.

The provision at issue ascertained the financial resources that political parties can make use of while exercising their activities. According to this article, political parties can raise funds from membership fees, contributions, revenues from their own assets, credits, donations, grants and from the state budget. What was challenged and nullified by the Court referred to the revenue parties could earn from their own assets.

In its reasoning, the Court primarily considered the legal position and objectives of political parties. Thus, Article 2 of the law defines political parties as organised groups of citizens pledging to participate in the government. Article 3 therefore determines the objectives of political parties: to enforce and safeguard the political, economic, social, cultural and other rights and beliefs of their members; to take part in making political decisions; to be involved in the process of election of representatives in the National Assembly and in municipalities' assemblies and of the city of Skopje. Article 20 of the Constitution safeguards freedom of association. Citizens can exercise this right to safeguard their political, economic, social, cultural and other rights and convictions.

This definition of the position and objectives of political parties was the starting point for the Court to determine its findings. Political parties are civil associations. The performance of their tasks is not of direct material interest for a limited group of citizens (the members of that party). They accomplish objectives of global and general interest for society that are of a political, economic, social, cultural and civil nature. Thus, political parties are a counterbalance in society to other groups of citizens and individuals whose interests are material and partial, and can be accomplished individually or in association. In the Court's opinion, this enables the existence of different value structures in society, the mutual interaction of which ensure its development and democratisation.

The Court partially rejected the provision in question, allowing parties to raise funds from revenues from their own assets, for several reasons. First, because of its imprecise content, which can induce different interpretations and application in practice. This imperils the principle of the rule of law, a fundamental concept of the constitutional order. Second, it jeopardises the constitutional concept of the functions and objectives of political parties. Third, such activity employed by political parties can violate one of the economic bases of the country enshrined in Article 55 of the Constitution: freedom of market and entrepreneurship and the equal legal position of all market entities.

Languages:

Macedonian.



Identification: MKD-2001-1-003

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 14.03.2001 / e) U.br.175/2000 / f) / g) / h) CODICES (Macedonian).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
 3.17 **General Principles** – General interest.
 5.1.1.4 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons.
 5.2 **Fundamental Rights** – Equality.
 5.3.37.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Church, property / Denationalisation / Land, right to use / Legal person, equality / Restitution, criteria applied.

Headnotes:

Churches, monasteries and estates are rightful claimants of the right to denationalisation, which derives from the specific character and nature of their activities and objectives. They are a social need and a historical reality, throughout which the protection of interests of members affiliated therein is safeguarded. Although the principle of equality prohibits arbitrariness in law enforcement, “exemptions” are allowed if the protection of public interest so requires.

Summary:

The Court did not sustain the alleged unconstitutionality of an article from the law amending the Law on denationalisation according to which “a property is returned, i.e. compensation is given to individuals and religious temples, monasteries and estates for property seized as from as 2 August 1944”.

In the petitioner's view, the entities enumerated were not legal entities. The provision at issue defined an estate in property as a legitimate holder of the right to denationalisation, which was contrary to the principle of legal protection of ownership, stated in Articles 8.6 and 30 of the Constitution and Article 1 Protocol 1 ECHR.

According to the petitioner, the law in question has stated that only individuals are possible holders of the right to denationalisation and has exempted legal entities. If religious institutions could be treated as legal entities, the provision violated the principle of equality enshrined in Article 9 of the Constitution. Besides, the petitioner ascertained that the Serbian Orthodox Church owned the property in issue when it was seized. Since the law did not explicitly define the Macedonian Orthodox Church as the legitimate successor, it could not be taken as the holder of the right to denationalisation.

According to Article 8.6 of the Constitution, the legal protection of ownership is amongst the fundamental values of the constitutional order of the state.

By virtue of Article 30 of the Constitution, the right to ownership and inheritance is a fundamental economic human right guaranteed by the Constitution. Although it does not enumerate possible holders of this right, it can be concluded that such a right enjoys each legally verified entity.

Article 1 Protocol 1 ECHR safeguards the protection of ownership, guaranteeing each individual and legal entity the right to peaceful enjoyment of the property. No one can be deprived from their property, except in cases of public interest and under terms in accordance with law and general principles of the international law.

In the Court's opinion, the term "individual and legal entity" refers to the national law of countries to determine the scope of entities eligible to enjoy their property peacefully, in each concrete case.

According to Article 19.3 of the Constitution, the Macedonian Orthodox Church and other religious groups are separate from the state and are equal before the law. The separation of religious institutions from the state aims to ensure that the state would not interfere and intervene in church and religious matters, and that the church and religion would not be involved and engaged in political life or exercise state functions. Therefore, it is inevitable that these entities are constitutionally verified and confirmed and are legally bound to perform their duties in accordance with the Constitution, laws and other regulations.

The denationalisation, taken as a process of the restitution of property or compensation for assets seized in the state's favour, protects the rights of former owners, directly or indirectly. The Court found that the disputed provision gives legitimacy to religious institutions (religious temples, monasteries and estates) to call for the right of denationalisation in order to enable these communities to enforce their

specific objectives. Referring to the legal continuity of these entities from the time of seizure of the property until its restitution, the Court stated that this is a matter which should be ascertained in the denationalisation procedure itself.

Bearing in mind the whole content of the law, it could be taken that individuals are central to the process of denationalisation. Beyond that, only churches, monasteries and estates are determined as legitimate holders of the denationalisation right. The exclusivity that law gives to these entities (including the Holocaust Fund for Jewish people from Macedonia) derives from the specific nature of activities exercised by these entities, their objectives and significance. The Court found no grounds to sustain the alleged incompatibility of the provision with the principle of equality.

Languages:

Macedonian.



Identification: MKD-2001-1-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 21.03.2001 / **e)** U.br.168/2000; U.br.169/2000 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 27/2001 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.1 **General Principles** – Sovereignty.
 3.17 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
 5.5.4 **Fundamental Rights** – Collective rights – Right to self-determination.

Keywords of the alphabetical index:

Constitutional order, destruction / Hatred, incitement.

Headnotes:

Citizens are free to establish associations of citizens and political parties and to join and leave them. The programme and activities of associations may not be directed towards violent destruction of the constitutional order of the Republic or at the encouragement or incitement of national or racial hatred or intolerance.

Summary:

Three attorneys from Skopje lodged a petition with the Court challenging the constitutionality of the Programme and Statutes of Radko, an association of citizens seated in Ohrid (“the association”).

The petitioners grounded their allegations of unconstitutionality of the acts at stake on several points: the programme of the association was directed towards the violent destruction of the constitutional order; they blocked the free expression of the national affiliation of the Macedonian people, i.e. they denied its self-existence; and they incited ethnic hatred or intolerance.

When reviewing the constitutionality of the disputed acts, the Court took into consideration not only the association’s objectives that have directly and explicitly called for the violent destruction of the constitutional order and incited ethnic hatred or intolerance, but also those activities which objectively led towards what the Constitution does not allow.

The association’s literature stated that the association is named after the nickname of Ivan Mihajlov-Radko, under whose leadership the Macedonian liberation movement had grown up. The association glorified the work of Ivan Mihajlov-Radko, as the moral and intellectual pillar of the revolutionary and cultural struggle of Bulgarians from Macedonia. His heritage provided future heirs with evidence of the cultural and revolutionary struggle of Bulgarians from Macedonia, they claimed.

Thus, the following were indicated as the association’s objectives:

- the affirmation of the cultural and historical identity of the Slavs from Macedonia, that were known as Bulgarians throughout centuries;
- the restoration of traditional ethics and human values; and
- the affirmation of the Macedonian liberation movement.

The acts in question have also indicated the ways in which these objectives could have been enforced, which were basically cultural forms of activity: the publication of books, a newspaper and electronic media, the organisation of seminars, conferences and workshops etc.

The Court considered constitutional provisions related to the freedom of association. According to Article 20 of the Constitution, citizens are guaranteed freedom of association in order to exercise and safeguard their political, economic, social, cultural and other rights and convictions. The establishment of, as well as the freedom to join or resign from associations of citizens and political parties is free. Nevertheless, Article 20.3 of the Constitution comprises imperative provisions according to which the programmes and activities of associations of citizens may not be directed towards the violent destruction of the constitutional order or at the encouragement or incitement of ethnic or racial hatred or intolerance.

In the Court’s opinion, citizens’ freedom and the right to assemble act is a fundamental value for the existence and development of democratic relations in exercising power, which has the citizens, their freedoms and interests at its core. However the stated objectives of the Association enshrined in its programme and statute have the effect of limiting their freedom of association.

In this respect, the Court has the effect of taken into consideration the Preamble of the Constitution, provided that each activity denying the self-determination of the Macedonian people is in fact directed towards violent destruction of the constitutional order, or at the encouragement or incitement of ethnic or racial hatred or intolerance and towards negating free expression of national affiliation.

The association was declared to be unconstitutional by the Court.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2001-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 16.09.1998 / **e)** K.1998/52 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – General interest.
- 4.10.7 **Institutions** – Public finances – Taxation.
- 4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, duration / Education, levels, differentiation / Education, primary / Education, public, free of charge, secular / Education, religious / Education, duty of the state.

Headnotes:

Compulsory and continuous education for 8 years under state control and supervision is not contrary to the Constitution. The state may determine 8 or more years continuous education as compulsory. The taxes imposed in order to meet the expenses of this kind of education were also constitutional.

Summary:

On 16 August 1997 Law no. 4306 amended certain articles of the Law on Primary Education and envisaged various provisions related to taxes on this matter. The main opposition party brought an action to annul the law before the Court. The main objection was that after this law it would not be possible for students to have education at Prayer Leader Preacher High Schools (*Ýmam Hatip Liseleri*).

Articles 1 and 5 of Law no. 4306 provided that education in primary schools shall be for 8 years. In these schools education shall be without break and the participants shall be given a primary school diploma.

According to Article 42 of the Constitution education is compulsory. It shall be realised under state control and supervision in the spirit of Atatürk's principles and reforms. Whether it shall be continuous or not is up to the lawmaker. In order to realise education at the highest level, the state is under an obligation to take necessary measures according to its revenues. In this connection the lawmaker may determine 8 years or a longer period for continuous education. Thus, the challenged provisions are not contrary to Article 42 of the Constitution.

Article 24 of the Constitution regulates freedom of religion and conscience. It was submitted that the challenged law deprived individuals of their right to freedom of religion and conscience, since it will no longer be possible to have education at Prayer Leader Preacher Schools after a 5 year period of primary school. Prayer Leader Preacher High Schools will, however, be able to accept students in order to educate imams and other religious officials after 8 years compulsory uninterrupted primary education. Therefore it may not be asserted that religious education, which is a matter for the choice of the individuals concerned or the parents of the children, has been blocked. The challenged provision is not contrary to Article 24 of the Constitution.

Under Article 166 of the Constitution, it is the state's duty to plan the country's recourses. There is no contradiction between the challenged law and the plan prepared according to this article. The plan makes no provision for continuous or non-continuous education. There is no unconstitutionality with regard to Article 166 of the Constitution.

The Court also reviewed the constitutionality of the disputed provisions with regard to Articles 5, 10 and 17 of the Constitution – the fundamental aims and duties of the state; equality before the law; and the personal inviolability, material and spiritual entity of the individual; respectively. The reasoning of the law stated that it was aimed to ensure students choose their professions consciously without being affected by outside influences. That aim is not conflict with Articles 5, 10 and 17 of the Constitution.

Article 12 of the Constitution provides that everyone possesses inviolable and inalienable fundamental rights and freedoms. Since primary education facilitates reveal the skill of children and ensure their mental development, this constitutes a strong

foundation for professional and religious training. For this reason the challenged law is not in contradiction with the parents' right to determine the training of their children.

The challenge was also brought under the Preamble and Article 2 of the Constitution – the respect for human rights and the rule of law. The challenged provision provides that individuals will receive education for longer periods. This provision is in conformity with contemporary developments. It is necessary, from the point of view of respecting human rights, to improve and increase the length of, education. It is not contrary to the Preamble or Article 2 of the Constitution.

In regard to Article 65 of the Constitution (social and economic rights), there is nothing unconstitutional about the challenged provisions. Longer education will have positive effects on the individual and society.

Article 3 of the challenged law envisaged that individuals shall be educated in certain kinds of schools and programmes according to their abilities and skills. The article is not contrary to the Constitution for the same reasons that Articles 1 and 5 were held to be compatible.

Articles 2, 4, 6, 7, 8 and 9 of the disputed law (envisaging detailed provisions on the compulsory and continuous nature of the 8 year primary education system) are not in conflict with the Constitution for the same reasons that Articles 1 and 5 were held to be compatible.

These findings were all made unanimously by the Court.

The other part of the challenge to the provisions was related to taxes imposed to meet the expenses of compulsory and continuous primary education for 8 years. This was rejected by a majority vote. The judges Mr Kılıç, Mr Adalı, Mr Hüner, Mr Dinçer, Mr Bumin and Mr Acargün had dissenting opinions on certain parts of the provisions related to taxes.

Supplementary information:

Prayer Leader Preacher High Schools are a special kind of high schools in Turkey. They are under state control and supervision. It is possible to become a prayer leader or a preacher for the graduates of these high schools as well as to continue university education at different fields. The period of education at these special schools was for 7 years. The challenged law provided 4 years education at these

schools after 8 years continuous education at primary school.

Languages:

Turkish.



Identification: TUR-2001-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 06.01.1999 / **e)** K.1999/1 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.12 **General Principles** – Legality.
 3.17 **General Principles** – General interest.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.8.5.2.1 **Institutions** – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.
 4.11 **Institutions** – Armed forces, police forces and secret services.
 5.2 **Fundamental Rights** – Equality.
 5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Administrative authority, discretionary power / Search, order / Search and seizure, document.

Headnotes:

When a serious disturbance arises, it is the local governor's duty to call the police, military and other forces. The period of time for which the forces remain on duty in a given area is a matter for the commander of the security forces. The duties given to the armed forces in the disputed provisions are not unconstitutional. Boundary operations with the aim of following activists may be begun without the permission of the Turkish Grand National Assembly. The governors may be given the power to search individuals and their vehicles in airports, seaports and boundary gates. It is not unconstitutional to connect the

computer terminals of accommodation facilities to those of the security forces.

The Council of Ministers may not be given the power to transfer funds established by laws, since the location of these kind of funds are determined in the related laws. Certain kinds of expenses may not be taken out of the control of the Audit Court. The authority to use firearms should depend on certain kinds of conditions. The provision pardoning only certain temporary guards is in conflict with the principle of equality.

Summary:

Law no. 4178 provided certain amendments to the Laws on Provincial Administration, on the Struggle against Terrorism, on Feeding of the Military, on Firearm and other Arms and on Identity Declaration. 113 deputies objected to various provisions of those laws before the Court.

The amendment of Article 11/D-1 of the Law on Provincial Administration provided that if governors cannot prevent disturbances in their province with their own forces, they have the authorisation to call the forces of other provinces and other forces assigned for that duty. The Court decided that it is a requirement of the rule of law to determine the duties and responsibilities of administrators. The term "other forces" may not be interpreted as an organisation which is not determined by law. The article gives competence to the governors to call for assistance from forces of the Ministry of Interior or military units. The governors have the possibility to evaluate reliably the forces needed according to the magnitude and characteristics of the disturbances in a short time. There is nothing unconstitutional in allowing governors that competence.

The Amendment of the second clause of Article 11/D-2 of the Law on Provincial Administration gave competence to the commander of the armed forces to determine how many forces are needed and how long their duties should continue. The commander will determine the number of forces needed and the period of time for which they should remain after receiving the opinion of the governor. The commander will be in the best position to know which measures should be taken. The authority given to the commander of armed forces is not an authority related to martial law or extraordinary rule. There is nothing unconstitutional in the determination of the number of forces.

The judge, Ms Kantarcioglu, had a dissenting opinion on this issue. She found that one of the most important functions of the rule of law is to ensure public order and safety. This duty is vested in the

governor. It is a necessity that the governor determines the period of time for which armed forces remain. Therefore, it is contrary to the principle of the rule of law to give this power to the commander of armed forces. This part of the clause should be annulled. Ms Akbulut, Mr Burnin and Mr Hüner had dissenting opinions on this part of the clause.

The Amendment of the 4th, 5th and 6th clauses of Article 11/D included regulations regarding the scope of functions of the security forces and armed units provided that these functions are within the boundaries of the nature of the services performed. It may not be asserted that these provisions are contrary to the necessities of democratic order and for that reason the objection was rejected.

The amendment of the 8th Clause of Article 11/D envisaged limited off-boundary operations with the agreement of neighbour countries in order to capture or prevent activists. A limited off-boundary operation, in this context and with this aim, may not be evaluated as sending the Turkish Armed Forces to foreign countries within the meaning of Article 92 of the Constitution, which necessitates the permission of the National Assembly. Thus, this clause is not related to Article 92 of the Constitution. The objection was rejected.

The Amendment of the 10th Clause gave the authority to the Council of Ministers to transfer certain designated funds for the duties mentioned in the challenged article. The aim of the designated funds is determined by the related laws or decrees. Thus, the authority given to the Council of Ministers is contrary to Articles 7 and 11 of the Constitution.

The Amendment of the 13th Clause excluded expenditures for the aforementioned aims from review by the Auditing Court. It is contrary to Article 160 of the Constitution. The objections related to the other clauses of Article 11/D-2 were rejected.

The Amendments of supplementary Article 1 of the Law on Provincial Administration gives some authority over civil airports, seaports and boundary gates to governors. It may be necessary for any governor to take certain immediate actions in these areas. This constitutes an exception to Article 20 of the Constitution. It is not contrary to Article 20 of the Constitution to search vehicles and persons at points of departure and entrance. The judges Mr Sezer, Ms Kantarcioglu, Mr Ilýcak and Mr Sönmez had dissenting opinions on this question.

The Supplementary Article 2 of the Law on Struggle against Terrorism relates to the right to life. Under the disputed provision, when activists attempt to use

“arms”, the security forces may use “firearms”. According to the Court, firearms may only be used in unavoidable conditions. Without regard to the nature of the attempt, firearms may not be used for attempts which can be easily prevented. Therefore, the article is contrary to Article 17 of the Constitution. Mr Tuncel had a dissenting opinion on this issue.

The Amendment of temporary Article 9 of the Law on Firearms and other Arms gives authority to the Council of Ministers to conditionally pardon some “temporary village guards”. The Council would determine the scope of the pardon. The legal situation of the guards who would be given a pardon by the council and that of the guards who probably would not be given a pardon are the same. Therefore, this part of the regulation is contrary to Article 10 of the Constitution (the equality principle). It should be annulled.

The Amendment of Supplementary Article 1 of the Law on Identity Declaration necessitates that information of either private or official accommodation facilities be connected to those of police and gendarme stations. This obligation is aimed at securing public order, general public security and public interest. The Court decided that it is not contrary to Articles 2, 13 and 20 of the Constitution (the rule of law; basic rights and freedoms, and privacy; respectively). The objection should be rejected.

The Court gave a certain time limit to parliament to legislate on the annulled provisions. Until that time, the current provisions will remain in force.

Languages:

Turkish.



Identification: TUR-2001-1-003

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 19.09.2000 / **e)** K.2000/23 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.2.1 **Constitutional Justice** – Types of claim – Claim by a public body.
1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
3.19 **General Principles** – Reasonableness.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Status, legal, inequality / Sentence, suspension.

Headnotes:

Any state governed by the rule of law should be based on human rights and should preserve and strengthen those rights. All acts should be in conformity with law and consistent with the Constitution. They should be open to judicial review. The legislator has the responsibility to ensure that laws are in congruence with the Constitution and with universal legal principles.

Everyone is equal before the law without discrimination on any ground such as language, race, religion, colour, sex, political or other opinion. This principle is valid for people whose legal status is the same; but equality before the law does not mean that everyone must be bound by the same rules in every aspect.

The legislator has the right to legislate the actions that shall be deemed as an offence and the punishments that shall be applied to those offences provided that it is in conformity with the Constitution and with the general principles of criminal law. It also has the right to provide regulations on suspensions of judgments. However, everyone who is in the same situation must be treated equally.

Summary:

Act 4454 suspended the execution of judgments related to offences that have been committed by means of press, oral or televised media in conjunction with expression. In order to get the benefit from that suspension, imprisonment in the related criminal provisions should not exceed 12 years. In addition, prosecutions of related offences and judgments of pending cases have been suspended in certain situations. Thus, if those crimes have been committed by means other than press, oral or televised media, the suspension shall not be applied.

Under the Turkish Constitution, the major opposition party has the right to challenge any law after its

promulgation in the Official Gazette within 60 days if it considers that the related provision or provisions of a certain law unconstitutional. The main opposition party applied to the Court asserting that the provision in the related law is not in conformity with Articles 10 and 2 of the Constitution (the principle of equality and the rule of law, respectively).

The equality principle is one of the basic principles of law and is regulated in Article 10 of the Constitution. No privilege may be given to a person, a certain family or a certain community. State authorities and administrative bodies must apply the equality principle in all their acts. The principle is valid for individuals who are in the same legal position. The aim of this principle is to ensure individuals in the same legal position are treated equally and that discrimination is forbidden.

Article 1/1 of Law no. 4454 suspended the execution of judgments related to crimes that have been committed by means of press, oral or televised media if the crime has been committed before 23 April 1999. The legislator has the right to regulate which actions shall be deemed as offences and what the appropriate punishment should be for different offences. It also has the competence to determine aggravating and attenuating circumstances. It even has the competence to regulate the suspension of imprisonment and prosecution of offences. If such a regulation is made, all individuals of the same status should be treated equally. In order to determine different provisions, there should exist valid reasons such as national security, public interest and public order.

The challenged provisions brought the suspension of certain crimes committed by means of press, oral or televised media in conjunction with expression. But the suspension did not include crimes committed by other means in spite of their short-term imprisonment. It is clear that this kind of difference in regulations does not have sound reasoning. Moreover, it may not be asserted that it is just and constitutional to bring the suspension for serious crimes and not to bring the suspension for less serious offences within the same field. For those reasons the challenged provision is contrary to Articles 2 and 10 of the Constitution. It should be annulled.

Judges Mr Bumin, Mr Acargün, Mr Hüner and Mr İlyıcak delivered dissenting opinions.

Languages:

Turkish.



Identification: TUR-2001-1-004

a) Turkey / b) Constitutional Court / c) / d) 12.12.2000 / e) K.2000/50 / f) / g) *Resmi Gazete* (Official Gazette) / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

- 1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
- 1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
- 1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
- 1.3.4.7.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Banning of political parties.
- 3.1 **General Principles** – Sovereignty.
- 3.3.3 **General Principles** – Democracy – Pluralist democracy.
- 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
- 3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.
- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Weighing of interests.
- 5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Political party, dissolution / Political party, freedom.

Headnotes:

When any political party intends to demolish or imperil the basic democratic order of society determined by the Constitution, it is consistent with the democratic order to apply sanctions against this party. Therefore, the constitutional and the legal provisions related to political parties should be suitable for the Court to set a sensitive balance between prohibitions on political parties and the freedom of political organisation.

Summary:

According to Article 152/1 of the Constitution, if a court trying a case finds that the law or the decree having force of law to be applied is unconstitutional,

or if it is convicted of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on this issue. While the Court was trying the case on the prohibition of the Virtue Party, it found a provision of the Law on Political Parties as unconstitutional on its own. Thus, the Constitutional Court challenged this provision before it, "as the court trying a case". The Court considered that the disputed provisions were contrary to Articles 68 and 69 of the Constitution (on political parties).

Article 103 of the Law no. 2820 on Political Parties provided that whether any political party has become the focus of activities contrary to the provisions of Article 68/4 of the Constitution or not shall be determined by the Court. According to Article 68/4 of the Constitution, the statutes and programmes of political parties shall not be in conflict with the indivisible integrity of the State, human rights, national sovereignty and the principles of a democratic and secular Republic. According to Article 69 of the Constitution, if unconstitutional activities are committed by members of any political party and if that situation is accepted and approved by the competent organs of the political party concerned or if those organs themselves commit such activities, it shall be deemed as the focus of the activities prohibited.

The Court found that it is incontrovertible that political parties act freely in contemporary democracies that depend on rule of law, pluralism and participation. But activities tending to imperil or abolish the basic democratic order may not be accepted. The regulations of the Constitution must be evaluated within this framework. Under the regulations of Law no. 2820, even if the activities of any political party are contrary to Article 68 of the Constitution, this shall not be enough to abolish the political party concerned. In order to determine whether any political party has become the focus of the activities mentioned, the conditions in Article 103 of Law no. 2820 have to be fulfilled.

The competent organs of any political party under pressure of abolition do not expressly approve the unconstitutional activities of its members. Under the provisions of Law no. 2820 the activities of a leader of any political party are deemed those of any one of its members. But the activities of the leader of any political party may not be equal to those of its members. Therefore, it is almost impossible to determine that any political party has become the focus of activities contrary to the Constitution and Law.

When any political party intends to demolish or endanger the basic democratic order determined by the Constitution, it is not consistent with the essence of democratic order to endanger or to create difficulties in the application of sanctions against the related party. Therefore, the constitutional and the legal provisions related to the political parties should be suitable for the Court to set a sensitive balance between prohibitions of political parties and the freedom of political organisation.

For those reasons Article 103/2 of Law no. 2820 is contrary to Articles 68 and 69 of the Constitution. It should be annulled.

The judges Mr Bumin, Mr K yl c, Mr Adal y, Mr H ner and Mr Akyalc yn delivered dissenting opinions.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2001-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.02.2001 / **e)** 1-rp/2001 / **f)** Constitutionality of provision of the Regulations of the Supreme Council of the Autonomous Republic of Crimea, Regulation on the Accounting Chamber of the Supreme Council of the Autonomous Republic of Crimea, the Regulation of Procedures of management of the property in possession of the Autonomous Republic of Crimea or transferred under its management, approved by relevant resolutions of the Supreme Council of the Autonomous Republic of Crimea, and the Resolution of the Supreme Council of the Autonomous Republic of Crimea "On Measures of Improvement of Work with Personnel in the Autonomous Republic of Crimea" (the case of legal acts passed by the Supreme Council of the Autonomous Republic of Crimea) / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.1 **General Principles** – Sovereignty.

4.8.1 **Institutions** – Federalism and regionalism – Basic principles.

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

4.8.5 **Institutions** – Federalism and regionalism – Distribution of powers.

Keywords of the alphabetical index:

Autonomy, status / Autonomous authority, decisions, procedures of approval, quorum / Ownership, legal regime / Autonomous authority, budget, financial control, expenses / Accountability, determination.

Headnotes:

According to Article 92.1.8 of the Constitution, Ukrainian law exclusively determines the legal fundamentals and guarantees of business activity; and the rules of competition and standards of anti-monopoly regulation. According to Article 92.1.7 of the Constitution, Ukrainian law also exclusively

determines the legal regime of ownership. Articles 7 and 92.1.15 of the Constitution provide for a single system of local self-administration in the entire territory of the Ukraine recognised and guaranteed in Ukraine. The regulation of these issues have not been delegated to the Autonomous Authority.

Summary:

The President of Ukraine petitioned the Constitutional Court for a declaration that certain provisions passed by the Supreme Council of the Autonomous Republic of Crimea were unconstitutional.

The Constitutional Court recognised as unconstitutional provisions of Regulations of the Supreme Council of the Autonomous Republic of Crimea of 30 June 1998. These concerned procedures for the conduct of plenary sessions of the Supreme Council of the Autonomy and approval of resolutions by them; and the Resolution of the Supreme Council of the Autonomous Republic of Crimea "On Measures of Improvement of Work with Personnel in the Autonomous Republic of Crimea" of 20 January 1999, (as amended).

The Court also recognised as unconstitutional those provisions of the Resolution which contain directives in accordance with the Regulation of Procedures of management of the property in possession of the Autonomous Republic of Crimea or transferred under its management of 21 April 1999. This provided for the delegation of the performance of executive functions in management of the property in possession of the Autonomous Republic of Crimea, to the Supreme Council of the Autonomous Republic of Crimea and its Presidium; and the regulation on the Accounting Chamber of the Supreme Council of the Autonomous Republic of Crimea as of 17 March 1999.

In accordance with Article 5.2 of the Constitution, the people of the Ukraine are the bearers of sovereignty and the single source of power in Ukraine. The sovereignty of the Ukraine applies to its entire territory (Article 2.1 of the Constitution) the Autonomous Republic of Crimea being its integral part (Article 134 of the Constitution).

Article 136.4 of the Constitution establishes that the powers, procedures of formation and activity of the Supreme Council of the Autonomous Republic of Crimea and the Council of Ministers of the Autonomous Republic of Crimea are governed by the Constitution and Ukrainian law, and legal provisions of the Supreme Council of the Autonomous Republic of Crimea concerning issues within its competence. At the same time, provisions of the Supreme Council

of the Autonomous Republic of Crimea and decisions of the Council of Ministers of the Autonomous Republic of Crimea must not conflict with the Constitution and Ukrainian law, according to Article 135.2 of the Constitution.

The organisation and activities of the Supreme Council and the Council of Ministers of the Autonomous Republic of Crimea are based on sharing powers (Articles 1.3 and 1.4 of the Constitution of the Autonomous Republic of Crimea and the Law of Ukraine “On the Supreme Council of the Autonomous Republic of Crimea”).

The provisions of the Supreme Council of the Autonomous Republic of Crimea challenged by the President of Ukraine were found inconsistent with the aforementioned provisions of the Constitution.

Languages:

Ukrainian.



Identification: UKR-2001-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 19.04.2001 / **e)** 4-rp/2001 / **f)** Formal construction of provisions of Article 39.1 of the Constitution of Ukraine on timely notification of bodies of the executive power or bodies of local self-government on conduct of meetings, rallies, marches and demonstrations (the case concerning timely notification on peaceful gatherings) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)**.

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.

3.19 **General Principles** – Reasonableness.

4.8.5.2 **Institutions** – Federalism and regionalism – Distribution of powers – Implementation.

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

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

Keywords of the alphabetical index:

Mass event, organisation, notification / Conduct, information / Time limit, reasonableness.

Headnotes:

Provisions of Article 39.1 of the Constitution concerning the timely notification of bodies of executive power or local self-government on the plans for meetings, rallies, marches and demonstrations should be understood to require the organisers of such peaceful gatherings to notify the bodies on the plans for such events in due time, i.e. within the prescribed time period preceding the date of such events. This time period should not restrict the right of citizens provided in Article 39 of the Constitution. At the same time, it should provide the appropriate bodies with a possibility to take measures to ensure the unhindered conduct by the citizens of meetings, rallies, marches and demonstrations, public order, and the rights and liberties of other people.

Establishing concrete terms of timely notification allowing for peculiar forms of peaceful gatherings, their mass character, and place and time is subject to legal regulation.

Summary:

The right of citizens to hold peaceful meetings, rallies, marches and demonstrations is fixed in Article 39 of the Constitution, and belongs to citizens as a inalienable and inviolable right guaranteed by the Fundamental Law of the Ukraine.

This right is one of the constitutional guarantees of the citizen of his/her right to freedom of ideology and religion, thought and speech, free expression of opinions and views, use and dissemination of information verbally, in writing or by other means subject to his/her choice, free development of personality etc. In the exercise of these rights and liberties, any encroachment on the rights and liberties or honour and dignity of other people is not permitted. According to Article 68 of the Constitution, every citizen is bound to steadily observe the Constitution and laws of the Ukraine. Citizens are entitled to conduct meetings, rallies, marches and demonstrations provided obligatory timely notification of bodies of the executive or local self-government of such events.

Time limits for such notification should be reasonable and should not restrict the right of citizens to conduct meetings, rallies, marches and demonstrations. These time limits should serve as a guarantee of this

right of citizens. Within such time limits, the above mentioned bodies should take certain preparatory measures, in particular, in order to secure the unhindered right of citizens to conduct meetings, rallies, marches and demonstrations, and the maintenance of public order, and the protection of the rights and liberties of other people. If necessary, bodies of the executive or local self-government may co-ordinate with the organisers of mass events the date, time, place, route, conditions and duration of such events.

The time limit for notification should be sufficient for bodies of the executive or local self-government to determine the consistency of the events with law and, if necessary, in accordance with Article 39.2 of the Constitution, to appeal to a court for the settlement of disputes.

Languages:

Ukrainian.



United Kingdom

House of Lords

Privy Council

Introduction

The United Kingdom does not have any court, either at first instance or on appeal, to which all constitutional law questions must be referred. In part this is because it lacks a single written constitution although it has a number of constitutionally significant documents as well as a lot of constitutionally significant case law. Disputes between the citizen and the government or its emanations, while they can and do arise in all sorts of legal contexts and can be heard initially by all sorts of courts, have generally and traditionally been determined in actions for judicial review heard in the Supreme Court of England and Wales, the High Court of Justiciary in Scotland and the High Court of Northern Ireland. The Judicial Committee of the House of Lords is the highest and ultimate court in the UK, other than when dealing with “devolution issues” or criminal appeals from Scotland. The House of Lords only considers appeals which raise issues of general public or legal importance and in practice hears no more than 100 cases a year of which only a small proportion involve constitutional law points. The Court of Appeal of England and Wales is in practice the ultimate court for most appeals in the United Kingdom. Appeals from Scotland and Wales and Northern Ireland raising devolution issues, that is constitutional questions relating to the devolved powers of those regions pursuant to the Devolution Acts, can ultimately go up to the Judicial Committee of the Privy Council which is comprised in practice largely of the same judges as the House of Lords but with a larger proportion of judges from the country with which the appeal is concerned.

Since the incorporation of the European Convention on Human Rights into domestic law via the Human Rights Act 1998 and the constitutional changes included in the Devolution Acts of 1998, there has been a significant increase in constitutional law decisions, adding to the already large body of judicial review decisions. It is not possible to provide precise statistics since many cases include constitutional or administrative law points, but very few exclusively raise such issues. Thus, the courts are unable to compile comprehensive statistical information of, for instance, the number of constitutional challenges brought in any given period. Included here are those decisions considered of most significance and interest.

Important decisions

Identification: GBR-2001-1-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 25.03.1999 / **e)** / **f)** R. v. Immigration Appeal Tribunal and another, *ex parte* Shah / **g)** [1999] 2 *Appeals Cases*, 629 / **h)** [1999] 2 *Weekly Law Reports*, 1015; [1999] 2 *All England Law Reports*, 545; CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.

2.3.4 **Sources of Constitutional Law** – Techniques of review – Interpretation by analogy.

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

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

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

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

5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.

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

Keywords of the alphabetical index:

Asylum, seeker / Particular social group, meaning / Woman, position in Pakistan / Refugee, political / Refugee, Geneva Convention / Woman, married, discrimination.

Headnotes:

Women in Pakistan could constitute a “particular social group” for the purposes of obtaining refugee status under the Geneva Convention relating to the Status of Refugees because they are persecuted because of their gender.

Summary:

Two Pakistani women applied for asylum in the United Kingdom (U.K.). They claimed they were forced to leave their homes by their husbands and were at risk of being falsely accused of adultery in Pakistan. They said they would be unprotected by the

state and would face the risk of criminal proceedings for sexual immorality if they were forced to return to Pakistan. In their application for asylum, they argued they were refugees as they had a well-founded fear of persecution for reasons of “membership of a particular social group” within the meaning of Article 1.A.2.a of the Geneva Convention relating to the Status of Refugees (the Convention). The Secretary of State and the immigration adjudicators rejected their application finding they were not members of a particular social group within the meaning of the Convention. Following an appeal to the Immigration Appeal Tribunal the Court of Appeal agreed with the rejection of their application. The women appealed to the House of Lords.

The House of Lords held the women could be part of a particular social group for the purposes of Article 1.A.2.a of the Convention. Cohesiveness might prove the existence of a particular social group, but the definition of a group should not be so limited. The phrase, “particular social group”, applied to whatever groups might be regarded as coming within the Convention’s anti-discriminatory objectives, that is groups whose members shared a common immutable characteristic and were discriminated against in matters of fundamental human rights.

In Pakistan, women are unprotected by the state. Discrimination against women is partly tolerated and partly sanctioned by the state. Married women are subordinate to the will of their husbands. There is strong discrimination against married women. A woman who makes an accusation of rape is at great risk. Even Pakistani statute law discriminates against such women. For a small minority of women convicted of sexual immorality, there is the spectre of 100 lashes or stoning to death in public.

Discrimination against women in matters of fundamental human rights on the ground that they are women is plainly equivalent to discrimination on grounds of race. It offends against their rights as human beings to equal treatment and respect. It may seem strange that sex (or gender) was not specifically enumerated in the Convention when it is mentioned in Article 2 of the Universal Declaration of Human Rights, but the Convention was originally limited to persons who had become refugees as a result of events occurring before 1 January 1951, and the drafters may not have been sufficiently conscious of gender persecution. The concept of a social group is perfectly adequate to accommodate women as a group in a society that discriminates on grounds of sex, that is, that perceives women as not being entitled to the same fundamental rights as men. Thus women in Pakistan were a “particular social group” for the purposes of the Convention provision.

If this definition of a group was considered too wide, the Appellants in this case are, in any case, members of a more narrowly circumscribed group with a coincidence of three factors: gender, the suspicion of adultery, and their unprotected position in Pakistan.

The Appellants' appeals were allowed. In relation to one of the women the Court made an order declaring that her removal from the U.K. would be unlawful, in relation to the other her case was remitted to the Immigration Appeal Tribunal.

One of the five judges, Lord Millet, gave a dissenting opinion. He did not accept, as a general proposition, the submission that those who are persecuted because they refuse to conform to discriminatory laws to which, as members of a particular social group, they are subject, thereby qualify for refugee status. Such persons are discriminated against because they are members of the social group in question; but they are persecuted because they refuse to conform, not because they are members of the social group.

Languages:

English.



Identification: GBR-2001-1-002

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 06.07.2000 / **e)** / **f)** Horvath v. Secretary of State for the Home Department / **g)** [2001] 1 *Appeals Cases*, 489 / **h)** [2000] 3 *Weekly Law Reports*, 379 [2000] 3 *All England Law Reports*, 577; CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.

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

5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.

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

5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.

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

Keywords of the alphabetical index:

Asylum, seeker / Surrogacy, principle / Racial hatred / Refugee, political / Refugee, status denied / Roma / State, duty to protect.

Headnotes:

When determining applications for refugee status from applicants who allege persecution by non-state agents, the applicant has to satisfy two tests: demonstrating fear and lack of protection by the home state.

The principle of surrogacy underpinning the Geneva Convention relating to the Status of Refugees meant an applicant could be granted refugee status only where he had a well-founded fear of threats to his life, acts of violence or ill-treatment and the home state is unable or unwilling to discharge its duty to protect its own nationals.

Summary:

The Appellant was a citizen of Slovakia and a Roma (or gypsy). He applied for asylum in the U.K. claiming he feared persecution by skinheads in Slovakia and that the police were failing to protect Roma. He claimed to be a refugee for the purposes of Article 1.A.2.a of the Geneva Convention relating to the Status of Refugees (the Convention). According to that article, the term “refugee” applied to a person who, owing to a well-founded fear of being persecuted for reasons of race, was outside the country of his nationality and unable or, owing to such fear, unwilling to avail himself of the protection of that country.

The Appellant's application was refused by the Secretary of State and an immigration adjudicator. On appeal, the Immigration Appeal Tribunal (IAT) accepted the Appellant had a well-founded fear of violence by skinheads, but held that for this to amount to persecution there had to be a failure of the state to provide protection. The IAT found that violent attacks on Roma in Slovakia were isolated and random, carried out by thugs, and that the protection afforded by the state was sufficient. Therefore, the Appellant's fear did not amount to persecution. The Court of Appeal agreed. The Appellant appealed to the House of Lords.

The House of Lords held that in an allegation of persecution by non-state agents, the word “persecution” in Article 1.A.2 of the Convention implied a failure by the state to make protection available against ill-treatment or violence. The principle of surrogacy underpinned the Convention. An applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, does not entitle him without more to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy. The obligation to afford refugee status arises only if the applicant’s own state is unable or unwilling to discharge its own duty to protect its own nationals.

The court had to apply a practical standard taking proper account of the duty owed by a state to all its nationals, rather than a standard eliminating all risk. The sufficiency of state protection had to be measured not by the existence of a real risk of an abuse of human rights but by the availability of a system for the protection of the citizen and a reasonable willingness to operate that system.

On the evidence before it, the IAT was entitled to conclude that the protection of the state was sufficient for the level of fear held by the Appellant. The Appeal was dismissed and the lower courts’ orders upheld.

Languages:

English.



Identification: GBR-2001-1-003

a) United Kingdom / **b)** Privy Council / **c)** / **d)** 05.12.2000 / **e)** / **f)** Brown v. Stott / **g)** / **h)** [2001] 2 *Weekly Law Reports*, 817; [2001] 2 *All England Law Reports*, 97; CODICES (English).

Keywords of the systematic thesaurus:

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

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.15 **General Principles** – Proportionality.
 3.16 **General Principles** – Weighing of interests.
 3.18 **General Principles** – Margin of appreciation.
 4.8.5.3 **Institutions** – Federalism and regionalism – Distribution of powers – Supervision.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
 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:

Devolution / *Ex facto oritur ius* / Right, implied / Road safety, offence / Road traffic, offence.

Headnotes:

A provision requiring a person keeping a motor vehicle to give the police the identity of the person driving it when a suspected road traffic offence was committed is not incompatible with Article 6 ECHR, the right to a fair trial. Whilst it may, *prima facie*, infringe a person’s privilege against self-incrimination, such privilege is not absolute and the infringement was both necessary and proportionate in the circumstances.

Summary:

A woman was suspected of shoplifting at a store. The police believed she had been drinking alcohol and asked her how she came to the store. She said she travelled by her car. She was taken to a police station, charged with theft, and obliged, under provisions in the Road Traffic Act 1988 (“the Act”) to tell the police who was driving her car when she travelled to the store. She admitted she was the driver. She was then found to be over the alcohol limit for driving and was charged with an offence under the Act. She raised a “devolution issue”, under Section 6 of the Scotland Act 1998, as to whether the prosecution’s reliance on her compulsory admission of driving the car was compatible with Article 6.1 ECHR. The High Court of Justiciary in Scotland allowed her appeal and declared the prosecution could not rely on such evidence. The Scottish law officers appealed to the Privy Council.

Section 172 of the Act requires the person keeping a vehicle to provide police with the identity of the driver of that vehicle where the driver is alleged to be guilty of a specified driving offence. The defendant claimed

this provision infringed her privilege against self-incrimination.

The Judicial Committee of the Privy Council recalled that Articles 10 and 11.1 of the Universal Declaration of Human Rights (1948) and Article 6 ECHR grant a right to a fair trial but contain no express guarantee of a privilege against self incrimination. The right is implied.

The European Court and Commission of Human Rights have interpreted Article 6 ECHR broadly by reading into it a variety of other rights to which the accused person is entitled in the criminal context. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. They include the right to silence and the right against self incrimination with which this case is concerned. As these other rights are not set out in absolute terms in the article they are open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the European Convention on Human Rights could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently avoided by the Court throughout its history. The case law shows that the Court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. *Ex facto oritur ius*. The Court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lönnroth v. Sweden* at paragraph 69 of the judgment (*Special Bulletin ECHR* [ECH-1982-S-002]); *Sheffield and Horsham v. United Kingdom* at paragraph 52 of the judgment.

The high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it effectively, for the public benefit, cannot be doubted. One way democratic governments have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers. Under some legal systems (e.g. Spain, Belgium and France) the registered owner of a vehicle is assumed to be the driver guilty of minor

traffic offences unless he shows that some other person was driving at the relevant time. The jurisprudence of the European Court tells us that the questions that should be addressed when issues are raised about an alleged incompatibility with a right under Article 6 ECHR are the following: (1) Is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) If it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest? (3) If so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised? The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual. There being a clear public interest in enforcement of road traffic legislation the crucial question in the present case is whether the challenged provisions represent a disproportionate response, or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial.

In determining this question it is recalled that the European Convention on Human Rights places the primary duty on domestic courts to secure and protect rights. The function of the European Court of Human Rights is essential but supervisory. In that capacity it accords to domestic courts a margin of appreciation, which recognises that national institutions are in principle better placed than an international court to evaluate local needs and conditions. That principle is logically not applicable to domestic courts. On the other hand, national courts may accord to the decisions of national legislatures some deference where the context justifies it.

In the Privy Council's view, the challenged provision was not a disproportionate response to the serious problem of misuse of motor vehicles, nor would the defendant's admission undermine her right to a fair trial. The provision puts only a single, simple question, the answer to which cannot, by itself, incriminate a defendant since driving a car in itself is not an offence. The defendant was also required to submit to a breath test to discover her alcohol limit. It was not argued that such a procedure violated her right to a fair trial, and it is difficult to distinguish it from the challenged provision. The possession and use of a motor vehicle carries with it responsibilities including the submission to the regulatory regime in place. For all these reasons, the challenged provision was found to be compatible with Article 6 ECHR and the lower courts declaration was quashed.

Cross-references:

European Court of Human Rights:

- *Sporrong and Lönnroth v. Sweden*, 23.09.1982; (1982) 5 *European Human Rights Reports* 35, *Special Bulletin ECHR* [ECH-1982-S-002];
- *Sheffield and Horsham v. United Kingdom*, 30.07.1998; (1998) 27 *European Human Rights Reports* 163.

Languages:

English.

*Identification:* GBR-2001-1-004

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 19.12.2000 / **e)** / **f)** *R. v. Secretary of State for the Home Department, ex parte Adan*; *R. v. Secretary of State for the Home Department, ex parte Aitseguer* / **g)** / **h)** [2001] 2 *Weekly Law Reports*, 143; [2001] 1 *All England Law Reports*, 593; CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.

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

3.12 **General Principles** – Legality.

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

5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.

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

Keywords of the alphabetical index:

Asylum, seeker / Surrogacy, principle / Interpretation, principles / Refugee, political / Refugee, Geneva Convention / Refugee, status denied / Roma / State, duty to protect.

Headnotes:

In determining whether a person is in danger of persecution for the purposes of the Geneva Convention relating to the Status of Refugees, the responsible government minister must interpret the Convention according to its one true international meaning. The United Kingdom government and courts had determined that the true meaning included persecution by non-state agencies. Thus, when considering whether to send an asylum seeker to a third country, if that third country held a different interpretation, limiting the relevant persecution to only that by state authorities, the minister should not allow the asylum seeker to be sent there. It was not open to the minister to say his act was lawful if the third country had a different but reasonable interpretation of the Convention.

Summary:

Two asylum seekers, one Somali and one Algerian, arrived in the United Kingdom from “third countries”. The Somali came via Germany and claimed she was a member of a minority clan persecuted by majority clans. The Algerian came via France and claimed he was at risk from a political faction in Algeria and that the Algerian authorities were unable to protect him.

Section 2.2.c.a of the Asylum and Immigration Act 1996 (the Act) allowed the Secretary of State to send an asylum seeker to a third country provided he certified that in his opinion the government of that country would not send him to another country “otherwise than in accordance with” the Geneva Convention relating to the Status of Refugees (the Convention). The Convention prohibited contracting states from returning a refugee to territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Article 1.A.2.b of the Convention defined a refugee as a person who, owing to a well-founded fear of being persecuted for those reasons, was outside the country of his nationality and unable or, owing to such fear, unwilling to avail himself of the protection of that country.

The government of the United Kingdom accepted that Article 1.A.2 of the Convention extended to persecution by non-state agents, but the German and French authorities interpreted the Convention as applying only to persecution by the state. The Secretary of State accepted that, if the Somali asylum seeker were returned to Germany, the authorities would probably send her back to Somalia because the governmental authority in that country had collapsed and there was therefore no state to persecute her. He also accepted

the French authorities would probably return the Algerian asylum seeker to his country on the ground that the Algerian state neither tolerated nor encouraged the feared persecution. He nevertheless issued certificates under the Act providing for the return of the asylum seekers to Germany and France. They challenged certificates in judicial review proceedings. The Somali's application was dismissed, but the Algerian's was allowed. On appeal to the Court of Appeal the Secretary of State contended he had complied with the Act if he considered the approach of the third country was an interpretation of the Convention reasonably open to that country. The Court of Appeal held the Secretary of State had to be satisfied that the practice in the third country was consistent with the one true and international interpretation of the Convention, namely that the Convention extended to persons who feared persecution by non-state agents. It allowed the Somali's appeal and dismissed the Secretary of State's appeal in the other case. The Secretary of State appealed to the House of Lords, arguing that the Act was to be interpreted as if it referred to the Convention "as legitimately interpreted by the third country concerned", and challenging the Court of Appeal's conclusion that the Convention had only one true meaning.

The House of Lords held that Section 2.2.c of the Act referred to the meaning of the Convention as properly interpreted, not as "legitimately interpreted by the third country concerned". The contrary conclusion would involve interpolation of words into the Act, not interpretation, and there was no warrant for implying such words. It followed that the inquiry had to be into the meaning of the Convention, approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It was therefore necessary to determine the one true autonomous and international meaning of Article 1.A.2. That meaning was that the protection of the Convention extended to those who were subject to persecution by factions within the state if the state in question was unable to afford protection against such factions. In that respect, there was no material distinction between a country where there was no government and one in which the government was unable to afford the necessary protection to citizens.

Just as the courts must seek to give a "Community" meaning to words in the EC Treaty (e.g. "worker") so the Secretary of State and the courts must (in the absence of a ruling by the International Court of Justice or uniform state practice) arrive at their interpretation on the basis of the Geneva Convention as a whole read in the light of relevant rules of international law, including the Vienna Convention on

the Law of Treaties. The Secretary of State and the courts of the United Kingdom have to decide the meaning of this phrase. They cannot adopt a list of permissible, legitimate, possible, or reasonable meanings and accept that any one of those when applied would be in compliance with the Geneva Convention. The phrase "otherwise than in accordance with the Convention" does not mean "otherwise than in accordance with the relevant state's possible reasonable, permissible or legitimate view of what the Convention means".

The Secretary of State had wrongly proceeded on the twin assumptions that there was a band of permissible meanings of the Convention provisions and that the practice adopted in Germany and France fell within that permissible range. His appeals were dismissed.

Languages:

English.



Identification: GBR-2001-1-005

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 09.05.2001 / **e)** / **f)** R. v. Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury and others / **g)** [2001] *United Kingdom House of Lords*, 23 / **h)** [2001] 2 *Weekly Law Reports*, 1389; [2001] 2 *All England Law Reports*, 929 [2001]; CODICES (English).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 3.3 **General Principles** – Democracy.
- 3.9 **General Principles** – Rule of law.
- 3.12 **General Principles** – Legality.
- 3.17 **General Principles** – General interest.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.13.2 **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.

5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

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

Keywords of the alphabetical index:

Land, use, plan.

Headnotes:

Even though the Secretary of State is not an independent and impartial tribunal, it is not incompatible with Article 6.1 ECHR for him to determine certain administrative matters that involved individual rights, so long as his decisions are open to judicial review to ensure they are taken rationally, in accordance with a fair procedure and within the powers conferred by parliament.

Summary:

A number of companies and agencies had disputes regarding applications for planning permission. The Secretary of State “called in” the applications under his statutory powers, thereby having the ultimate decision making power. Following an Application for Judicial Review, the High Court found that the Secretary of State’s acts were in breach of the Human Rights Act 1998 as they were incompatible with Article 6.1 ECHR. The Court found the Secretary of State was not an impartial tribunal because of his dual role in formulating policy and taking decisions. The Court therefore made a declaration of incompatibility under its powers in Section 4 of the Human Rights Act. The Secretary of State appealed to the House of Lords.

The House of Lords allowed the appeals and reversed the decision of the High Court. Their Lordships found that planning decisions did affect civil rights even if they are of an administrative law rather than strictly civil law nature. As he is responsible for laying down planning policy, the Secretary of State cannot be an independent and impartial tribunal of planning disputes. However, determining planning policy was a different function from the judicial function, the former should generally be left to elected politicians. In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. So long as these decisions are subject to judicial review in so far as they affect the rights of

individuals, the process can be compatible with the concept of the rule of law and the rights protected by Article 6.1 ECHR.

There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights are not capable of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (e.g., concerning the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.

All democratic societies recognise that while there are certain basic rights which attach to the ownership of property, they are heavily qualified by considerations of the public interest. This is reflected in Article 1 Protocol 1 ECHR. Under the first paragraph, property may be taken by the state, on payment of compensation, if the public interest requires. Under the second paragraph, the use of property may be restricted without compensation on similar grounds. The question of what the public interest requires for the purpose of Article 1 Protocol 1 ECHR can be determined according to the democratic principle - by elected local or central bodies or by ministers accountable to them. There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals.

Another relevant principle must also exist in a democratic society: the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in Article 1 Protocol 1 ECHR, which states that a taking of property must be “subject to the conditions provided for by law”. The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by parliament.

Article 6.1 ECHR confers the right to an independent and impartial tribunal to decide whether a policy

decision by an administrator such as the Secretary of State was lawful but not to a tribunal which could substitute its own view of what the public interest required. The requirements are thus met by the right to judicially review a decision.

There is nothing in the case law of the European Court or Commission of Human Rights, which the Court must consider pursuant to Section 2 of the Human Rights Act, that suggests the United Kingdom provisions for judicial review are inadequate to satisfy Article 6.1 ECHR in the circumstances of this type of case.

Languages:

English.



Identification: GBR-2001-1-006

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 17.05.2001 / **e)** / **f)** R. v. A. / **g)** [2001] *United Kingdom House of Lords*, 25 / **h)** [2001] *2 Weekly Law Reports*, 1546; [2001] *3 All England Law Reports*, 1 [2001]; 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.

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

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.

3.15 **General Principles** – Proportionality.

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

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.

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

Keywords of the alphabetical index:

Interpretation, compatibility with the European Convention on Human Rights / Interpretation, implications / Rape / Sexual offence.

Headnotes:

Section 41 of the Youth Justice and Criminal Evidence Act 1999 (Section 41) prevented a defendant charged with committing a sexual offence from giving evidence or questioning a complainant about her/his previous sexual history, except in restrictively defined circumstances where a criminal court could give permission to do so. A literal interpretation of Section 41 could, in certain circumstances, deny a defendant the right to a fair trial protected by Article 6 ECHR.

Section 3 of the Human Rights Act 1998 (the Human Rights Act) imposed an obligation on the courts to interpret all laws so as to be compatible with the European Convention on Human Rights where possible. Thus, Section 41 should be read to import the safeguards of a fair trial even if this required a strained, yet nevertheless possible, interpretation.

Summary:

Mr A was charged with rape. His defence was that the complainant consented to sexual intercourse or (alternatively) that he had believed she had. Mr A's lawyer asked for permission to question the complainant about an alleged sexual relationship between her and Mr A over the course of a three week period before the alleged rape. The trial judge ruled that the complainant could not be cross-examined, nor could Mr A give any evidence, about the alleged relationship because Section 41 prevented the court from giving permission to a defendant to give evidence, or cross examine, a complainant on his/her previous sexual behaviour, unless the court was satisfied that the limited exceptions to the prohibition which are set out in the section applied, and that these did not apply to this case.

On appeal to the Court of Appeal it was held that Mr A could have been given leave under the limited exception in Section 41.3.a in relation to his belief in consent (i.e. where there is no actual consent), but that the exceptions where actual consent is alleged did not cover him. The Court of Appeal was concerned that a direction to a jury on that basis could lead to an unfair trial. The prosecution appealed to the House of Lords.

Under Section 41 permission can only be given where consent is an issue if the sexual behaviour of the complainant is alleged to have taken place at or about the same time as the offence (Section 41.3.b) or it is alleged to have been so similar to the sexual behaviour alleged to have taken place as part of the offence that it could not be a coincidence (Section 41.3.c).

The House of Lords said that a prior sexual relationship between the complainant and the accused may be relevant to the issue of consent. If the impact of Section 41 were to deny the right of an accused from putting forward a full and complete defence it might amount to a breach of the defendant's right to a fair trial under Article 6 ECHR.

The right to a fair trial under Article 6 ECHR is absolute. A conviction obtained in breach of it cannot stand (see: *R v. Forbes*). The only balancing permitted is in respect of what the concept of a fair trial entails. Account may be taken of the interests of the accused, the victim and society. In this context proportionality has a role to play. The criteria for determining the test of proportionality have been analysed in similar terms in the case law of the European Court of Justice and the European Court of Human Rights. In the U.K. case, *de Freitas*, it was held that the question was whether the legislative objective is sufficiently important to justify limiting a fundamental right; whether the measures designed to meet the objective are rationally connected to it; and whether the means used to impair the right are no more than is necessary to accomplish the objective.

The words "at or about the same time as the event" in Section 41.3.b can be given a wide meaning, a few hours or even a few days when a couple were continuously together. But that meaning could not reasonably be extended to cover a few weeks which are relied on in the present case even if read with Article 6 ECHR.

Section 41.3.c permits evidence where consent is alleged and the sexual behaviour of the complainant is alleged to have been so similar to her/his sexual behaviour which took place as part of the alleged offence that the similarity cannot reasonably be explained as a coincidence. Read literally or even purposively this provision is disproportionately restrictive.

However, Section 3 of the Human Rights Act imposes an interpretative obligation on the courts to construe legislation as compatible with the European Convention on Human Rights where possible. It applies even if there is no ambiguity in the language of the legislation. Parliament rejected the legislative

model of requiring a reasonable interpretation. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it (see: Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties). However, Section 3 of the Human Rights Act qualifies this principle as it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. It will sometimes be necessary to adopt an interpretation which may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility (for which provision is made in Section 4 of the Human Rights Act) is a measure of last resort. It must be avoided unless it is plainly impossible to do so.

It is not impossible to read Section 41.3.c together with Article 6 ECHR in a way which will result in a fair hearing. It is possible to read Section 41.3.c as permitting the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers necessary to make the trial a fair one. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under Section 41.3.c.

Under Section 41.3.c, construed where necessary by applying the interpretative obligation under Section 3 of the Human Rights Act, and due regard always being paid to the importance of seeking to protect the complainant from indignity and humiliating questions, the test of admissibility is whether the evidence is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 ECHR. If this test is satisfied the evidence should not be excluded.

The appeal was dismissed.

Cross-references:

- *R. v. Forbes* [2001] 1 Appeals Cases, 473; [2001] 2 Weekly Law Reports, 1; [2001] 1 All England Law Reports, 686;
- *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 Appeals Cases, 69; [1998] 3 Weekly Law Reports, 675.

Languages:

English.



Identification: GBR-2001-1-007

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 23.05.2001 / **e)** / **f)** R. v. Secretary of State for the Home Department, ex parte Daly / **g)** [2001] *United Kingdom House of Lords*, 26 / **h)** [2001] 2 *Weekly Law Reports*, 1622; [2001] 3 *All England Law Reports*, 433 [2001]; CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
 3.15 **General Principles** – Proportionality.
 3.16 **General Principles** – Weighing of interests.
 3.19 **General Principles** – Reasonableness.
 5.1.1.3.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
 5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.
 5.3.34.1 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Correspondence.

Keywords of the alphabetical index:

Common Law rights / Legal professional privilege / Unconstitutionality, declaration, non-compatibility with the ECHR / Prison, rules.

Headnotes:

Prison rules required searches of prison cells and the examination of otherwise legally privileged material by prison staff, in the absence of the prisoner. This blanket policy requirement in the rules infringed a prisoner's common law right to legal professional privilege and right to respect for correspondence under Article 8 ECHR.

Summary:

The Home Secretary introduced a new policy (the policy) governing the searching of prisoners' cells. The rules specified that prison staff must not allow a prisoner to be present during a search of her/his cell. Staff could normally read legal correspondence only if the Governor had reasonable cause to suspect their contents endangered security or were of a criminal nature, and the prisoner involved should be given the opportunity to be present and informed that his correspondence is to be read.

Mr Daly was a long term prisoner. He challenged the lawfulness of the policy. He argued that a blanket policy requiring the absence of prisoners when their legally privileged correspondence is examined infringes, to an unnecessary and impermissible extent, basic common law and the European Convention on Human Rights, and that the general terms of the statute under which the rules were made did not, either expressly or impliedly, authorise such infringement.

The House of Lords held that any custodial order inevitably curtails the prisoner's enjoyment of rights enjoyed by other citizens. But the order does not wholly deprive the prisoner of all rights. Some rights, perhaps in a qualified form, survive the making of the order. Three important related but free standing rights concerning appropriate legal protection survive: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser. Such rights may be curtailed in laws only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment (see e.g. *ex p Leech*). The decision in *Leech* was approved by the House of Lords in *ex p Simms*, which added that the more substantial the interference with fundamental rights, the more the court would require justification before it could be satisfied the interference was reasonable.

The challenged policy infringes Mr Daly's common law right to legal professional privilege. It is necessary to ask whether, to the extent that it infringes a prisoner's common law right, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime. Mr Daly's challenge is directed to the blanket nature of the policy, applicable to all prisoners of whatever category in all closed prisons, irrespective of a prisoner's conduct and of any emergency. A policy in its present blanket form is not justified by the reasons given. Any prisoner whose conduct demonstrates he is likely to intimidate or disrupt a search of his cell may be excluded even while his privileged corre-

spondence is examined to ensure the efficacy of the search. But no justification is shown for routinely excluding all prisoners, whether disruptive or not, while that part of the search is conducted.

The same result is achieved by reliance on Article 8.1 ECHR which gives Mr Daly a right to respect for his correspondence. Interference with that right by a public authority may be permitted if it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others. The policy interferes with Mr Daly's exercise of his right under Article 8.1 ECHR to an extent much greater than necessity requires. In this instance, therefore, the common law and the convention yield the same result.

The Court went on to say that this may not always be the case. In cases where European Convention on Human Rights apply courts should review the disputed act adopting the proportionality approach. This may differ from the conventional grounds of judicial review in at least three ways. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *ex p Smith* is not necessarily appropriate to the protection of human rights. In *Smith* the Court of Appeal reluctantly rejected a challenge under Article 8 ECHR on a ban on homosexuals in the military. The European Court of Human Rights said that: "the threshold at which the ... Court ... could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration ... of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under Article 8 ECHR" (*Smith and Grady v. United Kingdom*).

Thus, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. It is important that cases involving the European Convention on Human Rights are analysed in this way.

The Court allowed Mr Daly's appeal from the Court of Appeal's decision to refuse his application for judicial review of the Home Secretary's rules. The Court declared the rules unlawful and void.

Cross-references:

- *R v. Secretary of State for the Home Department, ex p Leech (no. 2)* [1994] *Queens Bench*, 198; [1993] 3 *Weekly Law Reports*, 1125; [1993] 4 *All England Law Reports*, 539;
- *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 *Appeals Cases*, 115; 3 *Weekly Law Reports*, 328; [1999] 3 *All England Law Reports*, 400;
- *R v. Ministry of Defence, ex p Smith* [1996] *Queens Bench* 517; [1996] 2 *Weekly Law Reports*, 305; [1996] 1 *All England Law Reports*, 257;
- *Smith and Grady v. United Kingdom*, 27/09/1999; (1999) 29 *European Human Rights Reports*, 493.

Languages:

English.



United States of America Supreme Court

Important decisions

Identification: USA-2001-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 27.02.2001 / **e)** 99-1257, 99-1426 / **f)** Whitman v. American Trucking Associations / **g)** 121 *Supreme Court Reporter* 903 (2001) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.7.1.1 **Institutions** – Courts and tribunals – Jurisdiction – Exclusive jurisdiction.

Keywords of the alphabetical index:

Administrative agency, authority, exercise / Quality standards, establishment.

Headnotes:

The legislature makes an unconstitutional delegation of its legislative power when it confers decision-making authority upon an administrative agency without setting forth an intelligible principle that will define the parameters of the agency's actions.

Whether a statute unconstitutionally delegates legislative power to an administrative agency is a question reserved exclusively to the courts.

Summary:

A group of private companies, business associations, and individual States challenged certain actions taken in 1997 by the U.S. Environmental Protection Agency ("EPA"). The EPA's actions involved the establishment of "national ambient air quality standards" ("NAAQS"), pursuant to requirements set forth by the U.S. Congress in Section 109.b.1 of the federal Clean Air Act ("CAA").

Among the grounds for the challenge to the EPA's actions was the claim that Section 109.b.1, which

instructs the EPA to establish NAAQS in order to protect public health, was an unconstitutional delegation of legislative power to an administrative agency. The challengers in this regard claimed that Section 109.b.1 contravened Article I.1 of the Constitution, which states that all legislative powers granted under the Constitution shall be vested in the U.S. Congress, because it did not provide any intelligible principles to guide the administrative agency's exercise of authority. Under case law established by the U.S. Supreme Court, the Congress violates Article I.1, when it confers decision-making authority upon an agency without setting forth an intelligible principle that will define the parameters of the agency's actions.

The Federal Circuit Court of Appeals for the District of Columbia, which is the first instance court for controversies involving most federal administrative agencies, agreed with the challengers. However, the Court of Appeals decided that perhaps the administrative agency could cure this problem by adopting a restrictive construction of Section 109.b.1, and therefore remanded the NAAQS to the EPA instead of declaring Section 109.b.1 unconstitutional.

The U.S. Supreme Court reversed the Court of Appeals on this question, ruling that Congress did provide an intelligible principle for setting air quality standards and that it was not necessary for Section 109.b.1 to establish precise upper limits for air polluting substances. In addition, the Court ruled that the Court of Appeals had incorrectly directed the EPA to construe the legislative act in an effort to save its constitutionality; instead, the Court stated, the question of whether a statute delegates legislative power is a question reserved solely for the judiciary.

Languages:

English.



Identification: USA-2001-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 28.02.2001 / **e)** 99-603, 99-960 / **f)** Legal Services Corporation v. Velazquez / **g)** 121 *Supreme Court Reporter* 1043 (2001) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

4.7.15 **Institutions** – Courts and tribunals – Legal assistance and representation of parties.

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

Keywords of the alphabetical index:

Judicial function / Lawyer, freedom of expression / Lawyer, representation of client.

Headnotes:

Legislation prohibiting attorneys from seeking amendment of certain existing legislation, or challenging its validity, is a viewpoint-based interference with constitutionally-protected freedom of expression.

Legislation that prohibits attorneys who receive government funding for representation of clients from seeking amendment of certain existing legislation, or challenging its validity, is not a restriction on dissemination of a governmental message, but instead is an interference with private constitutionally-protected freedom of expression.

Legislation that prohibits attorneys from presenting litigation arguments as to the validity of applicable laws serves to insulate legislative acts from judicial inquiry, thereby impairing the judicial function.

Summary:

A federal statute, the Legal Services Corporation Act, established the Legal Services Corporation (“LSC”) as a non-profit corporation in 1974. The LSC is authorised to distribute public funds, appropriated by the U.S. Congress, to local grantee organisations that provide legal assistance to indigent persons.

In appropriating funds for the LSC, the U.S. Congress has imposed restrictions on the use of such monies by the local grantee organisations. Beginning in 1996, one of these conditions prohibited LSC funding of any grantee organisation that represented clients in efforts to amend or otherwise challenge existing public welfare laws. Thus, an LSC grantee was permitted to represent indigent clients in challenges to factual determinations or statutory interpretations by welfare agencies, but not in efforts to change welfare laws or to challenge the constitutional or statutory validity of those laws. As a result, the restriction prohibited an attorney from arguing to a court that a state statute conflicts with a federal

statute or that either state or federal legislation is inconsistent with the U.S. Constitution.

A group of individuals and organisations, including lawyers employed by LSC grantee organisations in New York City, initiated a lawsuit in federal district court, asking the court to declare that the above restriction on representation was a violation of the First Amendment to the U.S. Constitution and to enjoin its enforcement. The First Amendment states in relevant part that Congress shall make no law that abridges freedom of speech. The district court ruled against issuance of an injunction, but the U.S. Court of Appeals for the Second Circuit reversed this decision, ruling that the restriction in question was an impermissible viewpoint-based discrimination in violation of the First Amendment.

The U.S. Supreme Court, in a five-to-four vote, affirmed the judgment of the Court of Appeals. The Court recognised that the legislation, by restricting LSC attorneys in advising their clients and presenting arguments to the judiciary, was an invalid interference with expression protected by the First Amendment, as well as a contravention of accepted separation of powers principles.

In regard to the First Amendment issue, the Court rejected the argument of the legislation’s proponents that the restrictions on expressive activity were constitutional under the reasoning of a 1991 U.S. Supreme Court decision, *Rust v. Sullivan*. In the *Rust* case, the federal legislation in question provided subsidies to medical doctors to advise patients on a variety of family planning topics, but prohibited the doctors from discussing abortion with their patients. The Supreme Court upheld the constitutionality of the legislation against a First Amendment challenge, ruling that Congress had not discriminated against viewpoints on abortion, but instead had merely chosen to fund one activity to the exclusion of another. The Court, however, distinguished the instant case from *Rust* by explaining that *Rust* involved a permissible restriction on what amounted to the dissemination of a governmental message, whereas the restrictions on LSC attorneys were an interference with private speech in which an attorney speaks on behalf of a private client. The Court ruled that the legislature may not design a subsidy that imposes such a fundamental restriction on the advocacy of attorneys.

The Court also found that the legislation severely threatened to impair the function of the judiciary under separation of powers principles by preventing LSC attorneys from advising the courts of potential statutory and constitutional infirmities in public welfare laws. Thus, even though the Congress might find

certain litigation arguments unacceptable, it is within the courts' sphere of authority to interpret and assess the legality and constitutionality of governmental acts, and the restrictions placed on attorneys would impermissibly limit the availability of information and legal theories to the courts, thereby insulating laws from judicial inquiry.

Cross-references:

- *Rust v. Sullivan*, 500 *United States Reporter* 173, 111 *Supreme Court Reporter* 1759, 114 *Lawyer's Edition Second* 233 (1991).

Languages:

English.



Court of Justice of the European Communities and Tribunal of First Instance

Important decisions

Identification: ECJ-2001-1-001

a) European Union / **b)** Court of First Instance / **c)** / **d)** 17.06.1998 / **e)** T-174/95 / **f)** Svenska Journalistförbundet v. Council of the European Union / **g)** *European Court Reports* 1998, II-2289 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 1.4.3 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings.
- 1.4.10.1 **Constitutional Justice** – Procedure – Interlocutory proceedings – Intervention.
- 3.16 **General Principles** – Weighing of interests.
- 3.17 **General Principles** – General interest.
- 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.
- 5.3.24 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.
- 5.3.25 **Fundamental Rights** – Civil and political rights – Right of access to administrative documents.

Keywords of the alphabetical index:

Confidentiality, duty.

Headnotes:

1. The Community rules governing procedural time-limits must be strictly observed both in the interest of legal certainty and in order to avoid any discrimination or arbitrary treatment in the administration of justice. Accordingly, while Article 1 of Annex II to the Rules of Procedure of the Court of Justice provided for a 10-day extension on account of distance for certain designated countries, of which Sweden was not one, the extension on account of distance applicable to that Member state could only be the two weeks

applicable to all other European countries and territories.

2. A person who is refused access by the Council to a Council document has, by virtue of that very fact, established an interest in the annulment of the decision refusing him such access. The objective of Decision 93/731 on public access to Council documents is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration. It does not require that members of the public must put forward reasons for seeking access to requested documents. The fact that the requested documents were already in the public domain is irrelevant in this connection.

3. Under the final paragraph of Article 37 of the Statute of the Court of Justice, applicable to the Court of First Instance by virtue of Article 46 thereof, an application to intervene is to be limited to supporting the form of order sought by one of the parties. An intervener is not therefore entitled to raise an objection as to admissibility that was not raised in its written pleadings and the Court is not therefore obliged to consider the submissions it has made in that regard.

However, under Article 113 of the Rules of Procedure, the Court of First Instance may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with a case, including any raised by interveners.

4. The Court of First Instance has jurisdiction to entertain an action for the annulment of a Council decision refusing the applicant access to documents, even if those documents were adopted on the basis of the provisions of Title VI EU concerning cooperation in the fields of justice and home affairs.

First, Articles 1.2 and 2.2 of Decision 93/731 on public access to Council documents expressly provide that the decision is to apply to all Council documents; it therefore applies irrespective of the contents of the documents requested. Secondly, since, pursuant to Article K.8.1 EU, measures adopted pursuant to Article 151.3 EC, which is the legal basis for Decision 93/731, are applicable to measures within the scope of Title VI EU, in the absence of any provision to the contrary, Decision 93/731 applies to documents relating to Title VI and the fact that the Court has, by virtue of Article L EU, no jurisdiction to review the legality of measures adopted under Title VI does not curtail its jurisdiction in the matter of public access to those measures.

5. The duty, pursuant to Article 190 EC, to state reasons in individual decisions has the double purpose of permitting, on the one hand, interested parties to know the reasons for the adoption of the measure so that they can protect their own interests and, on the other hand, enabling the Community court to exercise its jurisdiction to review the validity of the decision. In the case of a Council decision refusing to grant public access to documents, the statement of reasons must therefore contain – at least for each category of documents concerned – the particular reasons for which the Council considers that disclosure of the requested documents comes within the scope of one of the exceptions provided for in Article 4.1 and 4.2 of Decision 93/731 relating, first, to the protection of the public interest, and secondly, to the confidentiality of the Council's proceedings.

A decision refusing the applicant access to a number of Council documents that indicates only that disclosure of the documents in question would prejudice the protection of the public interest (public security) and that the documents relate to proceedings of the Council, including the views expressed by members of the Council, and for that reason fall within the scope of the duty of confidentiality, does not satisfy the above requirements and must therefore be annulled.

First, in the absence of any explanation as to why the disclosure of those documents would in fact be liable to prejudice a particular aspect of public security, it is not possible for the applicant to know the reasons for the adoption of the measures and therefore to defend its interests. It follows that it is also impossible for the Court to assess why the documents to which access was refused fall within the exception based upon the protection of the public interest (public security) and not within the exception based upon the protection of the confidentiality of the Council's proceedings. Secondly, as regards the latter exception, the terms of the decision do not permit the applicant or, therefore, the Court to check whether the Council has complied with its duty, under Article 4.2 of Decision 93/731, to make a comparative analysis which seeks to balance, on the one hand, the interest of the citizens seeking the information and, on the other hand, the confidentiality of the proceedings of the Council.

6. The rules which govern procedure in cases before the Court of First Instance, including Article 5.3.3 of the Instructions to the Registrar and Article 116.2 of the Rules of Procedure, under which parties are entitled to protection against the misuse of pleadings and evidence, reflect a general principle in the due administration of justice according to which parties have the right to defend their interests free from all

external influences and particularly from influences on the part of members of the public.

It follows that a party who is granted access to the procedural documents of other parties is entitled to use those documents only for the purpose of pursuing his own case and for no other purpose, including that of inciting criticism on the part of the public in relation to arguments raised by other parties in the case.

Summary:

On the basis of Article 151.3 EC, the Council adopted Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ L 340, p. 43). Article 4.1 of this decision provides for access to a document to be refused in particular when disclosure could undermine protection of the public interest, including public security. Article 4.2 provides for access to a Council document to be denied in order to protect the confidentiality of the Council's deliberations.

The applicant, an association of Swedish journalists, was denied access to a number of Council documents concerning the establishment of the European Police Office (Europol) under Title VI EU and its provisions on co-operation in the fields of justice and home affairs.

The applicant appealed against this decision to the Court of First Instance. Having rejected objections to admissibility on the grounds of the time-limit for lodging an appeal and the applicant's capacity to take legal proceedings, the Court considered the question of its own competence, which had been challenged on the ground that the Community Court had no jurisdiction to review the legality of Council measures adopted under Title VI EU.

It decided that it did have jurisdiction insofar as Decision 93/731 applied to all Council documents irrespective of the content of the documents requested.

On the merits, the Court held that as the Council had failed to state on which provision of Article 4 of Decision 93/731 its refusal was based, it had failed in its obligation under Article 190 EC to state the reasons for its decision.

Accordingly, it annulled the impugned decision, but punished the applicant for posting the Council's defence pleadings on the Internet, by ordering it to pay one third of its own legal costs.

Languages:

Dutch, English, French, Finnish, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-002

a) European Union / **b)** Court of First Instance / **c) / d)** 16.07.1998 / **e)** T-199/96 / **f)** Bergaderm SA and Jean-Jacques Goupil v. Commission of the European Communities / **g)** *European Court Reports* 1998, II-2805 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

4.17.1.3 **Institutions** – European Union – Institutional structure – Commission.

4.17.4 **Institutions** – European Union – Legislative procedure.

5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Adversarial principle.

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

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

Keywords of the alphabetical index:

Law, approximation / Decision, scientific issues / Adaptation, measures, necessity / Principle, application in legislative process / Legislation, liability.

Headnotes:

1. The Commission was not in breach of Article 10 of the Directive 76/768 on the approximation of the laws of the member states relating to cosmetic products where, having submitted to the Adaptation Committee established under the directive alternative proposals for restricting the maximum permitted level of a substance used in the preparation of cosmetic products, it withdrew those proposals because the member states' delegations were divided in their preference between them.

A situation of that kind is not covered by Article 10.3.a of the cosmetics directive, which provides that “the Commission shall adopt the proposed measures when they are in accordance with the opinion of the Committee”; nor is it covered by Article 10.3.b which provides that “where the proposed measures are not in accordance with the opinion of the Committee, or if no opinion is adopted, the Commission shall without delay propose to the Council the measures to be adopted ...”. In such a situation the “proposed measures” no longer exist since, after the Adaptation Committee had met, the Commission withdrew its proposal. The Commission cannot be criticised for withdrawing its proposal in such circumstances since – in cases concerning public health, which are both delicate and controversial – it must have a sufficiently broad discretion and enough time to enable it to arrange for the scientific issues which will determine its decision to be examined afresh.

2. The *audi alteram partem* principle is a fundamental principle of Community law which applies in all administrative proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, but does not apply in the context of the legislative process.

3. The Commission cannot be criticised for requesting the Scientific Committee on Cosmetology for an opinion on the harmfulness of a substance used in the preparation of cosmetic products or for complying with the Committee's opinion, drawn up on the basis of a large number of meetings, visits and specialist reports, since the protection of public health is one of the objectives of Directive 76/768 and the Commission is not in a position to carry out itself the scientific assessments needed to further that objective. The Scientific Committee has the task of assisting the Community authorities on scientific and technical issues in order to enable them to determine, in full knowledge of the facts, which adaptation measures are necessary. Furthermore, where there is uncertainty as to the existence or extent of risks to the health of consumers, the institutions may take protective measures without having to wait until the reality and the seriousness of those risks become fully apparent.

Summary:

With Directive 95/34/EC of 10 July 1995 adapting to technical progress Annexes II, III, VI and VII to Council Directive 76/768/EEC on the approximation of the laws of the member states relating to cosmetic products (OJ L 167, p. 19) the Commission prohibited the marketing of sun creams and bronzing products with a psoralen content of 1 mg/kg or more. As a result of this ban the Bergaderm pharmaceutical

laboratories, run by Mr Goupil, had to stop marketing its Bergasol sun cream. The firm never recovered from this ban on the sale of its best-known product and went into liquidation.

The applicants lodged a claim for damages with the Court of First Instance to obtain compensation for the prejudice they allegedly sustained as a result of the ban imposed by Directive 95/34.

Inter alia they alleged procedural irregularities in the process that led to the adoption of the directive, violation of the *audi alteram partem* principle, the existence of a clear error in assessing evidence, and violation of the proportionality principle.

The Court began by pointing out that where damages are allegedly caused by a directive, the rules applicable are those governing the liability of the Community in its law-making role. It then noted that the fact that the Commission, having received a negative opinion from the science Committee, which it had an obligation to consult, chose to withdraw its proposal rather than refer the matter to the Council, and resumed the procedure a few years later, could not be considered a procedural irregularity.

On the *audi alteram partem* principle, the Court recalled that, unless otherwise stipulated in the texts, as in the case of protection against dumping, for example, it did not apply to the legislative process. It noted, however, that in this particular case the applicants had had ample opportunity to develop their arguments.

Finally, on the merits of the ban on sales, the Court held that the adoption of measures to protect public health was not conditional on proof that a real and serious potential risk existed.

As the arguments put forward by the applicants were unfounded, the Court dismissed the application.

Languages:

Danish, Dutch, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-003

a) European Union / **b)** Court of First Instance / **c)** / **d)** 17.07.1998 / **e)** T-111/96 / **f)** ITT Promedia NV v. Commission of the European Communities / **g)** *European Court Reports* 1998, II-2941 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.19 **General Principles** – Reasonableness.
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Dominant position, abuse / Decision, explanation / Constitutional tradition, common to member states / Right, abuse.

Headnotes:

1. The ability to assert one's rights through the courts and the judicial control which that entails constitutes the expression of the general principle of law which underlies the constitutional traditions common to the member states and which is also laid down in Articles 6 and 13 ECHR. As access to the courts is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article 86 EC.

Where the Commission has set out two cumulative criteria on the basis of which to identify cases in which legal proceedings are an abuse within the meaning of Article 86 EC – that they cannot reasonably be considered to be an attempt to assert the rights of the undertakings and can therefore only serve to harass the opposing party and that they were conceived in the framework of a plan whose goal was to eliminate competition – those two criteria must be interpreted and applied restrictively in a manner which does not frustrate the general rule of access to the courts. As regards the application of the first criterion, it is the situation existing when the action in question is brought which must be taken into account.

Moreover, it is not a question of determining whether the rights which the undertaking concerned was asserting when it brought its action actually existed or whether that action was well founded, but rather of determining whether such an action was intended to assert what that undertaking could, at that moment, reasonably consider to be its rights.

2. The statement of reasons for a decision must be such as to enable the addressee to ascertain the matters justifying the measure adopted so that he can, if necessary, defend his rights and verify whether or not the decision is well founded and, second, to enable the Community judicature to exercise its power of review; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted. Since a decision constitutes a single whole, each of its parts must be read in the light of the others.

The Commission, in stating the reasons for the decision which it is led to take in order to apply the competition rules, is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.

Summary:

In a 1969 agreement the Belgian telephone company Régie des Télégraphes et Téléphones (RTT) granted an exclusive right to publish Belgium's telephone directories to ITT Promedia.

In 1994, unable to agree with ITT Promedia on terms for continuing the co-operation initiated in 1969, RTT's successor Belgacom terminated the agreement. This termination of contract gave rise to extensive litigation in the Belgian courts, each company filing various complaints against the other, which in turn led to counter-claims.

Meanwhile, ITT Promedia brought proceedings against Belgacom before the Commission, accusing it of abusing its dominant position within the meaning of Article 86 EC.

The Commission admitted certain aspects of the application but rejected others. The applicant lodged an appeal against this decision with the Court of First Instance.

Its main grievance was against the Commission's decision that, in taking legal action to have what it considered as its rights acknowledged and ITT

Promedia punished for infringing them, Belgacom was not abusing its dominant position.

While agreeing, like the Commission before it, that legal action taken by a firm in a dominant position against its competitors could indeed constitute abuse of power in certain circumstances, the Court found that in this instance there were no such circumstances and that the Commission had adequately explained its decision to that effect and could therefore not be accused of violating its obligation to explain its decisions under Article 190 EC.

It therefore dismissed the application.

Languages:

English, French.



Identification: ECJ-2001-1-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 15.09.1998 / **e)** C-231/96, C-260/96 / **f)** Edilizia Industriale Siderurgica Srl (Edis) v. Ministero delle Finanze, Ministero delle Finanze v. Spac SpA / **g)** *European Court Reports* 1998, I-4951, I-4997 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
- 1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
- 3.10 **General Principles** – Certainty of the law.
- 3.19 **General Principles** – Reasonableness.
- 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.
- 5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Interpretation, request / Taxation, reimbursement / Equivalence, principle / Effectiveness, principle / Directive, breach.

Headnotes:

1. The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177 EC, the Court gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied. Having regard to those principles, it is only exceptionally that the Court may limit the effects of a judgment ruling on a request for interpretation.

The application of detailed procedural rules governing legal proceedings under national law, as regards matters both of form and of substance, must not be confused with a limitation on the effects of a judgment of the Court ruling on a request for interpretation of a provision of Community law. The consequence of such a limitation is to deprive litigants, who would normally be in a position, under their national procedural rules, to exercise the rights conferred on them by the Community provision concerned, of the right to rely on it in support of their claims.

Accordingly, the fact that the Court has given a preliminary ruling interpreting a provision of Community law without limiting the temporal effects of its judgment does not affect the right of a Member state to impose a time-limit under national law within which, on penalty of being barred, proceedings for repayment of charges levied in breach of that provision must be commenced.

2. In the absence of Community rules on reimbursement of national charges levied though not due, it is for the domestic legal system of each Member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the

exercise of rights conferred by Community law (principle of effectiveness).

As regards the principle of effectiveness, it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the administration concerned. Such time-limits are not liable to render virtually impossible or excessively difficult the exercise of rights conferred by Community law. In that regard, a time-limit of three years under national law, reckoned from the date of the contested payment, appears reasonable.

Observance of the principle of equivalence implies, for its part, that the procedural rule at issue applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues. That principle cannot, however, be interpreted as obliging a Member state to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law. Thus, Community law does not preclude the legislation of a Member state from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.

It follows that Community law does not prohibit a Member state from resisting actions for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years, by way of derogation from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due, for which the period allowed is more favourable, provided that that time-limit applies in the same way to actions based on Community law for repayment of such charges as to those based on national law.

3. Community law does not prevent a Member state from resisting actions for repayment of charges levied in breach of a directive by relying on a time-limit under national law which is reckoned from the date of payment of the charges in question, even if, at that date, the directive concerned had not yet been properly transposed into national law, provided, first, that that time-limit is not less favourable for actions based on Community law than for those based on domestic law and that it does not render virtually

impossible or excessively difficult the exercise of rights conferred by Community law and, second, provided that it is not established that the conduct of the national authorities, in conjunction with the existence of the contested time-limit, had the effect of depriving the plaintiff of any opportunity of enforcing his rights before the national courts.

Summary:

Until 1993, firms in Italy were required to pay a government business tax upon initial registration and annually thereafter.

In its Judgment of 20 April 1993, *Ponente Carni and Cispadana Costruzioni* (C-71/91 and C-178/91, *Reports* p. I-1915) the Court found that Article 10 of Council Directive 69/335/EEC dated 17 July 1969, concerning indirect taxes on the raising of capital, prohibits the collection of a company registration tax on an annual basis.

Italy accordingly amended its legislation, bringing it into line with the directive.

When the finance authorities refused to reimburse the annual government business tax it had paid from 1986 to 1992, *Edilizia Industria SA* appealed to the Genoa Court. The Court found that although there was no doubt as to the unlawful nature of the tax, the request for reimbursement was at variance, at least in part, with a previous decision of the Italian Court of Cassation. The Court of Cassation had ruled that Article 13.2 of Decree no. 641/72, whereby taxpayers must request the refund of taxes paid but not due within three years of the date of payment, failing which they forfeit their right to reimbursement, applied to the government business tax. The Genoa Court applied to the Court for a preliminary ruling as to the compatibility of such rules governing the repayment of charges levied but not due with Community law.

Referring to the judgments of 16 December 1976, *Rewe* (33/76, *Reports* p. 1989) and *Comet BV* (45/76, *Reports* p. 2043), the Court confirmed that the fact that the Court had made a preliminary ruling on the interpretation of a provision of Community law without limiting the temporal effects of its ruling did not affect the right of a Member state to impose a national time-limit on claims for the repayment of charges levied in breach of that provision.

However, the Court made this possibility subject to the condition that the time-limit applied equally to claims for reimbursement based on Community law and to those based on domestic law. Furthermore, having recalled the Judgment of 2 December 1997,

Fantask and Others (C-188/95, *Reports* p. I-6783), the Court added that in the case in point Community law did not prohibit a Member state from resisting actions for repayment of charges levied in breach of a directive by relying on a time-limit under national law which is reckoned from the date of payment of the charges in question, even if, at that date, the directive concerned had not yet been transposed into national law.

In the case *Ministero delle Finanze v. Spac SpA* the Court received a request from the *Corte d'Appello di Venezia* for a preliminary ruling on interpretation of Community law concerning the repayment of charges levied but not due.

The *Corte d'Appello di Venezia* had to settle a dispute between a company and the tax authorities over the repayment of a government tax on company registration, a levy which the Court had already found to be at variance with the provisions of Council Directive no. 69/335/EEC of 12 July 1969 (Judgment of 20 April 1993, Ponente Carni and Cispadana Costruzioni, (C-71/91 and C-178/91, *Reports* p. I-1915).

The Court had to examine two separate issues. The firm which had been refused repayment challenged the refusal on two counts: first, the time-limit on the basis of which its claim had been dismissed was that provided for under Italian tax law, namely three years from the date of payment of the tax, rather than the ten-year general time-limit for repayment of sums paid but not due which the firm alleges should have been applied. Second, the firm considered it a breach of Community law that a time-limit should begin to lapse even before the directive concerned has been properly transposed into domestic law.

On the first count, the Court applied its established case-law concerning the institutional freedom of member states when implementing Community law, and confined itself to ascertaining whether the time-limit applied in this case was reasonable and was that applied in tax repayment situations other than those brought about by Community law.

On the second count, the Court had to explain an apparent contradiction between two of its previous decisions, the Judgment of 25 July 1991, *Emmott* (C-208/90 *Reports* p. I-4269), in which it ruled that until such time as a directive has been correctly transposed, the Member state in default may not rely on the late date of legal action taken against it by individuals in order to protect their rights under the said directive, and that national time-limits for taking action may not be reckoned from before the date of transposition, and the Judgment of 2 December 1997,

Fantask e.a. (C-188/95, *Reports* p. I-6783), in which it considered that Community law did not prevent member states which had not correctly transposed Directive 69/335/EEC from setting a national time-limit of five years, starting from the date of effect of the rights, on claims for repayment of charges paid in breach of that directive. It ruled in favour of the *Fantask and Others* judgment, explaining, as it had already established in its Judgment of 27 October 1993, *Steenhorst-Neerings* (C-338/91, *Reports* p. I-5475), that the *Emmott* judgment applied only to very special cases where application of the time-limit effectively deprived the individual of any opportunity of enforcing his rights before the national courts. The two earlier judgments are not incompatible, therefore, as they do not apply in the same circumstances.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 22.09.1998 / **e)** C-185/97 / **f)** Belinda Jane Coote v. Granada Hospitality Ltd / **g)** *European Court Reports* 1998, I-5199 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Directive, implementation / Principle, compliance, enforcement / Employment, vocational training, promotion.

Headnotes:

1. The member states' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of member states including, for matters within their jurisdiction, the courts. In applying national law, in particular legislative provisions which were specially introduced in order to implement a directive, the national court is required to interpret its national law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued of Article 189.3 EC (cf. point 18).

2. Article 6 of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions requires member states to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of that directive.

The principle of effective judicial control laid down in Article 6, a principle which underlies the constitutional traditions common to the member states and which is also enshrined in Article 6 ECHR, would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive (cf. points 21, 24, 28 and ruling).

Summary:

The Court was asked by the Employment Appeal Tribunal, London, for a preliminary ruling under

Article 177 EC on two matters relating to the interpretation of Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The Tribunal wished to know whether the directive required member states to introduce into their national legal systems such measures as were necessary to ensure judicial protection for workers whose employer, after the employment relationship had ended, refused to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of that directive.

After referring to its judgments of 10 April 1984, *von Colson and Kamann* (14/83, *Reports* p. 1891), 15 May 1986, *Johnston* (222/84, *Reports* p. 1651) and 2 August 1993, *Marshall* (C-271/91, *Reports* p. I-4367), the Court confirmed this interpretation and referred to the general principle of law that member states were required to take measures that were sufficiently effective to achieve the Directive's object and ensure that the rights it conferred could be effectively relied on by the persons concerned before the national courts.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.

*Identification:* ECJ-2001-1-006

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 24.09.1998 / **e)** C-319/96 / **f)** Brinkmann Tabafabriken GmbH v. Skatteministeriet / **g)** *European Court Reports* 1998, I-5255 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.25 **General Principles** – Principles of Community law.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

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

Keywords of the alphabetical index:

Turnover taxes, tobacco / Obligation, breach, damage, direct link / Interpretation, erroneous, sufficiently serious.

Headnotes:

1. Articles 3.1 and 4.1 of Second Directive 79/32 EEC of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, in the version in force in May 1990, are to be interpreted as meaning that rolls of tobacco wrapped in porous cellulose which have to be inserted into cigarette-paper tubes to be smoked must be deemed to be smoking tobacco within the meaning of Article 4.1 of that directive. Such rolls of tobacco, not being capable of being smoked as they are, do not correspond to the definition of a cigarette within the meaning of that directive.

2. Community law recognises a right to reparation for individuals who sustain damage as a result of a breach of Community law for which a member state can be held responsible where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. Although failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law, it must be determined, where the national authorities gave immediate effect to the provisions of the directive, whether the authorities committed a sufficiently serious breach of those provisions, having regard to the degree of clarity and precision of those provisions (cf. points 24-25, 28, 30).

3. A member state whose authorities, in interpreting Articles 3.1 and 4.1 of Second Directive 79/32 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, erroneously classified a product such as rolls of tobacco wrapped in porous cellulose as a cigarette and did not suspend the operation of the decision adopted, is not bound by Community law to compensate the manufacturer for the damage sustained by the latter as a result of that erroneous decision.

Since the relevant provisions of the directive are open to a number of perfectly tenable interpretations, the national authorities did not commit a sufficiently serious breach of those provisions since the interpretation given to them was not manifestly contrary to the wording of the directive or in particular to the aim pursued by it (cf. points 31-33, § 2 of the ruling).

Summary:

The Danish court in question, which had asked the Court for a preliminary ruling under Article 177 EC, had to rule on an action for damages lodged by a tobacco manufacturer, Brinkmann, against the Danish tax authorities. The manufacturer was seeking compensation for alleged damage arising from the fact that, in breach of Second Council Directive 79/32/EEC of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, one of its products, a roll of tobacco of industrial manufacture, intended for smoking after being inserted in a separately sold cigarette tube or rolled in ordinary cigarette paper, was classified in the cigarette category, which was taxed more heavily than smoking tobacco. After examining its characteristics, the Court concluded that from the standpoint of the directive the product in question concerned smoking tobacco and not cigarettes. With regard to the right to damages for infringement of Community law, the Court did not confine itself to referring to its previous case-law, such as the *Brasserie du Pêcheur and Factortame* Judgment of 5 March 1996 (C-46/93 and C-48/93, *Reports* p. I-1029). Although, in its own words, it was in principle the responsibility of national courts to determine whether the conditions for state liability arising from an infringement of Community law had been met, in this case it decided to apply the case-law itself, since it considered that it had all the necessary information to establish whether the facts of the case amounted to a sufficiently serious infringement of Community law and, if so, whether there was a causal link between the infringement of the state's obligation and the damage sustained. It concluded that the violation of Community law attributable to the Danish authorities did not entitle Brinkmann to damages.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 29.09.1998 / **e)** C-191/95 / **f)** Communities v. Federal Republic of Germany / **g)** *European Court Reports* 1998, I-5449 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.1.10 **Constitutional Justice** – Types of claim – Claim by a public body – Institutions of the European Union.

1.4.5.1 **Constitutional Justice** – Procedure – Originating document – Decision to act.

1.4.5.3 **Constitutional Justice** – Procedure – Originating document – Formal requirements.

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

4.17.1.3 **Institutions** – European Union – Institutional structure – Commission.

Keywords of the alphabetical index:

Collegiality, principle / Opinion, issuing.

Headnotes:

1. The functioning of the Commission is governed by the principle of collegiality. That principle is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted (cf. points 33, 39).

2. Decisions by the Commission to issue a reasoned opinion and to commence proceedings before the Court are subject to that principle of collegiality. Recourse to Article 169 EC provides one of the means by which the Commission ensures that the member states give effect to the provisions of the Treaty and those adopted under the Treaty by the institutions. The decisions to issue a reasoned opinion and to commence proceedings before the Court thus come within the general scope of the supervisory task entrusted to the Commission under the first indent of Article 155 EC. In issuing a reasoned opinion, the Commission formally sets out

its position with regard to the legal position of the member state concerned. Moreover, by formally stating the infringement of the Treaty with which the member state concerned is charged, the reasoned opinion concludes the pre-litigation procedure provided for in Article 169 EC. The decision to issue a reasoned opinion cannot therefore be described as a measure of administration or management and may not be delegated. The same is true of the Commission's decision to apply to the Court for a declaration of failure to fulfil obligations, since such a decision falls within the discretionary power of the institution (cf. points 34-37).

3. The formal requirements for effective compliance with the principle of collegiality, which is of concern to individuals affected by the legal consequences of a Commission decision, vary according to the nature and legal effects of the acts adopted by that institution. Thus the detailed procedure governing the collective deliberation by the college of Commissioners concerning the issue of the reasoned opinion and the bringing of an action for failure to fulfil obligations must therefore be determined in the light of the legal effects of those decisions with regard to the state concerned.

The reasoned opinion does not have any binding legal effect for its addressee. It is merely a pre-litigation stage of a procedure which may lead to an action before the Court and has legal effect only in relation to the commencement of proceedings, so that where a member state does not comply with that opinion within the period allowed, the Commission has the right, but not the duty, to commence proceedings before the Court. The decision to commence proceedings before the Court, whilst it constitutes an indispensable step for the purpose of enabling the Court to give judgment on the alleged failure to fulfil obligations by way of a binding decision, nevertheless does not per se alter the legal position in question.

Accordingly, both the Commission's decision to issue a reasoned opinion and its decision to bring an action for a declaration of failure to fulfil obligations must be the subject of collective deliberation by the college of Commissioners. The information on which those decisions are based must be available to the members of the college. It is not, however, necessary for the college itself formally to decide on the wording of the acts which give effect to those decisions and put them in final form (cf. points 40-41, 43-44, 46-48).

4. Although the reasoned opinion provided for in Article 169 EC must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the state in question has failed to

fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice (cf. point 54).

5. Although it is true that the letter of formal notice from the Commission to the member state and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute and consequently the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited (cf. points 55-56).

6. A member state may not plead internal circumstances in order to justify a failure to comply with obligations and time-limits resulting from rules of Community law (cf. point 68).

Summary:

An application was lodged with the Court against Germany under Article 169 EC on grounds of incomplete transposition of Directives 68/151/EEC and 78/660/EEC on the annual accounts of certain types of companies. Before it could examine the merits of the case, the Court had to consider certain objections to admissibility presented by the defendant. The German Government argued that because the decision to issue a reasoned opinion and commence proceedings before the Court was taken by one of the commissioners acting under the authorisation procedure, there had been an infringement of the collegiality principle governing the Commission's activities. The Court responded to this complaint by finding, first, that the issuing of a reasoned opinion and the subsequent commencement of proceedings before the Court were subject to this principle. It then examined the practical implications of this line of reasoning and drew a distinction between the decision of principle to issue a reasoned opinion or commence proceedings before the Court, which had to be the subject of collective deliberation by the college of commissioners, after each commissioner had been supplied with the

necessary information to take a position, and the wording and final form of the decision, for which it was permissible to use the authorisation procedure.

The defendant government also argued that the application was inadmissible because the letter of formal notice and the reasoned opinion were not couched in the same terms. The Court dismissed this objection, and referred to its well established case-law, according to which the requirement, for reasons relating to the rights of the defence, that the reasoned opinion and the Commission's application should be based on the same complaints as those contained in the letter of formal notice initiating the pre-litigation procedure could not be carried so far as to prevent the Commission from limiting the subject-matter of the proceedings, as it had done in this case. On the merits of the case, the Court found that the directives had not been correctly transposed.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-008

a) European Union / **b)** Court of First Instance / **c)** / **d)** 30.09.1998 / **e)** T-154/96 / **f)** Christiane Chvatal and Others v. Commission of the European Communities / **g)** / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 1.4.10.1 **Constitutional Justice** – Procedure – Interlocutory proceedings – Intervention.
- 3.21 **General Principles** – Prohibition of arbitrariness.
- 3.25 **General Principles** – Principles of Community law.
- 4.6.11 **Institutions** – Executive bodies – The civil service.
- 4.17.1.1 **Institutions** – European Union – Institutional structure – European Parliament.
- 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

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

Keywords of the alphabetical index:

Staff reduction, list / Service, termination, interest / Measure, benefit.

Headnotes:

1. Pursuant to Article 90.1 of the Staff Regulations, any person to whom the regulations apply may submit to the appointing authority a request that it take a decision relating to him. The exercise of this right is not subject to the existence of a pre-existing legal basis permitting the authority concerned to adopt the requested decision, nor restricted by the fact that the authority has no margin of discretion regarding its adoption.

2. A decision of the appointing authority to reject a request for inclusion on the list of officials expressing an interest in staff reduction measures, on the grounds that Regulation no. 2688/95 of the Council, introducing special measures to terminate the service of officials of the European Communities, to coincide with the accession of new member states, was not applicable in the institution concerned, directly and immediately affected the legal situation of the officials concerned and thus adversely affected them, since they could not benefit from the measures in question, either by participating in another procedure or by any other means, and the institution concerned had not taken any final decision subsequent to the decision to reject these requests, which these officials could challenge.

Moreover, while inclusion on the list only constituted a preparatory act that did not grant a final right of benefit from the measures sought, the refusal to take an official's expression of interest in terminating his service into consideration, on the aforementioned grounds, and in the absence of the adoption by the Council on the Commission's proposal of a similar regulation applicable to the official, certainly and finally deprived him of the benefit of this measure and therefore adversely affected him.

3. According to Article 37.4 of the Court's Statute, applications to intervene shall be limited to supporting the form of order sought by one of the parties, while Article 116.3 of the Court's Rules of Procedure, which requires interveners to accept cases as they find them at the time of their intervention, does not prevent an intervener from presenting arguments that differ from those of the party he is supporting, so long

as the intervention is still concerned with supporting the latter's case.

4. The grounds of illegality provided for in Article 184 EC reflect a general principle that any party has the right to challenge, through a supplementary application and with a view to securing the annulment of a decision affecting him, the validity of the regulation on which that decision is directly based and, more generally, that of any regulation that may be relevant to the adoption of the decision.

The illegality of a regulation relied on in support of a challenge may result from the exclusion of a specific category of persons from its scope.

The fact that the authority that adopted the decision was legally bound, in accordance with the legality principle, to apply the regulation whose legality is being challenged, does not prevent the applicant from exercising his right, under Article 184 EC, to apply to the Community court to have the regulation declared inapplicable.

5. According to the general principle of equality, comparable situations must not be treated differently, if no differentiation is objectively justified. In cases that relate to the exercise of discretionary power, this principle is breached if an institution exercises different treatment that is arbitrary or manifestly inappropriate in relation to the objective pursued.

By restricting the application of Regulation no. 2688/95 of the Council, introducing special measures to terminate the service of officials of the European Communities, to coincide with the accession of Austria, Finland and Sweden, to the parliament, even though other institutions had indicated their intention of implementing staff reduction measures and had had comparable changes in their staff numbers, the Council differentiated between these institutions' situations in an arbitrary, or at least inappropriate, fashion.

6. Consultations with the parliament under Article 24 EC of the fusion treaty, which enable it to participate effectively in the Community's legislative process, are a key aspect of the institutional balance sought in the treaties. Regular consultation of parliament on the basis of this text is thus an essential formality, and failure to observe it renders the decision in question void.

It is necessary to consult the parliament whenever a final adopted text, taken in its entirety, differs in substance from the one on which it has already been consulted, other than in cases when the amendments essentially reflect the wishes expressed by the

parliament itself. Modifications are not considered to affect the substance of a text, taken in its entirety, if they are subsumed in the objective pursued in the text and do not affect its underlying logic.

7. Under the second sentence of Article 10.2 of the Staff Regulations, the Staff Regulations Committee must be consulted by the Commission on any proposal to revise the regulations. This provision makes it obligatory for the Commission to enter into consultations not just on formal proposals but also on substantial changes it plans to make to proposals already examined, unless the latter largely correspond to ones proposed by the Staff Regulations Committee.

This interpretation is justified by the fact that the relevant provision gives broad scope to the obligation it lays down and is the necessary consequence of the role played by the Staff Regulations Committee, which, as a joint body containing representatives of both management and staff, the latter democratically elected, of all the institutions, is required to take into consideration and express the interests of the Community civil service as a whole.

Summary:

To coincide with the accession of Austria, Finland and Sweden, and as in the case of previous accessions, the Council adopted a regulation, Regulation (EC, EURATOM, ECSC) no. 2688/95 of 17 November 1995 introducing special measures to terminate the service of officials of the European Communities (Official Journal L 280, p. 1).

However, in contrast to what had happened previously, it limited these measures to officials of the parliament. A certain number of officials of the Court of Justice considered that this limitation was illegal and, after following the procedure laid down in Articles 90 and 91 of the Staff Regulations, appealed to the Court of First Instance against the refusal to record their interest in the application of a measure to terminate their service.

The Court of Justice, supported by the Council and a member state, challenged the admissibility of the appeal, on the grounds that the parties' request had no legal basis, since the regulation only applied to officials of the parliament, and that the refusal to grant their request could not adversely affect them.

The Court of First Instance did not accept these objections and considered the merits of the appeal. It accepted that, pursuant to Article 184 EC, the appellants were entitled to rely on the unlawfulness of the regulation on which the rejection of their request

was based, to challenge the lawfulness of this rejection.

The Court considered the lawfulness of the regulation concerned and found that there had been no objective justification for the different treatment of the parliament, and thus of its officials, to that reserved for the other institutions, and thus of their respective officials, and hence that there had been an infringement of the principle of non-discrimination.

It also found that the procedure for drawing up the regulation had been defective, since the opinions that it was obligatory to seek, those of the parliament and of the Staff Regulations Committee, had been concerned with a draft regulation that was significantly different from the final adopted version and there had been no further consultations.

As a result of these various unlawful aspects of Regulation no. 2688/95, the Court annulled the decision relating to the appellants.

Languages:

French.



Identification: ECJ-2001-1-009

a) European Union / **b)** Court of First Instance / **c)** / **d)** 23.10.1998 / **e)** T-609/97 / **f)** Regione Puglia v. Commission of the European Communities / **g)** *European Court Reports* 1998, II-4051 / **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*.

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

Keywords of the alphabetical index:

Regulation, aid, production / Regulation, economic and social repercussion.

Headnotes:

A regional body of a member state has no right of action against a regulation determining, in the context of the common organisation of the markets in oils and fats, the estimated production of olive oil and the amount of unit production aid that may be paid in advance for any given marketing year to producers established in the Community, claiming that the reduction brought about by the regulation in the amount of aid payable has significant socio-economic consequences for its region.

A regional body cannot rely of Article 173.2 EC since it is clear from the general scheme of the Treaty that the term "member state", for the purposes of the provisions relating to proceedings before the Community courts, refers only to the government authorities of the member states of the European Communities and cannot be extended to the governments of the regions, irrespective of the powers they may have.

Notwithstanding the fact that the body in question may possess the requisite legal personality to bring an action under Article 173.4 EC, since the regulation in question is not in the nature of a decision, the general interest that such an applicant may have – as the body responsible for the economic and social affairs within its jurisdiction – in obtaining a result that is favourable to the economic prosperity of the region, is not sufficient on its own to enable it to be regarded as individually concerned by the provisions of the regulation.

Summary:

The Puglia Region initiated proceedings in the Court of First Instance against the Kingdom of Spain and the Commission seeking the annulment of a Commission regulation on aid that could be granted for olive oil production, as part of the common organisation of the markets in oils and fats.

The applicant argued that the case was admissible because it had delegated authority from the Italian state to implement the Community agricultural regulations in its territory or, if it was not deemed to a member state, because it would have been directly and individually concerned by a regulation that could have such significant economic and social repercussions on its area.

The Court immediately dismissed the application in so far as it was lodged against the Kingdom of Spain, since it had no jurisdiction to deal with such a case. In so far as it was lodged against the Community, the

application was found inadmissible, firstly because regional bodies did not have the procedural rights of member states, whatever the extent of the powers conferred on them, and secondly because the social and economic consequences to which the applicant referred did not justify its contention that that a regulation that concerned all the Community's olive oil producers concerned it directly and individually, within the meaning of Article 173.4 EC.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.

*Identification: ECJ-2001-1-010*

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 12.11.1998 / **e)** C-415/96 / **f)** Kingdom of Spain v. Commission of the European Communities / **g)** *European Court Reports* 1998, I-6993 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.1 **Constitutional Justice** – Effects – Scope.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Provision, illegality, identification / Restructuring plan, success, chances / Decision, operative part / Decision, grounds.

Headnotes:

According to Article 176 EC, an institution whose act has been declared void must, in order to comply with the judgment and to implement it fully, have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality

contained in the operative part and which the institution concerned must take into account when replacing the annulled measure.

The procedure for replacing such a measure may thus be resumed at the very point at which the illegality occurred, since annulment of a Community measure does not necessarily affect the preparatory acts leading up to its adoption.

In that case, where the compatibility of state aid with the common market is being examined, the Commission may, without infringing the right to be heard, found its fresh decision exclusively on the information which it had at the time of the adoption of the annulled measure (cf. points 31-32, 40).

Summary:

The Kingdom of Spain initiated proceedings in the Court under Article 173 EC seeking the annulment of a Commission decision of 18 September 1996, modifying an earlier decision that had been partially annulled by a Judgment of the Court of 14 September 1994, *Spain v. Commission* (C-278/92 to 280/92, *Reports* p. I-4103).

The first Commission decision declaring illegal the aid granted to Hytasa, a Spanish firm in difficulty, had been partially annulled on the grounds that the Commission had not examined the chances of success of the restructuring plan for the firm in the light of the criteria that it had imposed on itself. Following the Court judgment, the Commission had not repeated the whole of the Article 93 EC procedure but had confined itself to a fresh analysis of the investigative measures without again consulting Spain, which confirmed its finding that the aid was incompatible with the Common Market. The Kingdom of Spain then cited breaches of Articles 93 and 174 EC and of the principles of legal certainty and of the protection of legitimate expectations.

Relying on Article 176 EC, and with reference to the *Asteris* Judgment of 26 April 1988 (97/86, 193/86, 99/86, and 215/86, *Reports* p. 2181), according to which a judgment must be interpreted in the light of the grounds that led to it, and the *Fedesa and Others* Judgment of 13 November 1990 (C-331/88, *Reports* p. I-4023), according to which the annulment of a Community measure does not necessarily affect the preparatory acts, the Court dismissed the Spanish action, and noted that in this case the investigative measures, which had respected the rights of the defence, had permitted an exhaustive analysis of the financial aspects of the aid concerned.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-011

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 19.11.1998 / **e)** C-159/96 / **f)** Portuguese Republic v. Commission of the European Communities / **g)** *European Court Reports* 1998, I-7379 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
- 2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
- 4.17.1.3 **Institutions** – European Union – Institutional structure – Commission.

Keywords of the alphabetical index:

Flexibility, exceptional measure, practice, application / Import, third country.

Headnotes:

1. Since Article 173 EC does not allow a practice of a given Community institution to be annulled, an action for the annulment of the Commission's practice of applying exceptional flexibility measures' in the administration of quantitative limits on the importation into the Community of textile products and clothing originating in non-member countries is inadmissible (cf. point 24, disp. 1).

2. In connection with the powers conferred by the Council on the Commission for the implementation of the rules which the Council lays down, it follows from the Treaty context and from practical requirements that the concept of implementation must be given a wide interpretation. Since only the Commission is in a position to watch international market trends and act quickly when necessary, the limits of the powers conferred by the Council in this area must be

determined by reference, *inter alia*, to the essential general aims of the legislation in question.

Article 8 of Regulation no. 3030/93 on common rules for imports of certain textile products from third countries must be interpreted restrictively, since it confers power on the Commission to grant additional import opportunities in derogation from the general system established by the same regulation where, in particular, circumstances exist within the meaning of that provision that are capable of justifying the authorisation of additional quantities. The fact that the Chinese authorities issued export licences in excess of the quantitative limits laid down by that regulation, mainly because of a breakdown in the computer system of those authorities, cannot justify additional import opportunities authorised by a Commission decision. The exceeding of the quantitative limits has its origin in the administration of the double-checking system established by the EEC-China Agreement and must therefore be described not as an unusual or unforeseeable event but as a risk inherent in the procedure for monitoring those quantitative limits. Therefore, the decision adopted by the Commission concerning the importation of textile products and clothing originating in the People's Republic of China must be annulled (cf. points 40-41, 44-48, disp. 2).

Summary:

The Portuguese Republic brought an action in the Court under Article 173 EC for annulment of the Commission's practice of applying 'exceptional flexibility' measures in the administration of quantitative limits on the importation into the European Community of textile products and clothing from non-member countries and, specifically, of the decision adopted by the Commission following the meeting of the Textile Committee of 6 March 1996 concerning textile products originating in the People's Republic of China.

The Court only partially upheld the action, since Article 173 EC did not allow a practice of a Community institution to be annulled. Portugal argued that the Commission lacked the necessary powers, having exceeded the authority granted to it by the Council. After referring to its judgments of 30 October 1975, *Rey Soda* (23/75, *Reports* p. 1279), and 17 October 1995, *Netherlands v. Commission* (C-478/93, *Reports* p. I-3081), and noting that the Commission's power under Article 8 to allow greater opportunities for imports had to be interpreted restrictively, the Court annulled the Commission's decision, on the grounds that there were no circumstances in this case to justify the authorisation of import opportunities in excess of those provided for in the regulation.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-012

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 24.11.1998 / **e)** C-274/96 / **f)** Criminal proceedings against Horst Otto Bickel and Ulrich Franz / **g)** *European Court Reports* 1998, I-7637 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
 4.17.2 **Institutions** – European Union – Distribution of powers between Community and member states.
 5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
 5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.
 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
 5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Languages.

Keywords of the alphabetical index:

Criminal proceedings, language / Language, official, regional, residence, requirement.

Headnotes:

1. The situations governed by Community law which are covered by the prohibition of 'any discrimination on grounds of nationality', laid down in Article 6 EC, include those covered by the freedom to provide services, the right to which is laid down in Article 59 EC. That provision applies to all nationals of member states who, independently of other freedoms guaranteed by the Treaty, visit another member state where they intend or are likely to receive services; they are therefore free to visit and move around within the host State. Furthermore, pursuant to Article 8A EC, "[e]very citizen of the Union shall have

the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect” (cf. points 14-15).

2. The right conferred by national rules to have criminal proceedings conducted in a language other than the principal language of the state concerned falls within the scope of the Treaty and must comply with Article 6 thereof. Although, generally speaking, criminal legislation and the rules of criminal procedure are matters for which the member states are responsible, Community law sets certain limits to their power in that respect. Such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law (cf. points 17-19, disp. 1).

3. Article 6 EC precludes national rules which, in respect of a particular language other than the principal language of the member state concerned, confer on citizens whose language is that particular language and who are resident in a defined area the right to require that criminal proceedings be conducted in that language, without conferring the same right on nationals of other member states travelling or staying in that area, whose language is the same (cf. point 31, disp. 2).

Summary:

The *Bolzano Pretura Circondariale* (District Magistrates' Court) referred to the Court for a preliminary ruling under Article 177 EC a question on the interpretation of Articles 6, 8A and 59 EC.

The issue related to two sets of criminal proceedings in the Trentino-Alto Adige Region, against an Austrian and a German national, who asked for the proceedings to be conducted in German.

Under Article 100 of Presidential Decree no. 670 of 30 August 1972, the German-speaking Italian citizens of the Province of Bolzano were entitled to use their own language in relations with the judicial and administrative authorities based in that province or entrusted with responsibility at regional level.

Since the accused persons were resident in other member states, the Italian court asked the Court whether the right conferred by national rules to have criminal proceedings conducted in a language other than the principal language of the state concerned fell within the scope of the Treaty and must accordingly comply with Article 6 EC, which prohibited discrimination. After referring to the importance attaching to language rights and facilities granted to individuals, to

the *Cowan* Judgment of 2 February 1989 (186/87, *Reports* p. 195), under which nationals of one member state who go to another are covered by Article 59 EC as at least potential recipients of services, and to Article 8A EC, the Court ruled that it was inadmissible to make entitlement to the special language provisions subject to a residence requirement, unless it could be shown that such a requirement was based on objective considerations independent of the nationality of the persons concerned and was proportionate to the legitimate aim of the national provisions.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-013

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 03.12.1998 / **e)** C-368/96 / **f)** The Queen v. The Licensing Authority established by the Medicines Act 1968 (acting by The Medicines Control Agency), ex parte Generics (UK) Ltd, The Wellcome Foundation Ltd and Glaxo Operations UK Ltd and Others / **g)** *European Court Reports* 1998, I-7967 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.

5.2 **Fundamental Rights** – Equality.

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:

Medical product, “essentially similar” / Drug, generic, marketing / Drug, generic, producer / Drug, authorisation, abridged procedure / Drug, public health, danger.

Headnotes:

1. Whereas a declaration recorded in the minutes of a meeting of the Council on the occasion of the adoption of a provision of secondary legislation cannot be used for the purpose of interpreting that provision where no reference is made in the wording thereof to the content of the declaration, that declaration may be taken into consideration in so far as it serves to clarify a general concept used in the provision in question (cf. points 26-27).

2. Article 4.8.a.iii of Directive 65/65, as amended by Directive 87/21 – which permits recourse to an abridged procedure for the issue of authorisation to place medicinal products on the market where the product for which such authorisation is sought is essentially similar to a product which has been authorised within the Community, in accordance with the Community provisions in force, for not less than 6 or 10 years and is marketed in the member state for which the application is made – is not inconsistent with the principle of non-discrimination or with the principle of proportionality; nor does it infringe the fundamental right to property.

First, the abridged procedure is not inconsistent with the principle of non-discrimination since the first and second applicants for marketing authorisation are not in comparable situations. The first applicant can show the efficacy and safety of the product only by means of the necessary tests. By contrast, where the second applicant shows that his product is essentially similar to that of the first applicant, a product which has already been authorised, he may merely – without risk to public health – refer to the data relating to the efficacy and safety of the original product which the first applicant has supplied.

Second, the abridged procedure does not undermine the principle of proportionality, since, in the light of the discretion enjoyed by the Community legislature in the context of its task of harmonising legislation, that procedure is not an inappropriate means of reconciling the underlying objectives, namely, of avoiding the repetition of tests on humans or animals where these are not absolutely necessary, and of safeguarding the interests of innovative firms by granting them a period of protection for their data of 6 or 10 years from the date of the first marketing authorisation obtained in the Community for a particular product.

Finally, the abridged procedure, which serves objectives of general public importance pursued by the Community, does nothing to impair the very substance of the right to property, since it does not make it impossible in practice for innovating firms to

carry on their business of producing and developing medicinal products (see points 63-65, 67, 71, 73-75, 84-87, § 5 of the ruling).

Summary:

The High Court of Justice, Queen's Bench Division, referred to the Court for a preliminary ruling under Article 177 EC five questions on the interpretation and validity of Article 4.8.a.iii of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products, as amended by Council Directive 87/21/EEC of 22 December 1986.

Those questions were raised in proceedings concerning marketing authorisation for medicinal products. Article 4.8.a.iii of Directive 65/65/EEC, as amended, provided for an abridged marketing authorisation procedure if the medicinal product for which such authorisation was sought was essentially similar to a product which had been authorised within the Community, in accordance with the Community provisions in force, for not less than 6 or 10 years and was marketed in the member state for which the application was made. However, the directive did not define the notion of “essentially similar medicinal product”, which was the main question for preliminary ruling. The Court noted first that, according to the *Antonissen* Judgment of 26 February 1991 (C-292/89, *Reports* p. I-745), a declaration recorded in the minutes of the Council on the occasion of the adoption of a directive could not be used for the purpose of interpreting a provision of that directive where no reference was made to the content of the declaration in the wording of the provision in question, and therefore had no legal force.

However, inasmuch as it served to clarify a general concept such as that of an “essentially similar medicinal product”, as used in the Directive, a declaration of that kind could be taken into consideration. The Court therefore took account of the minutes of the Council meeting of December 1986, at which the directive was adopted, according to which the criteria for identifying essentially similar medicinal products were that they should have the same qualitative and quantitative composition in terms of active principles, and the same pharmaceutical form, and where necessary, bioequivalence of the two products had been established by appropriate bioavailability studies. The Court also referred to the guidelines and other guides published by the Commission to confirm its interpretation.

On the merits of the case, the Court's interpretation of the provision that had been the subject of the national

court's question favoured the producers of generic drugs. It dismissed the complaints concerning breaches of the proportionality principle and property rights lodged by the pharmaceutical companies, which considered themselves to be adversely affected by the opportunities the directive offered to the producers of generic medicines, by limiting the scope of their exclusive marketing of new products for which they had undertaken the research, when they were granted marketing authorisation.

Languages:

Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2001-1-014

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 17.12.1998 / **e)** C-185/95P / **f)** Baustahlgewebe GmbH v. Commission of the European Communities / **g)** *European Court Reports* 1998, I-8417 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.

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

3.19 **General Principles** – Reasonableness.

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

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.

Keywords of the alphabetical index:

Fact, complex, examination / Competition, rules, violation / Procedure, suspension / Evidence, presentation, delay / Document, utility / Evidence, new.

Headnotes:

1. Under Article 168A EC and Article 51.1 of the Statute of the Court of Justice, in appeals the Court of Justice has jurisdiction only to verify whether a breach of procedure adversely affecting the appellant's interests was committed before the Court of First Instance and must satisfy itself that the general principles of Community law have been complied with.

Those principles include the right of everyone to a fair trial, provided for in Article 6.1 ECHR, and in particular the right to a fair trial within a reasonable period (cf. points 18-21).

2. In an appeal, the Court of Justice has no jurisdiction to find the facts or, as a rule, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the Rules of Procedure relating to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value to be attached to the evidence produced. Save where the clear sense of that evidence has been distorted, that appraisal does not constitute a point of law which is subject, as such, to review by the Court of Justice (cf. point 24).

3. The structure of the Community judicial system justifies, in certain respects, the Court of First Instance – which is responsible for establishing the facts and for undertaking a substantive examination of the dispute – being allowed sufficient time to investigate actions calling for a close examination of complex facts. However, that task does not relieve the Community Court established especially for that purpose of the obligation to observe reasonable time-limits in dealing with cases before it.

The reasonableness of the duration of the proceedings before the Court of First Instance must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and the competent authorities (cf. points 29, 42).

4. Where proceedings before the Court of First Instance, relating to the existence of an infringement of the competition rules, have lasted for around five years and six months, the requirements concerning completion within a reasonable time are not satisfied, even if account is taken of the relative complexity of the case, if it has been established that:

- the proceedings were of considerable importance not only for the applicant (even if its economic survival was not directly endangered by the proceedings) and for its competitors, but also for third parties, in view of the large number of persons concerned and the financial interests involved;
- the applicant did not contribute in any significant way to the protraction of the proceedings;
- such duration was not justified either by the constraints inherent in proceedings before the Community judicature, associated in particular with the use of languages, or by exceptional circumstances, particularly where there was no stay of proceedings under Articles 77 and 78 of the Rules of Procedure of the Court of First Instance.

A procedural irregularity of that kind justifies, as an immediate and effective remedy, first, annulment of the judgment of the Court of First Instance in so far as it set the amount of the fine imposed for the infringement found and, second, determination of that amount by the Court of Justice at a level which takes account of the need to give the applicant reasonable satisfaction.

However, in the absence of any indication that the duration of the procedure had any impact on the outcome of the proceedings, such a procedural irregularity cannot give rise to annulment of the contested judgment as a whole (cf. points 30, 40, 43, 46-49, 141).

5. As regards the alleged infringement of the principle of prompt conduct of the procedure, neither Article 55.1 of the Rules of Procedure of the Court of First Instance nor any other provision of those Rules or of the Statute of the Court of Justice provides that the judgments of the Court of First Instance must be delivered within a specified period after the oral procedure (cf. point 52).

6. Pursuant to Article 48.1 of the Rules of Procedure of the Court of First Instance, the parties may offer further evidence in support of their arguments in reply or rejoinder but they must give reasons for the delay in offering such evidence.

Evidence in rebuttal or the amplification of the offers of evidence submitted in response to evidence in rebuttal from the opposite party in his defence are not covered by the time-bar laid down in the abovementioned provision. That provision concerns offers of fresh evidence and must be read in the light of Article 66.2, which expressly provides that evidence may be submitted in rebuttal and that previous evidence may be amplified (cf. points 71-72).

7. The general principles of Community law governing the right of access to the Commission's file in competition cases do not apply, as such, to proceedings before the Community judicature, these being governed by the Statute of the Court of Justice and by the Rules of Procedure of the Court of First Instance.

In particular, under Article 64.3.d and 64.4 of the Rules of Procedure of the Court of First Instance, measures of organisation of procedure may be proposed by the parties at any stage of the procedure and may include requesting the production of documents or any papers relating to the case.

Nevertheless, in order to enable the Court of First Instance to determine whether it is conducive to proper conduct of the procedure to order the production of certain documents, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (cf. points 90, 92-93).

8. It is clear from Article 168A EC, Article 51 of the Statute of the Court of Justice and Article 112.1.c of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. That requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by it. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (cf. point 113).

9. It is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of the fines imposed on undertakings for infringements of Community law (cf. point 129).

Summary:

An appeal was lodged with the Court pursuant to Article 49 of its Statute against the *Baustahlgewebe GmbH v. Commission* Judgment of the Court of First Instance of 6 April 1995 (T-145/89, *Reports* p. II-987).

On 2 August 1989 (Decision 89/515), the Commission had imposed fines on 14 welded steel mesh producers for breach of Article 85 EC.

The appellant, *Baustahlgewebe*, one of the firms affected by the decision, had brought an action in the Court for the annulment of the decision and, in the alternative, for a reduction of the fine to a reasonable level. The Court had partially upheld the appellant's claims and had reduced the fine from ECU 4.5 million to 3 million.

The appellant relied on several grounds in support of its appeal: breaches of the right to a hearing within a reasonable time and of the general principle of promptitude, of the requirement to provide reasons, of the principles applicable to assessing the evidence, of the right of access to all relevant documentation and of Article 15 of Regulation no. 17/62. The Court upheld only the complaint of breach of the right to a hearing within a reasonable time. It noted first that it had not been shown that the appellant had contributed significantly to prolonging the length of proceedings. Having then noted that Article 6.1 ECHR provided that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal", and that it was a general principle of Community law that everyone was entitled to fair legal process (Opinion 2/94 of 28 March 1996, *Reports* p. I-1759 and *Kremzow* Judgment of 29 May 1997, C-299/95, *Reports* p. I-2629), the Court partially annulled the judgment of the Court of First Instance for breach of the right to a hearing within a reasonable time. It argued that although the latter had needed time to examine the complex facts of the case, this did not relieve it from the obligation of observing reasonable time-limits in dealing with cases before it. To decide what was reasonable a distinction had to be drawn between the oral and written proceedings. In this case, 32 months had elapsed between the end of the written proceedings and the decision to open the oral proceedings. Moreover, this period was not justified by any measure of organisation of procedure or of inquiry, or any other exceptional circumstance. The Court therefore partially annulled the decision of the Court of First Instance and reduced the fine by ECU 50 000, because of the excessive length of the proceedings.

Languages:

Dutch, English, French, Finnish, German, Italian, Portuguese, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2001-1-001

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 18.01.2001 / e) 27238/95 / f) Chapman v. the United Kingdom / g) / h) CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.16 **General Principles** – Weighing of interests.
3.17 **General Principles** – General interest.
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.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Right of other, protection / Land, stationing, permission / Land, planning permission / Gypsy, caravan, illegal stationing.

Headnotes:

Right to respect for private and family life, guaranteed by Article 8 ECHR, does not necessarily go so far as to allow the applicant to be provided with a home. Whether the state provided funds to enable everyone to have a home was a matter for political not judicial decision.

Summary:

The applicant, Sally Chapman, is a gipsy by birth. She bought land in the Three Rivers District on which to station her caravan, without obtaining prior planning permission. She was refused planning permission for her caravan, and also permission to build a bungalow. Her land was in a Green Belt area. It was acknowledged in the planning proceedings that there was no official site for gypsies in the area and the time for compliance with the enforcement order

was for that reason extended. She was fined for failure to comply and left her land for eight months, returning due to an alleged lack of other alternatives and having spent the time being moved on from one illegal encampment to another. She still lives on her land with her husband and father, who is over 90 years' old and suffering from senile dementia.

The Court had to consider whether measures taken against the applicant to enforce planning measures

concerning the occupation of her own land in her caravan violated Article 8 ECHR.

The Court noted that the applicant's occupation of her caravan was an integral part of her ethnic identity as a gypsy and that the enforcement measures and planning decisions interfered with the applicant's right to respect for her private and family life.

However, the Court found that the measures were "in accordance with the law" and pursued the legitimate aim of protecting the "rights of others" through preservation of the environment.

As regards the necessity of the measures taken in pursuit of that legitimate aim, the Court considered that a wide margin of appreciation had to be accorded to the domestic authorities who were far better placed to reach decisions concerning the planning considerations attaching to a particular site. In this case, the Court found that the planning inspectors had identified strong environmental objections to the applicant's use of her land which outweighed the applicant's individual interests.

The Court also noted that gypsies were at liberty to camp on any caravan site with planning permission. Although there were insufficient sites which gypsies found acceptable and affordable and on which they could lawfully place their caravans, the Court was not persuaded that there were no alternatives available to the applicant besides occupying land without planning permission on a Green Belt area.

The Court did not accept that, because statistically the number of gypsies was greater than the number of places available in authorised gypsy sites, decisions not to allow the applicant to occupy land where she wished to install her caravan constituted a violation of Article 8 ECHR. Neither was the Court convinced that Article 8 ECHR could be interpreted to impose on the United Kingdom, as on all the other Contracting States to the European Convention on Human Rights, an obligation to make available to the gypsy community an adequate number of suitably equipped sites. Article 8 ECHR did not give a right to be provided with a home, nor did any of the Court's

jurisprudence acknowledge such a right. There had accordingly been no violation of Article 8 ECHR.

Cross-references:

- *Buckley v. the United Kingdom*, 25.09.1996, Reports 1996-IV, p. 1271;
- *Dudgeon v. the United Kingdom*, 22.10.1981, Series A, no. 45, *Special Bulletin ECHR* [ECH-1981-S-003];
- *Lustig-Prean and Beckett v. the United Kingdom*, 27.09.1999, Reports 1999;
- *Gillow v. the United Kingdom*, 24.11.1986, Series A, no. 109, p. 22;
- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31, p. 15, *Special Bulletin ECHR* [ECH-1979-S-002];
- *Keegan v. Ireland*, 26.05.1994, Series A, no. 290, p. 19, *Bulletin* 1994/2 [ECH-1994-2-008];
- *Kroon and Others v. Netherlands*, 27.10.1994, Series A, no. 297-C, p. 56, *Bulletin* 1994/3 [ECH-1994-3-016].

Languages:

English, French.



Identification: ECH-2001-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 22.03.2001 / **e)** 34044/96, 35532/97, 44801/98 / **f)** Streletz, Kessler and Krenz v. Germany / **g)** / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

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

5.3.7 **Fundamental Rights** – Civil and political rights
– Right to emigrate.

Keywords of the alphabetical index:

Official, senior, decision, responsibility / Border, protection, installation / Firearm, border, use.

Headnotes:

A state governed by the rule of law does not breach Article 7.1 ECHR when it brings criminal proceedings against persons who had committed crimes under a former regime. Similarly, the courts of such a State, having taken the place of those which existed previously, could not be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a state subject to the rule of law.

Summary:

The three applicants, all German nationals, were senior officials of the German Democratic Republic (GDR): Fritz Streletz was a Deputy Minister of Defence; Heinz Kessler was a Minister of Defence and Egon Krenz was President of the Council of State. All three applicants were convicted by the courts of the Federal Republic of Germany (FRG), after German unification, under the relevant provisions of the GDR's Criminal Code, and subsequently those of the FRG's Criminal Code, which were more lenient than those of the GDR. Mr Streletz, Mr Kessler and Mr Krenz were sentenced to terms of imprisonment for intentional homicide as indirect principals, on the ground that through their participation in decisions of the GDR's highest authorities, such as the National Defence Council or the Politbüro, concerning the regime for the policing of the GDR's border, they were responsible for the deaths of a number of people who had tried to flee the GDR across the intra-German border between 1971 and 1989. The applicants' convictions were upheld by the Federal Court of Justice and declared by the Federal Constitutional Court to be compatible with the Constitution.

The Court had to consider, from the standpoint of Article 7.1 ECHR, whether, at the time when they were committed, the applicants' acts constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or international law.

The Court noted that the legal basis for the applicants' convictions was the criminal law of the GDR applicable at the material time, and that their sentences corresponded in principle to those prescribed in the relevant provisions of the GDR's legislation; in the event, the sentences imposed on the applicants had been lower, thanks to the principle of applying the more lenient law, which was that of the FRG.

The Court pointed out that although the aim of the GDR's state practice had been to protect the border between the two German States "at all costs" in order to preserve the GDR's existence, the reason of state thus invoked had to be limited by principles enunciated in the Constitution and legislation of the GDR itself; above all, it had to respect the need to preserve human life, enshrined in the GDR's Constitution, People's Police Act and State Borders Act, regard being had to the fact that even at the material time the right to life was already, internationally, the supreme value in the hierarchy of human rights.

Because of the very senior positions the applicants occupied in the state apparatus, they evidently could not have been ignorant of the GDR's Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime that had been made internationally. Moreover, they themselves had implemented or maintained that regime, by superimposing on the statutory provisions orders and service instructions on the consolidation and improvement of the border-protection installations and the use of firearms. The applicants had therefore been directly responsible for the situation which had obtained at the border between the two German States.

Moreover, regard being had to the pre-eminence of the right to life in all international instruments on the protection of human rights, the Court considered that the German court's strict interpretation of the GDR's legislation in the present case was compatible with Article 7.1 ECHR.

Lastly, a state practice such as the GDR's border-policing policy, which flagrantly infringed human rights and above all the right to life, the supreme value in the international hierarchy of human rights, could not be described as "law" within the meaning of Article 7 ECHR and therefore covered by the protection of this Article 7.1 ECHR.

Having regard to all of the above considerations, the Court held that at the time when they were committed the applicants' acts constituted offences defined with sufficient accessibility and foreseeability in GDR's law.

The Court noted that, from the standpoint of the principles of international law, the pre-eminence of the right to life had been constantly affirmed. It held that the applicants' acts were not justified in any way under the exceptions to the right to life contemplated in Article 2.2 ECHR. It also recalled that, like Article 2.2 Protocol 4 ECHR, Article 12.2 of the International Covenant on Civil and Political Rights provided: "Everyone shall be free to leave any country, including his own."

The Court finally pointed out that, even supposing that no individual criminal responsibility could be inferred from the international instruments on the protection of human rights, it could be deduced from those instruments when they were read together with Article 95 of the GDR's Criminal Code, which explicitly provided that individual criminal responsibility was to be borne by those who violated the GDR's international obligations or human rights and fundamental freedoms.

In the light of all of the above considerations, the Court considered that at the time when they were committed the applicants' acts also constituted offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights. Accordingly, the applicants' conviction by the German courts after reunification had not breached Article 7.1 ECHR.

Cross-references:

- *Schenk v. Switzerland*, 12.07.1988, Series A, no. 140, p. 29;
- *Kopp v. Switzerland*, 25.03.1998, *Reports* 1998-II, p. 541, *Bulletin* 1998/1 [ECH-1998-1-005];
- *S.W. and C.R. v. the United Kingdom*, 22.11.1995, Series A, no. 335-B, p. 41, *Bulletin* 1995/3 [ECH-1995-3-021];
- *Osman v. the United Kingdom*, 28.10.1998, *Reports* 1998-VIII, p. 3159;
- *Akkoç v. Turkey*, 10.10.2000.

Languages:

English, French.



Identification: ECH-2001-1-003

a) Council of Europe / b) European Court of Human Rights / c) Third Section / d) 03.04.2001 / e) 27229/95 / f) Keenan v. the United Kingdom / g) / h) CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 5.1.1.3.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
- 5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Detention, conditions / Health, effective monitoring / Decision, automatic review / Prison, segregation.

Headnotes:

It is not apparent that the prison authorities omitted any step which should have reasonably been taken in order to protect Mark Keenan's right to life. There had accordingly been no violation of Article 2 ECHR. However, significant defects in the medical care provided to a mentally-ill person were in breach of Article 3 ECHR. Finally, the applicant and his son did not have any effective remedy to complain against Mark Keenan's mistreatment contrary to Article 13 ECHR.

Summary:

The applicant, Susan Keenan, is the mother of Mark Keenan who died in HM Prison Exeter (England), at the age of 28, from asphyxia caused by self-suspension. Mark Keenan had been receiving intermittent anti-psychotic medication from the age of 21 and his medical history included symptoms of paranoia, aggression, violence and deliberate self-harm. On 1 April 1993, he was admitted to Exeter prison, initially to the prison health care centre, to serve a four-month sentence for assault. Various attempts to move him to the ordinary prison were unsuccessful, as his condition deteriorated whenever

he was transferred. On 1 May 1993, after the question of being transferred to the main prison was raised with him, Mr Keenan assaulted two hospital officers, one seriously. He was placed the same day in a segregation unit of the prison punishment block. On 14 May, he was found guilty of assault and his overall prison sentence increased by 28 days, including seven extra days in segregation in the punishment block. On 15 May 1993, he was discovered by the two prison officers hanging from the bars of his cell.

The Court had to consider whether the applicant's son was the victim of a failure to protect his life and inhuman and degrading treatment in violation of Articles 2 and 3 ECHR and whether he and his mother did not have any effective remedy, in violation of Article 13 ECHR.

The Court noted that no formal diagnosis of schizophrenia provided by a psychiatric doctor had been submitted to it. It could not therefore be concluded that Mark Keenan was at immediate risk throughout the period of detention. Furthermore, the Court found that, on the whole, the authorities made a reasonable response to his conduct, placing him in hospital care and under watch when he showed suicidal tendencies. As a consequence, it was not apparent that the authorities omitted any step which should have reasonably been taken. There had been no violation of Article 2 ECHR in this case.

The Court found the lack of effective monitoring of Mark Keenan's condition and the lack of informed psychiatric input into his assessment and treatment disclosed significant defects in the medical care provided to a mentally-ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment which may well have threatened his physical and moral resistance, was not compatible with the standard of treatment required in respect of a mentally-ill person. There had accordingly been a violation of Article 3 ECHR.

The Court observed that two issues arose under Article 13 ECHR: whether Mark Keenan himself had available to him a remedy in respect of the punishment inflicted on him and whether after his suicide, the applicant, either on her own behalf or as the representative of her son's estate, had a remedy available to her.

Concerning Mark Keenan, no remedy at all was available to him which would have offered him the prospect of challenging the punishment imposed within the seven-day segregation period or even within the period of 28 days' additional imprisonment.

Similarly, the internal avenue of complaint against adjudication to the Prison Headquarters took an estimated six weeks. If it were the case, as has been suggested, that Mark Keenan was not in a fit mental state to make use of any available remedy, this would point to the need for the automatic review of an adjudication. Mark Keenan had been punished in circumstances disclosing a breach of Article 3 ECHR and he had the right, under Article 13 ECHR, to a remedy which would have quashed that punishment before it had either been executed or come to an end.

Turning to the remedies available after Mark Keenan's death, the Court noted that the inquest did not provide a remedy for determining the liability of the authorities for any alleged mistreatment, or for providing compensation. The applicant should have been able to apply for compensation for her non-pecuniary damage and that suffered by her son before his death. Moreover, no effective remedy was available to the applicant, which would have established where responsibility lay for her son's death. In the Court's view, this was an essential element of a remedy under Article 13 ECHR for a bereaved parent.

Cross-references:

- *L.C.B. v. the United Kingdom*, 09.06.1998, Reports 1998-III, p. 1403;
- *Osman v. the United Kingdom*, 28.10.1998, Reports 1998-VIII;
- *Salman v. Turkey*, no. 21986/93, ECHR 2000-VII;
- *Tekin v. Turkey*, 09.06.1998, Reports 1998-IV;
- *Raninen v. Finland*, 16.12.1997, Reports 1997-VIII, p. 2821;
- *Ireland v. the United Kingdom*, 18.01.1978, Series A, no. 25, p. 66, *Special Bulletin ECHR* [ECH-1978-S-001];
- *Ilhan v. Turkey*, no. 22277/93, ECHR 2000-VII;
- *Herzegovina v. Austria*, 24.09.1992, Series A, no. 244;
- *Aerts v. Belgium*, 30.07.1998, Reports 1998-V, p. 1966;
- *Ribitsch v. Austria*, 04.12.1995, Series A, no. 336, p. 26, *Bulletin* 1995/3 [ECH-1995-3-023];
- *Aksoy v. Turkey*, 18.12.1996, Reports 1996-VI, p. 2286, *Bulletin* 1996/3 [ECH-1996-3-017];
- *Aydin v. Turkey*, 25.09.1997, Reports 1997-VI, p. 1895, *Bulletin* 1997/3 [ECH-1997-3-016];
- *Kaya v. Turkey*, 19.02.1998, Reports 1998-I, p. 329, *Bulletin* 1998/1 [ECH-1998-1-004];
- *Boyle and Rice v. the United Kingdom*, 27.04.1998, Series A, no. 131, p. 23;
- *Yasa v. Turkey*, 02.09.1998, Reports 1998-VI, p. 2242.

Languages:

English.

*Identification:* ECH-2001-1-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 10.05.2001 / **e)** 28945/95 / **f)** T.P. and K.M. v. the United Kingdom / **g)** / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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.

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

Keywords of the alphabetical index:

Medical authority, document, disclosure / Family, forced, separation, compensation.

Headnotes:

The applicant was not adequately involved in the decision-making process concerning the care of her daughter, contrary to her right to respect for family life guaranteed by Article 8 ECHR. Moreover, the applicants did not have any effective remedy to complain against that interference with their rights (Article 13 ECHR). Finally, the striking out procedure, which rules on the existence of sustainable causes of action, does not offend *per se* the principle of access to court.

Summary:

The applicants, T.P. and K.M., mother and daughter, had been separated by the local authority, the London Borough of Newham, on 13 November 1987. T.P. was granted limited access. Indeed, K.M. had been interviewed by a consultant child psychiatrist and had disclosed that she had been abused by someone who lived with the applicants. The health authority concluded that T.P. would be unable to protect the second applicant from abuse. In or about October 1988, T.P.'s representatives applied for access to the video of the disclosure interview. The health authority lodged an objection to disclosure of the video to the first applicant. On an unspecified date at or about that time, T.P.'s solicitors had sight of the transcript. On 21 November 1988, after a hearing in the High Court, the local authority recommended that the second applicant be rehabilitated to the first applicant, considering that K.M. had identified her abuser as having been thrown out of the house by T.P.

On 8 November 1990, the applicants issued proceedings making numerous allegations of negligence and breach of statutory duty against the local authority, the central allegation being that the health authority failed to investigate the facts with proper care and thoroughness. The applicants claimed that as a result of their enforced separation each of them had suffered a positive psychiatric disorder. Following proceedings which terminated in the House of Lords, the applicants' claims were struck out. In the judgment given on 29 June 1995, which concerned three cases, Lord Browne-Wilkinson held, among other things, that public policy considerations were such that local authorities should not be held liable in negligence in respect of the exercise of their statutory duties safeguarding the welfare of children.

The Court had to consider first whether the question to disclose the video of the interview could be determined by the local authority without being in breach of Article 8 ECHR, and whether the applicants did not have any effective remedy in violation of Article 13 ECHR. The Court had then to examine whether the striking out procedure offends *per se* the principle of access to court guaranteed by Article 6 ECHR.

Noting that the local authority's failure to submit the issue to the court for determination meant T.P. was not adequately involved in the decision-making process concerning the care of her daughter, K.M., the Court found a failure to respect the applicants' family life and a breach of Article 8 ECHR.

The Court recalled that if psychiatric damage occurred, there might have been elements of medical costs as well as significant pain and suffering to be addressed. It did not agree with the government that pecuniary compensation would not provide redress. As a consequence, the applicants did not have available to them an appropriate means for obtaining a determination of their allegations that the local authority breached their right to respect for family life and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. For these reasons, they were not afforded an effective remedy in accordance with Article 13 ECHR.

Concerning Article 6 ECHR, the Court was satisfied that at the outset of the proceedings there was a serious and genuine dispute about the existence of the right asserted by the applicants under the domestic law of negligence. It found that Article 6 ECHR was therefore applicable to the proceedings brought by these applicants alleging negligence by the local authority.

However, the Court observed that the applicants were not prevented in any practical manner from bringing their claims before the domestic courts. Indeed, the case was litigated with vigour up to the House of Lords. The domestic courts were concerned with the application brought by the defendants to have the case struck out as disclosing no reasonable cause of action. This involved the pre-trial determination of whether, assuming the facts of the applicants' case as pleaded were true, there was a sustainable claim in law. Nor was the Court persuaded that the applicants' claims were rejected due to the application of an exclusionary rule. The applicants had not argued before the House of Lords that any direct duty of care was owed to them by the local authority. It could not therefore be maintained that the applicants' claims were rejected on the basis that it was not fair, just and reasonable to impose a duty of care on the local authority in the exercise of its child care functions.

The Court concluded that the applicants might not claim that they were deprived of any right to a determination on the merits of their negligence claims. Once the House of Lords had ruled on the arguable legal issues that brought into play the applicability of Article 6.1 ECHR, the applicants could no longer claim any entitlement under Article 6.1 ECHR to obtain any hearing concerning the facts. There was no denial of access to court and, accordingly, no violation of Article 6 ECHR.

Cross-references:

- *Hokkanen v. Finland*, 23.09.1994, Series A, no. 299-A, p. 20, *Bulletin* 1994/3 [ECH-1994-3-015];
- *Bronda v. Italy*, 09.06.1998, *Reports* 1998-IV, p. 1491;
- *Johansen v. Norway*, 07.08.1996, *Reports* 1996-III, p. 1003;
- *McMichael v. the United Kingdom*, 24.02.1995, série A, n° 307-B, p. 57, *Bulletin* 1995/1 [ECH-1995-1-004];
- *James and Others v. the United Kingdom*, 21.02.1986, Series A, no. 98, p. 46;
- *Lithgow and Others v. the United Kingdom*, 08.07.1986, Series A, no. 102, p. 70, *Special Bulletin ECHR* [ECH-1986-S-002];
- *The Holy Monasteries v. Greece*, 09.12.1994, Series A, no. 301, p. 37, *Bulletin* 1994/3 [ECH-1994-3-020];
- *Bentham v. the Netherlands*, 23.10.1985, Series A, no. 97, p. 15, *Special Bulletin ECHR* [ECH-1985-S-003];
- *Le Calvez v. France*, 25.07.1998, *Reports* 1998-V;
- *Golder v. the United Kingdom*, 21.02.1975, Series A, no. 18, p. 13, *Special Bulletin ECHR* [ECH-1975-S-001];
- *Le Compte, Van Leuven and De Meyere v. Belgium*, 23.06.1981, Series A, no. 43, *Special Bulletin ECHR* [ECH-1981-S-001];
- *Sporrong and Lönnroth v. Sweden*, 23.09.1982, Series A, no. 52, *Special Bulletin ECHR* [ECH-1982-S-002];
- *Tre Traktörer AB v. Sweden*, 07.07.1989, Series A, no. 159, p. 18;
- *Stubbings and Others v. the United Kingdom*, 22.10.1996, *Reports* 1996-IV, p. 1502, *Bulletin* 1996/3 [ECH-1996-3-014];
- *Tolstoy Miloslavsky v. the United Kingdom*, 13.07.1995, Series A, no. 316-B, p. 80, *Bulletin* 1995/2 [ECH-1995-2-011];
- *Ashingdane v. the United Kingdom*, 28.05.1985, Series A, no. 93, p. 24;
- *Aydin v. Turkey*, 25.09.1997, *Reports* 1997-VI, p. 1985, *Bulletin* 1997/3 [ECH-1997-3-016];
- *Klass and Others v. Germany*, 06.09.1978, Series A, no. 28, *Special Bulletin ECHR* [ECH-1978-S-004].

Languages:

English, French.



Systematic thesaurus *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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² E.g. Rules of procedure.

³ Including the conditions and manner of such appointment (election, nomination etc).

⁴ Including the conditions and manner of such appointment (election, nomination etc).

⁵ Vice-presidents, presidents of chambers or of sections etc.

⁶ E.g. State Counsel, prosecutors etc.

⁷ Registrars, assistants, auditors, general secretaries, researchers etc.

⁸ E.g. assessors, office members.

⁹ Registrars, assistants, auditors, general secretaries, researchers etc.

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¹⁰ Referrals of preliminary questions in particular.

¹¹ Enactment required by law to be reviewed by the Court.

¹² Review *ultra petita*.

¹³ Horizontal distribution of powers.

¹⁴ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁵ Decentralised authorities (municipalities, provinces etc).

¹⁶ This keyword concerns decisions on the procedure and results of referenda and other consultations.

¹⁷ This keyword concerns decisions preceding the referendum including its admissibility.

¹⁸ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities etc (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

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¹⁹ As understood in private international law.

²⁰ Including constitutional laws.

²¹ For example organic laws.

²² Local authorities, municipalities, provinces, departments etc.

²³ Or: functional decentralisation (public bodies exercising delegated powers).

²⁴ *Political questions*.

²⁵ Unconstitutionality by omission.

²⁶ For the withdrawal of proceedings, see also 1.4.10.4

²⁷ Pleadings, final submissions, notes etc.

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²⁸ May be used in combination with Chapter 1.2 Types of claim.

²⁹ For the withdrawal of the originating document, see also 1.4.5.

³⁰ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

³¹ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

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³² This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters etc).

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³⁵ Including the principle of a multi-party system.

³⁶ Includes the principle of social justice.

³⁷ Separation of Church and State, State subsidisation and recognition of churches, secular nature etc.

³⁸ Including maintaining confidence and legitimate expectations.

³⁹ Prohibition of punishment without proper legal base.

⁴⁰ Including compelling public interest.

⁴¹ 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.

⁴² Including questions of treason/high crimes.

⁴³ Including prohibition on monopolies.

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⁴⁴ For the principle of primacy of Community law, see 2.2.1.6.

⁴⁵ Including the body responsible for revising or amending the Constitution.

⁴⁶ For example nomination of members of the government, chairing of Cabinet sessions, countersigning of laws.

⁴⁷ For example presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁴⁸ For example the granting of pardons.

⁴⁹ Bicameral, monocameral, special competence of each assembly etc.

⁵⁰ Including specialised powers of each legislative body.

⁵¹ For delegation of powers to an executive body, see keyword 4.6.3.2.

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⁵² Representative/imperative mandates.

⁵³ Presidency, bureau, sections, committees etc.

⁵⁴ Including the convening, duration, publicity and agenda of sessions.

⁵⁵ Including their creation, composition and terms of reference.

⁵⁶ State budgetary contribution, other sources etc.

⁵⁷ For example incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility see 4.9.4.

⁵⁸ All these keywords apply equally to bodies of local self-government.

⁵⁹ Derived directly from the constitution.

⁶⁰ Local authorities.

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⁶¹ The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.

⁶² Civil servants, administrators etc.

⁶³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁶⁴ Other than the body delivering the decision summarised here.

⁶⁵ Positive and negative conflicts.

⁶⁶ For example, Judicial Service Commission, Conseil supérieur de la magistrature.

⁶⁷ Comprises the Court of Auditors in so far as it exercises judicial power.

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⁶⁸ See also keywords 5.2.38 and 5.2.1.4.

⁶⁹ Proportional, majority, preferential, single-member constituencies etc.

⁷⁰ E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

⁷¹ Tracts, letters, press, radio and television, posters, nominations etc.

⁷² Impartiality of electoral authorities, incidents, disturbances.

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⁷³ E.g. signatures on electoral rolls, stamps, crossing out of names on list.

⁷⁴ E.g. in person, proxy vote, postal vote, electronic vote.

⁷⁵ E.g. Panachage, voting for whole list or part of list, blank votes.

⁷⁶ E.g. Auditor-General.

⁷⁷ Parliamentary Commissioner, Public Defender, Human Rights Commission etc.

⁷⁸ E.g. Court of Auditors.

⁷⁹ Institutional aspects only: questions of procedure, jurisdiction, composition etc are dealt with under the keywords of Chapter 1.

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⁸⁰ Including state of war, martial law, declared natural disasters etc; for human rights aspects, see also keyword 5.1.5.

⁸¹ Positive and negative aspects.

⁸² The question of "*Drittwirkung*".

⁸³ Taxes and other duties towards the state.

⁸⁴ Here, the term national is used to designate ethnic origin.

⁸⁵ Discrimination in particular between married and single persons.

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⁸⁶ This keyword also covers Personal liberty. It includes for example identity checking, personal search and administrative arrest.

⁸⁷ Including questions related to the granting of passports or other travel documents.

⁸⁸ May include questions of expulsion and extradition.

⁸⁹ 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.

⁹⁰ Including the right to be present at hearing.

⁹¹ This keyword covers the right of appeal to a court.

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⁹² Covers freedom of religion as an individual right. Its collective aspects are included under the keyword Freedom of worship below.

⁹³ This keyword also includes the right to freely communicate information.

⁹⁴ Militia, conscientious objection etc.

⁹⁵ Aspects of the use of names are included either here or under Right to private life.

⁹⁶ Including compensation issues.

⁹⁷ This keyword also covers Freedom of work.

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⁹⁸

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index *

* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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