

## **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.*

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*The decisions are presented in the following way:*

1. Identification
  - a) country or organisation
  - b) name of the court
  - c) chamber (if appropriate)
  - d) date of the decision
  - e) number of decision or case
  - f) title (if appropriate)
  - g) official publication
  - h) non-official publications
2. Keywords of the Systematic Thesaurus
3. Keywords of the alphabetical index
4. Headnotes
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**G. Buquicchio**

Secretary of the European Commission for Democracy through Law

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

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# Albania

## Constitutional Court

### Important decisions

*Identification:* ALB-2001-2-002

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 24.04.2001 / **e)** 26 / **f)** Constitutionality of Council of Minister's decision on compensation / **g)** *Fletorja Zyrtare* (Official Gazette), 26, 624 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

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

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

*Keywords of the alphabetical index:*

Expropriation, compensation / Compensation, right / Land, use for state-owned business.

*Headnotes:*

Expropriations and other such measures to limit property rights for reasons of the public interest are allowed only if there is fair and adequate compensation. By way of a government decision, former owners of land used by the state for business properties which are still state-owned have been placed on an unequal footing with others whose land had been used by the state but not for the purpose of state-owned business premises. Both of these groups have equal legal personalities, and so they should be treated equally under the principle of equality before the law as guaranteed by Article 18 of the Constitution.

*Summary:*

As one of the measures implementing Albania's economic reform policies, the Council of Ministers established the procedures for privatising companies

not operating in strategic sectors, by auctioning off the state's shares in these companies.

The Decision of the Council of Ministers no. 119, dated 18 March 2000, held that former owners of land, who have not been compensated in one of the ways foreseen by the Law no. 7698, dated 23 April 1993 "On restitution and compensation following expropriation", have a right to a certain number of shares in the privatised company. This figure is to be based on the surface area of the land where the company is located and on the price of this land, as regulated by Decision of Council of Ministers no. 312, dated 30 June 1994.

The former landowners complained to the Ombudsman, alleging that the prices set out by the decision of the Council of Ministers have not taken into consideration the rules of the free market when regulating the value of the land.

The present application was brought by the Ombudsman under his powers to protect individuals' interests from the illegal actions of administrative bodies (Article 60.1 of the Constitution). Decision of the Council of Ministers no. 199, dated 18 March 2000, regulated the compensation pay-outs to landowners whose former land was used by the state for building premises for companies, where such companies are still state-owned. In order to calculate the compensation to be paid, the decision referred to the sale price of state-owned land, which was determined by a previous government decision (Decision of the Council of Ministers no. 312, dated 30 June 1994). This significantly restricts the former landowners' rights to compensation, because the value of this land that will be given in the form of shares is somewhat lesser than that set by the Commission on Compensation and Restitution of Property. The reason for this is that the state-determined prices for this category of property are lower than prices determined by the market. The decision did not take into account the fact that property prices could fluctuate with inflation. Therefore, the Constitutional Court reached the conclusion that such state regulation damaged the interests of this category of former landowners, because it restricts their right to be compensated for damage caused by illegal actions of state bodies, a right that has been guaranteed by the Article 44 of the Constitution.

The Constitutional Court accepted that forms of compensation foreseen by different normative acts differed from each other, but held that all of them were for the same purpose: to make amends for the injustices carried out by the previous regime against private property rights through expropriations,

nationalisations or confiscation or any other injustice, and to do so by any means possible under the country's socio-economic conditions. For this reason, the former landowners must be adequately compensated, according to the constitutional requirement for fair compensation. The Constitutional Court held that non-observance of this criterion constitutes a constitutional infringement.

Furthermore, the Constitutional Court observed that former landowners, to whom the decision referred, had been placed at a disadvantage as compared to other former landowners, whose land had been used by the state for building premises not used by state-owned companies.

Both of these groups have equal legal personality. The Constitutional Court held that the right to compensation must apply equally to both, with similar benefits being awarded to each type of landowner. This right applied the constitutional principle of the equality before the law (Article 18 of the Constitution). For this reasons, Constitutional Court decided to abrogate this provision on grounds of unconstitutionality.

#### *Languages:*

Albanian, English (translation by the Court).



#### *Identification:* ALB-2001-2-003

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 09.05.2001 / **e)** 33 / **f)** Constitutionality of financial control of political party / **g)** *Fletorja Zyrtare* (Official Gazette), 30, 956 / **h)** CODICES (English).

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

3.18 **General Principles** – General interest.  
4.5.10.2 **Institutions** – Legislative bodies – Political parties – Financing.  
4.10.6 **Institutions** – Public finances – Auditing bodies.

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

Budget, control / Political activity, transparency / Political party, dissolution.

#### *Headnotes:*

As voluntary unions of citizens based on common political beliefs, political parties cannot be subject to economic and financial control as exercised by the High State Audit (HSA), the body which oversees the economic activity of organs of the state and controls the utilisation and protection of state funds. The Constitutional Court held that even donations and support which political parties receive from parties or national or international organisations cannot be subject to the control exercised by this constitutional body. The fact that the HSA is prevented from controlling party finances does not imply that political parties sidestep the requirement of economic transparency of their finances because, according to Article 9.3 of the Constitution, they are obliged to make public their financial resources.

#### *Summary:*

The Law on Political Parties prescribed that the HSA was entitled to exercise financial control on political parties for that part of their budget which is provided both by public funds and by donations and by support that they receive from other sources.

Since it considered as unconstitutional the authority to exercise the financial control even on donations and support gained by political parties, the HSA took an action to the Constitutional Court.

The HSA requested a declaration of unconstitutionality regarding that part of provision which puts the HSA under an obligation to exercise financial control over income from donations or other legal support. The HSA is the highest authority to exercise economic and financial control and its jurisdiction extends over a wide number of state bodies. The HSA requested that political parties, as voluntary unions of citizens on the basis of their common political beliefs, opinions and interests, should not be classed as the state bodies and therefore they should not be subject to control by the HSA.

The Constitutional Court held that donations and support given to political parties by international unions and by local and foreign political organisations and foundations may not be subject to control by this constitutional body. The HSA was considered a body whose main duty was to control the effective and positive use of public funds and to supervise the legality of implementation in the financial and economic fields. For this reason, the Constitutional Court expressed the opinion that donations and support that political parties have been given by legal

donors, and have nothing to do with the public funds, exceed the specialised control of the HSA.

Political parties have legal personality and they may even possess their own property, as well as financial support according to measures specified in the state budget.

Exclusion of political parties from the range of subjects that are controlled by the HSA does not imply that their economic and financial activities are not controlled at all. Article 9.3 of the Constitution puts political parties under an obligation to publicise their financial resources and expenses. Non-observance of this obligation can lead the Constitutional Court to decide on the constitutionality of the activities of political parties. Moreover, the HSA has the authority to exercise its control on that part of the income of political parties which derives from the state budget.

Because of these reasons, the Constitutional Court held that the part of the provision, which puts the HSA under an obligation to control the part of the income of political parties deriving from donations or the other legal resources, is unconstitutional.

#### *Languages:*

Albanian, English (translated by the Court).



## Andorra Constitutional Court

### Important decisions

*Identification:* AND-2001-2-001

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 16.12.1994 / **e)** 94-1-CC / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 19.12.1994 / **h)**.

*Keywords of the systematic thesaurus:*

1.3 **Constitutional Justice** – Jurisdiction.

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

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

4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.

4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

*Keywords of the alphabetical index:*

Budget, justice, administration / Judicial Service Commission, budget, management.

*Headnotes:*

In the event of a dispute between constitutional organs about the exercise of a power, the Constitutional Court's decision shall assess that disputed power and assign it to one of the parties, without taking the place of the legislature.

*Summary:*

The Judicial Service Commission referred to the Constitutional Court a dispute about powers between itself and the government, for it took the view that it had power to manage the budget allocated for the administration of justice.

The Judicial Service Commission had in practice managed its budget from the date on which it was set up, 25 October 1993, until the General Budget Law of 1994. After that law had been adopted, the govern

ment included implementation of the justice budget in that of the general government budget.

The Judicial Service Commission had expressed the view that the government had encroached onto a power held by itself, seriously jeopardising the principle of the separation of powers.

In this judgment, the Constitutional Court points out that both the Constitution and the Special Law on Justice (*Llei Qualificada de la Justícia*) explicitly lay down the powers of the Judicial Service Commission, which do not encompass the management and implementation of the justice department budget. Nor is it the Court's role to take the place of the legislature in the drafting of new laws or the amendment of those in force, or to decide on laws which are not disputed within the framework of a conflict of powers.

#### *Supplementary information:*

The Constitutional Court deals with conflicts of powers between constitutional organs. It is the Coprinces (joint and indivisible Heads of State), the General Council (parliament), the government, the Judicial Service Commission and the *Comuns* (representative and administrative organs of the *Parròquies*, Andorra's territory being divided into seven *Parròquies*) that are defined as constitutional organs.

The Judicial Service Commission is the organ which represents, manages and administers the organisation of the courts and ensures that the courts are independent and function properly.

#### *Languages:*

Catalan.



#### *Identification:* AND-2001-2-002

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 03.04.1995 / **e)** 95-1-PI / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 05.04.1995 / **h)**.

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

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

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

3.16 **General Principles** – Proportionality.

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

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

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

Association, professional, membership, obligatory.

#### *Headnotes:*

The chambers are outside the scope of freedom of association, since they are not created through the free decision of their members. They are effectively set up by the public authorities so that specific administrative rights may be assigned to them and they may be entrusted with the management of certain public services.

#### *Summary:*

The administrative chamber of the Higher Court of Justice referred to the Constitutional Court a preliminary question for a ruling on the conformity with the Constitution of certain sections of the Law on the Chamber of Commerce, Industry and Services of Andorra, which obliges traders, industrialists and service providers to join the Chamber.

The Higher Court of Justice in fact wondered whether or not the freedom of association enshrined in Articles 17 and 18 of the Constitution allowed the public authorities to create a public legal entity to which affiliation was compulsory.

In this judgment, the Constitutional Court says that, firstly, there is no constitutional incompatibility between associations that can derive from private initiatives and professional associations of public origin, for the freedom not to associate cannot be interpreted as being an obstacle to the existence of the former, and, secondly, the public authorities may set up professional associations:

- if they are necessary for public purposes unable to be fulfilled by other means;
- if they do not prevent free competition by associations which have emerged in the same



field and have as their lawful purpose the defence of sectoral interests; and

- if, without prejudice to logical administrative supervision, the democratic and autonomous functioning of the professional associations set up is guaranteed.

The Constitutional Court therefore declared the aforementioned law to be in accordance with the Constitution.

#### *Supplementary information:*

When, during proceedings, a court has reasonable and well-founded doubts as to the constitutionality of a law or of a decree issued in pursuance of a delegation of legislative powers (*delegació legislativa*), of which application is necessary in order to resolve the dispute, it refers a preliminary question to the Constitutional Court, asking it to rule on the validity of the legal rule concerned. The Constitutional Court has to issue its ruling within two months.

Andorra's Constitution contains an explicit recognition only of freedom of association and does not mention any possibility of professional associations being set up by the public authorities.

#### *Languages:*

Catalan.



#### *Identification:* AND-2001-2-003

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 13.02.1999 / **e)** 98-3-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 17.02.1999 / **h)**.

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

1.2.1.7 **Constitutional Justice** – Types of claim – Claim by a public body – Public Prosecutor or Attorney-General.

1.2.2.1 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Natural person.

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.

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

4.7.1.3 **Institutions** – Judicial bodies – Jurisdiction – Conflicts of jurisdiction.

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

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

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

Marriage, dissolution, property / Marriage, property, separation.

#### *Headnotes:*

The courts have to rule on all the parties' claims; what is not permissible is for them to remain silent.

#### *Summary:*

The Principal State Prosecutor (*Ministeri Fiscal*) referred to the Constitutional Court a constitutional appeal against a decision of the civil chamber of the Higher Court of Justice, on grounds of violation of the right of appeal to a court, recognised in Article 10 of the Constitution.

In practice, in a case in which a husband and wife were separating, the matrimonial causes judge had ruled that, if the couple were married under the separate property matrimonial system, it was not for the court to decide, in a single ruling, on both the dissolution of the marriage and the division of the property used for the joint activities of both spouses.

In contrast, the Higher Court of Justice, ruling on appeal, left to the execution phase the whole matter of the settlement of the aforementioned property.

The Principal State Prosecutor allowed the plaintiff's claim, taking the view that the right of defence and the right of appeal to a court had been violated when not only the dissolution of the matrimonial financial arrangements, but also the declaration of the (disputed) ownership of numerous items covered by those arrangements, had been left to the execution phase, because the parties had not been allowed to make their claims and submit their evidence at a trial.

The plaintiff argued that the civil chamber of the Higher Court of Justice had considered the merits of the case without ruling on all the points put to it, and had in fact pointed the parties towards a path – that of

the execution of the decision – which was clearly inadequate for settling questions which should have been settled in that decision.

In this judgment, the Constitutional Court expresses the view that the Higher Court of Justice, by leaving the determination of the ownership of the aforementioned property to the execution phase, did not satisfy the request of the parties, who claimed respective ownership of the various items which constituted the matrimonial property. It was incongruous to have ordered the settlement of the matrimonial property at the time of execution of its decision, without having first determined each spouse's ownership of the jointly held items. This absence of response and the incongruous nature of the decision constituted a violation of the right of appeal to a court, laid down in Article 10 of the Constitution.

#### *Supplementary information:*

The Constitutional Court deals with appeals for the protection of the rights and freedoms recognised in Chapters III and IV of Title II of the Constitution (excluding the right for which Article 22 of the Constitution provides).

When this decision was delivered, the Principal State Prosecutor held sole power to lodge a constitutional appeal. The Special Law on the Constitutional Court was amended on 22 April 1999, and since 19 May 1999, the date of publication of this amendment in the Principality's Official Gazette, interested parties have been allowed to make direct appeals to protect their rights and freedoms.

The constitutional appeal is roughly equivalent to Spain's *recurso de amparo*.

#### *Languages:*

Catalan.



#### *Identification:* AND-2001-2-004

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 05.11.1999 / **e)** 99-7-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 12.11.1999 / **h)**.

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

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

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

1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.

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

4.7.1.3 **Institutions** – Judicial bodies – Jurisdiction – Conflicts of jurisdiction.

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

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

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

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

*Res iudicata*, scope / Marriage, dissolution, property, separation / Decision, operative part, setting aside.

#### *Headnotes:*

*Res iudicata* is not confined to the operative part of the court's decision, but also extends to the reasons on which the decision is based and on which it depends.

#### *Summary:*

A constitutional appeal was lodged with the Constitutional Court against a decision of the civil chamber of the Higher Court of Justice, which had issued its ruling on referral by the Constitutional Court, on the grounds of violation of the right to a trial and of the right to a trial within a reasonable time, recognised in Article 10 of the Constitution, and of failure to execute the judgment of the Constitutional Court.

The Constitutional Court had already ruled on this case by granting protection to the applicant, to which end it had set aside part of the civil chamber's decision. The Constitutional Court's judgment made it clear that the civil chamber, after having declared the matrimonial causes judge to have jurisdiction (something which this judgment neither confirmed nor stated to be wrong), should consequently have divided the jointly held property.

On the other hand, in its new decision, the civil chamber declared that, although it was the matrimonial causes judge's duty to dissolve the matrimonial property arrangements, it was not its duty to effect settlement, which was the responsibility of a civil court ruling in accordance with the ordinary procedure.

In this judgment, the Constitutional Court expresses the view that, in the civil chamber's first decision, the reasons relating to the power of the matrimonial causes judge to divide the jointly held property provided the necessary foundation on which the operative part, where it relates to the settlement of the matrimonial arrangements for jointly held property, was based and on which it depended. As this section of the operative part has been set aside, the civil chamber's decision could not, on this point, constitute *res iudicata*. It is indeed exceptional and surprising that, in a single case, the appeal court should contradict the reasons for an earlier decision and recognise, in its first decision, the jurisdiction of one specific court, and then, in its second decision, that of another; however, in so far as the reasons for the first decision gave rise to the setting aside of a section of the operative part of the decision, this contradiction cannot be considered to be a violation of *res iudicata*.

Where the violation of the right to a trial within a reasonable time is concerned, the Constitutional Court expressed the view that, while the excessive duration of a trial may contravene Article 6 ECHR, it is nevertheless the case that the obligation to keep to a reasonable time cannot, *a priori*, have the effect of obliging the court to amend the rules of procedure which it is the courts' duty to interpret.

#### Cross-references:

- This case is linked to case 98-3-RE of 13.02.1999, [AND-2001-2-002].

#### Languages:

Catalan.



## Argentina

### Supreme Court of Justice of the Nation

#### Important decisions

*Identification:* ARG-2001-2-004

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 03.04.2001 / **e)** I.7.XXXVI / **f)** Iraizoz, Juan Fermín c/ Gobierno de la Ciudad de Buenos Aires / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 (I) / **h)** CODICES (Spanish).

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

3.9 **General Principles** – Rule of law.  
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.  
 4.7.3 **Institutions** – Judicial bodies – Decisions.  
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

Jurisdiction, lack, declaration, court.

#### *Headnotes:*

The right of access to a court is violated when the court applied to issues a judgment declaring that it lacks jurisdiction but fails to transfer the case-file to the court which it considers competent to deal with the case.

#### *Summary:*

The plaintiff brought proceedings before the Higher Court of Justice of Buenos Aires, which declared, on a variety of grounds, that it lacked jurisdiction, and therefore decided to take no further action on the case. This prompted the plaintiff to lodge an extraordinary appeal with the Supreme Court.

The Supreme Court held that while the court below was within its rights to disclaim jurisdiction, the fact that it failed to transfer the case-file to the body it deemed competent constituted a case of denial of

access to the courts, exposing the plaintiff to deprivation of his right to have his case decided by a judicial body.

Three judges expressed dissenting opinions.

*Languages:*

Spanish.



*Identification:* ARG-2001-2-005

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 10.04.2001 / **e)** G.99.XXXII / **f)** Gaibisso, César A. y otros c/ Estado Nacional -M° de Justicia- s/ amparo ley 16.986 / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 (I) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

2.3.4 **Sources of Constitutional Law** – Techniques of review – Interpretation by analogy.

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

3.18 **General Principles** – General interest.

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

5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.

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

5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

*Keywords of the alphabetical index:*

Judge, retirement, allowance / Pension, sliding scale / Judge, independence.

*Headnotes:*

The constitutional protection afforded for the remuneration of judges also extends to their retirement pensions.

*Summary:*

Law no. 24.241 amended the regulations on retirement pensions for judges, including adjustments to the sliding scale of pensions, the amount of which was to be determined annually by the State Budget Law in accordance with the calculation of the resources available. The law also eliminated the proportionality between retirement pensions and the remunerations of serving members of the judiciary.

The plaintiffs, who were retired judges, lodged a “*de amparo*” action against this law on the grounds of unconstitutionality. The appeal was upheld at first instance and on appeal. This prompted the state to submit an extraordinary appeal to the Supreme Court.

The Supreme Court upheld the decision appealed against. It held that the laws on retirement pensions for members of the judiciary were aimed at guaranteeing a decent standard of living for such persons when they left office, and providing them with a financially secure future and the requisite independence in reaching their judicial decisions.

The point of the special pension system is to prevent judges from being influenced by the threat of experiencing frustration in old age of their plans for a decent standard of living during retirement.

This aim derives from Article 110 of the Constitution of Argentina, which affords judges the right to a remuneration that cannot be diminished in any way while they hold office.

This right is based on reasons of the public or common good and is supposed to benefit the whole judicial institution, rather than individual members thereof.

Protecting judges’ pensions does not mean discriminating in their favour, because such protection stems from the principles upholding the republican institutions, aimed at ensuring the independence of judges in the exercise of their duties. The beneficiaries of this special protection are not solely those individuals who exercise judicial functions but the whole population, who are entitled to a judicial service complying with the principles of the republican system.

Moreover, this type of question should not be assessed from an individualistic angle, as contended by the plaintiffs, because the difference in remuneration is justified by the status of the judiciary as a state power and by the republican requirement of shielding

judges from any concern that might affect the independence of their judgment.

The constitutional safeguard prohibiting any reduction in judicial salaries would be jeopardised if judges were frustrated in their expectation of a retirement pension enabling them to maintain a standard of living similar to that enjoyed during their working lives. This is especially so because even though the remuneration of serving judges does ensure a decent standard of living, it is not such as to allow them to make savings capable of offsetting the effects of a reduced retirement pension, given that judicial office precludes exercising any other paid work, apart from teaching.

This is not to say that judges must be shielded from all hardship borne by the whole community, but their retirement pensions must remain proportional to the remuneration of their serving colleagues. It is this latter remuneration must reflect the tension vis-à-vis the real resources which the community can earmark for remunerating the onerous responsibility of judicial service.

One judge expressed a partly dissenting opinion.

#### *Supplementary information:*

The judges' retirement pension scheme is also applicable to members of the public prosecutor's office.

The "*de amparo*" action protects acts or omissions which are manifestly arbitrary or unlawful and which actually or potentially damage, restrict, violate or threaten rights secured under the Constitution, a treaty or a piece of legislation (see in this same issue *Alvarez, Oscar Juan c/ Buenos Aires, Provincia de y otros/acción de amparo*), *Bulletin* 2001/2 [ARG-2001-2-008].

#### *Languages:*

Spanish.



#### *Identification:* ARG-2001-2-006

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 10.04.2001 / **e)** S.299.XXXV / **f)** Spota, Alberto Antonio y otros/ Artemisi, Dante Leonardo / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 (I) / **h)** CODICES (Spanish).

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

2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.  
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

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

*iura novit curia.*

#### *Headnotes:*

Judges are required to comply with the *iura novit curia* principle in reaching their decisions.

#### *Summary:*

A court admitted an action on the grounds that the defendant had not objected to it and that the facts set out therein should therefore be considered to have been acknowledged. The defendants lodged an extraordinary appeal with the Supreme Court.

The Supreme Court ruled that such acknowledgment did not dispense the judges from considering the facts in the light of the substantive rules governing the case in point. The judges were not bound by the legal definition given by the parties of their claims and were entitled to replace the right mentioned in the application, providing this did not alter the facts.

The Supreme Court therefore reversed the decision appealed against.

Four judges expressed dissenting opinions.

#### *Languages:*

Spanish.



*Identification:* ARG-2001-2-007

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 14.06.2001 / **e)** G.595.XXXV / **f)** González, Silvia Susana s/ comunicación en causa no. 56.523 Vicat, Luis Ernesto s/ denuncia / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 (II) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

4.7.4.1.5.3 **Institutions** – Judicial bodies – Organisation – Members – Status – Irremovability.

4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

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

*Keywords of the alphabetical index:*

Judge, impeachment.

*Headnotes:*

Decisions given by the special bodies responsible for trying judges are justiciable and therefore subject to review by the judiciary in cases of alleged violation of the safeguards on lawful proceedings.

*Summary:*

A judge from Buenos Aires Province was impeached by a special body made up of judges and members of the Bar Association. This body dismissed him from office on the ground that he had committed specific acts justifying this measure. The judge first of all appealed to the provincial Supreme Court of Justice. Following the rejection of this appeal, the judge lodged an extraordinary appeal with the Supreme Court.

The Supreme Court, with reference to its own case-law, held that the provincial court ought to have admitted the case because decisions given in cases of impeachment of a judge by bodies other than the judiciary could be brought before the judiciary when a violation of the guarantee on lawful proceedings, as protected by Article 18 of the Constitution of Argentina, was at issue.

Nevertheless, the extraordinary appeal was rejected on the ground that the appellant had not demonstrated sufficiently clearly and conclusively that this constitutional guarantee on proceedings had been seriously infringed.

One judge expressed a dissenting opinion.

*Languages:*

Spanish.

*Identification:* ARG-2001-2-008

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 12.07.2001 / **e)** A.304.XXXVII / **f)** Alvarez, Oscar Juan c/ Buenos Aires, Provincia de y otro s/ acción de amparo / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 (II) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.5.4.7 **Constitutional Justice** – Decisions – Types – Interim measures.

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

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

*Keywords of the alphabetical index:*

Interim measure.

*Headnotes:*

Given that a violation of the right at issue seems probable *a priori*, precautionary measures should be ordered during a trial concerning an individual's right to specific types of state medical care.

*Summary:*

The plaintiff brought a “*de amparo*” action against the national state and the government of Buenos Aires province for infringing his right to health. He asked the defendants to provide him with intensive

rehabilitation care, special orthopaedic shoes, a forearm crutch and the drugs required to treat his illness. He based his case, *inter alia*, on Article 25 of the 1969 American Convention on Human Rights.

The Supreme Court first of all noted its original jurisdiction to hear the case. It went on to state that the authorisation for precautionary measures did not require consideration of the certainty of there being an infringement the right claimed, because it was sufficient for this to be probable.

Drawing on this principle, the Court gave the decision mentioned in the headnotes above and gave the defendants five days within which to provide the plaintiff with the appropriate treatment and the orthopaedic equipment requested, failing which a coercive fine would be imposed.

#### *Supplementary information:*

The “*de amparo*” action protects acts or omissions which are manifestly arbitrary or unlawful and which actually or potentially damage, restrict, violate or threaten rights secured under the Constitution, a treaty or a piece of legislation (see in this same issue *Gaibisso, César A. y otros c/Estado Nacional - M° de Justicia - s/amparo ley 16.986*), *Bulletin* 2001/2 [ARG-2001-2-005].

#### *Languages:*

Spanish.



## Armenia Constitutional Court

### Statistical data

1 May 2001 – 31 August 2001

- 18 referrals made, 18 cases heard and 18 decisions delivered:
  - all cases concerned the compliance of international treaties with the Constitution;
  - all the international treaties were declared compatible with the Constitution.

### Information on the activities of the Constitutional Court of the Republic of Armenia during the reference period.

On 27-29 April 2001, within the framework of the Students' and Pupils' Olympiad on “Constitution and Law”, the Second All Armenian Student Scientific Conference on “The guarantees of protection of human rights in the Republic of Armenia” took place at the Constitutional Court of the Republic of Armenia. It was organised by the Centre of Constitutional Law and the Association of Lawyers of the Republic of Armenia.

Many students submitted their applications for participation in the student conference and their work was examined beforehand by the jury.

Following the decision of the jury 52 students were given an opportunity to present their work in the final stage of the Conference. Thirty-one students of the Law Faculty of the Yerevan State University, 7 students of the Russian-Armenian State University, 6 students of “Galik” University, 4 students of the State University of Gavar, 2 students of “M. Mashtots” University obtained the right to participate in the final stage.

About 200 students from different educational institutions participated in the Conference. Mr G. Harutyunyan, President of the Constitutional Court and President of the Council of Constitutional Law of the Republic of Armenia, and Mr G. Ghazinyan, Dean of the Law Faculty of Yerevan State University, gave opening speeches.

The reports presented during the Conference were devoted to different areas of the state and law and issues of human rights protection. Contributors to the conference had a chance to present their approaches to the concept and classification of basic human constitutional rights, human dignity as an inseparable element of human rights and freedoms, the right to freedom, the restriction of principles of human rights, constitutional review as a guarantee for the protection of human rights, as well as the international legal guarantees for the protection of children's rights.

The students made presentations on the European Convention on Human Rights and its role in the national legal system and on the European Court of Human Rights, regarding its jurisdiction, the order and conditions for addressing the court and the nature of its decisions. Many questions were raised, including terrorism as the most dangerous encroachment on human rights and security, the immunity of private life and the Criminal Procedure Code and the guarantees for protection of these rights in the Criminal Law.

There were also a number of interesting questions on the freedom of intellectual and creative property, the role of the mass media in the protection of human rights, raising the legal awareness of the general population and the legal status of national minorities in the Republic of Armenia.

Many proposals, comments and considerations were made in the reports submitted during the Conference which, doubtless, will be interesting for the pupils and even for specialists and legal practitioners.

There was no relevant constitutional case-law during the reference period 1 May 2001 – 31 August 2001.



## Austria Constitutional Court

### Statistical data

Session of the Constitutional Court during June 2001

- Financial claims (Article 137 B-VG): 13
- Conflicts of jurisdiction (Article 138.1 B-VG): 1
- Reviews of regulations (Article 139 B-VG): 74
- Reviews of laws (Article 140 B-VG): 88
- Challenges of elections (Article 141 B-VG): 3
- Complaints against administrative decrees (Article 144 B-VG): 522  
(298 were refused permission for examination)

### Important decisions

*Identification:* AUT-2001-2-004

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 28.06.2001 / **e)** G 103/00 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

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

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

2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.

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

3.6 **General Principles** – Federal State.

4.5.6.1 **Institutions** – Legislative bodies – Law-making procedure – Right to initiate legislation.

4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.

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



4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

*Keywords of the alphabetical index:*

Constitution, autonomy / Principle, structural / Constitution, total revision / Referendum, mandatory / Referendum, optional.

*Headnotes:*

Pursuant to Article 33.1 of the Constitution of the *Land* of Vorarlberg, the making of laws – including constitutional laws – and their amendment or abrogation / nullification can be required by a popular initiative. Such an initiative supported by at least 5,000 voters has to be presented to the State Parliament (*Landtag*), which has to decide whether it wants to take this popular initiative into account (Article 33.4). If the parliament refuses to take account of a popular initiative supported by at least 20% of the voters, the initiative must be put to a referendum (Article 33.5). If the initiative is approved by the people of Vorarlberg, the *Landtag* is obliged to issue a law corresponding to the substance of the popular initiative (Article 33.6).

Constitutional provisions of a *Land* such as Article 33.6 of the Constitution of Vorarlberg contradicts the Federal Constitution and its principle of indirect or representative democracy.

*Summary:*

A complaint was brought to the Constitutional Court against the administrative decree of the electoral board of Vorarlberg (*Vorarlberger Landeswahlbehörde*), which alleged that the complainant's application to start a popular initiative was denied. On receiving this, the Court started its *ex officio* review of the above-described Article 33, asking the Federal Government as well as all the governments of the *Länder* to submit statements on the case. Such statements were filed by the Federal Government and by the Governments of the *Länder* of Vorarlberg and Carinthia.

All three statements were based, above all, on the argument that the impugned provision, which was applied by the administrative authority, should never have been applied. Its application contradicted all logic (*denk unmöglich*) and the Court consequently and according to its own jurisprudence had no jurisdiction to review.

With regard to the Court's complaint about the unconstitutionality of Article 33 of the Constitution of the *Land* Vorarlberg, the governments argued that the Federal Constitution of 1920 and its structural principle of a representative democracy would not hinder the further development of certain instruments of direct democracy as long as this is done within the scope of the structural principle. The scope would be exceeded and thus cause a switch to direct democracy by referenda and an overall amendment of the Federal Constitution, if a provision enabled an act of legislation to be enacted under exclusion or even against the majority of the parliament, and in addition instituted legislation through a plebiscite in the place of or as well as through parliament.

These arguments did not find the Court's approval. The Court stated first that due to the wording of Article 33 of the Constitution of the *Land* Vorarlberg, the administrative authority was bound to consider whether the matter for legislative action, contained in the requested initiative, is consistent with the Constitution of the *Land* insofar as the legislature of the *Land* is authorised by Federal Constitutional Law to regulate on the matter. Otherwise the *Landtag* could be forced to pass a bill contradicting the Federal Constitution.

On the merits of the case, the Court came to the conclusion that the reviewed constitutional provision was partly not in compliance with the Federal Constitution:

As a result of extensive historical research and analysis of the different drafts of the Federal Constitution concerning especially the use of referenda, the Court found that the historical constitutional legislator definitely had the intention of bringing in the institution of the referendum only in a restricted extent as an instrument of legislation. During the debate of the constitutional assembly, a draft containing the institution of the “veto-referendum” (a phenomenon strongly influenced by the Swiss model) was refused outright. Another draft was finally approved which declared that a plebiscite should take place if at least half of the members of the National Council (*Nationalrat*) requested this. The advisory experts of the Constitutional Commission, Messrs Kelsen, Fröhlich and Merkl, commented that a referendum may be held only if the parliament consents to a relevant resolution. The concept of a mandatory referendum did not find approval because of its tendency to be conservative and constraining, as had often been experienced in Switzerland. The characteristic of the Austrian referendum model is that it can take place only after the resolution of the National Council and only on bills already adopted by

the parliament, but not for the purpose of a statute's modification or refusal.

With regard to the inception of the referendum and its institution, the Court was of the view that this was obviously a question of high importance during the creation of the Constitution. The Court furthermore concluded that this restricted admissibility of the referendum in the legislative procedure must be deemed as an essential element of the basic principle of representative or parliamentary democracy, a basic principle binding also the constitutional legislator of each *Land*.

Likewise, the federal principle and the constitutional autonomy of the *Länder* must be seen as limited by the structural principle of representative democracy. This structural principle could only be amended by the adoption of a constitutional law requiring a higher quorum in the National Council and public approval via a subsequent referendum.

Taking into account all these arguments, the Court came to the final conclusion that parts of the reviewed provision (Article 33.6 of the Constitution of the *Land Vorarlberg*) were contrary to the Federal Constitution, because it forced the parliament to adopt – even against its will – a bill responding to the substance of the popular initiative. Accordingly, the Court annulled those parts.

#### *Supplementary information:*

This is one of the rare decisions, in which the Court interpreted the Federal Constitution and, moreover, a structural principle of the Constitution. The alteration of such a structural principle is deemed as a total revision of the Constitution and the only case for which a mandatory referendum is brought into effect (Article 43.3 of the Federal Constitution).

#### *Languages:*

German.



## Azerbaijan Constitutional Court

### Important decisions

*Identification:* AZE-2001-2-004

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 27.07.2001 / **e)** 1/7 / **f)** / **g)** *Azerbaijan* (Official Gazette); *Azerbaijan Respublikasının Konstitusiyası Mehkemesinin Məlumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Housing, Code / Civil Code / Residential building, component, use / Shelter, right.

*Headnotes:*

Family members of the owner of a dwelling house who were brought by the owner into the house shall have the same rights as the owner to stay in the property, unless it was stipulated otherwise when they moved into the house (Article 123.1 of the Housing Code).

The conditions of use and the termination of the right to use a component part of a residential building shall be determined by written agreement concluded with the owner and certified via notarial procedure. Where no agreement has been reached concerning termination of the right to use a component part of residential building, this right can be terminated via judicial procedure with the owner making a payment of compensation corresponding to the market price (Article 228.2 of the Civil Code).

*Summary:*

According to Article 123.1 of the Housing Code of the Republic of Azerbaijan, which came into force in 1982, when members of a homeowner's family and

other persons equated with them by legislation are brought into the house, their right to use the dwelling space shall come into force as soon as they move in, unless stipulated otherwise. However, the aforementioned article does not determine the form and conditions of agreement between these persons, and the resolution of these issues is left to the parties themselves. The article does, however, state that disputes concerning use of the house and proportions of participation in expenses, shall be resolved via judicial procedure.

Article 228.1 and 228.2 of the Civil Code, which came into force on 1 September 2000, stipulate that the right to use a component part of a residential building is effective from the date of its registration in the state land registry and after certification by a notary of a written agreement concluded between members of family and other persons with the homeowner.

As opposed to the aforementioned articles of the Civil Code, Article 123 of the Housing Code does not link the commencement of the right to use a component part of a residential building with its registration in the land registry and the notarial certification of a written agreement.

Article 228.2 of the Civil Code stipulates that in the case where agreement on the termination of the right to use a component part of residential building was not reached, this right can be terminated via judicial procedure initiated by the owner, by means of payment of compensation corresponding to the market price. The Housing Code does not contain such provision.

As is apparent from the above, the essence of the requirements proceeding from Article 228.2 of the Civil Code is that they guarantee the comprehensive legal resolution of issues of property and usage of the dwelling house by family members and other persons.

According to Article 29 of the Constitution, everyone shall have the right to property. The right to property, including the right to private property, is protected by law. Nobody shall be deprived of his or her property without a decision of a court of law.

According to Article 43 of the Constitution, which provides for the right to shelter, nobody may be deprived of his or her dwelling.

The Constitutional Court decided that disputes connected with legal relationships in connection with usage of residential buildings and initiated after 1st September 2000 should be resolved via the procedure stipulated in Article 228.1 and 228.2 of the

Civil Code, and that disputes which are connected with legal relationships initiated before the mentioned date should be resolved in accordance with provisions of Article 123 of the Housing Code.

#### *Languages:*

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



#### *Identification: AZE-2001-2-005*

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 03.08.2001 / **e)** 07/15-8 / **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.  
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.  
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

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

Criminal procedure, code / Justice, implementation.

#### *Headnotes:*

Before the entry into force of the Criminal Procedure Code, sentences and other judicial decisions adopted by courts on the basis of provisions of the Criminal Procedure Code, which had been in force before 1 September 2000, could be re-examined by the Court of Appeal or Supreme Court via a procedure provided for by Articles 383-407, 409-427 and 461-467 of the Criminal Procedure Code (Article 7.5 of the Law “on the confirmation and entry into force of the Criminal Procedure Code of the Republic of Azerbaijan and issues of legal regulation thereon”).

*Summary:*

In its petition, the Supreme Court asked whether it was possible to examine civil complaints relating to judicial acts on civil cases adopted before 1 September 2000, via the procedure of appeal or cassation.

On the basis of the Law “on the confirmation and entry into force of the Civil Procedure Code of the Republic of Azerbaijan and issues of legal regulation thereon”, the Civil Procedure Code reflects the constitutional principles of the implementation of justice. The law does not contain norms, which provide the possibility of implementation of the right to appeal against judicial acts, adopted before 1 September 2000.

The right to a judicial guarantee of rights and freedoms and the right of repeated appeal to a Court (Articles 60 and 65 of the Constitution) are of great importance among the constitutional rights and freedoms. Being based on the aforementioned provisions of the Constitution, Article 4.1 of the Law “on Courts and Judges” provides that examination of cases shall be implemented by courts of first instance, appeal and cassation. Such rights of appeal are also provided for by the Civil Procedure Code currently in force.

According to Article 147.2 of the Constitution, the latter is directly applicable. This is also reflected in the Civil Procedure Code. According to Article 1.2 of the Code, the norms of the Constitution possess higher legal force and direct effect on the territory of Azerbaijan. In the case of a conflict between constitutional and legal norms, constitutional norms shall be applied.

According to Article 8 of the Universal Declaration of Human Rights, everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted to him or her by the Constitution or by law.

According to the practice of the European Court of Human Rights, the requirements of Article 6 ECHR regarding a fair trial shall cover both courts of the first instance and appeal courts.

The Constitutional Court notes that on the basis of the above-mentioned provisions of the Constitution, judicial acts on civil cases, adopted before 1 September 2000, may be appealed to the courts of appeal and cassation, taking into account the procedure and terms provided for by Articles 357-401, 402-431 and 432-438 of the Civil Procedure Code.

*Languages:*

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



# Belgium

## Court of Arbitration

### Important decisions

*Identification:* BEL-2001-2-004

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 08.05.2001 / **e)** 59/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.07.2001 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

1.1.3.1 **Constitutional Justice** – Constitutional jurisdiction – Status of the members of the court – Term of office of Members.

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

5.2.1 **Fundamental Rights** – Equality – Scope of application.

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

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

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

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

*Keywords of the alphabetical index:*

Arrest, safeguards / Detention, on remand, conditions / Criminal law, immediate court appearance, procedure.

*Headnotes:*

The fact that a defendant has no right to the assistance of a lawyer and to see the criminal case file even before his first questioning by the investigating judge, as well as on the occasion of his questioning prior to the issue of the arrest warrant, is not contrary to the constitutional rules of equality and absence of discrimination (Articles 10 and 11 of the

Constitution), whether or not taken in conjunction with Articles 5 and 6 ECHR.

Nor is it contrary to the aforementioned provisions for a defendant, held in custody, not to be able to be tried within a maximum period of seven days from the date on which the investigating judge issued the arrest warrant.

*Summary:*

The Law of 20 July 1990 on detention on remand lays down that a defendant must be questioned by the investigating judge before an arrest warrant may be issued, but does not provide for the defendant to have a right to the assistance of a lawyer during such questioning or for any opportunity to consult the criminal case file prior to arrest. One person who faced a criminal charge and was held in custody had complained of this and drawn attention to the fact that a law of 28 March 2000 certainly did offer such safeguards in the event of arrest, with a view to an immediate court appearance, making a rapid trial possible where an offender had been arrested in the act or where the offences had been committed very recently and were punishable by at least one year's imprisonment.

At the request of the person concerned, the Court of Arbitration was asked to resolve the preliminary question of whether this difference in treatment between defendants was not contrary to the constitutional principles of equality and absence of discrimination (Articles 10 and 11 of the Constitution), whether or not taken in conjunction with Articles 5 and 6 ECHR.

The Court took the view that there had been no violation of the aforementioned provisions. It took into account the provision of the Constitution which states that, other than when a person is arrested in the act, nobody may be arrested except in pursuance of an order containing the reasons issued by a judge, which has to be served at the time of arrest, or at the latest within 24 hours (Article 12 of the Constitution). This deadline left no time for a lawyer to intervene. The Court noted that other safeguards applied, and concluded from this that a balance was struck between the wish to abide by the principle of a secret and inquisitorial investigation and the concern to observe the rights of the defence. The Court acknowledged that it was possible for two different procedures to be used in respect of identical facts – the immediate court appearance procedure and the ordinary detention in custody procedure – but it emphasised that the legislature had intended to leave to the prosecuting authorities the decision as to the action most appropriate to the circumstances,

account being taken of guidelines laid down beforehand. It was not for the Court of Arbitration to assess the actual application of the law.

A second preliminary question was put about the difference between the immediate court appearance procedure, which had to be completed within seven days, and the ordinary procedure, which did not guarantee the defendant a trial within this period. The Court considered it justified for the legislature to have made provision for a rapid procedure when a person was arrested in the act, so as to avoid giving an impression of impunity. The Court took the view that the ordinary procedure was not discriminatory in consequence.

*Supplementary information:*

One feature of this case is the membership of the Court: one judge had in the meantime reached the retirement age limit (70), but was, on the basis of a recent provision, Article 60bis of the special law on the Court of Arbitration, of 6 January 1989 (see the CODICES database), able to continue to sit. The legislation in practice, so as to avoid the need for cases to be reheard, allowed the presidents and judges present at the hearing to continue to sit (for a maximum of six months) even after reaching the retirement age.

*Languages:*

French, Dutch, German.



*Identification:* BEL-2001-2-005

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 31.05.2001 / **e)** 74/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.06.2001 / **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.  
3.17 **General Principles** – Weighing of interests.  
4.3.1 **Institutions** – Languages – Official language(s).

4.7.4.1.5.2 **Institutions** – Judicial bodies – Organisation – Members – Status – Discipline.

4.7.4.4 **Institutions** – Judicial bodies – Organisation – Languages.

5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.

5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Languages.

*Keywords of the alphabetical index:*

Judge, discipline / Judge, language knowledge / Disciplinary proceedings, language.

*Headnotes:*

A law which makes no provision for a German-speaking section of the National Disciplinary Board responsible for disciplinary proceedings against judges, but which does provide for the presence within the Board of a German-speaking judge when the Board is dealing with proceedings against a judge who has proven his knowledge of German and requested the benefit of proceedings in German, is not contrary to the constitutional principles of equality and absence of discrimination (Articles 10 and 11 of the Constitution).

*Summary:*

The Court had to deal with proceedings for annulment brought by some judges in post at Eupen, a municipality in the German-speaking region, against a law of 7 May 1999 amending the provisions of the Judicial Code on the disciplinary system applying to judges.

The applicants complained that the law they challenged made no provision for a German-speaking section of the National Disciplinary Board. They took the view that, when proceedings were started against a German-speaking judge who requested that they be held in German, the presence of a single German-speaking judge was insufficient to satisfy the requirement for the whole proceedings to be conducted in German. They considered themselves victims of discrimination as compared to French or Dutch-speaking judges, who were able to appear before a section of the Disciplinary Board of which all the members understood their language.

The Court took the view that the difference in treatment was based on an objective criterion, that of language.

It further stated that the provision was a reasonably justified one, in view of the limited number of German-speaking judges able to satisfy the conditions for appointment to the National Disciplinary Board, a specific situation noted in the preparatory documents on the law.

The Court also ascertained whether German-speaking judges could actually be understood by the members of the National Disciplinary Board, and whether those members were able to deal with cases appropriately. In this context, it took into consideration the facts that the law required judges in the Eupen district to prove, through their degree certificate, that they were examined for their law degree in the French language, or to prove their knowledge of French, that German-speaking judges were allowed to ask for proceedings to be conducted in German, and that, in such cases, use was made of translators or interpreters if necessary. The Court also noted that the laws relating to the higher courts, the *Conseil d'État*, the Court of Arbitration and the Court of Cassation, included similar requirements as to knowledge of the German language, or even included no such requirement. These provisions had never prevented the courts concerned from hearing addresses by counsel in German, inspecting submissions or pleadings in German and delivering decisions in German whenever the law so required.

The applicant judges also compared the situation of German-speaking judges against whom disciplinary proceedings were taken with that of those who were prosecuted. The Court's reply in this context was that there was no difference in treatment between the two kinds of proceedings: the legislation had been drafted taking account of the fact that it was sometimes impossible to constitute a criminal court which was to deliver its ruling in German, and that, in such cases, the proceedings were conducted in French, and it was possible, if so requested by one of the parties, or by the court's own motion, for use to be made of translators.

An intervening party before the Court of Arbitration, the Government of the German-speaking Community, for its part, cited the violation of the constitutional principles of equality and absence of discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with Article 6 ECHR.

Referring to the Pellegrin judgment delivered on 8 December 1999 by the European Court of Human Rights, the Court of Arbitration took the view that the disciplinary system set up for judges did not come within the scope of Article 6 ECHR. But this circumstance did not prevent several of the safeguards provided from being applied to discipli-

nary matters as well, as a general principle of law, such as the general principle of the impartiality of the judge.

This principle, however, was not infringed, because there was no reliable evidence in support of the assumption that the German-speaking member of the National Disciplinary Board might exercise influence at every stage of the proceedings. The opportunity available to members of the Board with an insufficient command of the German language to use the services of translators or interpreters enabled them to have direct access to the documents relating to the proceedings and to the evidence in the file.

The Court dismissed the application.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2001-2-006

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 07.06.2001 / **e)** 77/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.09.2001 / **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.  
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.  
3.16 **General Principles** – Proportionality.  
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.

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

Sentence, classification / Sentence, suspension / Sentence, deferral / Sentence, cumulative / Sanction, criminal, concept / Sanction, nature / Fine, administrative / Social security, undeclared employment.

*Headnotes:*

The distinction between a penalty and additional financial sanctions is based, the case-law of the European Court of Human Rights being borne in mind, on whether or not the measure was applied for law enforcement purposes, on its objective, on the categories of persons likely to be subjected to it, on the preventive nature of the measure and on the classification of the sanction itself.

The fact that a sanction has to be classified as a penalty does not necessarily mean that all the applicable rules of ordinary criminal law are applied to it. The court in such cases verifies proportionality in the light of the intention of the legislature.

It may thus be justified for several sanctions to be imposed cumulatively, without application of the criminal law rule that, when more than one offence has been committed, only the severest penalty is imposed. It would be unjustified, on the other hand, for the judge not to be able to order remission of sentence or suspension of the judgment.

*Summary:*

Two preliminary questions were put to the Court of Arbitration at the request of employers who had been prosecuted for infringements of social security legislation (employment of persons not declared to the social security authorities and not included on the staff register, and without sufficient payment of social insurance contributions). The reported offences are subject not only to ordinary criminal sanctions, but also to large additional financial sanctions. The employers had already been ordered in civil proceedings to pay the social insurance contributions evaded. They asserted that ordinary criminal rules did not apply to such additional financial sanctions, a fact which, in their view, violated the constitutional principles of equality and absence of discrimination (Articles 10 and 11 of the Constitution).

The Court first considered whether the additional sanctions were criminal ones, taking into account the case-law of the European Court of Human Rights relating to what constitutes a criminal matter for the purposes of Article 6 ECHR. It noted that the sanctions concerned were predominantly applied for law enforcement purposes; that they were intended to prevent and punish infringements of social security legislation by employers, subordinates or representatives, without any distinction; that such persons were aware in advance of these sanctions and were therefore encouraged to comply with their obligations; that the provisions of the law under which these

sanctions were imposed were to be found in the chapter on criminal sanctions; that, lastly, the sanctions were additional to a penalty imposed by a criminal court and were intended to make the sanction more severe. The Court concluded that the additional sanctions complained of were criminal ones, and it then examined the question of whether any exceptions that existed to these ordinary rules of criminal law were justifiable.

The first exception to ordinary criminal law to which the interested parties objected was the failure to apply Article 65 of the Criminal Code, in pursuance of which only the severest penalty is to be imposed when a single act constitutes several offences, or when different offences are the expression of a single criminal intent. The Court concluded from various evidence that the legislature had deliberately wished to create an exception to this article, in a field where undeclared labour was frequently used, and that this exception was justified.

According to the persons concerned, a second exception lay in the fact that it would not have been possible to apply the ordinary provisions relating to criminal cases under which a suspended sentence might be imposed or sentencing be deferred (Law of 29 June 1964). In a previous judgment (no. 98/99 of 15 September 1999), the Court had taken the view that it was discriminatory to fail to apply the provisions of the aforementioned 1964 law to comparable additional sanctions under social security law which also should have been classified as criminal sanctions, but which had been regarded by the judge *a quo* as civil law sanctions. In the present case, the Court decided that there was no provision prohibiting application of the 1964 law by the judge. The Court concluded that, in this respect, there was no difference in treatment between the persons prosecuted, and that this part of the preliminary questions did not necessitate a reply.

*Cross-references:*

Like all judgments, Judgment no. 98/99, to which the summary refers, may be consulted (in French and in Dutch) on the Court of Arbitration's website ([www.arbitrage.be](http://www.arbitrage.be)). For a comparable case, see Judgment no. 80/2001 of 13 June 2001.

*Languages:*

French, Dutch, German.





**Identification:** BEL-2001-2-007

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 13.07.2001 / **e)** 105/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **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.

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

5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.

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

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

**Keywords of the alphabetical index:**

Driving licence, withdrawal / Safety measure / Road traffic, automatic device / Sanction, criminal, concept / Sanction, nature / Responsibility, authorities / Precaution, principle / Prudence, principle.

**Headnotes:**

Immediate withdrawal of a driving licence has to be regarded as a temporary safety measure, and not as a criminal sanction. It does not imply any determination of a criminal charge within the meaning of Article 6 ECHR. In view of the legislature's concern to improve road safety, the need to take action without delay may justify the prosecuting authorities' ability to take such a measure without prior judicial verification.

However, withdrawal of a driving licence for a maximum of 15 days, and its possible extension for two further periods of 15 days may, in certain cases, have serious consequences for the persons against whom the measure is taken. The issue of whether such decisions may be taken without verification by the courts concerns Article 56 of the law, about which no question was put to the Court.

**Summary:**

A police court asked the Court about the conformity with the constitutional principles of equality and absence of discrimination (Articles 10 and 11 of the Constitution), possibly taken in conjunction with Article 6.1 ECHR, of road traffic policing provisions allowing a driving licence to be immediately withdrawn when a serious offence has been committed, such withdrawal being decided by the prosecuting authorities. The Court noted that the prosecuting authorities had discretion and had to consider in each individual case, taking into account all the circumstances of the case, whether the seriousness of the offence was such that the temporary withdrawal of the driving licence was justified in order to maintain road safety.

The Court took the view that the immediate withdrawal of a driving licence was a temporary safety measure, and not a criminal sanction, so it did not imply any determination of a criminal charge within the meaning of Article 6 ECHR. In this context, the Court cited the Escoubet judgment of the European Court of Human Rights, of 28 October 1999. The legislature's concern to improve road safety – and the corresponding need to take action without delay – could justify the taking of this measure by the prosecuting authorities without prior judicial verification. The Court nevertheless noted that withdrawal of a driving licence for a maximum of 15 days and its possible extension for a maximum of two further periods of 15 days could, in certain cases, have serious consequences for the persons against whom the measure was taken. However, it did not take further its consideration of whether such decisions could be taken without judicial verification, because it had not been asked to rule on the provision which allowed such extensions.

Nor had the *ne bis in idem* rule been violated, as withdrawal of a driving licence was not a criminal sentence and was independent of prosecution.

The judge *a quo* also asked the Court about the conformity of the law with the constitutional rules of equality and absence of discrimination (Articles 10 and 11 of the Constitution), in that it made no provision for compensation for the unjustified withdrawal of a driving licence comparable to the compensation payable, for instance, when detention in custody was wrongful. The Court noted firstly that the situation of wrongful detention in custody for a period of more than eight days was not comparable with the withdrawal of a driving licence. It then noted that there was no difference in treatment between persons to whom damage was caused by the unjustified withdrawal of their driving licence and

persons who suffered damage as a result of a fault committed by an authority, since the state could be held responsible in both cases under Articles 1382 and 1383 of the Civil Code if the damage was caused by a fault such as violation of the principle of precaution and prudence.

Also referred to the Court were two differences in treatment between the arrangements applicable to disqualification from driving and those applicable to immediate withdrawal of a driving licence: in the event of disqualification, it was possible to reach a compromise, and the measure might be limited to certain categories of vehicles. The Court took the view that the character of a criminal sanction of a disqualification from driving enabled the first difference to be justified. Where the second was concerned, the Court also emphasised the difference in scope between the two measures. An urgent and temporary safety measure might, in order to achieve its aim, consist of the withdrawal pure and simple of a driving licence, whereas the judge passing a criminal sentence was able to modulate the sanction imposed, taking individual factors into account.

Finally, the judge *a quo* asked the Court about the difference in treatment, in the event of a driving licence being immediately withdrawn, between cases in which the breaking of a speed limit was detected by an automatic device operating in the presence or in the absence of a qualified official. The Court accepted that the legislature could, in order to achieve its aim of immediately removing dangerous drivers from the roads, and without violating the principle of equality and absence of discrimination, allow the Crown Prosecutor to decide whether the driving licence of a driver who has committed a serious offence should be withdrawn, without the law itself having to make a distinction between the ways in which the offence was detected.

The Court concluded that there had been no violation of Articles 10 and 11 of the Constitution.

#### *Languages:*

French, Dutch, German.



## Bosnia and Herzegovina Constitutional Court

### Important decisions

*Identification:* BIH-2001-2-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 02.02.2001 / **e)** U 16/00 / **f)** Request of eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina for institution of proceedings for the evaluation of constitutionality of Article 8.a.1 of the Law on Sale of Apartments with Occupancy Rights / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 13/200, 12.06.2001 / **h)** *Bulletin of the Constitutional Court of Bosnia and Herzegovina* (upcoming); 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.  
3.16 **General Principles** – Proportionality.  
3.17 **General Principles** – Weighing of interests.  
3.20 **General Principles** – Reasonableness.  
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.  
5.2 **Fundamental Rights** – Equality.  
5.2.2.3 **Fundamental Rights** - Equality - Criteria of distinction - National or ethnic origin.  
5.3.37.3 **Fundamental Rights** - Civil and political rights - Right to property - Other limitations.

*Keywords of the alphabetical index:*

Housing, right to return / Ethnic proportionality / Occupancy right / Property, disposal, limitation / Ethnic cleansing, reversal / Refugee / Displaced person.

*Headnotes:*

In the pursuit of enabling the return of refugees and displaced persons (Article II.5 of the Constitution of Bosnia and Herzegovina) and ensuring adequate pricing, it does not violate the right to non-discrimination (Article II.4 of the Constitution of Bosnia and Herzegovina and Article 14 ECHR) or the

right to property (Article II.3.k of the Constitution of Bosnia and Herzegovina and Article 1 Protocol 1 ECHR) if the state requires a person to stay in an apartment for two years before allowing him or her to acquire full property rights over it where that person previously only had occupancy rights in relation to it.

### *Summary:*

The applicants, eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, requested the review of Article 8.a.1 of the Law on the Sale of Apartments with Occupancy Rights (the "Apartment Law").

The Apartment Law regulates the sale of apartments with occupancy rights, a legal institution formulated in the days of the former Socialist Federal Republic of Yugoslavia that contains certain, but not all elements of full property rights over an apartment. According to other property legislation adopted in the aftermath of the war in Bosnia and Herzegovina, refugees and displaced persons were given the right to return to their pre-war homes even if this would require the eviction of other occupants of the properties in question. In practice, the return process showed little success, and often the former holders of occupancy rights preferred to buy and then sell their apartments immediately thereafter, often at very low prices, instead of returning to uncertain surroundings.

In order to promote the return of refugees and displaced persons and to ensure the sale of the properties at adequate prices, in July 1999, the High Representative in Bosnia and Herzegovina inserted the contested provision into the Apartment Law. According to this provision, "the holder of occupancy rights, over a property which was proclaimed as being abandoned by special regulations applied on the territory of the Federation of Bosnia and Herzegovina during the period of 30 April 1991 to 4 April 1998, shall acquire the right to purchase the property in compliance with the provisions of this law upon the expiry of a two year deadline after his or her reinstatement in the property."

The Court found that the contested provision was not in violation of the Constitution or the European Convention on Human Rights, the rights and freedoms set forth in which are directly applicable in Bosnia and Herzegovina and have priority over all other laws (Article II.2 of the Constitution of Bosnia and Herzegovina), in particular Articles II.3.k and II.4 of the Constitution of Bosnia and Herzegovina (Article 1 Protocol 1 ECHR and Article 14 ECHR). The Court interpreted these fundamental rights in the light of Article II.5 of the Constitution of Bosnia and Herzegovina which grants to all refugees and

displaced persons the right freely to return to their homes of origin, and to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. It further declares any commitments or statements relating to such property made under duress null and void.

The right to property was considered to be applicable to the question of occupancy rights. The Court argued that the right to return to and continue living in property over which refugees and displaced persons had had an occupancy right reflects an economic value protected under Article 1 Protocol 1 ECHR. However, due to the limited possibility of acquiring full ownership over the property, the protection afforded by this fundamental right was limited accordingly. Looked at separately from the aspect of possible discrimination, it could not be considered to give the holder of the occupancy rights a right to purchase the property and become the legal owner.

When interpreting the right to freedom from discrimination, the Court referred to the case-law developed under Article 14 ECHR, which allows differential treatment when there is an objective and reasonable justification in relation to the aim and effects of the measure under consideration. The Court observed that as a result of Article 8.a of the Apartment Law, holders of occupancy rights who abandoned their properties during the war are treated differently from those who did not escape, because the former, unlike the latter, are only allowed to buy their properties (and then sell them to other persons) after having lived in the property for two years after their return. It was considered to be a reasonable and legitimate objective with a view to Article II.5 of the Constitution of Bosnia and Herzegovina to encourage refugees and displaced persons to return to their previous homes and to discourage any sales of their properties at very low prices to members of the majority ethnic population in a certain area. Respecting the legislator's margin of appreciation in determining how this objective could best be served, the Court found the two-year rule to be a proportionate means to achieve this goal. Other possible regulations would give rise to legal difficulties with unpredictable consequences. Moreover, the Court noted that Article 8.a of the Apartment Law is of general application and cannot be considered to apply specifically to persons of a particular ethnic origin. The purpose was to make refugees and displaced persons, irrespective of their ethnic origin, return to their previous homes and to prevent the perpetuation of ethnic cleansing.

There are separate opinions by the Judges Prof. Dr. Vitomir Popovic, Prof. Dr. Snezana Savic and Mirko Zovko.

*Supplementary information:*

Since, on the one hand, the two-year rule proved ineffective and sometimes counter-productive in motivating the return of refugees or displaced people, or at least in providing for material compensation, and, on the other hand, there was no such restriction on the territory of the Republika Srpska, by a decision of 17 July 2001, the Office of the High Representative struck out the two-year rule in Article 8.a of the Apartment Law.

*Languages:*

Bosniac, Croat, Serb. English, French, German (translations by the Court).



*Identification:* BIH-2001-2-002

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 02.02.2001 / **e)** U 23/00 / **f)** Appeal of Mira Vrhovac against the Ruling of the Municipal Court of Banja Luka of 23 July 1998 in case no. P-1475/97 / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 10/2001, 16.04.2001 / **h)** *Bulletin of the Constitutional Court of Bosnia and Herzegovina* (upcoming); CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

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

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

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

5.3.13.12 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Trial within reasonable time.

*Keywords of the alphabetical index:*

Merits, failure to decide / Order to decide urgently / Failure to act, compensation.

*Headnotes:*

The Court's appellate jurisdiction over “judgments of any other court in Bosnia and Herzegovina” includes jurisdiction not only over all types of decisions and rulings but also over failures to take decisions where such failures are claimed to be unconstitutional.

A court's omission to take a decision on the merits of a claim for a period of five years without giving any justification violates the appellant's right to have his or her civil rights determined by a court within a reasonable time (Article 6.1 ECHR in conjunction with Article II.2 of the Constitution of Bosnia and Herzegovina). In this case, the proceedings were halted in compliance with a ministerial order.

*Summary:*

The appellant asked for protection of her constitutional rights against a ruling of the Municipal Court of Banja Luka of 23 July 1998 regarding the stay of the proceedings, and also asked for an order to be made to force the Municipal Court to decide on the merits of the case. The Court interpreted her appeal as referring to her right to have her civil rights determined by a court within a reasonable time (Article 6.1 ECHR in conjunction with Article II.2 of the Constitution of Bosnia and Herzegovina).

On 7 February 1989, the appellant had initiated proceedings before the Municipal Court of Banja Luka against the Property and Personal Insurance Association of Sarajevo. She requested the Court to order the Association to pay compensation for damage caused to her car. Twelve hearings in this case had been held before the Municipal Court. On 15 December 1997, the Government of Republika Srpska took a decision to temporarily stay certain proceedings concerning claims for compensation, pending before the ordinary courts of Republika Srpska. This decision was confirmed by the Minister of Justice of Republika Srpska on 24 March 1998. On the basis of the government's decision, the succes-

sors of the Association requested the Municipal Court to stay the proceedings regarding the appellant's claim. On 23 July 1998, the Municipal Court granted this request and informed the parties that they could be resumed upon request by one of the parties after the property, rights and obligations of the relevant insurance company had been divided between the successors. As a result of the stay of the proceedings, there had been no decision on the merits of the appellant's claim, and the proceedings were, at the time of the Court's decision, still pending before the Municipal Court.

The Court found the appeal to be admissible. It decided that its appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina had to be interpreted extensively. The term "judgment" should include not only all kinds of decisions and rulings but also a failure to take a decision where such failure is claimed to be unconstitutional. In the instant case, the Court understood the appeal as challenging the Municipal Court's failure to decide on the appellant's claim for compensation. Regarding the appellant's obligation to exhaust all available legal remedies before addressing the Court and respect the 60 day time-limit (Article 11.3 Court's Rules of Procedure), the Court found that during the proceedings of more than nine years (up to the ruling to stay the proceedings), the appellant had not had at her disposal a remedy against the Municipal Court's failure to decide on the merits of her claim. Nor had she had a legal remedy against the challenged ruling of 23 July 1998 or against the subsequent failure to take a decision. Since the delay in the proceedings was continuous and had not yet ended, the appellant had to be considered to have respected the 60-day time limit.

The Court granted the appeal because it found that the appellant's right under Article 6.1 ECHR to have her civil rights determined by a court within a reasonable time had not been respected. The Court noted that the proceedings before the Municipal Court had, at the time of the decision, been ongoing for almost twelve years, out of which more than five years fell within the relevant period after 14 December 1995, the date the Constitution entered into force and the European Convention on Human Rights became binding law in Bosnia and Herzegovina. Until 23 July 1998, no justification had been provided for this long delay. The Municipal Court ruling of 23 July 1998 caused further delay. This decision to stay the proceedings was taken in compliance with a decision by the Government of Republika Srpska to prevent certain court proceedings temporarily from being completed. Thereby, the parties to such proceedings, including the appellant,

were in fact denied, by an administrative decision, their right to a court decision during a certain period.

The Court, therefore, quashed the Municipal Court ruling to halt the proceedings and ordered it to decide on the merits of the case as a matter of urgency. The Court also pointed out that, according to the case-law of the European Court of Human Rights, a breach of Article 6.1 ECHR, insofar as it entitles a party to a court determination within a reasonable time, would normally give the injured party a right to financial compensation from the state concerned.

#### *Languages:*

Bosniac, Croat, Serb. English, French, German (translations by the Court).



#### *Identification:* BIH-2001-2-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c) / d)** 02.02.2001 / **e)** U 40/00 / **f)** Request of Mr Ante Jelavic for institution of proceedings for the evaluation of constitutionality of Articles 606 and 1212 of the Rules and Regulations of the Provisional Election Commission / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 13/2001, 12.06.2001 / **h)** *Bulletin of the Constitutional Court of Bosnia and Herzegovina* (upcoming); CODICES (English).

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

- 1.3.5.1 **Constitutional Justice** - Jurisdiction - The subject of review - International treaties.
- 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.
- 2.2.1.1 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national and non-national sources - Treaties and constitutions.

4.9.6 **Institutions** - Elections and instruments of direct democracy - Representation of minorities.

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

5.3.39 **Fundamental Rights** - Civil and political rights - Electoral rights.

*Keywords of the alphabetical index:*

Society, multi-ethnic / State powers, international body, temporary transfer / Electoral Commission.

*Headnotes:*

The Constitutional Court is presently not competent to review electoral rules and regulations adopted by a semi-international body under its specific powers originating in a separate Annex to the Dayton Peace Agreement.

*Summary:*

The applicant, then a member of the Presidency of Bosnia and Herzegovina, requested the review of the constitutionality (under Article VI.3.a of the Constitution of Bosnia and Herzegovina) of Articles 606 and 1212 of the Electoral Rules and Regulations (Electoral Rules), adopted by the Provisional Election Commission (PEC) under Annex 3 of the Dayton Peace Agreement (DPA).

Annex 3 DPA (Agreement on Elections) lays down a structure under which elections for various institutions in Bosnia and Herzegovina were organised and effected under the auspices of the Organisation for Security and Co-operation in Europe (OSCE). For this purpose the OSCE established the PEC, which adopted the Electoral Rules and supervised a number of elections in order to ensure their compliance with those Electoral Rules and with Annex 3 DPA in general. The Parties were to comply with the Electoral Rules, any internal laws and regulations notwithstanding. According to Article V Annex 3 DPA, the PEC eventually was to be replaced by a permanent Election Commission once the Parliamentary Assembly of Bosnia and Herzegovina had adopted an Election Law (Articles IV.2.a and V.1.a of the Constitution of Bosnia and Herzegovina, Article V Annex 3 DPA).

Article 606 of the Electoral Rules stipulated that decisions of the Election Appeals Sub-Commission (a juridical body that decides on any claims in the electoral process) "shall be final and binding and may not be appealed."

Article 1212 established a new method for the nomination of candidates from the Cantons to the House of Peoples of the Federation of Bosnia and Herzegovina.

The applicant questioned the PEC's competence under Annex 3 DPA to adopt regulations or conduct elections for the representatives in the Parliamentary Assembly of Bosnia and Herzegovina and the Parliament of the Federation of Bosnia and Herzegovina. He further contended that the contested provisions violated Articles 13 and 6.1 ECHR and Annex I to the Constitution in conjunction with Articles 2.3.a-c, 14.1 and 25 of the International Covenant on Civil and Political Rights, and Articles 8 and 28 of the Universal Declaration of Human Rights. Moreover, he claimed that Article 606 of the Electoral Rules was inconsistent with Articles 1 and 7.9 of the Document of the Second Meeting of the Conference on Security and Cooperation in Europe, Copenhagen 1990, in conjunction with Annex 3 DPA. Concerning Article 1212 of the Electoral Rules, the applicant considered this provision to be inconsistent with Article IV.1.a of the Constitution of Bosnia and Herzegovina and Section IV.A, Articles 6 to 10 of the Constitution of the Federation of Bosnia and Herzegovina.

The Constitutional Court rejected the request as inadmissible since it did not consider itself competent under Article VI.3.a of the Constitution of Bosnia and Herzegovina to evaluate the constitutionality of the Electoral Rules adopted by the PEC under Annex 3 DPA. In the light of the purpose of the DPA and its structure, the PEC could not be considered an institution of Bosnia and Herzegovina.

The Court explained that the DPA was adopted as a basis for the restoration of peace in Bosnia and Herzegovina. Apart from a new Constitution, the Parties, to this end, also set up separate international, or partly international, institutions (Annexes 3, 6, 7, 8 and 10 DPA) which would, during a transitional period, facilitate the return of normal, peaceful conditions in Bosnia and Herzegovina. These institutions, the Court noted, were not integrated into the normal national institutional framework of Bosnia and Herzegovina but kept separately in order to ensure the construction of a peaceful Bosnia and Herzegovina. This could be seen from the methods of appointment of their members (partly or fully controlled by international agents) as well as from the systematic separation into the different Annexes to the DPA, reflecting a kind of parallel structure between the international and the national institutions, which would supplement each other, but not stand in a hierarchical relationship to one another.

The Court drew a comparison with previous cases related to the DPA, such as U 7/97 (General Framework Agreement) and U 7/98, U 8/98 and U 9/98 (Annex 6 DPA, Human Rights Chamber), *Bulletin* 1999/2 [BIH-1999-2-001], and distinguished this case from U 9/00 (Annex 10, Office of the High Representative), *Bulletin* 2000/3 [BIH-2000-3-004], in which it had declared itself competent to review laws imposed by the High Representative in substitution of the national legislator. Unlike in the latter case, the Electoral Rules had been enacted according to a "specific original authorisation given to the PEC in Annex 3."

Remarking upon the importance of extending constitutional protection to the area of democratic elections, the Court urged the Parliamentary Assembly of Bosnia and Herzegovina to adopt an Election Law under Article IV.2.a of the Constitution without delay, which law could then be reviewed by the Court.

There were separate opinions by the following judges: Dr. Zvonko Miljko, Prof. Dr. Vitomir Popovic, Prof. Dr. Snezana Savic and Mirko Zovko.

#### *Supplementary information:*

The mandate of the OSCE (PEC) was extended several times. Only in August 2001, after several attempts, did the Parliamentary Assembly manage to adopt an Election Law for Bosnia and Herzegovina.

Even though Article 1212 of the Electoral Rules would not modify the proportionate composition of the House of Peoples of the Federation (30 Croats, 30 Bosnians and 20 others), this new method loosened the strict ethnic division of previous nomination processes and allowed the members of one ethnic group in a Cantonal Assembly to nominate candidates of another group, and thereby have influence on which Croat, Bosnian or other representatives are sent to the House of Peoples.

#### *Cross-references:*

- Decision of 26.02.1999 (U 7/98, U 8/98, U 9/98), *Bulletin* 1999/2 [BIH-1999-2-001];
- Decision of 03.11.2000 (U 9/00), *Bulletin* 2000/3 [BIH-2000-3-004].

#### *Languages:*

Bosniac, Croat, Serb. English, French, German (translations by the Court).



#### *Identification: BIH-2001-2-004*

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 23.03.2001 / **e)** U 25/00 / **f)** Request of 34 representatives of the National Assembly of Republika Srpska for the evaluation of constitutionality of the Decision on Amending the Law on Travel Documents of Bosnia and Herzegovina, adopted by the High Representative on 29 September 2000 / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 17/2001, 10.07.2001 / **h)** *Bulletin of the Constitutional Court of Bosnia and Herzegovina* (upcoming); CODICES (English).

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

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

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.

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

2.2.2.2 **Sources of Constitutional Law** - Hierarchy - Hierarchy as between national sources - The Constitution and other sources of domestic law.

4.8.7 **Institutions** - Federalism, regionalism and local self-government - Budgetary and financial aspects.

4.8.8 **Institutions** - Federalism, regionalism and local self-government - Distribution of powers.

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

Passport, issuing, powers / Passport, regulating, powers / Federation, entity / Budget, allocation / Passport, federation, entity, proof of citizenship.

#### *Headnotes:*

The Court is not competent to review the powers invested upon the High Representative under Annex 10 of the Dayton Peace Agreement, nor the exercise of those powers.

The Court may however review the constitutionality of laws or amendments thereto, adopted by the High Representative in substitution of the Parliamentary Assembly of Bosnia and Herzegovina.

The responsibilities of the Parliamentary Assembly of Bosnia and Herzegovina are not listed exhaustively in Article III.1 of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly may transfer certain revenues to the budget of Bosnia and Herzegovina.

Ordinary law does not serve as a standard of review for the Constitutional Court.

### *Summary:*

The applicants, thirty-four representatives of the National Assembly of Republika Srpska, requested that the Court evaluate the constitutionality of the Decision on Amending the Law on Travel Documents of Bosnia and Herzegovina, adopted by the High Representative (HR) on 29 September 2000. The Statute Amending the Law on Travel Documents had previously obtained a majority in the House of Representatives, but not the equally necessary majority in the House of Peoples (cf. Article IV.3.c of the Constitution of Bosnia and Herzegovina).

The applicants questioned the HR's competence under Annex 10 of the Dayton Peace Agreement (DPA) to amend existing laws and to transfer state income generated from passport administration into the budget of the institutions of Bosnia and Herzegovina. They also contested that "erasing the indications of the Entities" in national travel documents was in conformity with Article I.7.a and I.7.b of the Constitution of Bosnia and Herzegovina as well as Article 34 of the Law on Citizenship of Bosnia and Herzegovina.

The request was found to be admissible. The Court declared itself competent to review the HR decision. In continuation of its jurisprudence, first established in case U 9/00, *Bulletin* 2000/3 [BIH-2000-3-004], the Court distinguished between the review of the competences of the HR under Annex 10 DPA and the review of the acts adopted on the basis of these competences: neither the HR's powers themselves, being of international character, nor their exercise, are subject to review by the Court. However, when the HR intervenes into the legal system of Bosnia and Herzegovina substituting the domestic authorities and thus acting as an authority of Bosnia and Herzegovina, the law he adopts is a domestic law and must, therefore, be considered a law of Bosnia and Herzegovina. According to Article VI.3 of the Constitution of Bosnia and Herzegovina, the Court is called to "uphold this Constitution". Moreover, Article I.2 of the Constitution establishes that "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and

democratic elections." As the Court had already decided in case U 1/98, *Bulletin* 1998/2 [BIH-1998-2-002], these provisions demand an effective protection of the Constitution. It is carried out by the Court which has the power to review the constitutionality of all acts, regardless of who adopts them, as long as this review is based on one of the competences referred to in Article VI.3 of the Constitution.

With regard to Article 27 of its Rules of Procedure, pursuant to which the Court may evaluate the constitutionality only of those general acts that are in force, the Court found that the date of the decision of the Court and not the day of filing the request is relevant. Therefore, the request was admissible despite having been filed before the challenged decision had been published in the Official Gazette of Bosnia and Herzegovina.

On the merits, the Court decided that the HR's decision was not in violation of the Constitution. According to Article I.7.e of the Constitution, the Parliamentary Assembly is exclusively competent to regulate passports, since this article distinguishes between the regulation and the issuing of passports. Furthermore, as already established in U 5/98, *Bulletins* 2000/1 [BIH-2000-1-001] and 2000/3 [BIH-2000-3-003], second Partial Decision, the catalogue of responsibilities for Bosnia and Herzegovina in Article III.1 of the Constitution is not exhaustive, but complemented in other constitutional provisions such as Article I.7.e of the Constitution.

With regard to the absence of any indication of the citizenship of the Entities in the passports of Bosnia and Herzegovina, the Court found that neither Article I.7.a nor I.7.b of the Constitution, nor any other provision of the Constitution, requires that these documents should serve as proof of citizenship of the Entities.

Regarding the conformity of the HR's decision with Article 34 of the Law on Citizenship of Bosnia and Herzegovina, the Court stated that, with a view to the supremacy of the Constitution over ordinary law (Article III.3.b of the Constitution), this provision, which does not have constitutional rank, cannot serve as a standard of review for the Court.

Concerning the transferring of the income from travel documents into the budget of the institutions of Bosnia and Herzegovina, the Court pointed out that Articles IV.4.b and VIII.3 of the Constitution *expressis verbis* regulate that the Parliamentary Assembly is competent to regulate the collection of income.



There were dissenting opinions by the Judges Prof. Dr. Vitomir Popovic, Prof. Dr. Snezana Savic and Mirko Zovko.

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*Cross-references:*

- Decision of 05.06.1998 (U 1/98), *Bulletin* 1998/2 [BIH-1998-2-002];
- Decisions of 30.01.2000 and 01.07.2000 (U 5/98), *Bulletins* 2000/1 [BIH-2000-1-002] and 2000/3 [BIH-2000-3-003];
- Decision of 03.11.2000 (U 9/00), *Bulletin* 2000/3 [BIH-2000-3-004].

*Languages:*

Bosniac, Croat, Serb. English, French, German (translations by the Court).



## Bulgaria

### Constitutional Court

#### Statistical data

1 May 2001 – 31 August 2001

Number of decisions: 9

#### Important decisions

*Identification:* BUL-2001-2-002

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 03.05.2001 / **e)** 08/01 / **f)** / **g)** *Darzaven vestnik* (Official Gazette ), 44, 08.05.2001 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

4.9.8.1 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Financing.

4.9.8.2 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Campaign expenses.

5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

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

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

*Keywords of the alphabetical index:*

Election, ballot paper, financing, state contribution.

*Headnotes:*

The provisions of the Act on election of members of parliament, prescribing defrayal of expenses for the printing of voting papers by political parties and coalitions and by independent candidates, are unconstitutional.

*Summary:*

Proceedings were instituted at the call of 61 members of the National Assembly requesting that Sections 7.2 and 76 of the Act on election of members of parliament be declared unconstitutional as allegedly impeding the exercise of the right both to elect and to stand for election by rendering it substantially dependent on citizens' financial circumstances.

According to Section 72.2 of the Act, expenses for preparing and organising elections are defrayed by the state budget, the printing of voting papers excepted. This is amplified by Section 76 of the Act, which provides that printing costs are chargeable to the political parties and coalitions and to the independent candidates. It is accordingly prescribed that within 31 days prior to the election date, the sums required for printing of the voting papers should be paid into the account of the Council of Ministers. In the absence of a bank document certifying payment, registration of the parties, coalitions and independent candidates is withdrawn by the relevant electoral commission.

In reaching its decision, the Constitutional Court took into consideration the following points:

The text in question is altogether different from Section 7.2 of the Act on the election of members of parliament, local councillors and mayors (repealed), under which expenses relating to the technical and organisational preparation of elections were borne by the state. Nor does the statute now in force address the question of arrangements for subsidising the election campaigns of political parties and coalitions.

Article 10 of the Constitution stipulates that elections shall be held on the basis of universal, equal and direct suffrage by secret ballot. It follows from this provision that there is an explicit obligation of the state, not a right to organise or refrain from organising the elections in the specified manner. The very meaning of the word "election" embodies the requirement of pluralism, i.e. that participation by the subjects of the right to stand for election should be multiple.

It can be inferred from an examination of the text that elections must be conducted by universal suffrage. Admittedly the Constitution does not say that they must be free and fair, but there can be no doubt that these two requirements are inherent in elections by universal suffrage. Participation in elections is fair when it represents as faithfully as possible the attitude of society and the political views prevailing in the National Assembly. This fundamental need could

not be fulfilled if the right to elect or to be elected was in any way limited.

Under the terms of Article 11.1 of the Constitution, politics in the Republic of Bulgaria are founded on the principles of political pluralism. Without going deeply into this complex field, it should be noted that pluralism is chiefly upheld by the political parties, more so than by the citizens or political associations. Furthermore, according to Article 11.3 of the Constitution, the parties contribute to the formation and expression of the citizens' political will. This is expressed in everyday political affairs and especially during the parliamentary elections. From this standpoint, the financial situation of the parties should not become an impediment to the expression of the citizens' will. Legal equality as to the participation of political parties in the elections cannot be claimed while at the same time imposing economic burdens which would hardly trouble some of them but would frankly prevent others from taking part in the electoral process.

Article 6.2 of the Constitution is also breached in that lack of adequate financial resources would disable independent candidates from participating in the elections. This in effect limits the principle of equality before the law on the basis of financial circumstances.

There are indeed "hopeless" political candidatures. It is understandable that these should be averted by means of fixed contributions that are non-refundable in the event of failure. This is a common practice, especially for elections of the majority type. But it must have nothing in common with the state's obligation to hold elections by universal suffrage.

In the light of the foregoing, the Court held the challenged provisions unconstitutional in the passages "with the exception of expenses for producing voting papers", "the party or coalition shall bear the expenses for producing the voting paper with which it contests the elections" and "initiative committees and independent candidates for parliamentary office shall make their own arrangements to pay the expenses for producing the voting papers with which the candidates contest the elections". It also held totally unconstitutional the other portions of the Act closely linked with those cited above.

Two of the judges entered dissenting opinions in signing this decision.

*Languages:*

Bulgarian.



## Canada Supreme Court

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There was no relevant constitutional case-law during the reference period 1 May 2001 – 31 August 2001.



## Croatia

### Constitutional Court

*Languages:*

Croatian.



### Important decisions

*Identification:* CRO-2001-2-006

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 09.05.2001 / **e)** U-VII-914/2001, U-VII-928/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 43/01) / **h)**.

*Keywords of the systematic thesaurus:*

4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.

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

*Keywords of the alphabetical index:*

Election, list of candidates.

*Headnotes:*

Lists of electoral candidates, which do not contain the requisite number of candidates (i.e. as many candidates as there are members in the representative body for which the elections are held), are not considered complete and valid except in the case of death of a candidate after submission of the lists.

*Summary:*

The Constitutional Court's decision annulled one list of candidates and a ruling of the electoral commission, which found that the list of candidates for the town of Opatija may be subsequently amended when it was found that one of the candidates does not reside on territory of Opatija. The law regulating elections for members of councils and assemblies of municipalities and towns (*Narodne novine*, 33/01) prescribes that candidates must reside in the constituency for which the elections are held. Consequently, the Court held that in case of a candidate not residing in the constituency, the candidacy list could not be subsequently corrected.

*Identification:* CRO-2001-2-007

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 26.05.2001 / **e)** U-VII-1226/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 49/01) / **h)**.

*Keywords of the systematic thesaurus:*

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

4.9.9.3 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Voting.

*Keywords of the alphabetical index:*

Election, name of candidate, mistake.

*Headnotes:*

An inaccurately stated name of a candidate on the list is a reason for annulment of elections. During voting, nobody may inform voters about facts which change statements on the ballot papers.

*Summary:*

A decision of the Constitutional Court annulled elections in the municipality of Brdovec because the name of the candidate on the list of the Social Democratic Party was stated as "Vladimir" while his name was in fact "Velimir". The party which applied to the Court claimed that members of the electoral board were warning the voters about the mistake, thus turning their attention towards the list of Social Democratic party. It was claimed that this constituted a form of campaigning during voting, which might have influenced the results of the election.

The local electoral commission held that an inaccurately stated name in a small municipality in which everyone knew each other could not affect the results of an election.

The Court found subjective opinions of the electoral commission about the place in which elections were held irrelevant, and the idea of correcting the mistake on the list by drawing voters' attention to it during voting inadmissible. An inaccurate name of a candidate on an electoral list violates the provisions of the law regulating elections for members of councils and assemblies of municipalities and towns (*Narodne novine*, 33/01) and also of law regulating the use of personal names (*Narodne novine*, 69/92).

*Languages:*

Croatian.



*Identification:* CRO-2001-2-008

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 06.06.2001 / **e)** U-VII-1271/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 52/01) / **h)**.

*Keywords of the systematic thesaurus:*

4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.

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

4.9.9.7 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Method of voting.

*Keywords of the alphabetical index:*

Election, surplus mandate / Representative body, seats, member.

*Headnotes:*

The proportional method for converting number of votes into number of seats excludes "surplus mandates".

*Summary:*

In electoral procedures according to Croatian law, voters from the whole territory of a local unit do not vote for individual candidates, but for one of the

proposed lists on which there are as many candidates as there are members in the representative body for which the elections are being held. A number of seats in the representative body is allocated to each list which receives at least 5% of the vote, according to the rule that the number of seats for each list is proportional to the number of valid votes which that list achieved in elections. After the total number of valid votes for a list is ascertained, it is divided by numbers from 1 to the number of members in representative bodies for which the elections are held. Of all results received the last one (in the present case, the eleventh one) is the common divisor by which the total number of votes for each list is divided. Each list shall receive as many seats in the representative body as the number of times its number of votes can be divided by the common divisor.

"Surplus mandates" appear when the sum of all mandates from lists of candidates exceeds the number of seats in a representative body. In this case there were 11 seats in the representative body, but the sum of mandates, which lists of candidates received in conversion of votes into mandates, after votes for each list of candidates were divided by the common divisor, totalled 12 seats in the representative body (6+5+1). Since Croatian electoral law does not recognise these "surplus mandates", and does not allow a change in the number of seats in the representative body, the Court held that the number of councillors from each party is to be established in a way that the first 11 numbers represent mandates for lists of candidates. The Court's decision ascertained 5+5+1 seats in the body.

*Languages:*

Croatian.



*Identification:* CRO-2001-2-009

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20.06.2001 / **e)** U-I-607/1998, U-I-362/2000, U-I-479/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 57/01) / **h)**.

*Keywords of the systematic thesaurus:*

3.25 **General Principles** – Market economy.

5.2.1 **Fundamental Rights** – Equality – Scope of application.

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:*

Entrepreneur, equal status / Capital, investment.

*Headnotes:*

The state and its agencies, when acting on the securities market, are to have a status equal to other corporations.

*Summary:*

The subject of review was the law on the procedure for the takeover of companies with share capital (*Narodne novine*, 124/97). The disputed provisions (Articles 3, 5, 7 and 29) concerned the situation in which one or more persons acquired the number of votes sufficient to ensure to these persons a decisive influence in key decisions concerning the company. In such situations, demand for shares in that company decreases or vanishes and small shareholders are denied the possibility of selling their shares. Consequently, shareholders themselves are put into an unequal position because only some of them will be able to sell their shares to the person or persons who took over the company. Therefore, in order to protect small shareholders and the securities market, the law obliges persons who took over a company to offer other shareholders the chance to buy their shares also. The provisions regulating this situation (Articles 3, 7 and 29) were held by the Court to be concordant with constitutional guarantees of entrepreneurial and market freedoms, equal status of all entrepreneurs on the market and rights acquired through the investment of capital (Article 49 of the Constitution).

However, three provisions were repealed – Articles 5.1, 5.2 and 5.3 of the disputed law under which the obligation to make an offer to buy to other shareholders was not applicable in certain situations (for instance: the Croatian Privatisation Fund, the State Agency for Deposit Insurance and Bank Rehabilitation, Croatian Pension Insurance, persons who acquired shares on the grounds of a decision by the Government of the Republic of Croatia, and shareholders in banks and building societies).

The Court found these provisions unconstitutional having in view the constitutional provision, which provides that the state shall ensure to all entrepreneurs an equal legal status on the market and that all shall be equal before the law. The Court held that the repealed provisions created just those negative consequences, which were meant to be avoided by passing the disputed law.

*Languages:*

Croatian.

*Identification: CRO-2001-2-010*

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20.06.2001 / **e)** U-II-454/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 57/01 / **h)**.

*Keywords of the systematic thesaurus:*

3.13 **General Principles** – Legality.

5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

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

*Keywords of the alphabetical index:*

Building plot, sale / Investment, land, value.

*Headnotes:*

Real property owned by local government bodies may be sold or otherwise disposed of only through a public competition and by giving appropriate compensation as established according to market prices.

*Summary:*

The assembly of the town of Ploče passed a decision whereby the prices of building plots could be lowered by as much as 60% if the buyer who participated in the competition invested previously in infrastructure schemes in the town. The reasoning of the decision stated that such previous investments had increased the value of land in the town and those who

contributed to that increase were entitled to a lower price of building plots.

The decision was disputed from the point of view of equality.

The Court repealed the decision having in mind the principle of Article 5 of the Constitution, which states that sub-statutory regulations must be in conformity with the Constitution and laws, and provisions of the Law on property ownership and other real rights (*Narodne novine*, 91/96, 68/98, 137/99, 22/00, 73/00) which prescribes that building plots owned by local government bodies may be sold through public competition, for prices determined by the market, failing which the sale is not valid.

#### *Languages:*

Croatian.



#### *Identification:* CRO-2001-2-011

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 12.07.2001 / **e)** U-I-190/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 67/01 / **h)** CODICES (English).

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

3.18 **General Principles** – General interest.

4.7.4.1.1 **Institutions** – Judicial bodies – Organisation – Members – Qualifications.

4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.

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

Court, president, appointment.

#### *Headnotes:*

Provisions in the Courts Act, whereby a candidate for president of a court (except in the case of the Supreme Court of the Republic) may be a person who is not a judge, were held to be unconstitutional.

#### *Summary:*

The subject of review was the revised Courts Act (*Narodne novine*, 129/00), of which part of the provisions of Article 73c.2 and 73c.3 were repealed. These provisions had prescribed (as an exception to the rule that candidates for presidency of a court must be a judge who satisfies the requirements for a judge of that court) that a candidate for the presidency may exceptionally be a person who does not perform a function of judge, provided that he or she is a distinguished lawyer who satisfies the requirements for a judge of the court in question. The provisions had further described that the president of a court, who had not been a judge prior to being appointed president, shall inform, within 30 days from the date of his appointment, the state judicial council which may appoint him a judge of that court. In the case of non-appointment, the whole procedure of appointment has to be repeated.

The Court found in these provisions a source of instability of judicial power which is manifested, for instance: in legal uncertainty as to whether the state judicial council will appoint the president of the court as judge or not; in institutional instability caused by the repeated procedure of appointing the president of a court in the case of the elected president subsequently not being appointed a judge; and in legal future of acts and activities made, signed and undertaken by the elected president between his appointment as the president and the decision of the state judicial council to refuse his or her request to be appointed a judge. Apart from reasons concerning the instability of judicial power, the Court found that the repealed provisions violated the constitutional demand for judicial power to be performed exclusively by the courts and the principle that everyone shall be equal before law.

The Court did not accept the proposals to repeal the provisions which prescribed the following: that the president of a court shall be appointed by the Minister of Justice from among the candidates proposed by judges' council; that the president of the judges' council shall request from the Minister of Justice an evaluation of judicial performance and other data from the records of judges, which are important for the establishment of the professional ability of the candidate for the president of a court; that the decision of the Minister of Justice to relieve the president of a court of his duty shall be in writing and shall contain reasons for the decision; that the election of members of judicial councils and the appointments of the presidents of courts according to the provisions of the Act shall be carried out within three months from the day of the Act's entry into force; as regards provisions regulating the election of



the President of the Supreme Court of the Republic of Croatia (who, on constitutional grounds holds a unique position which differs from that of the presidents of other courts); provisions concerning evaluation of judicial performance, the provision according to which judges appointed for the first time shall be evaluated in terms of their judicial performance every year, and the work of other judges once every three years; the provision according to which a member of the judges' council shall cease to perform his or her duty prior to expiry of office if he or she so requests; and the provision according to which legal interpretation adopted at a meeting of the Department of the Supreme Court of the Republic, and of the Department of the Administrative Court of the Republic, shall be binding on all levels in that department.

*Supplementary information:*

Dissenting opinion of Judge Petar Klarić, who did not find the repealed provisions unconstitutional, particularly having in view that the identical provision concerning the President of the Supreme Court was not repealed. The opinion holds that a part of Article 44.1 is unconstitutional when it states that “appointments of the presidents of the courts according to the provisions of this Act shall be carried out within three months from the day of entry into force of this Act.”

*Languages:*

Croatian, English (translation by the Court).



## Cyprus Supreme Court

### Important decisions

*Identification:* CYP-2001-2-002

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

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

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

*Headnotes:*

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

*Summary:*

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

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

and 10 months' imprisonment, respectively. The particulars of the offence were that on 12 January 1983, whilst they were liable for military service and duly called up to join the National Guard, the appellants failed to do so without reasonable cause. On being formally charged in respect of this offence, the appellants replied that the reason for not enlisting was because, being Jehovah witnesses, their conscience did not allow them to take up arms.

Upon appeal against their conviction they contended:

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

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

The Supreme Court observed that it trusted that the appropriate Authorities of the Republic would, if and when in the future the circumstances of the country

might permit it, consider the exemption of conscientious objectors from compulsory military service and the imposition of alternative service.

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

#### *Languages:*

English.



#### *Identification: CYP-2001-2-003*

**a)** Cyprus / **b)** Supreme Court / **c)** / **d)** 15.06.2001 / **e)** 6961 / **f)** to be published in *Cyprus Law Reports* (Official Digest) / **g)** / **h)**.

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

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

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

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

Legal assistance, free, right.

#### *Headnotes:*

Violation of the right to grant free legal assistance results in the annulment of the trial.

#### *Summary:*

Article 12.5.c of the Constitution safeguards the right of a person charged with an offence to defend himself in person or through a lawyer of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require.

The appellant was indicted of the offence of burglary. He pleaded not guilty and the trial court approved the granting of free legal assistance to him having found

that he did not have sufficient means to pay for legal assistance. When the case came up for hearing the lawyer who undertook the defence of the appellant withdrew from the case with the leave of the court on grounds of disagreement with the appellant. Thereupon the trial court embarked on a new inquiry regarding the financial means of the appellant. It held that the appellant was not entitled to free legal assistance because he had no physical incapacity that would render him incapable of working.

The appellant defended himself in person. He pleaded guilty and was sentenced to four years' imprisonment.

The Supreme Court set aside the conviction and sentence of the appellant. It held that the trial court proceeded to revise the previous decision of the court, by virtue of which free legal assistance was granted to the appellant in the interests of justice, even though no fact had arisen warranting the revision of the previous decision. Violation of the right safeguarded by Article 12.5.c of the Constitution results in the annulment of the trial and the making of an order for the retrial of the case. However as the offence was committed in November 1997, the indictment was filed in June 1998, the trial ended in June 2000 and the appellant had since then remained in prison for about a year an order of retrial would have constituted an oppressive measure for the appellant. Therefore the conviction had to be aside.

#### Languages:

Greek.



## Czech Republic Constitutional Court

### Statistical data

1 May 2001 – 31 August 2001

- Decisions by the plenary Court: 9
- Decisions by chambers: 37
- Number of other decisions by the plenary Court: 6
- Number of other decisions by chambers: 787
- Number of other procedural orders: 82
- Total: 921

### Important decisions

*Identification:* CZE-2001-2-006

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 15.05.2001 / **e)** IV. US 402/99 / **f)** tax / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.

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

3.13 **General Principles** – Legality.

4.7.9 **Institutions** – Judicial bodies – Administrative courts.

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

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

*Keywords of the alphabetical index:*

Proof, administrative law / Review, administrative, tax.

*Headnotes:*

The fact that administrative authorities or courts proceed in a manner which cannot lead to the issuance of a decision on the basis of an objective

ascertainment of facts of the case in question may constitute a breach of the principle of legality, a threat to the principle of fair process and, possibly, an encroachment upon property rights.

### *Summary:*

The complainant lodged a constitutional complaint against a decision of the City Court in Prague and a decision of the Financial Directorate, alleging a breach of the right to due and fair process. The complainant had submitted a claim to the tax administrator for an excessive VAT refund. The tax authority reduced the amount. The complainant's appeal and subsequent suit were rejected.

Due to the nature of tax proceedings, it is necessary to stipulate the obligation to produce evidence, and the extent of that obligation. The Administration of Taxes and Fees Act stipulates that taxpayers must prove all the facts which they are obliged to state in their tax returns, reports and statements, as well as all the facts which they are requested to prove in the course of tax proceedings by the tax authority. In its Judgment no. Pl. US 38/95, the Constitutional Court ruled that the tax authority cannot decide arbitrarily which facts taxpayers are to prove, and that they can only be asked to prove the facts that they themselves claimed. This, however, was not respected.

A tax document presented in evidence constitutes only a formal proof of the compliance with substantive law requirements relating to taxable transactions. If no taxable transaction was made, the obligation to produce evidence cannot be satisfied by only presenting a tax document. A tax document that fraudulently demonstrates that a taxable transaction has taken place is not sufficient proof, and its presentation may be grounds for a request that proof that the taxable transaction did take place be submitted. At that stage of evidentiary proceeding, the tax authority should have concentrated on challenging warehousing records. The tax authority should have required that stocktaking be performed. If no stocktaking report was presented, the tax authority may have stated that accounting records were not kept properly.

The tax authority should have examined, in a manner which would show mutual relations between them, the payment of the invoice, inventory records, the report of the payment and of the inventory in stocktaking, the sale of inventory and how the sale of the inventory was reflected in inventory records, a record of the sale in the income reports, the payment of VAT on the goods sold, a record of a payment by cash or by bank transfer for the goods sold, and the conclusiveness, completeness and accuracy of the

accounting system. It is, however, not admissible that the taxpayer be required to provide evidence of something of which he was not part. It can therefore be concluded that without a more detailed audit of accounting documents of the companies involved in the present case, the tax administrator was not able to decide if the documentation recording the purchase of goods and their subsequent sale to other customers was forged or not.

The Czech Republic does not yet have a Supreme Administrative Court, and the Constitutional Court must therefore pronounce on matters which would otherwise be appropriate to that Court. It is therefore necessary that the Constitutional Court be more forthright in adjudicating such cases, although it continues to consider itself not to be a higher court for such cases. The problem is that the current system of administrative justice does not allow any type of judicial review other than the constitutional complaint. Those courts which review decisions of administrative bodies must provide a consistent protection of basic rights.

In this case, the complainant alleged a breach of her right to due and fair process of law. The Constitutional Court did not deal with the question of whether the complainant made the taxable transaction or not. It only considered the objections raised and concluded that both the tax authority and the City Court proceeded in a manner which could not lead to the issuance of a decision on the basis of objectively ascertained facts. The Constitutional Court therefore annulled the contested decision.

### *Languages:*

Czech.



### *Identification: CZE-2001-2-007*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 17.05.2001 / **e)** IV. US 393/2000 / **f)** Interpretation of administrative decisions / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

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

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

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

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.

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

*Keywords of the alphabetical index:*

Review, administrative / Proceedings, effectiveness, concentration, principle / Provision, broad interpretation.

*Headnotes:*

It is necessary to conclude from the article on the imposition of duties and restrictions relating to fundamental rights in the Charter on Fundamental Rights and Basic Freedoms, that none of the provisions in the Civil Procedure Code ruling out judicial review of administrative decisions can be interpreted broadly. On the contrary, the utmost restraint is called for. If there is any doubt, an assumption must be made in favour of preserving the right to access to the court.

*Summary:*

The complainant contested a judicial decision which suspended proceedings on reviewing an administrative decision, claiming violation of his fundamental rights and referring to the differing case law of the courts in similar situations, which is in sharp contradiction with the principle of the rule of law embodied in the Constitution. The proceedings were suspended by the Regional Court on the grounds that the action was directed against a decision which could not be the subject of review by the court, as the decision was a procedural one, which does not directly affect the party's rights arising from substantive law, but only concerns his procedural rights. In the field of the administrative judiciary, the above-mentioned basic rights were defined or restricted, as the case may be, by provisions contained in Part V of the Civil Procedure Code, as worded before its amendment. This concerned provisions specifying those persons who had standing to sue, as well as mandatory legal representation, the time limit for filing

a complaint and limiting the plaintiff's opportunity to expand the scope of contesting an administrative decision beyond this time limit.

The Court accepted the opinion that these statutory requirements for the implementation of the constitutional right enshrined in the Charter are only supposed to ensure that a citizen applies to the court in a specified way, that the principle of concentration and effectiveness of proceedings is applied and that thereby the implementation of another constitutional right is facilitated: the right to have a matter reviewed and decided in a reasonable time and without unnecessary delay.

The Constitutional Court could not accept the steps taken by the Regional Court, which further restricted the statutorily defined or restricted opportunity to apply a constitutionally guaranteed basic right, by broad interpretation of the Civil Procedure Code provision which (in the previous wording) excluded from judicial review, among other things, procedural decisions of administrative bodies. The Court held that, when the provisions on the limitations upon fundamental rights and freedoms were applied, their essence and significance must be preserved and they may not be used for purposes other than those for which they were provided. This constitutional principle means that the courts have to approach with equal restraint the interpretation of all Civil Procedure Code provisions which rule out the review of certain types of administrative decisions. This must be done with the ultimate aim of preserving the right of access to the courts and to judicial protection.

In the opinion of the Constitutional Court, the fact that some of these provisions were apparently abused is also evidenced by the fact that the amendment of the Civil Procedure Code, effective from 1 January 2001, clearly restricted the exclusion to decisions which regulate the conduct of administrative proceedings. The situation where the ordinary courts, when performing administrative decision-making, have already applied three diametrically opposed interpretations, is in sharp contrast with the principle of the rule of law enshrined in the Constitution, as it establishes a state of legal uncertainty.

The unification of the case law of the administrative courts is clearly entrusted to the Supreme Administrative Court, presumed in the Constitution of the Czech Republic. However, this court has not yet been established. It is fundamentally not the task of the Constitutional Court to mitigate the undesirable situation mentioned above, nor to replace this missing supreme body in the administrative court system, which the Constitutional Court has repeatedly pointed out in its decisions. However, it is impossible not to

take into account the decisions of the plenum of the Constitutional Court, file no. Pl. US 54/2000, under which the applied interpretation of the Customs Act, which customs bodies follow when applying security covering customs debt, cannot be described as a violation of constitutional rights or freedoms of the guarantors.

The Constitutional Court granted the petition.

### Languages:

Czech.



### Identification: CZE-2001-2-008

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 18.05.2001 / **e)** IV. US 639/2000 / **f)** Freedom of choice in personal healthcare / **g)** / **h)** CODICES (Czech).

### Keywords of the systematic thesaurus:

- 1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
- 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
- 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

### Keywords of the alphabetical index:

Police, powers / Health, protection / Personal integrity, treatment, essence / Patient, agreement.

### Headnotes:

The principle of the freedom of choice in personal healthcare matters derives from the constitutional principle of the inviolability of personal integrity. When applying provisions enabling specific types of treatment or examinations to be carried out without the patient's explicit approval, it is necessary to safeguard the essence of that freedom and to proceed with maximum restraint. A diagnosis is not more important than law.

### Summary:

The complainant contested the resolution of the Public Prosecutor's Office dismissing her complaint against the decision of the Police of the Czech Republic to discontinue investigating her report of a commission of a crime, and alleged that her fundamental rights had been infringed. The Constitutional Court requested statements from the parties referred to in her complaint. The documents submitted showed that the complainant refused to be taken to a mental hospital in locality J., and subsequently sent a report to the police alleging the commission of a crime by the organisers of her hospitalisation. Later, however, she agreed and was taken for examination, undoubtedly mainly because she was asked to do so by the state police. The subsequent medical examination showed that there were no reasons for treatment or hospitalisation.

The Court held that everybody is free and under no obligation to do something not imposed on him by law. It follows that in issues relating to healthcare, he is also free to choose if and to what extent he will agree to undergo specific medical examinations, and only a law may stipulate that there are certain examinations with which he or she must agree. The Public Health Care Act stipulates a general principle that medical examinations and therapeutic procedures can be performed only with the patient's agreement, or if his agreement can be assumed. However, the inviolability of personal integrity as a fundamental constitutional principle and the ensuing principle of freedom of choice in personal health-care matters are never absolute or unlimited in any society. Therefore the cited provisions of the Public Health Act also list situations when medical procedures may be performed against the patient's will. This may be, for example, in a situation where a person exhibiting symptoms of mental illness or intoxication is a risk to himself or others, or if it is a procedure necessary to save his life or health.

It was the opinion of the Constitutional Court that the ascertained facts showed beyond any doubt that this was not the case in the application under review. For

this reason the assistance of the police, requested and granted, during the transport of the complainant to the mental hospital represented a coercive measure that had no support in the provisions of the Police of the Czech Republic Act or in any other acts. While it is true that this Act states that everybody has the right to turn to the police for help, there is no doubt that the extent of such help must not interfere with another person's freedom guaranteed by the Constitution. This was not the situation in the present case, because the execution of a decision by a state organ was not involved, and the complainant could not interfere with it or endanger those who were executing it. Nor was it a situation envisaged by the Act in which the policeman is entitled to arrest the person whose behaviour constitutes an immediate threat to that person's life, the life of other persons, or a threat to property. The assistance of the police was an immediate coercive measure, and while it was probably prompted by good intentions and by a belief that the doctor's requirement was justified, it definitely had no support in any law and, in its consequences, it restricted the individual liberty of the complainant, even if only for a short period of time.

The Constitutional Court, however, was of the opinion that the above unconstitutional procedure did not represent a sufficiently serious interference with the individual liberty of the complainant to invoke criminal liability on the part of the parties involved. After all, it is the responsibility of institutions in charge of criminal proceedings to evaluate the facts of their cases and decide whether parties involved should or should not be prosecuted, and it is principally impossible for the Constitutional Court to interfere with this. The Constitutional Court also rejected the complaint against the fact that no criminal charges were filed. Although such a decision concerns subjectively the complainant, in its consequences it cannot infringe her constitutionality guaranteed rights and freedoms. The possibility of demanding protection against the infringement of individual rights in civil proceedings is, of course, another matter.

The Constitutional Court considered as being inadmissible that part of the complaint in which the complainant sought the verdict to the effect that her right to personal honour and good reputation was infringed, and that part of the complaint that contained a request for criminal charges to be brought. Because this constitutional complaint also accused the parties that requested that the complainant be taken for an examination, especially the physician, it was necessary to point out that constitutional complaints are admissible solely against acts of public authorities, and that no public authority was involved in this case.

The Constitutional Court deemed it necessary to reaffirm that a medical diagnosis cannot be placed above the law even in cases where mental disorders have been diagnosed. The police and other public authorities must therefore consider requests for intervention or assistance very carefully to determine whether such a request, and, indeed, the intervention itself, are supported by law. Requests made by relatives may not always be motivated by their interest in the person's health. Their motives may in fact be quite different and not always honourable. Whenever any statutory provisions which consequently allow the restriction of fundamental rights and freedoms are to be applied, it is necessary that provisions of the Charter on Fundamental Rights and Basic Freedoms be fully respected, namely that their substance and purpose be protected and their abuse ruled out. The maximum restraint is therefore called for.

For the above reasons, the Constitutional Court partially granted the complaint when it concluded that its verdict of unconstitutionality of the act which took place once and is not likely to be repeated is a sufficient guarantee that such a course of action will not be taken against the complainant or against other people in similar situations.

#### *Languages:*

Czech.



#### *Identification: CZE-2001-2-009*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 20.06.2001 / **e)** Pl. US 14/01 / **f)** Banking Council – countersignature / **g)** / **h)** CODICES (Czech).

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

- 2.1.2.1 **Sources of Constitutional Law** – Categories – Unwritten rules – Constitutional custom.
- 2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
- 3.9 **General Principles** – Rule of law.
- 4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.

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

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

President, powers, delegation / Central bank, member, appointment, right / President, countersignature / Central bank, independence / Estoppel.

##### *Headnotes:*

The President of the Republic appoints all members of the Banking Council without countersignature by a member of the government. No restriction of his right to appoint only four members may be imposed only by interpretation of an ordinary law, as the Constitution can only be amended by a constitutional law. The current Constitution does not recognise any membership in the Banking Council of the Czech National Bank (CNB) which could arise without appointment by the President of the Republic. Under the Constitution, no one can become a member of the Banking Council merely “by operation of law”, if the Constitution establishes membership in the Banking Council exclusively on the basis of appointment by the President of the Republic. The Constitution, as the law with the highest legal force, cannot be re-interpreted on the basis of an ordinary law, but the ordinary law must be always interpreted in accordance with the Constitution.

A long-standing constitutional procedures, which correspond to the institutional consensus of constitutional bodies and repeatedly confirm a certain interpretation of the Constitution, must be understood as constitutional practices which cannot be ignored when interpreting the Constitution.

##### *Summary:*

The government turned to the Constitutional Court with a petition to decide the jurisdictional dispute between the President of the Republic and the Prime Minister (or the government). The President of the Republic expressed his opinion on the petition. The Czech National Bank Act (“CNB Act”) clearly formulated the main tasks of the Banking Council, and described it, as a whole, as “the supreme governing body of the CNB”. It also enumerated the range of the powers of the Banking Council, as it had in mind the possibility of including in this jurisdiction other, unnamed matters. The purpose of this provision was to broaden the remit for decision-making by the Banking Council.

The Governor of the CNB is one of the members of the Banking Council, which is the supreme governing body. As far as the Governor is concerned, his

position differs from that of the other members because he, or a Vice Governor appointed by him, chairs the meetings of the Banking Council, acts externally in the name of the CNB, and is entitled to attend government meetings in an advisory capacity. The Governor of the CNB has the authority to sign legal regulations issued by the CNB and promulgated in the Collection of Laws. His refusal to sign cannot be considered an obstacle to the validity of such legal norms. As regards the powers of the Governor of the CNB in administrative proceedings conducted by CNB, the Governor decides “on the basis of a proposal from a special commission established by him”.

The CNB Act entrusts decisions on appeals against CNB decisions to the Banking Council as a collective body. Under the Constitution, the President of the Republic appoints all the members of the Banking Council and the CNB Act specifies the composition of the Council. In contrast with the Constitutional Court, where the consent of the Senate is required for the appointment of all judges, in the case of the Banking Council the Constitution does not distinguish between individual members.

If the Constitution does not distinguish between the procedure for appointing the Governor and the Vice Governors of the CNB and the procedure which it itself provides for all members of the Banking Council, it is not possible to derive from ordinary laws a different procedure for appointing some members of the Banking Council. The Constitution makes it possible to appoint the Governor and Vice Governors simultaneously, by a single act, as members of the Banking Council. If two different regimes for appointment are introduced in a sphere reserved by the Constitution to the exclusive authority of the President, both these regimes must be defined directly in a constitutional law. This requirement is a *conditio sine qua non*. The fact that they have a common six-year term of office also testifies in favour of a single act of appointment for all members of the Banking Council. If the President of the Republic appoints the members of the Banking Council as of a particular date, a new term does not begin to run if one of them is later appointed Governor.

The legal opinion that the President of the Republic is authorised to appoint all members of the Banking Council without countersignature has been observed and practiced from 1993 to 2000. This practice was not contested by constitutional bodies, and the complainants themselves recognised it by the fact that they contested only the appointment of the Governor and one of the Vice Governors. This interpretation has become constitutional practice. In a democratic state governed by the rule of law it is



hardly imaginable that the interpretation of the Constitution and corresponding constitutional practice, respected and not contested during the entire period since the acceptance of the Constitution, would be cast in doubt by a self-serving misinterpretation of the Constitution, and with them the entire existing practice, including a range of decisions which have never been contested.

The right of appointment, exercised by a non-partisan president, although without a direct connection to the consent of the government composed of the representatives of one or more political parties, is part of the guarantees of the CNB's independence. The independence of the CNB is a constitutional value arising from the Constitution. If the Constitution provides a specific rule, an exception from this rule is possible only on the assumption that the Constitution itself, or a later constitutional law, expressly allows for such an exemption. The Constitution itself cannot be re-interpreted under the provisions of an ordinary law into a form which it obviously does not have. The interpretation process operates the other way around, namely always from constitutional regulations to laws, unless a constitutional regulation itself expressly provides for an exception.

The Governor is not a member of the Banking Council by dint of a direct provision of the CNB Act, but directly and primarily from the Constitution itself. Under the Constitution, the President of the Republic appoints, without exception, all members of the Banking Council. If the CNB Act defines these members of the Banking Council as the Governor, Vice Governors and other members, it does not, under any circumstances, remove the Governor and both Vice Governors from the constitutionally established appointing authority of the President of the Republic. The current Constitution does not recognise any membership in the Banking Council which could be created without appointment by the President of the Republic, i.e. created only and directly by a law.

The idea that, under this article, the President of the Republic appoints only those members of the Banking Council who remain to be appointed after the appointment of the Governor and two Vice Governors is equally unconstitutional. This is in conflict with the cited article of the Constitution, under which the President of the Republic appoints all the members of the Banking Council without the requirement of countersignature. In the area of the appointing authority of the President of the Republic, the Constitution entrusts to the implementing statute on the CNB only the regulation of "other details". Because Article 98.2 of the Constitution has to be understood at the same time as a framework

established by the Constitution which cannot be violated by the implementing CNB Act, the attempt to derive the obligation of countersignature from the CNB Act cannot be described as anything but unconstitutional, as it does not concern the regulation of details but an essential change with constitutional consequences.

Although the Prime Minister and the government are firmly of the view that the appointment of the CNB Governor and Vice Governors is subject to countersignature by the Prime Minister or a member of the government authorised by him, in fact they contested that only the appointment of the Governor and one of the Vice Governors was unconstitutional and invalid, and at the same time they accept without objection the same manner of appointment (without countersignature) of the second of the current Vice Governors. This introduces an element of arbitrariness into the principle of the state under the rule of law.

The Constitutional Court also did not recognise as justified the objection that the President of the Republic should have recalled both members of the Banking Council from their current positions before appointing them to the positions of Governor and Vice Governor. The transfer of positions took place during the six-year term of office of both members of the Banking Council. The entire concept of the law confirms the intent of the Constitution to make the CNB an institution which would be independent of the government when performing its main task. If the consent of the government were needed to move members of the Banking Council internally within the Council, this would threaten the Council's independence from the government.

The Constitution defines the Banking Council as the undifferentiated body consisting of all its members, without specifying differences in their positions. The CNB Act provides that all 7 members of the Banking Council are appointed for six years. If a law stipulates appointment to an office for a particular period, this period cannot be exceeded. The law does not make any distinction between the members of the Banking Council during this term of office. The Banking Council is a collective management body which decides as a body and in which the Governor is only *primus inter pares*. A member of the Banking Council may be recalled only if he is convicted of a crime or if, according to a decision of the Banking Council, he loses the ability to perform the duties of his office; he may also be recalled at his own request, delivered to the Banking Council, or if he takes on the performance of a specified office. None of these conditions was fulfilled in this case. The Constitutional Court decided that the President of the Republic was

entitled to issue the decision indicated in the petition to open proceedings on this jurisdictional dispute, and therefore it rejected the petition of the Prime Minister and the government.

In a joint dissenting opinion to the verdict, the judges said that the Constitutional Court should find that the decision of the President of the Republic on appointment of the Governor and Vice Governor of the CNB requires countersignature by the Prime Minister or a member of the government authorised by him in order to be valid. Both sides in the dispute rely on ordinary laws to support their arguments.

The President of the Republic is not a sufficient guarantee of independence, as he is elected by parliament. The independence of the CNB can be achieved only by the interaction of the individual counterbalances among different constitutional bodies. The relationships between the government and the President are partly analogous to those among different states, where a state need not accept any person sent to it unilaterally by another state. The appointment authority of the President must be interpreted restrictively, i.e. in such way that it does not include the power to appoint the Governor and Vice Governor of the CNB unilaterally. This power is set by the CNB Act and is therefore subject to countersignature.

The concept of a statute governed by the rule of law and legal certainty undoubtedly includes the legitimate expectation of continuity in the behaviour of the subjects of law. In accordance with the principle of estoppel, a party to a dispute cannot deny a legal regime or principle which it previously expressly or indirectly recognised. Estoppel is applied in the interests of certainty in legal relationships in society. Of course, judicial bodies handle the objection of estoppel very carefully and usually require, in addition to simple recognition of a certain regime or principle, the fulfilment of additional restrictive conditions.

It is true that there are examples of appointment with countersignature or without it, and the government was contesting the appointment of only one of the vice governors. However, it was unthinkable for the Constitutional Court to base its verdict purely on granting the objection of estoppel raised by the other party. The Prime Minister's individual failures to require countersignature for a particular governor and vice governor may perhaps be capable of suspending the effect of the constitutional rule requiring countersignature in a single case, but are not capable of annulling the validity of that constitutional rule. Such annulment would require constitutional practice, but that has not arisen.

The reasoning of the dissenting opinion stated that after the Constitution first came into effect, the constitutional practice developed *praeter constitutionem* of appointing the Governor and the Vice Governor of the CNB by the President of the Republic without countersignature by the Prime Minister or a minister entrusted by him, has developed in constitutional practice. In the opinion of these judges, a change of this constitutional practice could now be made only on the basis of a decision by a constitutional assembly, i.e. by an amendment to the Constitution.

#### *Languages:*

Czech.



#### *Identification: CZE-2001-2-010*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27.06.2001 / **e)** Pl. US 16/99 / **f)** Administrative code / **g)** / **h)** CODICES (Czech).

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

- 1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
- 1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
- 1.4.9 **Constitutional Justice** – Procedure – Parties.
- 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.
- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – Legality.
- 3.20 **General Principles** – Reasonableness.
- 4.7.9 **Institutions** – Judicial bodies – Administrative courts.
- 5.2 **Fundamental Rights** – Equality.
- 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.

5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

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

*Keywords of the alphabetical index:*

Administrative law / Sanction, administrative, judicial protection / Decision, administrative, assessment / Proceedings, participation, restriction / Failure to act, administrative body / Representation, mandatory / Legal aid.

*Headnotes:*

The current regulation of the administrative courts shows serious constitutional law deficiencies. Some activities of the public administration, like its potential inactivity, are not subject to review by the judicial branch of power. Not everyone whose rights may be affected by an administrative decision has the right to make an application to the courts. Even if he or she does have that right, a fully fair trial under Article 6.1 ECHR is not guaranteed, although that is the case in a number of situations. A court decision is then final and, with the exception of a constitutional complaint, non-reversible, which leads to inconsistent case law as well as to an unequal position for the administrative body, i.e. to a situation in conflict with the requirements of a state governed by the rule of law. The finality of certain decisions can even lead to a denial of justice. Finally, the exercise of the administrative judiciary is organised in a manner which ignores the fact that the Constitution states that the Supreme Administrative Court is part of the court system.

*Summary:*

During 1999-2001 some submissions to annul specific provisions of Part V of the Civil Procedure Code (the "CPC") on the administrative court system were submitted to the plenum of the Constitutional Court. The Court decided to join all these submissions in one single set of proceedings. After the matters were joined the court received additional petitions which were rejected on the grounds of a pending suit, and the complainants were given the status of a secondary party. The Chamber of Deputies, the Senate of the Parliament of the Czech Republic and the Ministry of Justice expressed opinions on these submissions.

There was no dispute about the fact that the manner in which the administrative court system was restored

after 1991 was understood as a provisional solution. The Constitution expressly incorporated the Supreme Administrative Court into the court system without postponing the establishment of this court in the transitional and final provisions. Thus, the constitutional order envisaged a supreme body in the administrative court system while the law regulating this branch of the judiciary was constructed quite differently, as it created three independent levels of decision-making, and this decision-making is final, with the exception of pension matters.

Further, the current system did not provide judicial protection against unlawful procedures or interventions of the public administration which did not have the character and form of an administrative decision. There was no means for judicial protection against the inactivity of an administrative authority and the administrative courts could not decide directly about the validity of public administrative acts. In these cases the Constitutional Court was often competent.

A separate problem existed in the so-called administrative punishment, where the Constitutional Court annulled part of the Administrative Offences Act, but this area was not in accordance with the European Convention of Human Rights. Accusations of crime, under the case law of the European Court of Human Rights, include in practice proceedings on all sanctions imposed on individuals by administrative authorities for administrative offences or other administrative transgressions, as well as proceedings on sanctions imposed in disciplinary proceedings, or imposed in analogous proceedings on members of chambers with compulsory membership. The Constitutional Court then has to be endowed with the power to consider not only the legality of a sanction but also its reasonableness.

The Constitutional Court stated that although the current administrative court system was generally in accordance with the Constitution and the Charter on Fundamental Rights and Basic Freedoms, as far as procedure and jurisdiction are concerned, it was not in accordance with the Human Rights Convention, which requires that a court or a body similar to a court decide the case. Thus, under Czech regulations, the court could only annul an unlawful decision, not a substantively deficient one. This meant that the administrative discretion of a dependent body cannot be replaced by independent judicial consideration. The Civil Procedure Code was satisfied with mere review of legality, without regard to the specific nature of a matter, and its provisions regulate in detail only this review, which was in conflict with the Convention and therefore also with the constitutional order of the Czech Republic. This deficiency could not be solved

otherwise than by a fundamental change in the structure and powers of the administrative judiciary.

As regards the problem of the constitutionality of procedural regulation, which the administrative judiciary in most cases restricts to one level, it was stated that neither the Constitution nor the Charter guaranteed a multi-level judiciary as a fundamental right, and it also cannot be derived from international treaties. The requirement to create a mechanism for unifying case law (even if only in the form of a Court of Cassation complaint or other extraordinary form of appeal) follows from the requirements placed on a state which defines itself as being governed by the rule of law. The non-existence of such a mechanism then leads to insufficient pressure to cultivate the public administration as a whole and to the feelings of the public administration bodies that they are exposed to judicial review which lacks a unifying function. The absence of any means of unifying the case law of the administrative courts forces the Constitutional Court into the role of “unifier”, which is inconsistent with its position.

This situation creates a basic inequality between legal entities and natural persons, on one side, and administrative authorities, on the other side, as the state has no means to defend itself against the sometimes diametrically opposed decision-making of the administrative courts. The Executive has no opportunity to call for assessment of administrative decisions by the supreme judicial body if it believes that it is in conflict with the law. Making it a condition that applicants have active standing to file an administrative complaint on previous participation in administrative proceedings can, in some cases, lead to a situation where persons whose rights or obligations were obviously the subject of proceedings or whose rights could be affected by a decision of a public administration body were excluded from the right to file a complaint. This leads to the existence of persons whose rights are affected by an administrative decision being in unequal positions, which is in conflict with the Charter and the Convention.

The legislature itself had already corrected certain special regulations, and the Constitutional Court also proceeded in this spirit. The Constitutional Court was aware of the fact that even restricting participation in proceedings to the claimant and the defendant is a step backwards in comparison with the First Republic legal regulation, which is also admitted in the Commentary to the Civil Procedure Code, as it speaks about the fact that this provision evokes doubts from a constitutional viewpoint and will require effective remedy *de lege ferenda*. It should be a matter of general interest for the administrative court not only to concern itself with the claimant's

objections but to arrange for all persons who were somehow involved in the matter to have the opportunity to defend their rights before a court.

Concerning the reservations of the Fourth Chamber of the Court about the constitutionality of the provisions, it must be stated that mandatory representation, whether by an attorney or by other specialists, is not usual before the administrative courts of the first instance in Europe. Despite this unusual situation, and factual strictness of the Czech regulation, the current concept could not be criticised for being in conflict with the constitutional order. An argument against the possible objection of limited access to the court is the attempt to ensure the equality of the parties in proceedings before the administrative court, i.e. that the plaintiff is not at a disadvantage against the defendant administrative body, which is usually represented by a qualified state official. Mandatory representation should generally serve to effect the principle of equality of arms. It is a matter for the legislature, in the new codification, to evaluate the necessity of mandatory legal representation generally, as well as whether legal assistance can be provided only by persons with a university level legal education. The Constitutional Court also pointed out that in the case of mandatory legal representation, it was necessary to ensure, more so than has been the case until now, the availability of such representation for socially disadvantaged persons.

The plenum of the Constitutional Court decided to annul the whole of Part V of the Civil Procedure Code since, in its opinion, the above-mentioned deficiencies in constitutionality could not be meaningfully resolved by partial derogations. After considering all the circumstances, especially the work in progress on the reform of the administrative court system, the Constitutional Court decided to postpone the enforcement of the annulment verdict until 31 December 2002. The Constitutional Court was convinced of the need for a lengthier *vacantia legis* for such a fundamental change, from which it follows that passing new regulations is a task for the present legislative body.

#### *Languages:*

Czech.



*Identification: CZE-2001-2-011*

a) Czech Republic / b) Constitutional Court / c) Second Chamber / d) 03.07.2001 / e) II. US 105/01 / f) / g) / h) CODICES (Czech).

*Keywords of the systematic thesaurus:*

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

5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.

5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

*Keywords of the alphabetical index:*

Judge, exclusion / Judge, matter, involvement / Judge, media criticism.

*Headnotes:*

Decisions on cases of alleged bias must be based exclusively from an objective viewpoint. It is not admissible to rely only on doubts concerning the relationship of judges to the case under review or persons directly affected by the act. There must also be a substantive legal analysis of the facts leading to such doubts. A judge can be excluded from hearing and deciding a matter only when it is evident that the judge's relationship to the matter, the parties or their representatives, is of such a nature and intensity that, despite his statutory duty, he will be unable or incapable of making a decision independently and impartially. The judge's relationship to the matter, or to the parties or their representatives, must be evaluated from two interconnected angles: the nature of the relationship, and whether it appears that the judge is heavily involved in the matter.

*Summary:*

The complainants contested a decision on the exclusion of judges from hearing and deciding matters and objected that the court's actions violated their constitutional right to a judge as properly guaranteed by law. The core of the constitutional complaints was the complainants' dispute with the opinion of the Regional Court in the town of B., which reached the conclusion that at the present time doubts might arise about the objectivity and impartiality of the judges of the Regional Court in the town of H., related to their actions when deciding and hearing the complainant's matter.

The Constitutional Court considered the key question to be the assessment of the constitutional conformity of the interpretation and application of provisions on the exclusion of judges from hearing and deciding a matter in relation to the basic right to a judge, as properly guaranteed by law. The fundamental right to such a judge includes the procedural rules determining the jurisdiction of courts and their members, the principle of allocating the court agenda and determining the composition of panels on the basis of rules contained in the timetable of court work, as well as the requirement of the exclusion of judges from hearing and deciding a matter on the grounds of their bias.

The subjective viewpoint of the parties to proceedings, or of the judges themselves, is the starting point for deciding on possible bias, although deciding on this question must be done only on the basis of an objective viewpoint. The issue is not only the assessment of a judge's subjective feeling, whether he does or does not feel biased, or assessment of his personal relationship to the parties to proceedings, but also objective consideration of whether it can be presumed that the judge could be biased. A judge can be excluded from hearing and deciding a matter only when it is evident that the judge's relationship to the given matter, to the parties or to their representatives is of such a nature and intensity that, despite the statutory obligation, he will be unable or incapable of deciding independently and impartially. Another example is if the judge knows the parties to the proceedings well or has family connections, or if there is a relationship of economic dependence with the parties. The judge's relationship to the matter, or to the parties or their representatives, must be evaluated from two interconnected angles: the nature of this relationship, and whether the judge appears to have a serious direct involvement with the parties or the matter.

Regarding the nature of the assessed relationship, it became apparent, from the evidentiary hearing conducted by the Regional Court, that a newspaper article containing criticism of the delays in handling the complainants' matter, which contained speculation about the court's connections with certain politicians, had to be considered decisive. Here it must be stated that the judge as a representative of public power can be, and often is, the object of unjustified criticism in the media. At the same time, it is necessary to presume and require a higher level of tolerance and perspective than in the case of individual citizens. It is also necessary to take into account that the principle of independent, impartial and fair decision-making is the basic principle for the functioning of the judicial power and it is a legal, or

constitutional, as well as moral obligation of all judges to observe this principle.

As for the second angle, in the given case such a direct relationship could not be found, at least not as regards all the judges of the court in question, as not all of the excluded judges took part in the hearing of the case under review. The relationship of the judges to the adjudicated matter and to the parties to the proceedings, which did not take part in the hearing of the matter at all, was not of such a nature and intensity as to be objectively able to cause bias. The Constitutional Court was convinced that the judges of the above-mentioned court were able to decide the complainants' matter without bias and impartially. Therefore the Constitutional Court granted the complainants' petition and annulled the contested decision.

#### *Languages:*

Czech.



#### *Identification:* CZE-2001-2-012

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

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

- 1.3.2.4 **Constitutional Justice** – Jurisdiction – Type of review – Concrete review.
- 1.5.4.4 **Constitutional Justice** – Decisions – Types – Annulment.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.19 **General Principles** – Margin of appreciation.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.

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

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

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

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

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

#### *Headnotes:*

It is in the interest of the state to define security risks generally because the importance of specific individual security risks may change over time. The interest of the state cannot legitimise the creation of security risks that would not be constituted by the legislature but by administrative bodies. Legislation which makes it possible for executive administrative bodies never to give reasons for their decisions, whereby the applicant may never learn or even guess whether and why he was found a personal security risk, is in contradiction with the basic principles of the state governed by the rule of law. For security checks of natural persons, the law stipulates a special modification of administrative proceedings. This is not unconstitutional because the decisive aspect is whether the special proceedings safeguard constitutionally guaranteed fundamental rights of persons investigated.

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

#### *Summary:*

As well as making a constitutional complaint, the complainants requested the annulment of certain provisions of the Protection of Classified Information Act. Opinions on the complaints were expressed by the Czech Security Information Service, the Chamber

of Deputies, the Senate, the Ministry of the Interior and the National Security Authority. The purpose of the Act was to define which information would be classified in the interests of the Czech Republic, the method by which it will be protected, the jurisdiction and powers of state institutions in the performance of their duties in protecting classified information, the duties of natural persons and legal entities, and the responsibility for the violation of duties under the Act.

Individual fundamental rights need to be assessed in compliance with the principle of proportionality. The interest of the state is a vital interest which legitimises a degree of restriction on individual privacy. The state cannot behave arbitrarily towards its citizens, and it cannot restrict their fundamental rights beyond an absolutely necessary limit. When restraining fundamental rights and freedoms, the state has to respect both formal requirements of restriction, as defined by law, as well as the material requirements (the need to keep in mind the essence and purpose of basic rights). By restricting access to classified information only to people who fulfil statutory requirements, the state tries to protect its own interests, which is a fully legitimate objective. The stipulation of adequate statutory requirements for persons with access to classified information cannot be considered as unconstitutional, and it is also in accordance with the case law of the European Court of Human Rights. National legislation must provide a degree of protection against arbitrary interventions by state institutions. The law must provide a sufficiently clear definition of the extent of, and conditions for, the execution of such powers with respect to the intended legitimate aim in order to provide individuals with adequate protection against arbitrariness. Not even the relative freedom enjoyed by the law-maker gives him the right to use laws for the violation of the essence and substance of the right to the free choice of profession and training, and to start a business or engage in any other commercial activity.

Only a law whose consequences are clearly predictable fulfils the requirements for the operation of a materially conceived democratic state governed by the rule of law. This, however, was not the case with the issue in hand. The statutory definition of security risks has to be general enough to enable due consideration by the relevant state organ and, above all, a classification of specific cases according to specific security risks. It is therefore necessary to reject legislation which, besides examination of real security risks, would allow for the examination of risks, even fictitious ones, which are not listed in the law. The only definition of security risks that is constitutionally acceptable is a definition which gives relevant authorities a possibility to use their discretion, but not for the creation of new risks not

sanctioned by the law. The fact that consequences are unforeseeable opens up a possibility of potentially arbitrary attitudes of relevant authorities. The law-maker may set some statutory limitations for the performance of some professions or activities. This, however, must be done in an unambiguous and foreseeable manner, without any margin being left for any arbitrary attitudes on the part of state organs. The stipulated list of security risks provides room for arbitrary restrictions to the performance of some professions and activities which are not clearly defined in advance; such a practice is not in conformity with the Charter. The guarantee of a free choice of profession is not only a part of the catalogue of national human rights but is also strongly reflected at the level of international law in the European Social Charter.

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

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

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

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

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

*Languages:*

Czech.





## Denmark

### Supreme Court

There was no relevant constitutional case-law during the reference period 1 May 2001 – 31 August 2001.



## Estonia

### Supreme Court

#### Important decisions

*Identification:* EST-2001-2-004

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 03.05.2001 / **e)** 3-4-1-6-01 / **f)** Review of the petition of Tallinn Administrative Court to declare Section 140.1 of the Family Act invalid / **g)** *Riigi Teataja III* (Official Bulletin), 2001, 15, Article 154 / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.  
 3.16 **General Principles** – Proportionality.  
 3.18 **General Principles** – General interest.  
 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.  
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.  
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.

*Keywords of the alphabetical index:*

Surname / National identity, protection.

*Headnotes:*

It is unconstitutional to prohibit an Estonian citizen or a person with an Estonian surname from taking a non-Estonian surname.

*Summary:*

The applicant, Ms Arendi, wished her surname to be changed to Arendi Elita von Wolsky. The Minister of Internal Affairs refused her request. Ms Arendi contested the Minister's decision in the Tallinn Administrative Court, claiming that she wished to preserve the name of her family. The Court repealed the disputed decision and filed a petition with the Supreme Court to review the constitutionality of Section 140.1 of the Family Law Act.

According to that section, the provisions of the Surnames Act 1934 had to be applied upon change of name. The Surnames Act provided, *inter alia*, that a non-Estonian surname could not be requested, if the person concerned was of Estonian origin or had an Estonian name. The Administrative Court found that this provision of the Surnames Act discriminated against persons of Estonian origin based upon their ethnicity, and was in violation of Article 12 of the Constitution.

The Constitutional Review Chamber of the Supreme Court noted that Section 140.1 of the Family Law Act does not contain any rules concerning the changing of names and, therefore, cannot interfere with the fundamental rights of individuals. This Section only refers to the relevant provisions of the Surnames Act, including Section 11 of the Act, which is relevant to the case.

The Supreme Court observed that the right to change one's surname may fall within the sphere of protection of several provisions of the Constitution, e.g. Article 26 of the Constitution (right to inviolability of private and family life), Article 19 of the Constitution (right to freedom of self-realisation), etc. Since Ms Arendi argued in the Administrative Court that she wished to add her maiden name to her surname, the Supreme Court focused on the right to inviolability of private and family life.

The Supreme Court saw safeguarding of Estonian identity as the aim of the restriction imposed by Section 11 of the Surnames Act. According to the Preamble of the Constitution, the state shall guarantee the preservation of the Estonian nation and culture through the ages. The Court took notice of the great importance of the protection of national identity during the drafting of the Constitution. However, the Court noted that today the protection of national identity should not prevent the changing of names. This conclusion was supported by a comparative analysis of the practice of European countries as presented by the European Court of Human Rights in the case of *Stjerna v. Finland* (*Bulletin* 1994/3 [ECH-1994-3-019]). The Supreme Court concluded that Section 11 of the Surnames Act was disproportional and violated Article 26 of the Constitution.

The Supreme Court noted that the prohibition of Section 11 of the Surnames Act was also discriminatory with respect to non-Estonians who had Estonian surnames. The Act prohibited such individuals from changing their name to a non-Estonian one, while a non-Estonian who had a non-Estonian surname, could change it to another non-Estonian name. This differentiation was found arbitrary and in violation of Article 12.1 of the Constitution.

The Constitutional Review Chamber declared Section 11 of the Surnames Act partially invalid.

#### *Cross-references:*

Decisions of the Supreme Court: 3-4-1-6-2000 of 28.04.2000, *Bulletin* 2000/1 [EST-2000-1-004]; 3-4-1-10-2000 of 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009].

European Court of Human Rights decisions: *Sunday Times v. the United Kingdom* 26.04.1979, *Special Bulletin ECHR* [ECH-1979-S-001]; *Burghartz v. Switzerland* 20.02.1994, *Bulletin* 1994/1 [ECH-1994-1-001]; *Stjerna v. Finland* 25.11.1994, *Bulletin* 1994/3 [ECH-1994-3-019].

#### *Languages:*

Estonian, English (translation by the Court).



## Finland

### Supreme Court Supreme Administrative Court

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There was no relevant constitutional case-law during the reference period 1 May 2001 – 31 August 2001.



## France

### Constitutional Council

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#### Introduction

The Constitutional Council was created by the Constitution of the Fifth Republic on 4 October 1958. It is a recent institution, without any institutional precedent.

The Constitutional Council is not situated at the summit of a hierarchy of judicial or administrative courts. In that sense it is not a Supreme Court.

#### I. Basic texts

- Constitution: Title VII, Articles 56 to 63 and Article 54 (Title VI); Articles 7, 16, 37, 41, 46 and 77;
  - Ordinance no. 58-1067 of 7 November 1958 incorporating an institutional act on the Constitutional Council, amended by Ordinance no. 59-223 of 4 February 1959 and by Institutional Acts no. 74-1101 of 26 December 1974, no. 90-383 of 10 May 1990, no. 95-63 of 19 January 1995; (Official Gazette of 9 November 1958, 7 February 1959, 27 December 1974, 11 May 1990 and 20 January 1995);
  - Decree no. 59-1292 of 13 November 1959 on the obligations of members of the Constitutional Council (Official Gazette of 15 November 1959);
  - Decree no. 59-1293 of 13 November 1959 on the organisation of the General Secretariat of the Constitutional Council (Official Gazette of 15 November 1959);
  - Referendum Act no. 62-1292 of 6 November 1962 on the election of the President of the Republic by direct universal suffrage, amended by Institutional Acts no. 76-528 of 18 June 1976, no. 83-1096 of 20 December 1983, Nos. 88-35 and 88-36 of 13 January 1988, no. 88-226 of 11 March 1988 and no. 90-393 of 10 May 1990, no. 95-62 of 19 January 1995, no. 95-72 of 20 January 1995, no. 99-209 of 19 March 1999, no. 2001-100 of 5 February 2001; (Official Gazette of 7 November 1962, 19 June 1976, 21 December 1983, 15 January 1988, 12 March 1988, 11 May 1990, 21 January 1995 and 22 January 1995, 21 March 1999, 5-6 February 2001);
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- Decree no. 2001-213 of 8 March 2001 implementing the Law of 6 November 1962 on the election of the President of the Republic by direct universal suffrage (Official Gazette of 21 March 1999);
- Institutional Act no. 99-209 of 19 March 1999 on the Statute of New Caledonia (Art. 99 to 107) (Official Gazette of 21 March 1999);
- Electoral Code (Articles directly concerning the Constitutional Council): L.O. 136, L.O. 136-1, L.O. 137 to L.O. 153, L.O. 159, L.O. 160, L.O. 176-1, L.O. 179 to 189, L.O. 292, L.O. 297, L.O. 303, L.O. 319, L.O. 325;
- Regulations governing the procedure to be followed before the Constitutional Council in disputes concerning the election of deputies and senators, amended by the decisions of the Constitutional Council of 5 March 1986, 24 November 1987, 9 July 1991 and 28 June 1995; (Decision of the Constitutional Council of 14 May 1959; Official Gazette of 31 May 1959, 6 March 1986, 26 November 1987, 12 July 1991 and 29 June 1995);
- Regulation governing the procedure to be followed before the Constitutional Court in complaints concerning the conduct of referendums (Constitutional Council decision of 5 October 1988; Official Journal, 6 October 1988).
- Rules of Procedure on the archives of the Constitutional Council (Decision of the Constitutional Council of 27 June 2001; Official Gazette of 1 July 2001).

## II. Composition and organisation

### 1. Composition

The Constitutional Council is composed of nine members, one-third of whom are replaced every three years. The members of the Council are appointed by the President of the Republic and by the Presidents of each of the Parliamentary Assemblies (Senate and National Assembly). Former Presidents of the Republic are *de inure* life members of the Constitutional Council, provided they do not occupy a post incompatible with the mandate of Council member, in which case they are precluded from sitting.

The President of the Constitutional Council is appointed by the President of the Republic from among the members.

The members are appointed for a non-renewable nine-year term. However, where a member is

appointed to replace another member who is unable to complete his term of office, the term of office of the replacement may be extended for the duration of a complete mandate if, on expiry of the mandate of the member who was replaced, his replacement has not occupied the post for more than three years.

The members appointed take an oath before the President of the Republic.

There are no age or professional qualifications for membership of the Constitutional Council. The office is incompatible with membership of the government or the Economic and Social Council, and with any electoral mandate. Members are also subject to the same professional incompatibilities as members of parliament. During their term of office, members of the Council cannot be appointed to public posts or be promoted on merit if they are civil servants.

Members of the Constitutional Council can freely relinquish their functions and can be compulsorily retired from office in the event of incompatibility or permanent physical incapacity established by the Constitutional Council.

### 2. Procedure

The Constitutional Council is a permanent body whose sessions are organised as and when applications are referred to it. It only sits and passes judgment in plenary session. Its deliberations are subject to a quorum rule which requires the actual presence of seven judges. If opinions are equally divided, the President has the casting vote. There is no provision for dissenting opinions. The Council's discussions, in select or plenary session, and its votes are neither conducted in public nor published.

Each case is examined by a member of the Council, appointed rapporteur by the President. This does not apply to electoral disputes. In electoral disputes the examination of the case is entrusted to one of the three sections composed of three members chosen by lot, each of whom must have been appointed by a different authority.

The procedure is written and both parties are represented. However, following the Council's decision of 28 June 1995, the parties in electoral disputes may ask to be heard.

### 3. Organisation

A Secretary General appointed by decree by the President of the Republic heads the administrative services and the judicial service which is composed of administrative staff of the parliamentary assem-

blies, members of the judiciary or administrative courts and academics.

A documentation service assists in legal search operations. The secretariat also comprises a financial service, an external relations service, an information technology service and a recently created registry. The remainder of the staff are responsible for reception, secretarial, catering and transport services.

The Constitutional Council is financially autonomous. The President of the Council establishes its budget, the amount of which is included in the Finance Bill under the heading of common expenditure.

### III. Powers

The powers of the Constitutional Council, which reflect its specific area of jurisdiction, can be divided into two categories:

#### 1. Judicial authority, covering two types of disputes

##### a. Normative proceedings:

i. These proceedings involve abstract review only; they are optional in the case of ordinary laws or international agreements and mandatory for institutional acts and the rules of procedure of the parliamentary assemblies. This supervision is exercised after parliament has voted but before promulgation of the law, ratification or approval of an international agreement or entry into force of the rules of procedure of the assemblies. Optional referral can take place on the initiative either of a political authority (President of the Republic, Prime Minister, President of the National Assembly or of the Senate) or of 60 deputies or 60 senators.

ii. Under the amended Constitution of 20 July 1998, the Constitutional Council is also responsible for verifying the constitutionality of laws passed by the Congress of New Caledonia before they are published. Section 104 of Institutional Act no. 99-209 of 19 March 1999, passed under the new Constitution, details the procedure for referral. The High Commissioner, the Government of New Caledonia, the President of the Congress, the president of a provincial assembly or eighteen members of the Congress may now refer to the Council any New-Caledonian law that has been debated twice in Congress. In its decision no. 99-410 DC of 15 March 1999, the Council made it clear that no law might be challenged unless it had actually been debated twice;

##### b. Electoral and referendum disputes

The Constitutional Council decides on the lawfulness of presidential elections and the conduct of referendums of which it announces the results. It also decides on the lawfulness of parliamentary elections and the rules on eligibility and incompatibility of members of parliament.

Referrals on electoral matters to the Council, which are readily available to the electorate, have increased considerably following the enactment of legislation on the organisation and supervision of the funding of electoral expenses on which, in the case of parliamentary and presidential candidates, the Council adjudicates. At 31 December 2000, the Council had given 2 173 decisions on electoral questions, and 610 on legislation.

#### 2. Consultative powers

The Constitutional Council gives its opinion when officially consulted by the Head of State whenever Article 16 of the Constitution is applied and thereafter on decisions taken within that context.

Moreover, the government consults the Council on texts concerning the organisation of the election of the President of the Republic and referendums.

### IV. Nature and effects of judgments

All decisions are reached by the same formal procedure, comprising:

- the approval of the applicable texts and procedural stages;
- the presentation of the reasons in the form of recitals analysing the arguments put forward, setting out the principles applicable to the case and replying to the application;
- an operative part, divided into articles, sets out the solution adopted.

#### 1. Types of decision

The various types of decision can be identified by the letters which follow the registration number of the application.

Decisions are classified as follows:

- decisions on the constitutionality of legal rules carry the letters DC (review of conformity) or LP (laws passed by the Congress of New Caledonia);

- decisions on the division of powers between legislative and regulatory authorities carry the letters L (laws down-graded to regulations) or FNR (*fin de non recevoir* – objection as to admissibility, i.e. examined while the law was still being drafted);
- decisions on parliamentary electoral disputes carry the letters AN (*Assemblée nationale*) or S (*Sénat*) and an indication of the constituency or department.

## 2. Legal effects of decisions

The decisions of the Council are binding on the public authorities and all administrative and judicial authorities. No appeal lies against them. The legal force of the decision attaches not only to the judgment itself but also to the necessary reasons in support of it. However, the Constitutional Council does allow appeals on matters of material error in electoral cases.

Decisions on conformity (DC) lead to the total or partial striking down of the law but not its annulment, since they are handed down before promulgation of the law, the legal act required to bring it into force.

The effects of decisions concerning electoral disputes range from the voiding of ballot papers to the electoral procedures themselves and can include declaring that a candidate is ineligible and/or dismissing an elected candidate from office.

## 3. Publication

The Council's decisions are notified to the parties and published in the "*Journal officiel de la République française - Lois et décrets*" (Official Gazette of the French Republic) with the text of parliament's referral (since 1983) and the government's observations (since 1995).

An annual compendium of decisions is drawn up under the high authority of the Council about three months after the end of the reference year. It comprises the full text of decisions (not of opinions), and an analytical table, with an English translation since 1990.

The Constitutional Council has also published a twice-yearly review, *Les cahiers du Conseil constitutionnel* (Journals of the Constitutional Council), since 1996.

Lastly, the texts of the Council's rulings on constitutionality since it was established, and all its decisions since 1998, are available on its website.

## Conclusion

### 1. Assessment to date

In the three months from January to March 1994, the Constitutional Council delivered as many decisions on the constitutional verification of rules as in the 25 years from 1958 to 1974! This enormous increase is chiefly due to the combination of two factors:

- first of all, case law: in 1971, when giving judgment on the law governing associations, the Council incorporated in the rules of reference the text of the preamble to the Constitution and, incidentally, that of the 1946 Constitution and the 1789 Declaration of the Rights of Man and the Citizen. This development in case law establishes the role of the Council as the guarantor of rights and freedoms;
- secondly, constitutional factors: the 1974 revision extended the right of referral, hitherto reserved exclusively to the Presidents of the Assemblies, to a minority of parliamentarians.

### 2. Plans for the future

Several reforms are regularly proposed, the chief being:

- concrete constitutional review of specific laws on application by members of the public;
- changes in the procedure for appointing members.

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## Important decisions

*Identification:* FRA-2001-2-004

**a)** France / **b)** Constitutional Council / **c)** / **d)** 09.05.2001 / **e)** 2001-444 DC / **f)** Organic Law amending the expiry date of the term of office of the National Assembly / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.05.2001, 7806 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.16 **General Principles** – Proportionality.  
 4.4.2 **Institutions** – Head of State – Appointment.  
 4.5.3.3.1 **Institutions** – Legislative bodies – Composition – Term of office of the legislative body – Duration.

*Keywords of the alphabetical index:*

National Assembly, mandate, extension.

*Headnotes:*

The Act extending by eleven weeks the terms of office of currently serving members of the Chamber of Deputies does not infringe the constitutional principle that elections must be held at regular intervals, the purpose of the extension being to ensure that the presidential election – of key institutional importance within the Fifth Republic – takes place before the terms of office expire.

*Summary:*

Having been asked by the Prime Minister on 25 April 2001 to examine the organic law fixing the expiry date for the term of office of the National Assembly, starting from the present legislature, at the third Tuesday in June of the fifth year following the

Assembly's election, the Constitutional Council found the Act to be compatible with the Constitution. It noted that parliament's aim of ensuring that election of the President by direct universal suffrage took place before the parliamentary elections, given the presidential election's role in the functioning of the institutions of the Fifth Republic, contravened no principle or rule laid down in the Constitution. It also decided that extending the current terms of office by eleven weeks was not disproportionate to that aim.

#### *Languages:*

French.



#### *Identification:* FRA-2001-2-005

**a)** France / **b)** Constitutional Council / **c)** / **d)** 19.06.2001 / **e)** 2001-445 DC / **f)** Organic Law on judges and legal officers on the Judicial Service Commission / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.06.2001, 10125 / **h)** CODICES (French).

#### *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.

4.7.4.1.5.3 **Institutions** – Judicial bodies – Organisation – Members – Status – Irremovability.

5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

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

5.2.3 **Fundamental Rights** – Equality – Affirmative action.

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

Election to a profession, gender parity.

#### *Headnotes:*

Whereas an organic law can provide for mobility of judges and legal officers of the national legal service by limiting the length of time they are allowed to occupy certain judicial posts, it must ensure that the

effects of doing so are compatible with the irremovability of judges.

The law's requirement of strict alternation between men and women in lists of candidates for election to the Judicial Service Commission is incompatible with the principle of equal access to public-sector posts arising from Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen.

#### *Summary:*

On 19 June 2001, the Constitutional Council found that, except in one respect, the organic Law on the employment conditions of judges and legal officers of the national legal service and on the Judicial Service Commission, as communicated to it on 31 May by the Prime Minister, was compatible with the Constitution. In particular, the provisions of Articles 3 to 6 limiting the length of judges' occupancy of certain posts were not incompatible with judges' irremovability in light of the guarantees with which the law provided the occupants of the posts when their term of office expired.

However, Article 33 unacceptably provided that lists of candidates for election to the Judicial Service Commission had to comprise an equal number of male and female candidates. Such a restriction breached Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen ("All citizens... are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents"). The constitutional amendment of 8 July 1999, which required that the law promote equal access for women and men to electoral seats and other elected offices, was limited to political elections and did not apply in this case.

#### *Cross-references:*

- Cf. on the requirement of gender parity in political elections, the decision of 30.05.2000 (2000-429 DC), *Bulletin* 2000/2 [FRA-2000-2-006].

#### *Languages:*

French.





*Identification:* FRA-2001-2-006

**a)** France / **b)** Constitutional Council / **c)** / **d)** 27.06.2001 / **e)** 2001-446 DC / **f)** Act on Voluntary Termination of Pregnancy and Contraception / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.07.2001, 10828 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.17 **General Principles** – Weighing of interests.  
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.  
 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.  
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

*Keywords of the alphabetical index:*

Abortion, legal time limit.

*Headnotes:*

With respect to an Act extending the legal time-limit for pregnancy terminations from 10 to 12 weeks (from the start of the pregnancy), the Constitutional Council rejected objections alleging violation of the principle of respect for human beings from the beginning of life, violation of the right to human dignity and protection against all forms of degrading treatment, and violation of the right to freedom of conscience for heads of public health services.

*Summary:*

The Constitutional Council dismissed an appeal brought by more than sixty senators concerning the Act on Voluntary Termination of Pregnancy and contraception and found that extending the legal time limit for terminations from 10 to 12 weeks (running from the start of pregnancy) in cases where the woman was in a state of distress due to her condition was not incompatible with the Constitution. In particular, it rejected the objections based on violation of the principle of respect for human beings from the beginning of life, violation of the right to human dignity and protection against all forms of degrading treatment and violation of the right to freedom of conscience for heads of public health services. The legislator had struck a balance between all the relevant factors in the Constitution, including the personal freedom of women who found themselves in distress owing to their condition.

*Languages:*

French.

*Identification:* FRA-2001-2-007

**a)** France / **b)** Constitutional Council / **c)** / **d)** 27.06.2001 / **e)** / **f)** Decision on the archives of the Constitutional Council amending the Rules of Procedure / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 01.07.2001, 10590 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.1 **Constitutional Justice** – Constitutional jurisdiction – Statute and organisation.

*Keywords of the alphabetical index:*

Constitutional court, archives, legal rules / Constitutional court, Rules of Procedure.

*Headnotes:*

The Constitutional Council set a 60-year time-limit for free public access to material in its archives.

*Summary:*

On 27 June, the Constitutional Council decided to add rules governing its archives to its Rules of Procedure. It set a 60-year time-limit for free public access to documents generated by its work (60 years is the time-limit in the ordinary rules on public archives, Act no. 79-18 of 3 January 1979, for documents affecting national security). Before the time-limit, however, permission to consult its archives could be granted on certain conditions laid down by the Council. The rules on the contribution of documents to the French national archives were those generally applying to public archives. Article 63 of the Constitution provided that the Constitutional Council's operating rules and procedure must be laid down in organic legislation, but the Constitution was silent regarding the rules applicable to the Council's archives. The decision, which enabled the Council to

decide its own Rules and procedure, therefore filled a gap in the law.

*Languages:*

French.



*Identification:* FRA-2001-2-008

**a)** France / **b)** Constitutional Council / **c)** / **d)** 04.07.2001 / **e)** 2001-449 DC / **f)** Act on Voluntary Termination or Pregnancy and Contraception / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.07.2001, 10835 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

1.2.1.2 **Constitutional Justice** – Types of claim – Claim by a public body – Legislative bodies.

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

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

*Keywords of the alphabetical index:*

Promulgation, time-limit / Constitutional appeal, act already examined.

*Headnotes:*

Once the Constitutional Council has handed down its decision on an Act, it cannot be asked to examine the Act again, even if the time-limit for promulgation has not yet expired.

*Summary:*

In its Decision no. 2001-449 DC of 4 July 2001, the Constitutional Council dismissed an appeal brought by sixty members of the Chamber of Deputies on 29 June 2001 challenging the Act on Voluntary Termination of Pregnancy and Contraception on which it had already ruled (no. 2001-446 DC, see in the same issue [FRA-2001-2-006]) on 27 June 2001. It could not re-examine an Act on which it had already

handed down a decision, otherwise the deadlines for promulgation laid down in the Constitution (45 days from an Act's final adoption by parliament) might prove impossible to meet.

*Cross-references:*

- Cf. in a similar case, where the Constitutional Council was asked to examine an Act that had already been promulgated, the decision of 07.11.1997 (97-392 DC), *Bulletin* 1997/3 [FRA-1997-3-005];
- Decision of 27.06.2001 (2001-446 DC), see in the same issue [FRA-2001-2-006].

*Languages:*

French.



*Identification:* FRA-2001-2-009

**a)** France / **b)** Constitutional Council / **c)** / **d)** 25.07.2001 / **e)** 2001-448 DC / **f)** Organic Law on Finance Acts / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.08.2001, 12490 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

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

4.7.10 **Institutions** – Judicial bodies – Financial courts.

*Keywords of the alphabetical index:*

Auditor-General's Department, independence / National life, continuity / Finance Act, proper examination.

*Headnotes:*

In providing that no Act with financial consequences for the state can be published without a financial appendix setting out those consequences for the year the Act comes into force and the following year, the organic Law on Finance Acts violates the principle

that promulgation by the President of the Republic constitutes an order to all the competent authorities and departments to publish it without delay.

In giving the parliamentary finance committees control over the Court of Audit's audit programme ("programme des contrôles"), the organic Law on Finance Acts undermines the Department's independence.

There are rules designed to ensure parliament is well-informed that place new obligations on central government services as regards timetable, background research and information. If, by force of circumstance, one or other of these rules was not met within the required time-limits, the rules should not be interpreted as preventing debate on the Finance Act. It is then for the Constitutional Council to examine whether the Finance Act has complied with the Constitution and the organic law, and in doing so the Council has regard to the need to ensure continuity of national life and the requirement that examination of the Finance Act be full enough at all stages to be satisfactory.

#### *Summary:*

Having been asked by the Prime Minister to examine the organic Law on Finance Acts, the Constitutional Council found that on the whole it was compatible with the Constitution and had the requisite character. In particular, it accepted that, for purposes of debate on the Finance Act, it must be each package as a whole that was voted on. However, it rejected Article 33.1, which, in preventing laws with financial consequences for the state from being published without a financial appendix, breached the rule that promulgation by the President of the Republic constituted an order to publish legislation without delay. It also rejected Article 58.1, which, in giving the parliamentary finance committees control over the Court of Audit's programme of audit, undermined the Department's independence. The decision included several reservations as to interpretation and a number of clarifications. The most important reservation concerned the many provisions of the organic law which, in order to give parliament more powers to supervise the preparation and implementation of Finance Acts, required central government services to meet various new obligations regarding timetable, background research and information. If, by force of circumstance, any of these obligations were not met within the specified time-limit, the rules were not to be interpreted as preventing debate on the Finance Act. It would then be for the Constitutional Council to examine whether the Finance Act had complied with the Constitution and the new organic law, and in doing so it would have regard to the need

to ensure continuity of national life and the requirement that examination of the Finance Act be full enough at all stages to be satisfactory.

#### *Languages:*

French.



## Georgia Constitutional Court

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Summaries of important decisions of the reference period 1 May 2001 – 30 August 2001 will be published in the next edition, *Bulletin* 2001/3.



## Germany Constitutional Court

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Summaries of important decisions of the reference period 1 May 2001 – 30 August 2001 will be published in the next edition, *Bulletin* 2001/3.



## Greece

### Council of State

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#### Important decisions

*Identification:* GRE-2001-2-001

**a)** Greece / **b)** Council of State / **c)** Assembly / **d)** 27.06.2001 / **e)** 2283/2001 / **f)** **g)** / **h)**.

*Keywords of the systematic thesaurus:*

3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.

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

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

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

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

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

*Keywords of the alphabetical index:*

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

*Headnotes:*

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

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

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

*Summary:*

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

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

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

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

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

#### *Languages:*

Greek.



# Hungary

## Constitutional Court

### Statistical data

1 May 2001 – 31 August 2001

- Decisions by the plenary Court published in the Official Gazette: 10
- Decisions by chambers published in the Official Gazette: 15
- Number of other decisions by the plenary Court: 11
- Number of other decisions by chambers: 22
- Number of other (procedural) orders: 21

Total number of decisions: 799

### Important decisions

*Identification:* HUN-2001-2-005

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 14.05.2001 / **e)** 13/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/55 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

3.16 **General Principles** – Proportionality.

5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.

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

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

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

*Keywords of the alphabetical index:*

Prisoner, media, communication / Prison, official, control / Censorship.

*Headnotes:*

Regulations enacted by parliament which authorised censorship of prisoners' communications with the media were unnecessarily broad, since the regulations were not limited to cases when national security, state secrets or the security and order of prisons were in danger.

*Summary:*

The President of the Republic refused to sign an amendment to the Legislative Decree on Executing Punishments and other Punitive Sanctions. The proposed amendment required the permission of the prison official before publishing or broadcasting an interview, a talk or simply a statement of a prisoner. The prison official can refuse to give this permission, if it is necessary in the interests of national security, public safety, for the protection of the reputation and personal rights of others, or for the prevention of crime or preventing the disclosure of state secrets, official secrets or other information received in confidence as well as for maintaining security and order in the prison.

Before promulgating the amendment, the President requested the Constitutional Court, to review the constitutionality of the regulations restricting communications between prisoners and the media. According to the President, the prison regulation at issue restricts the prisoners' freedom of speech in a disproportionate way. The only constitutionally legitimate reason for such censorship could be the interest of maintaining the safety and order of penal facilities.

In itself it is not unconstitutional that the communication between prisoners and the media is subject to controls. The incarceration, however, must not be the sole reason and ground for restricting free speech. Upon incarceration, a prison inmate loses only those free speech rights which are inconsistent with the legitimate penal objectives of the prison system. This should be taken into account when asking the question of the extent to which those incarcerated may have access to the media.

The Constitutional Court, when analysing the regulation, examined each of the reasons for the restriction individually. As a consequence, the Court found unconstitutional that part of the challenged provision which allowed the prison official to refuse permission if he or she thought that the statement of the prisoner might risk public safety, violate the reputations or personal rights of others, or if he or she thought it necessary to prevent crime of the

disclosure of official secrets. The proposed amendment restricted prisoners' freedom of expression in an unnecessarily broad way, even when there was no legitimate penal justification for refusing permission to communicate with the media. As a result, the Constitutional Court declared unconstitutional the regulation permitting broad censorship of communication between prisoners and the press.

The Court held the proposed amendment was unconstitutional for other reasons as well. The regulation contains unclear notions, such as the definition of the press or of other information received in confidence, which do not have a special meaning in the Hungarian legal system. As the Constitutional Court declared in its Decision no. 11/1992, legal certainty is infringed if the wording of a law is not sufficiently clear and unambiguous.

According to the Court, it was acceptable to control the communication of prisoners with the media in the interests of national security or if it is needed to prevent disclosure of state secrets, or to protect the security and order of penal facilities.

#### *Supplementary information:*

One of the Justices attached a concurring opinion to the judgment. According to Justice Kukorelli, before discussing other issues, the Court should have examined whether the authorised censorship of the communication between prisoners and the media is in accord with the Constitution and the Constitutional Court's jurisprudence. Since censorship is the most restrictive method of limiting the fundamental right to freedom of expression, prior restraint can only be justified in very special and limited cases, and if it is clearly defined. Under the proposed rule challenged by the President, prison officials had an almost absolute authority to censor prisoners' communications. Therefore, the regulation restricted the freedom of expression in a disproportionate, and consequently unconstitutional, way.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-2001-2-006

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 01.06.2001 / **e)** 17/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/61 / **h)**.

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

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

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

4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – Status.

5.3.13.14 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Impartiality.

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

Judge, exclusion / Impartiality, subjective / Serving, trial judge.

#### *Headnotes:*

It is in accordance with the principle of a fair trial and its fundamental element, the impartiality of the judge, that the judge who notifies the Court about his or her impartiality must not serve as a trial judge in a given case.

#### *Summary:*

A judge of a city court initiated the proceedings before the Constitutional Court, because in the course of a pending case he considered Article 35.1.c of the Code of Criminal Procedure to be unconstitutional. Under this provision, judges who notified the judiciary about their bias in a particular case should be disqualified from service as trial judges in those cases until their notification has been fully processed and the issue resolved.

According to the petitioner, the provision was unconstitutional, because it was open to more than one interpretation and the wording made it possible for the president of the court to overrule the notification of the judge and to compel that judge to continue to sit at the court.

Under the Code of Criminal Procedure, the judiciary is compelled to respect the general legal principle that judges must be both subjectively and objectively impartial. Subjective impartiality means that the judge has to be aware of their own impartiality. When the judge notifies the court about his or her bias, his or



her lack of impartiality is beyond doubt. The president of the court examines the notification on the judge's bias notwithstanding the fact that the judge himself gave the notification. It is important to have such a procedure in order to avoid false notifications. It is against the principle of judicial impartiality, however, that the provision could be interpreted in such a way that the judge can be coerced to continue serving as a trial judge after a valid notification. Judges should be impartial, and what is equally important is that the external appearance of the impartiality of judges should be preserved. The president of the court should not have a discretionary power concerning the question of impartiality. The judge who is biased in a given case, and who notifies the court about this, should be excluded from trying the case.

The Constitutional Court, instead of declaring the provision at issue null and void, maintained it in force with a given constitutional meaning. According to this, when applying Article 35.1.c of the Criminal Procedure Code, the judge who notifies the court about his or her bias must not serve as a trial judge in a given case.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-2001-2-007

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 11.07.2001 / **e)** 33/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/79 / **h)**.

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

5.3.13.14 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Impartiality.

5.3.13.18 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Rights of the defence.

5.3.13.19 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Equality of arms.

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

Judge, exclusion / Party, equality.

#### *Headnotes:*

The Criminal Procedure Code's restrictions, in cases involving the exclusion of judges, which allow the court to hear the statement of the prosecution but not the opinion of the accused or his counsel, violates the principle of equality of arms, the impartiality of judges and the right to a defence.

#### *Summary:*

A petitioner submitted a constitutional complaint to the Constitutional Court asserting that he was aggrieved by the fact that, at his trial, the courts applied an unconstitutional provision. Under this provision of the Criminal Procedure Code, the appellate court was to obtain the statement of the prosecution when deciding on the issue of whether a specific motion calling for exclusion of a judge was founded or not. In the petitioner's view, this rule infringed the principle of equality of arms, the impartiality of judges and the right to a defence. Article 57 of the Constitution contains *inter alia* the rights to judicial legal protection, to an impartial, fair and public trial, and the right to a defence.

The principle of equality of the parties in legal proceedings is a cardinal principle of procedural fairness. It is enshrined in Article 57 of the Constitution. The challenged provision of the Criminal Procedure Code required the court to hear the statement of the prosecution, but not the opinion of the defence in a case involving the exclusion of a judge. Moreover, the provision did not even require the accused or his counsel to be notified about the exclusion procedure. Therefore, it was often the case that the accused was not informed about proceedings to exclude the trial judge. The defence became aware of the fact that the president of the court appointed a new judge only after the appointment. In this way, the defence did not have the opportunity to make comments on the exclusion itself and on the newly appointed judge.

The Constitutional Court declared the challenged provision null and void, since it was held to be unconstitutional.

*Languages:*

Hungarian.



## Italy

### Constitutional Court

#### Important decisions

*Identification:* ITA-2001-2-005

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 07.05.2001 / **e)** 131/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 20/23.05.2001 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources.

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

5.3.26 **Fundamental Rights** – Civil and political rights – National service.

*Keywords of the alphabetical index:*

Military service, refusal to perform / International law, generally accepted legal rule.

*Headnotes:*

The Court finds the provisions of the 1912 Citizenship Act and the 1964 Military Service Act to be unconstitutional insofar as they fail to provide for exemption from Italian military service for all those who no longer have Italian citizenship as a result of having become citizens of another country.

The ground for such unconstitutionality is the incompatibility of the legal rules referred to the Court – according to which subjects who no longer have Italian citizenship as a result of having acquired citizenship of another country where military service is not compulsory are still required to perform military service in Italy – with Article 10 of the Constitution which states that the Italian legal system must “conform with” general international law. In this respect, the Court found that there is a rule of general international law which prevents countries from requiring citizens of other countries to perform national service. This rule must also apply to those

who no longer have Italian citizenship as a result of having become citizens of another country.

### Summary:

The Military Court of Appeal questioned the constitutionality of legal rules which provide that in certain specific cases even people who have lost Italian citizenship are required to do national service in Italy. The case brought before the Court concerned a former citizen of Italy who, after obtaining Canadian citizenship and consequently losing Italian citizenship, had been convicted by a court of first instance of evading military service.

### Supplementary information:

Even though the new Citizenship Act which came into force on 15 August 1992 provides that anyone who has given up Italian citizenship is no longer required to do military service, the question raised is relevant (*rilevante*) insofar as the present case concerns someone convicted of refusal to perform military service before the new Act came into force. The party in question had become a national of Canada, where there is no compulsory military service.

### Cross-references:

Previous decisions of the Court on this subject (no. 974 of 1988 and no. 278 of 1992) cannot settle the question raised in this case. In the first case, the same legal rules had been found to be unconstitutional insofar as they failed to provide for exemption from Italian military service for people who had given up their Italian citizenship upon becoming citizens of a country "where they had already completed military service". In the second, the Court extended unconstitutionality to cases where the acquired citizenship concerned a country where military service was compulsory, even if the party concerned had not yet completed military service in that country.

### Languages:

Italian.



### Identification: ITA-2001-2-006

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 05.07.2001 / **e)** 252/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 29/25.07.2001 / **h)** CODICES (Italian).

### Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.  
 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.  
 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.  
 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

### Keywords of the alphabetical index:

Foreigner, treatment, health / Foreigner, residence, unlawfulness

### Headnotes:

The Court found the question concerning the constitutionality of a provision of the law governing foreigners' entry into Italy and their residence there, on the ground that it violated Articles 2 and 32 of the Constitution (on the protection of fundamental rights and the right to health respectively), to be unfounded. The provision was referred to the Court by a lower court which held that it did not prevent the expulsion of a foreigner who, after entering the country illegally, stays there for the sole purpose of receiving essential health treatment.

The Court handed down an interpretative decision dismissing the case and interpreting the legal rules on foreigners (legislative Decree no. 286 of 1998) to mean that an expulsion order issued to someone residing illegally in the country cannot be enforced if it causes irreparable damage to that person's health.

### Summary:

According to a principle upheld on several occasions in the Court's decisions, the right to essential health treatment is "conditional on the Constitution" insofar as it must be "balanced" with other interests protected under the Constitution. However, the right to health, as protected under the Constitution, is incompatible with the existence of situations totally lacking in protection. Consequently, the right to health has a "hard core" which, as a fundamental human right, must also be granted to foreigners, regardless of where they stand in relation to the domestic legal rules on entry and residence. In all events, foreigners

are entitled to receive any medical treatment they require on account of their state of health. It is precisely in order to ensure that foreigners in Italy enjoy the right to health regardless of the circumstances surrounding their presence in the country that the law provides that their access to health structures shall not be subject to any notification issued to the public authorities except where a medical report is compulsory, in which case the conditions of such notification must be the same as for Italian citizens.

*Cross-references:*

Concerning the right to health, the decision refers to Judgments nos. 509 of 2000 (*Bulletin* 2000/3 [ITA-2000-3-008]), 309 of 1999 (*Bulletin* 1999/2 [ITA-1999-2-007]), and 267 of 1998 (*Bulletin* 1998/2 [ITA-1998-2-005]).

*Languages:*

Italian.



## Japan Supreme Court

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There was no relevant constitutional case-law during the reference period 1 May 2001 – 31 August 2001.



## Kazakhstan Constitutional Council

Summaries of important decisions of the reference period 1 May 2001 – 30 August 2001 will be published in the next edition, *Bulletin* 2001/3.



## Republic of Korea Constitutional Court

### Important decisions

*Identification:* KOR-2001-2-001

**a)** Korea (Republic) / **b)** Constitutional Court / **c)** Full Bench / **d)** 04.10.1996 / **e)** 93Hun-Ka13 / **f)** Motion Pictures Pre-Inspection / **g)** *Korean Constitutional Court Report* (Official Digest) / **h)** *The first ten years of the Korean Constitutional Court*, 2001, 150.

*Keywords of the systematic thesaurus:*

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

5.4.21 **Fundamental Rights** – Economic, social and cultural rights – Artistic freedom.

*Keywords of the alphabetical index:*

Censorship, film / Motion picture, licence.

*Headnotes:*

A motion picture is a form of expression and its production and showing should be protected by the Constitution. An administrative authority's act of deliberating on the contents of an idea or opinion and preventing it from being published on the basis of its contents constitutes censorship. A system that subjects all motion pictures to pre-inspection by an administrative authority and prohibits showing of any unlicensed picture upon penalty of imprisonment or fine is unconstitutional.

*Summary:*

Articles 12.1, 12.2, 13.1, and 32.e of the old Motion Picture Act ("MPA") require all motion pictures to be evaluated by the Public Performance Ethics Committee ("the Ethics Committee") before showing. Failure to do so is punishable by imprisonment of up to two years or a fine of up to five million won.

Article 21.1 of the Constitution stipulates "every citizen shall have the freedom of speech and of press as well as that of assembly and association", providing general protection for freedom of expres

sion. The second part of the same article bans censorship or licensing of the speech and press, and licensing of assembly and association.

The case arose out of motions for constitutional review by the claimants who were brought to the Seoul District Criminal Court for violating the MPA by showing *Opening the Closed Gate to the School* in 1992 and *Oh, Country of Dream* in 1989 respectively without pre-inspection of the Ethics Committee.

The Court struck down the requirement of pre-inspection by the Ethics Committee provided in Articles 12.1, 12.2 and 13.1 of the MPA, referring to the constitutional protection of motion pictures and the principle of prohibition of censorship.

A motion picture is a form of expression and its production and showing should be protected by Article 21.1 of the Constitution (freedom of speech and press). It is protected also under Article 22.1 of the Constitution (freedom of science and arts) since it is often used as a means to publish the results of academic research or as a form of art.

Censorship, forbidden by Article 21.2 of the Constitution, is an administrative authority's act of deliberating on the contents of an idea or opinion and preventing it from being published on the basis of its contents – in other words, a ban on publication of the unlicensed material. Censorship debilitates originality and creativity of people's artistic activities, poses a grievous danger to their mental functions and may suppress in advance ideas adverse to the government or the ruler, leaving at large only the opinions controlled by the government or ideas innocuous to it.

Compared to Article 37.2 of the Constitution that allows all liberties and rights of the people to be limited by means of statute for reason of national security, public order or public welfare, Article 21.2 of the Constitution stands for prohibition of censorship as a means at all, even if in the form of a statute, when freedom of press and publication is at stake. However, unconstitutional censorship is only a system of pre-inspection conducted by an administrative body with complete control on whether a material can be published or not, based on compulsory submission and supported by a mechanism enforcing the ban in the event that it is not licensed.

The Motion Picture Act subjects all motion pictures to pre-inspection of the Ethics Committee (Article 12.1), which is commissioned by the Minister of Culture and Sports (Article 25.c.3), reports the inspection results to the Minister through its Chairperson, is funded from the government budget to support its operation (Article 25.c.6), and therefore is an administrative

body for all practical purposes. The Act finally prohibits showing of any unlicensed picture (Article 12.2) upon penalty of imprisonment or fine, meeting all the elements of censorship forbidden by the Constitution.

#### *Supplementary information:*

On 31 October 1996, about a month after this case, the Court issued another decision of unconstitutionality in the *Phonograph Pre-Inspection* case (94Hun-Ka6), a case with practically the same constitutional controversy. This case arose out of a motion for constitutional review by a singer being prosecuted and tried at the Seoul District Criminal Court for having produced and distributed records which had not been inspected. The District Court referred this challenge to the Sound Records and Video Products Act to the Constitutional Court, which struck it down unanimously for the same reason as in the Motion Picture Act case.

#### *Languages:*

Korean, English (translation by the Court).



# Latvia

## Constitutional Court

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### Statistical data

1 May 2001 – 31 August 2001

Number of cases: 2

### Important decisions

*Identification:* LAT-2001-2-003

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 26.06.2001 / **e)** 2001-02-0106 / **f)** On Compliance of the Transitional provisions of the Law on State Pensions (on length of insurance period for foreign citizens and stateless persons whose permanent place of residence on 1 January 1991 has been the Republic of Latvia) with the Constitution and with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the First Protocol to the Convention / **g)** *Latvijas Vestnesis* (Official Gazette), 99, 27.06.2001 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

*Keywords of the alphabetical index:*

Non-citizen, social insurance / Normative act / Pension, principle of solidarity / Pension, principle of insurance.

*Headnotes:*

A legal norm establish that foreign citizens and stateless persons, whose permanent place of residence until January 1991 was Latvia, were only allowed to include their periods of employment in Latvia but not those when they worked abroad, when assessing the length of the insurance period for calculating their state pension was held not violate these individuals' social rights, as protected by the Constitution.

The pension system, which existed in Latvia up until January 1991, and which was based on the principle of solidarity, did not create "possessions" within the meaning of Article 1 Protocol 1 ECHR.

*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 Pensions with the Constitution (*Satversme*), and with Article 14 ECHR and Article 1 Protocol 1 ECHR.

The disputed legal norm established that the length of the insurance period for calculating the state pensions of foreign citizens and stateless persons, whose permanent place of residence until January 1991 had been Latvia, included only periods of employment in Latvia. Periods of employment abroad, up until January 1991, were not to be included in the as part of the period of insurance.

The applicants pointed out that the disputed legal norm limited the right of permanent residents of Latvia – non-citizens, foreign citizens and stateless persons – to the state pension, even though up to 1 January 1991 all the residents of Latvia – citizens, non-citizens, foreign citizens and stateless persons – made the same pension contributions, and the length of service required in order to receive the pension was calculated on the basis of the same unified social insurance system and on the same principles. The applicant noted that Article 109 of the Constitution established that "everyone has the right to social security in old age, to disability benefits, to unemployment benefit, and in other cases as provided by law", and that Article 91 established that human rights should be implemented without any discrimination. Therefore, the applicant considered that the Constitution prohibited discrimination on the grounds of citizenship and that the expression "everyone" meant every inhabitant of Latvia, including non-citizens, foreign citizens and stateless persons. The applicant also pointed out that Article 14 ECHR, taken

with Article 1 Protocol 1 ECHR, had been violated. The applicant considered that pensions constituted “possessions” within the meaning of Article 1 Protocol 1 ECHR and referred to the European Court of Human Rights case of *Gaygusuz v. Austria*.

The Constitutional Court held that in the Soviet times the pension system was based on the principle of re-division, which did not encourage employees to make provision for their old age. Therefore, after the renewal of independence, it became necessary to formulate a new pension system, and the Law on State Pensions was adopted in 1995. The law radically changed the classical principle of solidarity. It introduced a mandatory system based on insurance principles. According to the law, the amount of the state pension shall depend on the length of insurance, which is constituted from periods of employment and periods regarded as equal to employment. None of this depends on the citizenship of a person. The new pension scheme is the “property”-creating system. A person makes payments into defined funds, creating an individual share, the amount of which may be calculated at any moment. The pension system which existed in Latvia up to January 1991 was based on the principle of solidarity, which established the responsibility of the community as a whole and did not create a link between the payment of contributions and the amount of the pension. According to the principle of solidarity, it was not possible to establish which part of the fund belonged to an individual participant. Therefore, the right to possessions protected by Article 1 Protocol 1 ECHR was not created. The disputed legal norm is not covered by Article 1 Protocol 1 ECHR and does not violate Article 14 ECHR.

According to Article 109 of the Constitution, everybody has the right to social guarantees and benefits in old age, but the article sets out neither a particular age nor the amount of the pension and the specific conditions of the pension scheme. The nature and the principles of the Latvian pension system objectively justify the differentiated approach, established by the disputed legal norm. Thus it may not be regarded as discrimination, and Articles 91 and 109 of the Constitution are not violated.

Latvia has concluded bilateral agreements on social security with several states. These agreements specify the rights and obligations of the contracting parties regarding social security.

As the disputed norm does not violate Articles 91 and 109 of the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, it does not contradict Article 89 of the Constitution, which establishes that “the state shall

recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia”.

The applicants also questioned the norm in connection with the rights of non-citizens. Non-citizens are a group of people with a specific legal status, provided by the special “Law on Non-Citizens”. In Latvian law, groups such as non-citizens, foreign citizens and stateless persons are strictly determined. The term “non-citizens” was not mentioned in the disputed legal norm. Nothing suggests that the notion of “stateless person” includes also non-citizens. Therefore, the legislator did not regulate the issue on whether to include the periods of employment of non-citizens up to 1991 in calculating the length of insurance. The Constitutional Court may evaluate only legal norms, which are formulated in normative acts, and cannot evaluate the compliance of a non-existent norm with a legal norm of higher legal force. However it should be taken into consideration that non-citizens are a part of the inhabitants of Latvia and the legislator should regulate the issue on including periods of employment abroad by non-citizens up to January 1991 in calculating the length of insurance.

The Constitutional Court decided the disputed norm was in compliance with Articles 89, 91 and 109 of the Constitution and Article 14 ECHR and Article 1 Protocol 1 ECHR.

#### *Cross-references:*

Cases of the European Court of Human Rights:

- *Gaygusuz v. Austria*, *Bulletin* 1996/3 [ECH-1996-3-012];
- *Marckx v. Belgium*, *Special Bulletin ECHR* [ECH-1979-S-002];
- *Sporrong and Lönnroth v. Sweden*, *Special Bulletin ECHR* [ECH-1982-S-002].

#### *Languages:*

Latvian, English (translation by the Court).





*Identification:* LAT-2001-2-004

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 25.07.2001 / **e)** 2001-03-04 / **f)** On Compliance of Cabinet of Ministers Regulation On the State Stock Company Diplomatic Service Agency (on incorporation of real estate into fixed assets of the Diplomatic Service Agency) with the Law on the Protection of Cultural Monuments and the Law on Objects of Education, Culture and Science of State Significance and National Sport Centres / **g)** *Latvijas Vestnesis* (Official Gazette), 112, 27.07.2001 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

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

2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.

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

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

3.13 **General Principles** – Legality.

*Keywords of the alphabetical index:*

Cultural institution / Culture policy, review.

*Headnotes:*

It did not contradict Latvian law to include the building, which housed the Latvian Photographic Artists' Society, in the fixed assets of a state stock company.

The Constitutional Court has no competence to evaluate the actions of the Cabinet of Ministers in the implementation of the cultural policy.

*Summary:*

The case was initiated by 20 members of the parliament (*Saeima*) who questioned the conformity of that part of the Cabinet of Ministers Regulation On the State Stock Company Diplomatic Service Agency which dealt with the incorporation of an investment property (6 Marstalu Street, Riga) into the fixed assets of the Diplomatic Service Agency, with the Law on the Protection of Cultural Monuments and the Law on Objects of Education, Culture and Science of State Significance and National Sport Centres.

The Law on Objects of Education, Culture and Science of State Significance and National Sport

Centres established that the Latvian Photographic Artists' Society (LPAS), whose legal address was 6 Marstalu Street, Riga, enjoyed "state significance" status. The LPAS rented premises at the above address. The petitioner's argued that an offer from the Diplomatic Service Agency, when the old agreement expired, to conclude a new lease agreement for an increased rent, would result in the liquidation of the LPAS.

The Constitutional Court held that according to the Law on the Protection of the Cultural Monuments "cultural monuments are the cultural heritage – landscape and separate territories ... as well as separate graves, groups of buildings and individual buildings, works of art, equipment and objects of historic, scientific or some other cultural value, whose conservation for the next generations is in the interests of the Latvian state as well as in international interests." LPAS, as a public organisation, was not and could not be a cultural monument. The building at 6 Martsalu Street is an outstanding old Riga monument, but the value of a building is not connected with the fact that LPAS resided in it. According to the Law on the Protection of Cultural Monuments, cultural monuments are to be used for scientific, educational and cultural purposes; their use for business activities is permissible only if this does not lessen their historical, scientific and artistic value. There were no evidences that incorporation of the building into the fixed assets of the Diplomatic Service Agency would damage it. Thus the disputed norm did not contradict the Law on the Protection of Cultural Monuments.

According to the Law on the Cultural Institutions, LPAS was not a state cultural institution; it was a private cultural institution. Changing the address of a public organisation does not mean it would cease liquidation.

The purpose of the Law on Objects of Education, Culture and Science of State Significance and National Sport Centres was to establish the status of objects of education, culture and science as well as national sport centres only in order to streamline land ownership-related matters in the cities of Latvia in accordance with the land denationalisation reforms. This law was only to be interpreted in the context of the Law on Land Reform in the Cities of Latvia. The objective of the law was not to make a list of objects of culture or to establish any other privileges. According to Article 12 of the law, property rights were not returned to the former landowners or their heirs if there are objects of education, culture and science of state significance on their former land. As for the property at 6 Marstalu Street, it could be seen from a copy of the Riga Land Register that the former

owner or his heirs had not submitted a claim for restitution of their property rights. According to Article 14 of the Law on the Land Reform in the Republic of Latvia Cities, in cases when property rights have not been returned to the former landowner because of reasons provided by the law, these rights have to be returned as soon as the above reasons cease to exist. The reason why property rights were not returned to the former owner is the fact that the claim was not submitted, and not the fact that LPAS had its offices in the building. Therefore Article 14 of the Law on the Land Reform in the Republic of Latvia Cities did not regulate the legal status of the property at 6 Marstalu Street and the disputed act did not contradict the above article.

LPAS was included in the list of the objects of culture of state significance of the Law on the Objects of Culture, Education and Science of State Significance and National Sport Centres. The law does not provide the listed institutions' property rights to the particular object of culture. The article does not mean that the enumerated objects of culture are state establishments. The purpose of the legislator has not been to grant the above institutions the status of state establishment or any other rights, not connected with the purpose of the law.

The civil dispute resulting from lease relations between LPAS and the landlord is within the competence of the courts of general jurisdiction

Therefore, the disputed act did not contradict the Law on the Objects of Education, Culture and Science of State Significance and National Sport Centres.

The applicants argued that the claim was directed against state cultural policy. The Constitutional Court has no competence to decide on the actions of the Cabinet of Ministers in the implementation of cultural policy and whether the Cabinet supports the institutions of culture, including LPAS.

The Constitutional Court decided the disputed norm was in compliance with the Law on the Protection of Cultural Monuments and the Law on Objects of Education, Culture and Science of State Significance and National Sport Centres.

### *Languages:*

Latvian, English (translation by the Court).



## Liechtenstein State Council

### Important decisions

*Identification:* LIE-2001-2-002

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 12.06.2001 / **e)** StGH 2000/65 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

- 3.16 **General Principles** – Proportionality.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
- 5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

*Keywords of the alphabetical index:*

Prisoner, private visit, supervision / Evidence, risk of destruction.

*Headnotes:*

Supervision of private visits received by a prisoner held on remand is an infringement of the right to personal development and therefore of the right to personal liberty as guaranteed by Article 32.1 of the Constitution. Such infringement is permissible only if it is proportionate.

There are no clear grounds for obliging a remand prisoner to accept supervision of private visits in all circumstances.

Such supervision may not be exercised unless it can be justified on the basis of suspicion that action may be taken against the purpose of detention or for other well founded reasons.

The supervision of visits received by a remand prisoner and the accompanying restriction of his

personal rights are disproportionate unless there are grounds for such a measure.

#### Summary:

The grounds given for arrest, namely the risk of destruction of evidence, having receded, the prisoner on remand asked that he no longer be supervised by prison officers when receiving private visits. The court of first instance (*Landgericht*) did not allow this application, and the Appeal Court (*Obergericht*) dismissed an appeal against this decision by reference to statutory provisions.

The State Council (*Staatsgerichtshof*) allowed a constitutional appeal against the decision on the grounds that the applicable law, Article 135.3 of the Code of Criminal Procedure (StPO), must be interpreted in the light of the Constitution and that the decision being challenged provided no grounds with which permanent supervision of private visits received by the remand prisoner could be justified.

#### Languages:

German.



## Lithuania

### Constitutional Court

#### Statistical data

1 May 2001 – 31 August 2001

Number of decisions: 6

All cases – *ex post facto* review and abstract review.

The main content of the cases was the following:

- Deprivation of the right to drive a vehicle (*ne bis in idem* principle): 1
- The competence of the government in dealing with the right to exchange residential premises and in the lowering of working hours: 2
- The principle of equality: 1
- The establishment and abolition of local governments, and the determination and amendment of their boundaries and centres: 1
- The reduction of judges' remuneration: 1

All final decisions of the Constitutional Court were published in the Lithuanian *Valstybės Žinios* (Official Gazette).

#### Important decisions

*Identification:* LTU-2001-2-006

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 07.05.2001 / **e)** 26/99 / **f)** On the deprivation of the right to drive a vehicle / **g)** *Valstybės Žinios* (Official Gazette), 39-1373, 09.05.2001 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Traffic offence, penalty, primary and additional / Traffic offence, points, deduction / Driving licence, suspension, penalty points.

*Headnotes:*

Article 31.5 of the Constitution provides that “no person may be punished for the same offence twice.” This provision reflects the principle of *ne bis in idem*. However, this principle does not mean that for any particular violation of the law, different types of responsibility may not be applied to a person at all and that for criminal or administrative offences he may not face additional punishments, as well as the main ones.

*Summary:*

The petitioner, the Šiauliai City District Court, appealed to the Constitutional Court requesting an investigation into the compliance of Article 130.2 of the Code of Administrative Violations of Law (CAVL) with Article 31.5 of the Constitution. Article 130.2 CAVL provides:

“For systematic violation of the Road Traffic Rules, i.e. commission of several violations provided for in the second, third, fourth and fifth paragraphs of Article 124, the first, third and fifth paragraphs of Article 124.1 and Article 125 of this code, in the course of one year, the sum of points given for which is ten and more, drivers shall be deprived of the right to drive a vehicle for one year.

Note: in the course of the imposition of this administrative penalty, the violation shall be assessed on a points basis: for the violation provided for in the second paragraph of Article 124 of this code, one point; the third paragraph, four points; the fourth paragraph, six points; the fifth paragraph, eight points; the first paragraph of Article 124.1, four points; the third paragraph, four points; the fifth paragraph, eight points; and Article 125, eight points.”

In the opinion of the petitioner, someone who has already been punished for particular violations also faces an administrative punishment for the fact that he has now committed a certain number of such violations.

The Constitutional Court noted that the assessment of violations of the Road Traffic Rules in points is not an administrative penalty. Under the legal regime established in CAVL, a person who has committed the last violation provided for in Article 130.2 CAVL is punished by the main administrative penalty (namely, a fine) according to the respective article (or paragraph thereof) of CAVL as well as by an additional administrative penalty under Article 130.2

CAVL. Thus, the legal regime established in Article 130.2 CAVL does not lead to the person being punished for the same deed twice.

*Languages:*

Lithuanian, English (translation by the Court).

*Identification:* LTU-2001-2-007

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.05.2001 / **e)** 4/2000 / **f)** On the right to exchange residential premises / **g)** *Valstybės Žinios* (Official Gazette), 41-1466, 18.05.2001 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.13 **General Principles** – Legality.  
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

*Keywords of the alphabetical index:*

Housing, exchange of apartments.

*Headnotes:*

A government resolution is a sub-statutory legal act. It must not conflict with any law, nor change the content of the norms of that law, nor may it contain any legal norms, which would compete with the norms contained in the law.

*Summary:*

The petitioner, the Klaipeda Regional Administrative Court, appealed to the Constitutional Court requesting an investigation into the compliance with the Constitution and Article 348.1 of the Civil Code (CC), of Item 3.2 of Appendix 1 (Standard Agreement relating to Residential Premises Rented in State-Owned or Public Houses – “Standard Agreement”) of the Standard Rules of Utilisation of Residential Houses or Apartments in State-Owned, Public or Private Dwellings and Upkeep of their Surroundings and Item 2 of the Rules of Exchange of Residential

Premises (which have been approved by a government resolution).

The petitioner specified that Article 348.1 of the CC provided that a tenant may exchange the council premises rented by him with another council tenant. This norm of the Civil Code does not expressly state that the tenant of such premises may exchange them with the owner of other premises or another tenant of the premises. Meanwhile, Item 2 of the Rules of Exchange of Residential Premises provides that the tenant or owner of residential premises shall have the right to exchange his residential premises with another tenant or owner from the same or another residential area, while Item 3.2 of the Standard Agreement provides that the tenant shall have the right to exchange his residential premises with another tenant, or a member of a residential house cooperative or the owner of a residential house or apartment.

The Constitutional Court noted that, compared with the range of individuals established in Article 348.1 CC, the Standard Agreement provides for a wider range of persons with whom a council tenant may exchange the residential premises. Moreover, the Standard Agreement provides for a different way of exchanging residential premises. The same regulation is also included in the Rules of Exchanging of Residential Premises. The Constitutional Court therefore ruled that the disputed norms conflicted with Article 348.1 CC.

Article 94.2 and 94.7 of the Constitution provides that the Government of the Republic of Lithuania shall implement laws and resolutions of the Seimas concerning the implementation of laws, as well as the decrees of the President of the Republic, and shall discharge other duties prescribed to the government by the Constitution and other laws. The Constitutional Court ruled that the disputed norms conflicted of Article 94.2 and 94.7 of the Constitution because the government did not meet the requirements established therein.

#### *Languages:*

Lithuanian, English (translation by the Court).



*Identification:* LTU-2001-2-008

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.05.2001 / **e)** 36/99 / **f)** On the establishment of reduced working hours / **g)** *Valstybės Žinios* (Official Gazette), 45-1595 of 30.05.2001 / **h)** CODICES (English).

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

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

3.13 **General Principles** – Legality.

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

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

Working hours, reduction.

#### *Headnotes:*

The establishment of a flexible regime for reducing working hours is in line with the provisions of the Constitution.

#### *Summary:*

The petitioner, the Higher Administrative Court, appealed to the Constitutional Court, requesting an investigation into the compliance of Item 3.3 of the Procedure for Establishing Reduced Working Days and Weeks (which had been approved by a government resolution) with Article 94.2 of the Constitution and Article 46.4 of the Law on Labour Protection.

The petitioner argued that Article 46.4 of the law provided that the procedure for establishing reduced working days or weeks should be established by the Government of the Republic of Lithuania, but that in fact Item 3.3 of the Procedure provided that upon agreement of a reduction in working time, one may provide for the shortening of a working day by a certain number of hours, by reducing at the same time the number of working days in the week.

The Constitutional Court noted that the fact that the law stated that the government should establish the procedure of reduced working days or weeks may not be construed as providing for an alternative to establish either only a reduced working day or only a reduced working week. Therefore, the Constitutional Court ruled that the disputed norm was in compliance with the law and the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).

*Identification:* LTU-2001-2-009

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 28.06.2001 / **e)** 9/2000 / **f)** On the establishment and abolition of local governments, and the determination and amendment of their boundaries and centres / **g)** *Valstybės Žinios* (Official Gazette), 56-1997 of 30.06.2001 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.8 **General Principles** – Territorial principles.  
 3.13 **General Principles** – Legality.  
 4.5.6 **Institutions** – Legislative bodies – Law-making procedure.  
 4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.  
 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.  
 5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in political activity.

*Keywords of the alphabetical index:*

Municipality, territory / Territorial law.

*Headnotes:*

The provision of Article 33.1 of the Constitution, that citizens shall have the right to participate in the government of their state both directly and through their freely elected representatives, is to be assessed not only as the right of citizens but also as a duty of institutions of power, including the legislator, to ask the opinion of local residents when decisions are adopted concerning changes to the boundaries of administrative-territorial units.

Under the Constitution, only parliament (*Seimas*), by means of a law, may determine administrative divisions and their boundaries and centres, or abolish existing local governments and establish new ones.

*Summary:*

The petitioner, a group of Members of parliament, appealed to the Constitutional Court requesting an investigation into the compliance of certain laws with the Constitution, and of a government resolution with the Constitution and with certain laws. The petitioner alleged that the procedure for enacting the disputed laws was violated.

The Constitutional Court ascertained that there were some violations of the procedure for enacting the disputed laws. Therefore, the Court ruled that the disputed laws contradicted the Constitution, and a government resolution, as well as certain other laws.

*Languages:*

Lithuanian, English (translation by the Court).

*Identification:* LTU-2001-2-010

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 12.07.2001 / **e)** 13/2000, 14/2000, 20/2000, 21/2000, 22/2000, 25/2000, 31/2000, 35/2000, 39/2000, 8/01, 31/01 / **f)** On the reduction of judges' remuneration / **g)** *Valstybės Žinios* (Official Gazette), 62-2276 of 18.07.2001 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.4 **General Principles** – Separation of powers.  
 3.9 **General Principles** – Rule of law.  
 3.11 **General Principles** – Vested and/or acquired rights.  
 4.7.4.6 **Institutions** – Judicial bodies – Organisation – Budget.  
 5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.

*Keywords of the alphabetical index:*

Judiciary, independence / Judge, remuneration, reduction / Judge, financial independence.

*Headnotes:*

Article 5 of the Constitution provides that, in Lithuania, the powers of the state shall be exercised by the parliament (*Seimas*), the President of the Republic and the government, and the Judiciary. In this and other articles of the Constitution, the principle of separation of powers is enshrined. The judiciary is the only state power assigned to administer justice. No other state institution or official may exercise that function. Only an independent and fully competent judiciary may successfully implement the function assigned to it.

The independence and competence of the judiciary are inseparable from the principle of the independence of judges and courts, entrenched in the Constitution. This principle means that the legislator has a duty to provide for sufficient guarantees to ensure the independence of judges and courts, which would ensure impartiality of courts in adopting decisions, and which would not permit anyone to interfere with the activities of judges and courts while they are administering justice.

The judge, who is obliged to consider conflicts arising between individuals, as well as those between individuals and the state, must not only have the highest professional qualifications and an impeccable reputation, but must also be financially independent. The state has a duty to establish such salaries for judges which would be in conformity with the status of the judiciary and judges, the functions exercised by them and their responsibility. The protection of judges' salaries is one of the guarantees of the independence of judges.

*Summary:*

The petitioners, Vilnius City Court of the First District, the Higher Administrative Court and the Vilnius Regional Administrative Court, doubted whether the following were in compliance with the Constitution: Articles 4, 5.1, 5.3 and 7 of the Law on Remuneration of National Politicians, Judges and State Officials, as well as Chapter II of the Appendix to the same law; the Law on Amending Article 7 of the Law on Remuneration of National Politicians, Judges and State Officials; Appendix 6 to the Law on the Approval of the Financial Indices of the 2000 State Budget and Local Government Budgets; Article 9 of the Law on Amending the Law on the Approval of the Financial Indices of the 2000 State Budget Local Government Budget; Government Resolution no. 499 "on the Temporary Experimental Procedure for Remuneration of Heads of State Power, State Administration and Law Enforcement Bodies and of Other Officials" of 29 November 1991; Government

Resolution no. 666 "on Remuneration of Judges, Officials and Other Employees of the Prosecutor's Office and the State Security Department of the Republic of Lithuania" of 24 June 1997; and Government Resolution no. 1494 "on the Partial Amendment of Government Resolution no. 689 "on Remuneration of Chief Officials and Law Officers" of 30 June 1997 of 28 December 1999.

The petitioners emphasised that any attempts to reduce the salary or other social guarantees of judges, or to cut the budget of the judiciary, are interpreted as infringement of the financial guarantees of the principle of independence of judges and courts. Consequently, they doubted if the disputed norms were in compliance with the principle of a state governed by law, as established in Articles 5, 109, 113.1 and 114.1 of the Constitution.

The Constitutional Court ruled that, to the extent that they established a reduction in the remuneration of judges, the disputed norms conflicted with Articles 5, 109 and 114.1 of the Constitution and the principle of a state governed by law, entrenched in the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).



# Malta

## Constitutional Court

### Statistical data:

1 January 2001 – 30 April 2001

- Number of judgments: 3
- Number of introduced cases: 3

### Important decisions

*Identification:* MLT-2001-2-001

**a)** Malta / **b)** Constitutional Court / **c)** / **d)** 17.01.2001 / **e)** 579/97AJM / **f)** Giovanni Psaila v. the Advocate General / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

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

3.18 **General Principles** – General interest.

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

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 – Rules of evidence.

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

*Keywords of the alphabetical index:*

Witness, detention / Informant, identity, disclosure / Witness, obligation, fulfilment.

*Headnotes:*

The applicant contended that Article 522.2 of the Criminal Code (Chapter 9 of the Laws of Malta) was in violation of Article 5.1 and 5.4 ECHR and Article 34.1 of the Maltese Constitution. The article

stipulated that “it shall be in the power of the court to order any witness, who shall refuse to be sworn in or to make a deposition, to be arrested and detained as long as may be necessary, or as the court may think proper, having regard to the insubordination of the witness and the importance of the matter”.

The law provided guarantees which secured the fulfilment of the obligation of the witness to reply to questions. Judges had to use their discretion in deciding if this obligation had been fulfilled, taking into account the supreme interest of the proper administration of justice.

The fact that Article 522.2 of the Criminal Code did not impose any limitation on the period of detention was in violation of Article 5.1.b ECHR and Article 34 of the Constitution. The Court held that in terms of the article it was possible for a hostile witness to be detained in custody even after the conclusion of the trial.

Article 522.2 was also held to be in breach of Article 5.4 ECHR in that it did not afford the witness an opportunity to contest the court’s order and request a review thereof.

*Summary:*

The applicant was summoned as a witness in the course of criminal proceedings instituted against a third party accused of homicide. During his deposition, the applicant refused to answer a question made by the prosecuting officer whereby he was requested to reveal the identity of a person. The Court of Magistrates ordered the arrest of the applicant under Article 522.2 of the Criminal Code. The applicant alleged that he was detained for a period of seven days.

The Constitutional Court emphasised that the Court had every right to adopt legitimate measures provided by legislation to ensure that a witness, declared to be hostile, understands that he has an obligation towards society to state the truth, and nothing but the truth. The witness had no right to refuse to disclose the identity of an individual. This was not a case where the witness could invoke the privilege of professional secrecy. His claim was based on the promise he made to his informant not to disclose his identity.

Under the disputed provision, detention was intended to secure the fulfilment of the obligation imposed on the witness to reply to questions. Detention in order to ensure the fulfilment of an obligation, rather than to act as a punishment for breaching such an obligation, cannot be justified under Article 5.1.b ECHR.



The law outlined the criteria for retaining a witness in detention in terms of Article 522.2 of the Criminal Code, and declared that they were not based on time but on the attitude of the witness and the circumstances under which he refused to co-operate. However, the Court took exception to that part of the provision which did not establish a maximum period during which the witness could be detained. The obligation of the witness to tender evidence should subsist during the course of the proceedings and no further. On conclusion of the court proceedings, the obligation of the witness ceased and his evidence would no longer be essential. The words “detained as long as may be necessary, or as the court may think proper”, without any limitation or qualification, could theoretically lead to a situation where the witness is remanded in custody notwithstanding the closure of the trial.

Furthermore, the law itself did not provide a right to appeal or to contest the detention once the court ordered the arrest of the witness or during the course of arrest. Article 5.4 ECHR was held to apply in all those cases where it was possible for an individual to be deprived of his liberty. The Convention intends ensuring the right of an individual to contest his detention in all circumstances, even where his arrest ensues for non-compliance with the lawful order of a court or to secure the fulfilment of an obligation imposed by law. A state must provide recourse to the courts in all cases whether the detention is justified by Article 5.1 ECHR or not. Therefore, although a detention has been found to be lawful under the European Convention on Human Rights, Article 5.4 ECHR must nonetheless be considered.

The respondent argued that in terms of Article 137 of the Criminal Code, a magistrate was empowered to attend to a lawful complaint dealing with an unlawful detention. Therefore, the decision to remand in custody a hostile witness was subject to revision by a court of law. However, the Constitutional Court referred to a judgment delivered by the European Court of Human Rights, *T.W. v. Malta* (App. Number 25644/94) on 29 April 1999, and upheld the view that:

“The review must be automatic. Furthermore, even in the context of an application by an individual under Section 137, and having regard to Section 353, the scope of the review has not been established to be such as to allow a review of the merits of the detention. Apart from the cases where the time limit of 48 hours was exceeded, the government has not referred to any instances in which Section 237 of the Criminal Code has been successfully invoked to challenge either the

lawfulness of, or the justification for, an arrest on suspicion of a criminal offence...”.

The Constitutional Court concluded that the arrest of a witness to ensure that he submits his evidence and replies to questions was a legitimate measure to ensure the proper administration of justice.

Article 522.2 of the Criminal Code was in breach of an individual’s fundamental rights, in that it did not stipulate that the period of detention could not exceed the duration of the trial in which the witness was summoned to give evidence. Furthermore this provision of law failed to provide for a system whereby the court’s order could be challenged.

In this particular case, the period of detention was not disproportionate to the scope of the Criminal Code, namely establishing an adequate mechanism in the search for the truth.

No compensation was due. The mere fact of violation of one or more of the first four paragraphs of Article 5 ECHR does not in itself constitute a sufficient ground for an award of compensation.

#### *Cross-references:*

- Decision no. 7341/76, *Egg v. Switzerland*;
- Decision no. 10600/83, *Johansen v. Norway*;
- *De Wilde, Ooms and Versyp v. Belgium*, 18.06.1971, *Special Bulletin ECHR* [ECH-1971-S-001];
- *T.W. v. Malta*, 29.04.1999.

#### *Languages:*

Maltese.



# Moldova

## Constitutional Court

### Important decisions

*Identification:* MDA-2001-2-004

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 05.07.2001 / **e)** 37 / **f)** Constitutionality of some provisions of Article 43 of the Budget Law for 2001, no. 1392-XIV of 30 November 2000 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, 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.

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

4.10.2 **Institutions** – Public finances – Budget.

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

*Keywords of the alphabetical index:*

Budget, law / Damage, compensation.

*Headnotes:*

Article 53 of the Constitution expressly foresees that any person whose rights have been infringed by a public authority is entitled to have that right protected. The state is responsible, as provided for by the law, for any damage caused through errors committed by bodies of investigation and courts of law.

Article 43 of the Budget Law for 2001 provides for the general manner in which damages caused to natural or legal persons through illicit conduct of state bodies, such as public administration authorities, judicial and auditing bodies, are compensated.

*Summary:*

A petition was lodged with the Court by the General Prosecutor seeking a review of the constitutionality of Article 43 of the Budget Law for 2001, no. 1392-XIV of 30 November 2000.

The petitioner claimed that the article's provisions directly violated the right of a person whose rights had been infringed by a public authority to compensation, a right which is sanctioned by the European Convention on Human Rights and Article 53 of the Constitution.

Article 43 of the Budget Law for 2001 provided that parliament should decide the general manner of compensation for damages caused to natural and legal persons through the illicit conduct of state bodies, such as public administration authorities, the judiciary and auditing organs. Any compensation for damages had to be paid from the expenditures' estimates of the relevant bodies.

Protection of the claimed right, annulment of the act and compensation for damages are regulated by the Law on administrative litigation no. 793-XIV of 10 February 2000 and the Law no. 1545-XIII of 25 February 1998 on the manner of compensating damages caused through the illicit conduct of bodies of penal investigation and preliminary inquiry, the prosecutor's office and courts of law.

Such litigation, which is initiated either by an administrative act, or by the failure to settle, within the time limits set by law, an application concerning the protection of a right recognised by law, in which at least one of the parties is a public body or a public servant, is considered to be an administrative matter to be resolved by a body of administrative litigation. Where the case is accepted, the body of administrative litigation can deliver, upon application, a ruling on compensation for pecuniary and non-pecuniary damages caused by the illegal administrative act, or by the failure to examine the preliminary application within the time limits set by law.

Pursuant to Law no. 1545-XIII, the pecuniary and non-pecuniary damages caused by the illicit conduct of bodies of penal investigation and preliminary inquiry, the prosecutor's office and courts of law are subject to compensation. Such compensation, provided for by Article 10 of Law no. 1545-XIII, has to be paid from the state budget, but if the damage was caused by a penal investigation body funded by the local budget, compensation is to be paid from the local budget.

According to Article 17 of Law no. 1545-XIII, after compensation has been paid for damages caused by the illicit conduct of bodies of penal investigation and preliminary inquiry, the prosecutor's office or courts of law, the state and the authorities of public administration are entitled to make a request to persons found to be guilty of illicit conduct for payment of compensa-

tion. This right is also provided for by Articles 20 and 53.1 of the Constitution.

Article 43 of the Budget Law for 2001 lays down rules for compensation which differ from those established by the Law on administrative litigation and Law no. 1545-XIII.

Citizens of the Republic of Moldova benefit from the rights and freedoms laid down by the Constitution and other laws, and are under the obligations foreseen by the latter. An essential duty of the state is to honour and protect the person. Any person is entitled to an effective remedy from the relevant judicial bodies against normative acts which infringe legitimate freedoms and interests. No law can restrict the free access to justice.

Contrary to these constitutional principles, Article 43 of the Budget Law for 2001 makes the right to compensation for damage caused by a public authority conditional on the source from which the compensation has to be paid, namely the expenditures' estimates of the relevant bodies.

The provisions of this article are also deemed unconstitutional on the basis that the Budget Law for 2001 is limited in time.

Pursuant to Article 53 of the Constitution any person whose rights have been infringed by a public body is entitled to obtain compensation unconditionally, not only during the budgetary year.

Any person who is arrested or taken into custody in circumstances contrary to the provisions of Article 5 ECHR has a right to compensation. Thus, the provisions of Article 43 of the Budget Law for 2001 run counter to Article 5 ECHR and Articles 15, 16.1 and 20 of the Constitution.

#### *Languages:*

Romanian, Russian.



#### *Identification:* MDA-2001-2-005

**a)** Moldova / **b)** Constitutional Court / **c)** / **d)** 12.07.2001 / **e)** 40 / **f)** Constitutionality of some

provisions of Law no. 1353-XIV of 3 November 2000 on the farms / **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.

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

3.13 **General Principles** – Legality.

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

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

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

Right to own, use, administration, possessions / Land, ownership, private, farm.

#### *Headnotes:*

The Constitution provides that the state must safeguard and protect the right to private property (Articles 9.1 and 46 of the Constitution). The Land Code foresees the right to own private landed property and safeguards its protection by the state (Article 3). The right to own property, including private landed property, is inherent to human beings and a way of achieving recognised human values. It is a right which is essentially economic and indissolubly bound by the economic structure of the society.

Any citizen is entitled to own private property (Article 46.1 of the Constitution). The state is bound to protect the property, regardless of its type (Article 127.1 of the Constitution).

#### *Summary:*

Members of parliament lodged a complaint with the Court challenging the constitutionality of Law no. 1353-XIV of 3 November 2000 on farms, which regulates the legal, organisational, economic and social basis for the setting up, re-organisation and liquidation of farms.

The petitioners sought a review of the constitutionality of the following provisions: “and lives permanently in the territorial administrative unit on which the farm shall be registered” (Article 9.1), “the head-office of the farm is located on the place of residence of its manager” (Article 12), “he/she should live in the

territorial administrative unit in which the farm is registered” (Article 15.2.a) and “to possess a qualification in the field of agriculture or a working experience in this domain of at least 3 years” (Article 15.2.b).

In the petitioners' opinion these provisions do not comply with Articles 9.1, 16 and 27 of the Constitution. Pursuant to the Law on property and the Civil Code, the owner has the right to own, use and administer possessions according to his or her will and needs.

The right to own property, sanctioned by Articles 9, 46 and 127 of the Constitution, is also considered to be one of the basic elements of the Universal Declaration of Human Rights, which lays down in Article 17 that any person is entitled to possess property, both individually and in common with others. Nobody can be arbitrarily deprived of his or her property.

In accordance with the constitutional rules, depriving an owner, through law, of one of the elements of the right to property represents a restriction of the right to property.

The restrictions contained in Articles 9.1, 12, 15.2.a of Law no. 1353-XIV infringe upon the legal right of the landowner to use the agricultural ground according to his or her needs and will and to obtain the benefits.

The provisions which include these restrictions run counter to the constitutional provisions in Articles 9 and 46 of the Constitution, which provide for the right of a person to possess, according to his or her will and needs, legally acquired property, in this case agricultural land, and the right to free economic initiative and fair competition in a market economy, and Articles 16 and 27.2 of the Constitution which provide for the equality of all citizens before the law and the right of any citizen of the Republic to establish his or her place of residence anywhere within the national territory.

These restrictions also run contrary to the provisions of some international treaties to which the Republic of Moldova is a party, Articles 6, 7, 13 and 17 of the Universal Declaration of Human Rights, Articles 5 and 18 ECHR and Article 1 Protocol 1 ECHR.

The statement that the phrase “should possess a qualification in the field of agriculture or a working experience in this domain of at least 3 years” is aimed at protecting social interests, people's health care and the environment, including soil protection, has no legal basis, since the legislation in force, especially the Law on environmental protection, which pursuant

to its Article 2, is considered to be the main legal framework for the relevant normative acts, provides that knowledge in the field of environmental protection and reasonable use of natural resources constitute a qualifying and mandatory condition for holding high ranking office in all state bodies, and paragraph 2 of the same article foresees that the necessary minimum knowledge in the field of environmental protection and reasonable use of natural resources binding for high ranking officials is established by the competent body. As for legal persons this minimum professional knowledge is not established yet, although this competence is assigned to managers of farms.

Any legal person which pursues the aim of organising a farm and making use of the property's attributes, cannot be restricted in its rights, unless in cases expressly provided for by the Supreme Law of the State.

Carrying out its competence of constitutionality review, the Court held that Articles 9.1, 12, 15.2.a and 15.2.b of Law no. 1353-XIV of 3 November 2000 on farms were unconstitutional.

*Languages:*

Romanian, Russian.



## Netherlands Supreme Court

There was no relevant constitutional case-law during the reference period 1 May 2001 – 31 August 2001.



## Norway Supreme Court

### Important decisions

*Identification:* NOR-2001-2-004

a) Norway / b) Supreme Court / c) / d) 18.06.2001 / e) 2000/887 / f) / g) *Norsk Retstidende* (Official Gazette), 2001, 762 / h) CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

3.20 **General Principles** – Reasonableness.  
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.  
5.3.36.4 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Taxation law.

*Keywords of the alphabetical index:*

Tax, statutory amendment / Tax, retroactive effect / Tax, income, calculation / Law, amendment, retroactive, application / Tax amnesty.

*Headnotes:*

The case concerns the taxation of the personal income of “active” shareholders in limited companies. The issue in the case was whether a statutory amendment had been given retrospective effect contrary to Article 97 of the Constitution.

*Summary:*

A was the sole owner of the shares in a limited company, which was engaged in brokering derivative securities related to the sale and purchase of petroleum products. On the grounds that A was an “active” shareholder of the company (since he was also an officer of the company), the taxation authorities calculated his personal income in accordance with Sections 60 and 61 of the Taxation Act. In 1995, A's personal income was assessed at NOK 2,913,500, which was the ceiling for personal income calculated pursuant to a statutory amendment of 8 December 1995 no. 73 (equivalent to 75 x G, where G is the basic amount pursuant to the National Insurance Act).

After A complained the tax assessment was upheld. A filed a civil action against the state. Both the City Court and the Court of Appeal ruled in favour of the state.

A appealed to the Supreme Court and argued that the basis for the calculation of personal income was work that he had performed for the company during 1994 – not 1995 – at which time the ceiling for the calculation of personal income was 34 x G, equivalent to NOK 1,285,800. This figure was therefore the appropriate ceiling to be applied, according to Article 97 of the Constitution, which states that “[n]o law must be given retroactive effect”.

The Supreme Court concurred with the arguments put forward by the state, and found that the income first arose in 1995. The taxpayer was bound by the business form that he had chosen for his enterprise. His personal income was a consequence of the profits of the company. The profits first became apparent at the end of the year, and thereafter, the personal income of the active shareholder was calculable. Hence, there was only a question of giving the statutory amendment retroactive effect within the same calendar year. The Supreme Court emphasised that there is long-standing practice to the effect that such retroactive application is not contrary to Article 97 of the Constitution.

The Supreme Court also discussed whether the retroactive application would be in breach of Article 97 of the Constitution if one were to ignore the fact that the business was run as a limited company. However, the Court came to the same conclusion. The Court took as its source remarks made in the plenary Decision Inr 76B/1996 of 8 November 1996, *Bulletin* 1996/3 [NOR-1996-3-007], to the effect that, as regards national insurance legislation, the prohibition in Article 97 of the Constitution would only cover qualified or obvious cases of unreasonableness and injustice. This would also be the appropriate starting point in relation to taxation legislation.

In determining what is reasonable, the Supreme Court stressed that the retroactivity was of a short duration, that warning of the amendment had been given in December 1994 in connection with a government proposal for a more comprehensive statutory amendment, and that, in the view of the political authorities, there was a clear need for the amendment. In its consideration of the amendment, the Standing Committee had found that in many areas of commerce, especially among the liberal professions, market salaries were far in excess of the 34 x G ceiling. The difference between the calculated personal income and the 34 x G ceiling was, in effect, something of a tax amnesty.

On the above grounds, the Supreme Court found it clear that the statutory amendment was not in breach of Article 97 of the Constitution.

#### *Cross-references:*

- Decision Inr 76B/1996 of 08.11.1996, *Bulletin* 1996/3 [NOR-1996-3-007].

#### *Languages:*

Norwegian.



#### *Identification:* NOR-2001-2-005

**a)** Norway / **b)** Supreme Court / **c)** / **d)** 22.08.2001 / **e)** 2000/1533 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2001, 1006 / **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.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 3.16 **General Principles** – Proportionality.
- 3.19 **General Principles** – Margin of appreciation.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.

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

Education, religious, ethical / Education, religious, dispensation.

#### *Headnotes:*

The Supreme Court found that neither Section 2.4 of the Education Act nor the national curriculum for the primary school subject “Christian Knowledge and

Religious and Ethical Education" ("KRL") were in breach of Norway's obligations in international law. The appellants had failed to prove on a balance of probabilities that the instruction that their children had received had been devised and implemented in such a manner that they could claim full dispensation from KRL pursuant to European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).

### Summary:

Article 2 of the Constitution provides that all inhabitants of Norway shall have the right to free exercise of their religion. The Evangelical-Lutheran religion is the official religion of the Norwegian state.

Christian Knowledge and Religious and Ethical Education ("KRL") was introduced gradually into the national curriculum as a primary school subject from autumn 1997 to replace the subjects Christianity and Ethical Education.

In 1998, the Norwegian Humanist Association and 16 parents whose applications for full dispensation from KRL had been turned down, filed a civil action against the state, claiming that junior-high-school children over the age of 15 years who were members of the Norwegian Humanist Association, and younger school children of members of the Association were entitled to full dispensation from KRL. The plaintiffs claimed that, in any event, parents were entitled to full dispensation from KRL education for their children. The state contended that the Norwegian Humanist Association's claim should be dismissed on the grounds of lack of *locus standi*, and that the state should be dismissed in the claim brought by the parents.

The City Court allowed the action from both plaintiffs, but decided in favour of the state. The Norwegian Humanist Association and the parents appealed to the Court of Appeal against the findings of the City Court, and asserted in addition that the administrative decisions whereby full dispensation was refused were null and void. The state maintained that the Norwegian Humanist Association's action should be dismissed for lack of *locus standi*. The Court of Appeal found that the Association had the requisite *locus standi* to file an action, but the claim was dismissed on the merits.

The Norwegian Humanist Association and 14 of the 16 parents appealed the decision of the Court of Appeal to the Supreme Court, where the appeal proceedings were limited to the issue of validity of the administrative decision to refuse full dispensation from KRL. The appellants alleged that refusal of full

dispensation was null and void on the grounds that, by introducing KRL with only a limited right to dispensation, the Norwegian state was in breach of its obligations in international law. The appellants referred in particular to Article 2 Protocol 1 ECHR and Article 18.4 ICCPR (concerning protection of the rights of parents to secure their children education and teaching in conformity with their own religious and philosophical convictions) viewed in light of Article 9 ECHR and Article 18.1 ICCPR on freedom of thought, conscience and religion.

The Supreme Court dismissed the Norwegian Humanist Association's appeal on the grounds of lack of legal interest in the issue of validity.

The Court stated that the consistent practice of the European Court of Human Rights provided that the Convention states shall themselves determine the content and composition of an educational subject, and referred to the decisions in *Kjeldsen et. al. v. Denmark* (Series A no. 23, para. 53, *Special Bulletin ECHR* [ECH-1976-S-002]) and *Valsamis v. Greece* (RJD 1996 at page 2312 ff. para. 28). The Court found that Article 9 ECHR and Article 2 Protocol 1 ECHR did not prevent obligatory instruction in the content of different world religions and philosophies of life, and in religious history and ethics, provided that such instruction is carried out in an objective, critical and pluralistic manner. The obligatory instruction must cover different world religions and philosophies of life. In the opinion of the Court, the emphasis in Section 2.4 of the Education Act on knowledge of Christianity as opposed to other religions and philosophies of life fell within the scope of the discretion conferred upon the member states. The requirement that the instruction should be objective, critical and pluralistic could not be interpreted in such a way that emphasis on the different world religions and philosophies of life must be distributed proportionally. It was acceptable that certain religions and philosophies were given a more dominant position than others, in the light of the history, culture and tradition of the individual member states.

The Court referred to the fact that the Education Act provides that the subject shall be an ordinary primary school subject, that the *travaux préparatoires* to the Act provide that the subject shall just provide pupils with the relevant facts, and that the Act provides that the teaching shall be neutral and non-proselytising.

For these reasons, the Court found that Section 2.4 of the Education Act concerning KRL and the national curriculum for the subject were not in breach of the European Convention on Human Rights or the International Covenant on Civil and Political Rights.

The Court did not find it necessary to come to a decision or make a ruling with regard to other Conventions that the parties had pleaded.

When presenting their case, the appellants had not gone into detail concerning the validity of the individual administrative decisions. There was no basis for determining whether the instruction that the appellants' children had received had been given in a manner that was in breach of the international conventions in question. The appellants had failed to prove on a balance of probabilities that the instruction that their children had received had been devised and implemented in such a manner that it gave grounds for dispensation from all of KRL.

An alternative contention, that the system of limited dispensation was discriminatory pursuant to Article 26 ICCPR and Article 14 ECHR, did not succeed.

The Supreme Court found that common instruction in KRL and the requirement of a written application for dispensation pursued a legitimate purpose, and that it was not a disproportionate interference to require those parents who wanted dispensation from parts of the subject to follow the instruction and apply for dispensation when required. In their pleadings, the parties had not discussed in detail what grounds had to be satisfied to substantiate an application for dispensation, nor which grounds had actually been given in the individual applications for dispensation. The Supreme Court therefore restricted itself to stating that there was no reason to believe that a breach of the prohibition against discrimination in this particular case could lead to the conclusion that the administrative decision to deny full dispensation from instruction in KRL was null and void.

#### Cross-references:

- *Kjeldsen et. al. v. Denmark* (Series A no. 23, para. 53, *Special Bulletin ECHR* [ECH-1976-S-002]);
- *Valsamis v. Greece* (RJD 1996 at page 2312 ff. para. 28).

#### Languages:

Norwegian.



## Poland Constitutional Tribunal

### Statistical data

1 May 2001 – 31 August 2001

#### I. Constitutional review

##### Decisions:

- Cases decided on their merits: 17
- Cases discontinued: 1

##### Types of review:

- *Ex post facto* review: 17
- Preliminary review: 1
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 16
- Court referrals on questions of law, under Article 25 of the Constitutional Tribunal Act: 2

##### Challenged normative acts:

- Cases concerning the constitutionality of statutes: 14
- Cases on the legality of other normative acts under the Constitution and statutes: 4

##### Holdings:

- The statutes in question held to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 7
- Upholding the constitutionality of the provision in question: 10

##### Precedent decisions: 1

#### II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 17
- Motions requesting such interpretation rejected: 0

### Important decisions

*Identification:* POL-2001-2-010

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.02.2001 / **e)** P 12/2000 / **f)** / **g)** *Dziennik Ustaw*



*Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 14, item 146; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2001, no. 3, item 47 / **h**) CODICES (Polish).

*Keywords of the systematic thesaurus:*

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

4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.

4.6.9.4 **Institutions** – Executive bodies – The civil service – Personal liability.

4.6.10.1.3 **Institutions** – Executive bodies – Liability – Legal liability – Criminal liability.

4.7.12 **Institutions** – Judicial bodies – Special courts.

*Keywords of the alphabetical index:*

Tribunal of State / Constitutional tort / Minister, prosecution, resolution, adoption.

*Headnotes:*

The notion of so-called “constitutional tort” covers acts or omissions breaching the law or the Constitution. Such a breach can take the form of an offence, but even in such a case, the notions of “constitutional tort” and “offence” cannot be treated as identical. Not every offence committed by the member of the Council of Ministers can be examined by the Tribunal of State, but rather only those committed in connection with their position. Adoption of a resolution regarding the prosecution of a member of the Council by the *Sejm* constitutes a necessary precondition for his or her prosecution before the Tribunal of State.

Until the *Sejm* decides on the prosecution for the offence of the member of the Council of Ministers, the common courts are competent to conduct criminal proceedings relating to the act committed. The common court also has competence to decide upon such offences if the “constitutional tort” has not become a subject of the proceedings before the Tribunal of State.

*Summary:*

The case was examined by the Constitutional Tribunal as a result of legal questions of a district court.

The Tribunal noted that the examined provisions of the Act on the Tribunal of State provide for the prosecution before the Tribunal of State of members of the Council of Ministers for breach of the

Constitution. The provisions also state that such persons are constitutionally liable before the Tribunal of State and may be criminally liable before the Tribunal for an offence committed in connection with their position, if a combined examination of the acts committed has been determined as useful for the prosecution.

*Cross-references:*

- Decision of 25.03.1997 (U 235/96).

*Languages:*

Polish.



*Identification:* POL-2001-2-011

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.03.2001 / **e)** K 21/2000 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette) 2001, no. 22, item 262; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 49 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

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

4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.

4.10.8 **Institutions** – Public finances – State assets.

*Keywords of the alphabetical index:*

Powers, delegation / Ordinance, issue, content / Uniformity, rule.

*Headnotes:*

The delegation of the power to issue ordinances must be detailed as to its subject (the body authorised to issue the ordinance must be identified), its matter (it must describe the scope of the cases to be regulated) and as to its content (it must provide for guidelines as to this).

*Summary:*

Provisions of the Act introducing laws to reorganise public administration and introducing an authorisation for the President of the Council of Ministers to issue an ordinance describing rules and procedure of devolution of state assets, are concordant with the provisions of the Constitution providing for rules on issuing ordinances.

The case was examined by the Tribunal as a result of a motion filed by a local authority of one of the *voivodships* (local self-governing regions). The applicant claimed that the Act in question did not provide for any regulations concerning the general rules and procedure for devolving state assets to the local level. As a consequence, providing for such rules and procedures in an ordinance had no basis in the Act. This would have given the ordinance an autonomous nature, which would constitute a breach of the Constitution.

The Tribunal did not agree with the applicant's position that the particular delegation in question breached the last condition (relating to its content). The Tribunal stated that the guidelines must be formulated in an Act but that they do not always have to be included in the provisions expressing the delegation. The rule of uniformity of an Act allows for situations in which the guidelines are included in provisions of the act other than those expressing the delegation itself. This is allowed under the condition that such construction of the provisions allows for a precise reconstruction of the content of the guidelines.

With reference to the provisions in question, the Tribunal stated that the guidelines as to the content of the ordinance resulted from the provisions of the Act providing for a range of state assets to be devolved, as well as a range of the devolved institutions and criteria for the transmission between the central and devolved authorities. This was sufficiently precise as to be able to conclude that the condition relating to the guidelines as to the content of the ordinance described in the Constitution had been met.

*Cross-references:*

- Decision of 22.11.1999 (U 6/99);
- Decision of 14.12.1999 (K 10/99).

*Languages:*

Polish.

*Identification:* POL-2001-2-012

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.03.2001 / **e)** K 24/2000 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2001, no. 10, item 160; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 51 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

3.3 **General Principles** – Democracy.  
 3.12 **General Principles** – Clarity and precision of legal provisions.  
 5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Right to intellectual property.

*Keywords of the alphabetical index:*

Trade mark, registration / Trade mark, transfer of rights / Good legislation, rule.

*Headnotes:*

The rule of good legislation covers in particular a requirement for provisions of law to be definite in nature, and to be formulated in a correct, precise and clear way. This is especially the case when it comes to the protection of rights and freedoms.

*Summary:*

An intellectual property statute stated that a trade mark registered abroad on behalf of a foreign company is subject to a transfer to a producer in Poland and abroad, if it was used consistently to mark products manufactured by such a producer in a period of at least ten years before the act came into force. Such a provision contravenes the principles of constitutional democracy, because it breaches the requirement that the provisions of law provided for in the Constitution should be definite.

The case was examined by the Tribunal as a result of a motion filed by the President of the Republic of Poland.

The Tribunal recalled that the democracy principle had been subject to its judgments many times. The Tribunal defined its content, scope and following from it detailed rules, in particular, a rule entrusting to the

government the law adopted, which in turn includes a rule of providing for good legislation and the protection of acquired rights.

The provisions in question, in the Tribunal's opinion, breached the rule of definitiveness and therefore did not meet the conditions of the good legislation rule. The provisions provided, in particular, that "the trade mark is subject to a transfer to the producer". This expression caused the Tribunal to have serious doubts, since there is no institution of transfer of trademarks in Polish law.

Failure to describe the enforcement procedure relating the results described in the examined act constitutes another legislative defect of the Act. It was not clear whether the Patent Office should introduce relevant changes on its own initiative or upon a motion from a third party. It was also unclear whether the producer of the product, the foreign company, their legal successor, or some other third party should make the motion.

#### *Cross-references:*

- Decision of 11.01.2000 (K 7/99), *Bulletin* 2000/1 [POL-2000-1-004];
- Decision of 08.03.1995 (W 13/94).

#### *Languages:*

Polish.



#### *Identification:* POL-2001-2-013

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 02.04.2001 / **e)** SK 10/2000 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 32, item 384; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 52 / **h)** CODICES (Polish).

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

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

5.3.13.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope.

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

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

Right to court, scope / Indictment, cases prosecuted / Prosecutor, auxiliary / Proceedings, preparatory, control.

#### *Headnotes:*

The right of access to a court consists, in particular, of the following:

- the right to commence court proceedings;
- the right to shape the court proceedings with the requirements of justice and openness; and
- the right to a judgment, i.e. the right to obtain a binding decision of the court.

#### *Summary:*

Provisions of the Criminal Procedure Code, providing for the status of the auxiliary prosecutor in criminal proceedings relating to cases prosecuted upon indictment, are concordant with the constitutional right of access to a court.

The Tribunal examined the case as a result of a constitutional claim. In the applicant's opinion, the provisions at issue limited the possibility of individuals being able to file an indictment in a situation where a public prosecutor has abandoned the investigation and discontinued preparatory proceedings.

In the Tribunal's opinion, the notion of "a case" which an authorised person can request to be heard by the court has a crucial significance for the description of the scope of the right of access to a court. Analysis of the doctrine and of the case law establishes, in the Tribunal's opinion, the objective scope of the right to court, which includes criminal cases, civil and administrative disputes.

In order to decide whether the legal construction adopted by the Criminal Procedure Code limits the right of access to a court, the Tribunal analysed the mechanism for establishing the status of an auxiliary prosecutor. The Tribunal recalled that an appeal from the decision of a prosecutor on the discontinuance of preparatory proceedings, or on a refusal to commence such proceedings and the subsequent overturning of such a decision by a court in a procedure concerning control of the preparatory proceedings, constitutes a condition for the right to file a subsidiary indictment.

The Tribunal decided that the admissibility of filing the indictment, on the basis of the subjective feelings of an injured person as to the criminal nature of a particular act, does not constitute any part of the right of access to a court in criminal cases prosecuted upon indictment. Introduction of the prosecutor's right to assess the criminality of the act does not determine a breach of the constitutional right to court.

#### *Cross-references:*

- Decision of 09.06.1998 (K 28/97), *Bulletin* 1998/2 [POL-1998-2-013];
- Decision of 10.05.2000 (K 21/99), *Bulletin* 2000/2 [POL-2000-2-013].

#### *Languages:*

Polish.



#### *Identification:* POL-2001-2-014

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03.04.2001 / **e)** K 32/99 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 32, item 3; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 53 / **h)** CODICES (Polish).

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

3.10 **General Principles** – Certainty of the law.  
 3.13 **General Principles** – Legality.  
 4.10.1 **Institutions** – Public finances – Principles.  
 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

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

Tax, value-added tax / Tax, subject / Tax, due rate.

#### *Headnotes:*

Provisions of the Constitution provide that, at the very least, it should be determined by statute who should pay tax, in which situations a tax is payable and the amount of tax to be paid.

#### *Summary:*

The provisions of the VAT Act, defining the subject of the tax and the amount of tax due, are concordant with the requirement to provide for taxation in statutes, as described in the Constitution.

The case was examined by the Tribunal as a result of a legal question of the Ombudsman. In the applicant's opinion the provisions in question stated that a classification adopted by organs of the Main Statistic Office determined what constituted goods and services were subject to VAT and stated the amount of tax due.

The Tribunal noticed that it followed from the content of the provisions at issue that the sale of goods and the supply of services for money, as mentioned in classifications issued under provisions relating to statistical data, as well as the sale of goods and supply of services which are not mentioned in such classifications, were subject to the tax. In short, the sale of all goods and the supply of all services for money, were subject to VAT. The tax was to be paid irrelevant of whether the particular goods or services were described in any classification.

The Tribunal stated that there was no doubt that neither determination of the subject of the tax nor the amount of the tax due required, in the currently binding legal order, use of the classification adopted on the grounds of the statistical data. The amount of the basic rate and the lower rates is determined in the Act itself. The goods and services covered by an exemption and lower rates are calculated and described in the Schedule to the Act.

#### *Cross-references:*

- Decision of 16.06.1998 (U 9/97).

#### *Supplementary information:*

There were two dissenting opinions (Judge Andrzej Mączyński and Judge Janusz Trzcíński).

Gloss: Kosikowski Cezary, *Państwo i Prawo* 2001 z. 7 s. 110-113.

#### *Languages:*

Polish.



*Identification:* POL-2001-2-015

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.04.2001 / **e)** U 10/2000 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 36, item 421; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 55 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

5.1.1.5 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons.

5.3.13.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope.

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

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

*Keywords of the alphabetical index:*

Enfranchisement / Administrative proceedings, proof / Burden of proof.

*Headnotes:*

An ordinance of the Council of Ministers related to enforcement provisions concerning enfranchisement of real property, and provided that a declaration of the principal accountant of the legal person involved in the enfranchisement constituted proof of the enfranchisement proceedings. This ordinance was concordant with the authorisation delegated by the Property Management Act.

*Summary:*

The case was examined by the Tribunal as a result of a motion filed by a local authority of one of the local self-governing regions in Poland.

The Tribunal recalled that proof by an interested party that the buildings in question have been built or acquired from their own resources of those of their legal successors, constitutes one of the conditions for a non-gratuitous acquisition of property by national and communal legal persons, authorised national enterprises and co-operatives. According to the provisions of the ordinance in question, documents

are needed to legally certify the sources of finances involved in the construction of the buildings. Where such documents do not exist, declarations of the principal accountant of the company confirming the absence of the documents and the source of the finances, are sufficient proof.

The Tribunal mentioned that an authorisation to issue the ordinance, provided for in the Property Management Act, met the conditions provided for in the Constitution. The Tribunal stated that an authority mentioned in the authorisation issued the ordinance and added that there were no doubts that its aim was to effect the provisions of the Act.

Referring to the content of the ordinance, the Tribunal mentioned that a scope of evidence used determined the subject of the proof, but that this related to proof of the facts, not law. There is a norm in the Polish legal system ordering the disclosure of all evidence which could contribute to an explanation of the case, and this is lawful proof in administrative proceedings. Therefore, the provisions at issue did not introduce a new norm to the legal system, which would either relate to an issue not as yet provided for in the law or which would regulate the issue in a way different to that adopted until now. The fact that the authorisation, provided for in the law, states that the Council of Ministers will set out the types of documents which prove that financial resources used for the construction or acquisition of property constitute the legal person's own money, does not abolish a general rule on evidence in Polish administrative law. In the Tribunal's opinion, such provisions could only be treated as an infringement of a legislative technique but cannot be treated as a breach of the provision constituting an authorisation to issue an ordinance.

*Cross-references:*

- Decision of 22.11.1999 (U 6/99);
- Decision of 16.02.1999 (SK 11/98), *Bulletin* 199/1 [POL-1999-1-003].

*Languages:*

Polish.



**Identification:** POL-2001-2-016

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.04.2001 / **e)** U 9/2000 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 38, item 458; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4 / **h)** CODICES (Polish).

**Keywords of the systematic thesaurus:**

4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.

5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

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

**Keywords of the alphabetical index:**

National enterprise / Commercialisation / Share, acquisition, gratuitous / Farmer, fishermen.

**Headnotes:**

The equality rule means that “all subjects of law, which have the same substantial features, are treated equally”. It means that there should be neither favourable nor discriminatory differences between legal subjects. Notwithstanding this, a deviation from equal treatment itself does not mean the provisions which have introduced that are unconstitutional. However, deviation from the equality rule should only be in exceptional circumstances and should be well justified.

**Summary:**

An ordinance of Ministry of Agriculture and Food Economy set out ways for farmers and fishermen to prove the circumstances which entitled them to free shares in the companies owned by the State Treasury. The ordinance also set out the rules for this, including a requirement that the applicant had run a farm for five year. The ordinance was held to be concordant with the constitutional equality rule.

The Tribunal examined the case as a result of a motion filed by *Związek Zawodowy Rolnictwa “Samoobrona”* (trade unions). The applicant claimed that setting a five-year requirement for one social group (i.e. farmers), where other authorised social groups have to fulfil a ten-year requirement, constituted a glaring breach of the equality rule.

The Tribunal noticed that the applicant did not question provisions of the act which concerned the commercialisation and privatisation of the state industries, which set out the circumstances in which different categories of individuals could acquire shares in the companies owned by the State Treasury. The differentiation relates especially to two categories of individuals, i.e. employees of state industries, on the one hand, and farmers and fishermen supplying those industries on the other hand. This differentiation is legally, socially and economically justifiable. The provisions of the ordinance at issue did not introduce any new developments in this respect. They only provided for a way in which the authorised farmers and fishermen should prove the circumstances enabling the acquisition of shares.

There was a difference in way in which farmers and fisherman, as opposed to the state employees, should prove the relevant circumstances. The difference, however, is a consequence of the differentiation already adopted in the act. The obligation provided by the ordinance related to all the farmers and fishermen and did not introduce any differentiation in this category of the subjects of the normative act.

**Cross-references:**

- Decision of 05.11.1997 (K 22/97), *Bulletin* 1997/3 [POL-1997-3-023];
- Decision of 28.11.1995 (K 17/95);
- Decision of 12.05.1998 (U 17/97).

**Languages:**

Polish.

**Identification:** POL-2001-2-017

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.04.2001 / **e)** K 13/01 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2001, no. 13, item 217; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 81 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

3.10 **General Principles** – Certainty of the law.  
 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

*Keywords of the alphabetical index:*

Tax, personal income / Tax, exemption / Tax year.

*Headnotes:*

In general, tax burdens must not be changed during the course of a year. Such changes, when concerning amendments to personal income tax, should be introduced at least one month before the end of a previous tax year. This is not mandatory, but abandoning such obligations is only allowed if this is justified by legal arguments.

*Summary:*

Provisions of the Law on the Performance of the State Budget 2001, and of the amending legislation dealing with incomes of units of self-government for the years 1999-2001, are unconstitutional, because they infringe the rule of confidence of a citizen in the country and in its legislation.

The case was examined by the Tribunal as a result of a motion filed by the President of the Republic of Poland.

The Tribunal referred to its earlier judgments relating to tax cases, which expressed the Tribunal's belief, as expressed in the Constitution, that since regulations on taxes directly concern citizens' rights, they should be made with an utmost care and diligence.

The Tribunal mentioned that the content of the provisions in question, which abolished an exemption from a tax which had been introduced previously, breaches the rule of confidence of citizens in the country and its laws, and consequently the duty of the legislator to respect interests associated with this rule. The abolished regulation introduced a three-year term of binding force of special rules relating to an exemption from personal income tax, which could be treated by a taxpayer as grounds to develop his future business activity. An arbitrary change of the above-mentioned rules was made without any justified reasons. Other procedural rules following from the democracy rule, in particular the obligation of a legislator to introduce relevant *vacatio legis* and the prohibition on making changes concerning tax burdens in the course of the tax year, were also breached in this case.

*Cross-references:*

- Decision of 29.03.1994 (K 13/93), *Bulletin* 1994/1 [POL-1994-1-004];
- Decision of 28.12.1995 (K 28/95), *Bulletin* 1995/3 [POL-1995-3-019].

*Languages:*

Polish.

*Identification:* POL-2001-2-018

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.05.2001 / **e)** P 15/2000 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 48, item 506; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 83 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.  
 5.1.1.4.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.  
 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.  
 5.3.26 **Fundamental Rights** – Civil and political rights – National service.

*Keywords of the alphabetical index:*

Allowance / Social justice.

*Headnotes:*

Equality means that all addressees of provisions of law, which have the same main features, must be treated equally. Any differentiation must be based on recognised criteria, and the grounds for such criteria must each time be subject to an assessment from the point of view of, in particular, the rule of social justice.

**Summary:**

Certain provisions of the Law on Compulsory General Military Service in the Republic of Poland, relating to an allowance for soldiers, contravened the equality rule enshrined in the Constitution.

The case was examined by the Tribunal as a result of a legal question of the Supreme Administrative Court.

The Tribunal mentioned that the allowance for soldiers was granted under the provisions in question, in order to ensure that members of soldiers' families would have the means to leave the family home where they did not earn an income (or where they earned an income lower than the minimal wage). There were no doubts, in the Tribunal's opinion, that a citizen should be granted a minimum amount of comfort that performance by him of a constitutional obligation will not lead to his family being destabilised.

The Tribunal remarked that the legislator made granting the allowance to the soldiers dependant on the fact whether members of his family had remained with him in the household before he enrolled on military service. The legislator did not, however, take into account the full range of possible situations, and made granting the allowance for families created after enrolment of the soldier impossible. Consequently, the legislator *de facto* made granting the allowance to the soldier's family dependent on the date of his marriage. In the Tribunal's opinion, all families of citizens performing military service (or supplementary military service) had to be covered state welfare provisions, and the date of creation of the family could not be treated as a criteria of distinction. Therefore, the provisions under review breached the equality rule enshrined in the Constitution.

**Cross-references:**

- Decision of 16.12.1997 (K 8/97).

**Languages:**

Polish.

**Identification:** POL-2001-2-019

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.06.2001 / **e)** U 6/2000 / **f)** / **g)** to be published in *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

**Keywords of the systematic thesaurus:**

3.13 **General Principles** – Legality.

4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

**Keywords of the alphabetical index:**

Legislation, secondary / Delegation, infringement of law.

**Headnotes:**

Provisions of an Ordinance of the Ministry of Transport and Maritime Economy regarding the enumeration and registration of roads and bridges, which imposed on the management of *voivodships* (local self-governing regions) an obligation to run a registry of determined numbers of roads, breached the provisions of the Law on Public Roads and the Constitution, since they imposed on the management of the *voivodship* new public tasks, which constitute an infringement of devolution provided for in the law.

**Summary:**

The Tribunal examined the case as a result of a claim of an authority of one of the *voivodships*.

The Tribunal confirmed an opinion of the applicant that the management of the *voivodship* managed the roads, and in this respect performed tasks provided for in the law.

The Tribunal mentioned that the provisions of the ordinance in question determined issues, which should be discussed in the provisions of a law. This was the result of introducing new duties on to the management of the *voivodships*, otherwise than by law, and of making the managing authorities subject to sub-legal norms. This infringed the scope of the delegation rules provided for in the law. It was clear, in the Tribunal's opinion, that the challenged ordinance cannot provide for resolutions, which have to be regulated by law. The ordinance should have met the purposes defined in relation to secondary legislation in the provisions of the Constitution.



*Cross-references:*

- Decision of 13.01.1998 (K 5/97);
- Decision of 09.11.1999 (K 28/98), *Bulletin* 1999/3 [POL-1999-3-028].

*Languages:*

Polish.



## Portugal

### Constitutional Court

#### Statistical data

1 May 2001 – 31 August 2001

Total: 191 judgments, of which:

- Abstract *ex post facto* review: 11 judgments
- Appeals: 93 judgments
- Complaints: 83 judgments
- Political parties and coalitions: 2 judgments
- Political parties' accounts: 2 judgments

#### Important decisions

*Identification:* POR-2001-2-001

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 02.05.2001 / **e)** 187/01 / **f)** / **g)** *Diário da República* (Official Gazette), 146 (Serie II), 26.06.2001, 10492-10506 / **h)**.

*Keywords of the systematic thesaurus:*

- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 3.20 **General Principles** – Reasonableness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
- 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
- 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
- 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

*Keywords of the alphabetical index:*

Property, private, right / Enterprise, private / Profession, freedom to choose / Drug, pharmaceutical / Pharmacy, transfer / Profession of pharmacist / Pharmacy, ownership / Health, protection / Proportionality, definition.

*Headnotes:*

The freedom to choose one's occupation or type of work, which is enshrined in Article 47.1 of the Constitution, is a personal right – not just a guarantee or a basis of economic activity – which consists not only of the negative “right of defence” but also of a positive dimension in relation to the “right to work”. Another aspect of the freedom to exercise an occupation is that it must be understood broadly in the sense that, while an occupation (such as that of pharmacist) may be exercised either on a self-employed basis or for an employer, and while both ways of exercising an occupation are important, the choice of one or the other way is itself protected as part of the right established in Article 47.1 of the Constitution.

If this view is taken of the occupation of pharmacist, characterising it as an independent profession (although this should not be incompatible with viewing pharmacists also as shopkeepers), the pharmacy premises consist essentially of the resources and assets, both material and non-material, which permit the establishment and exercise of that occupation – including the performance of quality and toxicity controls on products supplied, manual preparation and the lawful public sale of medicines. That a certain training and certain skills are required in order to be able to exercise the occupation is therefore no more than a professional safeguard. Legal restrictions, be they on access to pharmacy ownership or on the operation of a pharmacy as a business concern, are legitimate as restrictions laid down “in the public interest” or “inherent in the capacity” required of pharmacists.

Since in principle the legislative right to impose conditions on or restrict the exercise of the fundamental rights concerned is unquestionable, it follows that legal regulations conditioning or restricting access to a certain activity or occupation, or to private economic enterprise in a given field, are not unconstitutional unless they can in no way be justified by the specific terms of Articles 47.1 and 61.1 of the Constitution (the latter of which relates to private economic enterprise) or unless they exceed the general limits laid down in Article 18.2 and 18.3 of the Constitution for legal measures restricting fundamental rights, freedoms and guarantees, namely:

- the requirement that restrictions be necessary and proportionate;
- the requirement that they be general, abstract and non-retroactive;
- the requirement that they respect the essential content of the constitutional principle establishing the right.

In the case at issue, there is no doubt that the restrictions challenged are general, abstract and non-retroactive. Further, it appears unlikely that the essential content of the freedoms referred to above is infringed by the placing of restrictions, in the form of qualification requirements, on the choice and exercise of the occupation of self-employed pharmacist and pharmacy owner. From the point of view of freedom to choose an occupation, then, it also needs to be ascertained whether the restrictions introduced by the legal rules in question can be deemed to be necessary and proportionate.

Today, the legal notion of proportionality, in the broad sense, severely limits the exercise of public authority, to the advantage of personal rights and freedoms. In various decisions, the Portuguese Constitutional Court, too, has already recognised and applied the principle of proportionality, frequently referring to it when examining criminal laws or laws of another kind which made rights subject to conditions or restrictions. As regards restrictions placed on rights, freedoms and guarantees, the proportionality requirement is inherent in Article 18.2 of the Constitution. Yet, as a general principle limiting the exercise of public authority, proportionality may be based upon the general principle of the rule of law. There need to be limits which take account of the relationship between public authorities' aims and measures. Legislators and government must adapt their proposals for action to their stated aims, rather than determine which measures they consider to serve no purpose or to be overly restrictive. Moreover, the principle of proportionality, in its broad sense, can be broken down analytically into three requirements linked to this relationship between measures and stated aims: the need to adapt the means to the ends, the requirement that the means be necessary or essential, and proportionality in the strict sense, implying a “just measure”.

On consideration of the various aims which the legislator hopes to achieve by means of the regulations whereby pharmacy ownership is reserved for pharmacists and by making it impossible to regard a pharmacy separately from its technical management, it can be concluded that these regulations are neither inappropriate nor unhelpful to the pursuit of these aims. This is true, firstly, of the aims of pharmaceutical activities, since it can reasonably be deduced that these arrangements not only favour the aims of public health, the public interest and pharmacists' professional and ethical independence, but do so more specifically, comprehensively or easily than could any provisions allowing for pharmacies to be freely owned. It is obviously also true of aims which are directly linked to pharmacy ownership – such as the conscientious performance of duties, the

owner's or manager's ethical obligations and responsibilities and keeping in check concentrations of ownership in the field of sale of pharmaceutical drugs.

Having examined the cited grounds, it can be concluded that the principles of indivisibility and of reserving ownership for pharmacists are not unreasonable. It can therefore be declared that these arrangements do not contravene the principle of proportionality (or "avoiding excess") – in particular when this principle is combined with the right to property or the freedom to exercise an occupation – as applicable even to restrictions on rights, freedoms and guarantees. Accordingly, as regards the legislator's stated aim of serving the public interest, these restrictions cannot be deemed to be inappropriate, unhelpful or disproportionate, and there is consequently no contravention of the principle of equality.

#### *Summary:*

The ombudsman applied for two legislative provisions reserving ownership of pharmacies for pharmacists to be declared unconstitutional. The applicant argued, first, that the legal consequence of these provisions was to place restrictions on the right to private property, which is enshrined in Article 62.1 of the Constitution; and second, that reserving pharmacy ownership for pharmacists was an exclusive business privilege which could not be justified on grounds of public health, since the law, which stipulated that a pharmacy's technical management must be supervised by a pharmacist responsible for the preparation of pharmaceuticals and for the public sale or distribution of medicines or medicinal products, and established the principle of pharmacists' independence for practical purposes, already adequately guaranteed public health protection.

On examination of the purpose of the rules in question and the grounds given for the application, it can be concluded that the principal aim of the application was to obtain an examination of the constitutionality of the rule reserving ownership of pharmacies serving the public for individual pharmacists or to commercial partnerships of pharmacists. The other provisions contested were secondary, or were designed to allow for the hypothetical case where the legal restrictions suddenly lapsed, because a pharmacy was acquired by a non-pharmacist, with undesirable consequences. In addition, the fact that these rules predated the entry into force of the Constitution in no way affects this viewpoint since, according to the application, they were substantively unconstitutional.

The claims of unconstitutionality were therefore as follows:

1. restriction placed on the freedom to transfer property (in breach of Article 62 of the Constitution);
2. restriction placed on the right to private economic enterprise (in breach of Article 61 of the Constitution);
3. breach of the principle of equality (a breach of Article 13 of the Constitution);
4. restriction placed on the freedom to choose one's occupation (in breach of Article 47.1 of the Constitution);
5. breach of the principle of proportionality (a breach of Article 18.2 of the Constitution).

The judgment opened with a brief summary of the basis of Portuguese legal provisions in this area, mentioning their history and conformity with international standards. The tradition whereby pharmacy ownership is reserved for pharmacists and the indivisibility in principle of ownership and technical management have been established in the Portuguese legal system since at least the 1830s. Similarly, in other European countries where pharmacies can be privately owned, ownership is most frequently reserved for pharmacists (either directly or through a company). A notable exception is the "liberal" United Kingdom model, under which anyone (including the companies which operate leading chain stores) may acquire a pharmacy.

In the framework of this abstract *ex post facto* review, the judgment concluding that the legal provisions in question were not unconstitutional obtained ten votes in favour, with two against.

#### *Supplementary information:*

In Judgment no. 76/85 the Constitutional Court had previously examined the constitutionality of a number of the provisions in question in relation to property rights and freedom of private economic enterprise. In doing so, it had taken account of the principle of equality and the obligation to adhere to the rule of collective acquisition of the principal means of production and the principle of the elimination of monopolies and of excessively large estates. At the

time of the first revision of the Constitution, this obligation had been incorporated into Article 290.f. In that previous judgment, the Constitutional Court had concluded, with three dissenting votes, that the rules in question were not unconstitutional, so none of them were declared unconstitutional.

The present application for a ruling of unconstitutionality raised the following issues: first, the constitutionality of the rules contested and, second, the constitutionality of the rules restricting the transfer of pharmacy operation and the gift of pharmacies (these rules are another consequence of the restrictions placed on pharmacy ownership in the provisions already considered).

The subject of this application, and the majority of the questions of constitutionality which it raised, therefore partially overlapped with the issues resolved in Judgment no. 76/85. Nonetheless, where a judgment has previously been delivered dismissing a claim of unconstitutionality, the court can again rule on the same subject, whether the judgment was given as part of an *ex post facto* or a preventive review. In this regard, there was nothing to prevent an examination of the legal rules claimed in the present case to be unconstitutional, although the court had already issued one ruling on their constitutionality.

#### Languages:

Portuguese.



## Romania Constitutional Court

### Important decisions

*Identification:* ROM-2001-2-004

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 05.04.2001 / **e)** 98/2001 / **f)** Decision on the constitutionality of legislation rejecting Government Emergency Order no. 23/1999 for the repeal of Act no. 31/1996 on the state monopoly system / **g)** *Monitorul Oficial al României* (Official Gazette), 265/18.05.2001 / **h)** CODICES (French).

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

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

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

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

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

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

Emergency order, repeal / Decision, Court, publication.

#### *Headnotes:*

Constitutional Court decisions delivered in connection with the settlement of issues of unconstitutionality are binding and effective *erga omnes*. Thereafter, the statutory provision whose unconstitutionality has been determined by a Constitutional Court ruling is no longer applicable and ceases to operate for the future.

The legislation rejecting Government Emergency Order no. 23/1999 for the repeal of Act no. 31/1996 on the State Monopoly System is unconstitutional. Indeed, under the first sentence of Article 145.2 of the Constitution, Government Emergency Order no. 23/1999 ceased to operate on 14 June 2000 when Constitutional Court Decision no. 15/2000 declaring this order unconstitutional was published in

the Official Gazette of Romania (*Monitorul Oficial al României*).

### Summary:

In accordance with Article 144.a of the Constitution and Section 17 of Act no. 47/1992, the President of Romania asked the Constitutional Court to rule on the constitutionality of legislation rejecting Government Emergency Order no. 23/1999 for the repeal of Act no. 31/1996 on the State Monopoly System.

This legislation was regarded by the President of Romania as contrary to Article 145.2 of the Constitution, according to which decisions of the Constitutional Court are binding for the future without retroactive effect. These decisions are published in the Official Gazette.

In examining this objection of unconstitutionality, the Court recalled its finding in Decision no. 15 of 25 January 2000, published in the Official Gazette, Part I, no. 267 of 14 June 2000, that the provisions of the emergency order were unconstitutional. Consequently, on 14 June 2000, the date when the Court's decision was published in the Official Gazette, application of the order ceased. Act no. 31/1996 on the State Monopoly System took effect in accordance with the first sentence of Article 145.2 of the Constitution.

The universally binding character of the Court's findings of unconstitutionality follows from the provisions of Articles 145.2, 16.1 and 51 of the Constitution, as well as from the Constitutional Court's status as sole authority with constitutional jurisdiction, independent of any other public authority, which serves the purpose of guaranteeing the supremacy of the Constitution in accordance with the principle of rule of law laid down in Article 1.3 of the Constitution.

The Court observed that the *erga omnes* binding force of decisions delivered in proceedings on constitutional issues arose from the very essence of constitutional review and moreover was also stipulated in the constitutions of other European states, for instance the Constitution of the Kingdom of Spain (Article 164) and the Constitution of Portugal (Article 282).

The Court therefore held that once ruled unconstitutional by a decision, a law or an order could no longer be applied by any public authority or other legal entity, it being henceforth devoid of prescriptive effect. Although the Court is not empowered to repeal a statute, the parliament being vested with sole competence in this respect, decisions declaring a law

or an order unconstitutional are similar in effect to their repeal.

There is no suggestion that where the measure of repeal does not eventuate or is delayed, the Constitutional Court decision fails to take effect.

In the case in point, the Court held that Decision no. 15/2000, which was final and binding, had established the unconstitutionality of the provisions of Government Emergency Order no. 23/1999 repealing Act no. 31/1996 on the State Monopoly System. Upon publication of the decision in the Official Gazette, the order had ceased to be applicable.

Nonetheless, the parliament enacted a law to reject the emergency order without acknowledging its inapplicability upon publication of the Court's decision in the Official Gazette, Part I. The fact that it had ceased to apply was not even alluded to in the final clause of that law, referring to observance of Article 74 of the Constitution though without mention of Article 145 of the Constitution.

In accordance with the provisions of Article 78 of the Constitution, Government Emergency Order no. 23/1999 should have ceased to be applicable as soon as the law rejecting it was published in the Official Gazette, and not as from the date of publication of the Court's decision, which would be contrary to the first sentence of Article 145.2 of the Constitution.

### Cross-references:

- Decision no. 15 of 25.01.2000, *Bulletin* 2000/3 [ROM-2000-3-013].

### Languages:

Romanian, French (translation by the Court).



### Identification: ROM-2001-2-005

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 03.07.2001 / **e)** 226/2001 / **f)** Decision no. 226 of 3 July 2001 on the constitutionality of the provisions of Section 6.a of Act no. 188/1999 on the Civil Service Regulations, with later amendments and

supplements / **g**) *Monitorul Oficial al României* (Official Gazette), 605/26.09.2001 / **h**) CODICES (French).

*Keywords of the systematic thesaurus:*

- 1.3 **Constitutional Justice** – Jurisdiction.
- 2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources.
- 2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
- 2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
- 3.20 **General Principles** – Reasonableness.
- 3.24 **General Principles** – Loyalty to the State.
- 4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
- 4.6.9.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

*Keywords of the alphabetical index:*

International law, primacy / Civil service, specific requirements.

*Headnotes:*

The condition laid down by Section 6.a of Act no. 188/1999 on the Civil Service Regulations, under which any person of solely Romanian nationality habitually resident in Romania is eligible to hold a civil service position does not infringe the right to work set out in Article 38.1 of the Constitution.

A person's access to an official post or high public office on these terms is consistent with the norms and provisions of international instruments.

The Constitutional Court has no active legislative functions, or capacities for revising the Constitution.

*Summary:*

In an interlocutory decision of 16 October 2000, the Bucharest Court of Appeal – Administrative Appeals Division – asked the Constitutional Court to rule on the objection challenging the constitutionality of the provisions of Section 6.a of Act no. 188/1999 on the Civil Service Regulations.

The impugned legislation was alleged to contravene the spirit and letter of the international human rights treaties ratified by Romania and forming part of its domestic law, since it discriminated against Romanian citizens on the ground of their dual or multiple nationality.

In this connection, reference was made to Articles 2, 21.1 and 21.2 of the Universal Declaration of Human Rights, Articles 2.2 and 6.1 of the International Covenant on Economic, Social and Cultural Rights, and Articles 2.1 and 25 of the International Covenant on Civil and Political Rights, together with Articles 5.9 and 7.5 of the Document of the Copenhagen Meeting.

The terms of Section 6.a of Act no. 188/1999 are as follows: a civil service post may be held by a person who fulfils the following conditions: a. being of solely Romanian nationality, and habitually resident in Romania. In considering the objection, the Court found that although the provisions of Section 6.a of Act no. 188/1999 were acknowledged to be fully in keeping with the terms of Article 16.3 of the Constitution, the objecting party had requested a review under Article 20 of the Constitution concerning the primacy of international human rights provisions in the event of conflict with domestic law.

I. The Court observed that the true foundation for the request by the objecting party was Article 38.1 of the Constitution stipulating non-limitation of the right to work and free choice of occupation and workplace.

In the light of Articles 2 and 6 of the International Covenant on Economic, Social and Cultural Rights, the Court found that the right to work established by Article 38.1 of the Constitution could not be restrictively interpreted as the right of entry to either a regular civil service post or a similar post. Exercise of the right to work may be subject to conditions (education, age, etc) which are not to be construed as restricting the right to work. In the case of the civil service, there are other specific requirements besides these conditions.

The impugned legislation was fully in accordance with Articles 2 and 6 of the International Covenant on Economic, Social and Cultural Rights, with Articles 2, 23 and 29 of the Universal Declaration of Human Rights, and with Article 19.3 of the International Covenant on Civil and Political Rights. According to these provisions, the exercise of freedoms may by its very nature be subject to certain restrictions which must nevertheless be prescribed by law and necessary *inter alia* for maintaining national security or law and order.

Likewise concerning requirements as to the interpretation of Article 21 of the Universal Declaration of Human Rights as a whole, the Court made the observation that the provisions in question contemplate access to elected public offices, as long as these are deemed to embody paramount values of protection, expression of the people's will through genuine elections, the will of the people constituting the basis of the authority of the state, and elections held under procedures securing freedom of voting. Article 25 of the International Covenant on Civil and Political Rights has a similar purport.

It follows from the aforementioned international instruments that prohibition of all discrimination is not seen as unlimited but, in the context of a legal prescription may be assessed in terms of its reasonableness.

Consequently, the aforementioned rules and those of Articles 5.9 and 7.5 of the 1990 Document of the Copenhagen Meeting, prohibiting all discrimination in the exercise of civic rights, are not applicable to the case in point.

The Court also held that having regard to these international rules, the impugned statutory provisions met the requirements of Article 49 of the Constitution because the conditions which they stipulated were founded on interests relating to maintenance of national security. The conditions stipulated by law in this case were reasonable.

II. The court found Section 6.a of Act no. 188/1999 reflected in the provisions of Article 16.3 of the Constitution, interpreted in conjunction with Article 50 of the Constitution concerning loyalty to the nation. In the light of the foregoing, loyalty to the nation is clearly an essential obligation arising from the relationship of citizenship, a decisive one as regards regulation by the legislator of entry to certain official posts and high public offices. A similar condition is also found in Article 21.2 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights.

III. The Court also noted that from the legal theory angle, the expression "official posts and high public offices" could raise debate and criticism over their ambit and scope in one realm or another of community life and political affairs. Nonetheless, the Court does not have jurisdiction to modify, restrict or amplify the letter of the law without turning itself into an active legislator and thereby putting itself in the place of the parliament, the sole legislative authority.

IV. In the case in point, the Court correctly found the objection alleging unconstitutionality inadmissible in asking it to interpret a provision of the Constitution in such a way as to declare it incompatible with the international treaty framework relating to human rights. If it allowed the objection, the Court would take the revision of the Constitution upon itself, the effect of the decision being to nullify the application of the text.

In this way, the Court would extend the limits of its own jurisdiction.

*Languages:*

Romanian, French (translation by the Court).



## Russia Constitutional Court

Summaries of important decisions of the reference period 1 May 2001 – 30 August 2001 will be published in the next edition, *Bulletin* 2001/3.



## Slovakia Constitutional Court

### Statistical data

1 May 2001 – 31 August 2001

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 1
- Decisions on the merits by the panels of the Court: 15
- Number of other decisions by the plenum: 5
- Number of other decisions by the panels: 71

### Important decisions

*Identification:* SVK-2001-2-003

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 12.07.2001 / **e)** ES 3/01 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

*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.

1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.

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.

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



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*Keywords of the alphabetical index:*

Admission, prerequisite / Constitutional jurisdiction, subsidiarity / European Court of Human Rights, complaint, proceedings, parallel.

*Headnotes:*

To proceed upon an application found admissible by the European Court of Human Rights, regardless of the will of those who have exercised their right to file individual complaints as provided for by Article 34 ECHR, could amount to an unacceptable interference with this right.

The relationship between a national constitutional court and the European Court of Human Rights is based on a functional division characterised by the principle of their co-operation, and not competition between the two judicial authorities. To launch parallel proceedings before the Constitutional Court on the basis of a notice by the Cabinet, which is the defendant in the proceedings at the European Court of Human Rights, can serve to weaken the Convention-based protection mechanism.

*Summary:*

Pursuant to Article 75 of the Act on the Constitutional Court of the Slovak Republic, if the European Court of Human Rights ("European Court of Human Rights") admits an individual complaint against any decision of a Slovak public authority, and the Slovak Cabinet receives notice of such an admission, it is bound to inform the Constitutional Court, which then proceeds upon the notice as if a constitutional complaint were filed.

The Cabinet informed the Constitutional Court of the admission by the European Court of Human Rights of an application filed by a group of Slovak citizens. The Constitutional Court, however, stayed the proceedings, stating that it lacked competence to proceed upon applications filed by persons other than those who alleged that their own rights were violated. According to the ruling, the applicant's procedural autonomy is a fundamental principle of judicial decision-making and entails the right to abstain from filing a claim as much as to file it.

In addition, Article 34 ECHR precludes the High Contracting Parties from obstructing the exercise of their constituents' right to file individual complaints with the European Court of Human Rights. To proceed upon an application found admissible by the European Court regardless of the will of the

applicants could amount under the circumstances to an unacceptable interference with this right and would create the risk of conflict between the subsidiary application of international law and the national rights protection mechanisms.

The relationship between the Constitutional Court and the European Court of Human Rights is, the Court held, based on the principle of cooperation between them, and not on competition. Any ruling by the European Court of Human Rights is binding for all Slovak authorities, regardless of the disposition by the Constitutional Court of the respective claim. The parallel proceedings at the Constitutional Court therefore appear redundant and without legal relevance to the legal situation of the applicants.

The Constitutional Court subsequently followed this decision in three other applications based on different factual but identical legal situations (ES 1/01, ES 5/01, ES 6/01).

*Languages:*

Slovak.



## Slovenia

### Constitutional Court

#### Statistical data

1 May 2001 – 31 August 2001

The Constitutional Court held 23 sessions (8 plenary and 15 in chambers) during this period. There were 358 unresolved cases in the field of the protection of constitutionality and legality (denoted by the prefix "U" in the Constitutional Court Register) and 482 unresolved cases in the field of human rights protection (denoted by the prefix "Up" in the Constitutional Court Register) from the previous year at the start of the period (1 January 2001). The Constitutional Court accepted 85 new U and 171 Up new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 57 U cases in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 20 decisions and
  - 37 rulings;
- 12 U cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U cases resolved was 69.

In the same period, the Constitutional Court resolved 116 Up cases in the field of the protection of human rights and fundamental freedoms (4 decisions issued by the Plenary Court, 112 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 or 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 through 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, translated into Slovenian);
- 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-2001-2-002

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.06.2001 / **e)** U-I-104/01 / **f)** / **g)** *Uradni list RS* (Official Gazette), 45/01 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

- 1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
- 3.3.2 **General Principles** – Democracy – Direct democracy.
- 3.10 **General Principles** – Certainty of the law.
- 3.15 **General Principles** – Publication of laws.
- 4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
- 4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

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*Keywords of the alphabetical index:*

Trade, shops, duty-free / National Council, veto, suspensive / Citizen, management of public affairs, direct participation.

*Headnotes:*

The second paragraph of Article 254 of the Rules of Procedure of the National Assembly (PoDZ) was held not to be in accordance with the Constitution as it fails to take into account the institution of the post-legislative referendum, thereby making it possible that, prior to the expiry of the time period for lodging an initiative or a request to call a referendum, a law for which it is not clear whether it will be adopted or not is sent for promulgation. As the third paragraph of Article 292 of the Rules of Procedure of the National Assembly stipulates that, after a repeated voting following the exercise of the suspensive veto, the law, if passed, should be sent immediately for promulgation, the said article is not in conformity with the Constitution, as it makes it possible for the law to be sent for promulgation prior to the expiry of the time period for lodging an initiative or a request to call a referendum.

The Law regulating the transformation of duty-free shops located on land border crossings with Member States of the European Union to border crossing stores (the "ZPPCPEU" Law), and special control measures relating to such stores, was sent for promulgation and publication immediately after the National Assembly, following the imposition of the suspensive veto by the National Council, passed the said law prior to the expiry of the time period for lodging an initiative or a request to call a post-legislative referendum. Therefore ZPPCPEU was not promulgated and published in accordance with the Constitution and, accordingly, the law has not entered into force and must therefore not be applied.

*Summary:*

The petitioner, Nova Stranka, and the National Assembly, the opposing party, held opposing positions as regards the interpretation of Article 21 of the Referendum and Public Initiative Act (hereinafter "ZRLI"), which stipulated that the initiative to call a referendum may be lodged within seven days of passing the law. The central point of the disagreement between the parties was in the question of when the time period for lodging an initiative or a request to call a post-legislative referendum commenced and what is deemed to be the act of passing the law. In the opinion of the National Assembly, the said time period began to run as from the first passing of the

law even in the case where the suspensive veto was imposed and the National Assembly again decided on the law. The petitioner, however, opined that, in the event of the suspensive veto, the time period for lodging an initiative to call a referendum begins to run as from the second passing (or reading) of the law.

As holding a referendum is a demanding and complex legal activity, all questions arising in connection with the exercise of this constitutional right must be accurately and clearly defined. The suspension of the publication of a law is an important legal consequence of a lodged request or initiative to call a post-legislative referendum. The effectiveness of this type of referendum can only be ensured by suspending the publication of the law until the conclusion of the referendum procedure. A subsequent confirmatory legislative referendum would be senseless if a law was promulgated and published and entered into force prior to the referendum being carried out. The referendum, as the "people's veto", is an expression of the principle of the people's sovereignty according to which the power is vested in the people, who may, when disagreeing with their chosen representatives through which they exercise the power indirectly, assume their direct right to decide on public affairs. A decision directly adopted by the voters in a referendum has an overriding power over decisions taken by their chosen representatives.

Promulgation of a law and publication of a law, which are legally relevant actions following the passing of the law, represent a necessary condition for the entry into force of the law. Pursuant to the then-applicable arrangement, the National Assembly and/or its President submitted the law for promulgation and ordered its publication in the official gazette (*Uradni list*). It was not possible to promulgate and publish a law in connection with which there were constitutional barriers regarding its making. PoDZ regarded the suspensive veto as a barrier to the promulgation of a law, but failed, however, to consider the possibility of a post-legislative referendum as being a barrier to the promulgation of a law.

Indeed, the post-legislative referendum, which was laid down by the legislature as one of the methods of exercising the right to a referendum referred to in Article 90 of the Constitution, did constitute a barrier to the promulgation of a law. When the legislature adopted ZRLI, whereby a suspensive legislative referendum as a derivation of the constitutional right to a referendum was provided for, it should also have harmonised the provisions of PoDZ with ZRLI. The contested provisions of PoDZ were not in accordance with the Constitution as they failed to take into consideration post-legislative referenda, thereby

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making it possible that, prior to the expiry of the time period for lodging an initiative or a request to call a referendum, a law for which it is not clear whether it will be made or not (as this depends on whether it will be confirmed by the voters in a referendum or not) was sent for promulgation.

Repeated readings of the law by the National Assembly as a result of the suspensive veto are a part of the legislative procedure. If the suspensive veto has been imposed, a stricter majority of the deputies to the National Assembly is required in the second reading of a law than that required during its first reading/passing. Taking into account the current regulation of referenda in ZRLI, no interpretation is thus acceptable other than the one saying that the seven-day period after the passing of the law for lodging an initiative or a request to call a suspensive legislative referendum in the event of the suspensive veto begins to run as from the passing of the law during the second reading or passing of the law. In this context, the Constitutional Court pointed out that, in a situation where the question of the commencement of the time period for lodging an initiative to call a referendum in the event of the suspensive veto is not expressly regulated, the statutory regulation regarding referenda cannot be interpreted restrictively, but only to the benefit of exercising the constitutional right to a referendum; in the event of doubt, a decision must be adopted to the benefit of the party lodging an initiative or a request to call a referendum. The interpretation to the effect that the time period for lodging an initiative or a request to call a post-legislative referendum runs from the first reading/passing even in the case of a suspensive veto is not acceptable due to the constitutionally defined position of the National Council: it is not possible to consent to the National Assembly's position claiming that the National Council must, in the same seven-day period after the first reading or passing of the law, apply both institutions, i.e. the suspensive veto and the request for a post-legislative referendum, as the Constitution provides no basis for such interpretation. Taking into account the current statutory regulation of referenda, an initiative or a request to call a post-legislative referendum must in any case (with the suspensive veto either being imposed or not) be lodged within seven days after the passing of the law: if the suspensive veto is not used, within seven days of the first reading/passing of the law, and if the suspensive veto is used, within seven days of the second reading/passing of the law.

The Constitutional Court abrogated the contested provisions of PoDZ, which made it possible that a law could be sent for promulgation prior to the expiry of the time period for lodging an initiative or a request to call a referendum referred to in Article 21 of ZRLI. In

making a constitutional review of the procedure of passing a concrete law, i.e. ZPPCPEU, the Court on the same grounds found that the said law was not promulgated and published in accordance with the Constitution and that, accordingly, the law had not entered into force and must not be applied.

As both the suspension of the implementation of ZPPCPEU and this decision of the Constitutional Court resulted in a very specific situation, the Constitutional Court also laid down the method for implementing this decision. Laying down the method of implementation is therefore not necessarily optimal; it is true, however, that the Constitutional Court's room for manoeuvre in determining the method of implementation is not and cannot be equal to that available to the legislature in regulating legal relations. Restitution to the position prior to the promulgation and publication of the law means that the procedure relating to the referendum pursuant to the Constitution and ZRLI, which represents a constitutional barrier to promulgation, publication and entering into force of ZPPCPEU, can - and must - be carried out and concluded. The fact that ZPPCPEU has not entered into force means that no legal consequences could have arisen on the basis thereof; any declaratory decision, which might be issued on the basis of Article 16 of ZPPCPEU is therefore void.

#### *Supplementary information:*

Legal norms referred to:

- Articles 1, 2, 3, 44, 90, 91, 97, 107, 154, 155, 160, 161 of the Constitution;
- Articles 9, 20, 21, 24 of the Referendum and Public Initiative Act (ZRLI);
- Article 273 of the General Administrative Procedure Act (ZUP);
- Articles 21, 30, 40, 42, 43, 44 of the Constitutional Court Act (ZUstS).

#### *Languages:*

Slovenian, English (translation by the Court).



## South Africa Constitutional Court

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### Important decisions

*Identification:* RSA-2001-2-007

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 28.05.2001 / **e)** CCT 17/2001 / **f)** Mohamed and Another v. The President of the Republic of South Africa and Others / **g)** / **h)** 2001(3) *South African Law Reports* 893 (CC); 2001 (7) *Butterworths Constitutional Law Reports* 685 (CC); CODICES (English).

*Keywords of the systematic thesaurus:*

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

1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.

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

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

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

*Keywords of the alphabetical index:*

Death penalty / Deportation / Extradition proceedings / Extradition, safeguard against death sentence.

*Headnotes:*

Capital punishment is not only inconsistent with the Constitution, but also inconsistent with South Africa's obligations under international law.

Under the Constitution a person cannot be deported, extradited or expelled to a foreign country to face criminal charges in circumstances where there is a real likelihood that they will face a death penalty if convicted.

*Summary:*

This case came before the Constitutional Court as an appeal against a ruling by the Cape High Court (the High Court). The High Court declared that the

handing over of Mr Mohamed, a Tanzanian national, to the United States (US) authorities to face numerous capital charges arising out of the bombing of the United States embassy in Dar es Salaam in 1998, was not inconsistent with the Constitution of South Africa. The charges that Mohamed faced carried the sanction of the death penalty. The thrust of the appeal related to the failure of the South African authorities to seek an assurance from their US counterparts that the trial court in the US would not impose capital punishment on Mohamed should he be convicted and alternatively, should such a sentence be imposed, it would not be carried out.

Mohamed had entered the country under a false name. He had been living in Athlone, Cape Town. The US Federal Bureau of Investigations (FBI) had identified him as one of the suspects in the bombing in Dar es Salaam. The Department of Home Affairs, South African Police Service, International Police (Interpol) and the FBI had co-operated to apprehend Mohamed and to send him to the US. He was subsequently sent to the US to face numerous charges arising from such bombing. An application was then brought to the High Court for an order declaring unconstitutional his removal to the US without a condition that he would not be executed. Further, the High Court was required to order the government to direct a corresponding request to the Secretary of State and the Attorney-General of the US. The application failed and leave to appeal directly to the Constitutional Court was urgently sought.

In this court the applicants (supported by the Society for the Abolition of the Death Penalty in South Africa and the Human Rights Committee Trust) argued that the handing over and subsequent removal were a disguised extradition without a safeguard against the death sentence. It was also argued that the South African officials had breached the law relating to deportation (under the Aliens Control Act 96 of 1991 and its regulations). This infringed Mohamed's constitutional rights to life (Section 11 of the Constitution), to dignity (Section 10 of the Constitution) and not to be subjected to cruel, inhuman or degrading punishment (Section 12.1.e of the Constitution). The government argued that Mohamed had been lawfully deported because he was an illegal immigrant, had lawfully been arrested and at his request had properly been deported to the United States and not to Tanzania.

The Constitutional Court, speaking unanimously, found that it was immaterial whether the removal was a deportation or an extradition. The ruling in *S v. Makwanyane and Another* that capital punishment was inconsistent with the values and provisions of the interim Constitution applied with even greater force to

the final Constitution. South Africa could not expose a person to the risk of execution, whether by deportation or extradition and regardless of consent. The court also found that the Act did not permit deportation of Mohamed to the US. Assuming Mohamed to have consented, he could not validly have done so. This is because he was unaware of his right to appeal under the Act and to insist that the South African authorities seek an assurance that he would not be executed.

The Court upheld the appeal, and declared that the handing over was unlawful in that:

- a. the absence of an undertaking that Mohamed would not be executed infringed his constitutional rights to life, dignity and not to be subjected to cruel, inhuman or degrading punishment;
- b. it breached certain provisions of the Aliens Control Act. The Director of this Court was authorised and directed to draw the judgment to the attention of the trial court in New York as a matter of urgency.

#### Cross-references:

#### Death penalty:

- *S v. Makwanyane and Another*, 1995 (3) *South African Law Reports* 391 (CC), 1995 (6) *Butterworths Constitutional Law Reports* 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002].

#### Prerogative Powers:

- *President of the Republic of South Africa and Another v. Hugo*, 1997 (4) *South African Law Reports* 1(CC), 1997 (6) *Butterworths Constitutional Law Reports* 708 (CC), *Bulletin* 1997/1 [RSA-1997-1-004].

#### Waiver of Fundamental Rights:

- *S v. Shaba and Another*, 1998 (2) *Butterworths Constitutional Law Reports* 220 (T).

#### Languages:

English.



#### Identification: RSA-2001-2-008

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 07.06.2001 / **e)** CCT 49/2000 / **f)** Independent Electoral Commission v. Langeberg Municipality (as successor to the Stilbaai Municipality) / **g)** / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

4.6.8 **Institutions** – Executive bodies – Sectoral decentralisation.

4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.

4.9.9.1 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Polling stations.

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, electoral commission, independent, status.

#### Headnotes:

For the purposes of Section 41.3 of the Constitution, a dispute between the Independent Electoral Commission and a sphere of government or an organ of state within a sphere of government is not an intergovernmental dispute.

#### Summary:

In preparation for the local elections in November 2000, the Independent Electoral Commission (IEC), in terms of Local Government: Municipal Electoral Act 27 of 2000 (the Act), decided that a voting station for the voting district consisting of Stilbaai and Melkhoutfontein would be positioned in Melkhoutfontein. This would require the voters of Stilbaai to travel some ten kilometres to cast their votes. Section 19.1 and 19.2 of the Act require that voting districts will each have one voting station. In an urgent application brought to the High Court, Stilbaai challenged the IEC's decision. An order was sought directing the IEC to set up a separate voting district for Stilbaai or to provide it with a mobile voting station.

The High Court directed the IEC to provide an additional mobile voting station for Stilbaai. The IEC considered this to be contrary to the Act and so declared Stilbaai a separate voting district. The IEC pursued the matter to the Constitutional Court in

order to establish its status and position within the scheme of co-operative governance.

The dispute focussed on whether Section 41.3 of the Constitution had to be complied with. This section requires an organ of state involved in an intergovernmental dispute to make every effort to settle it before the court is approached.

Justice Yacoob, writing for a unanimous court, held that this dispute would be intergovernmental only if the IEC is in some way part of government as contemplated in Chapter 3 of the Constitution. The concept of intergovernmental relations in Chapter 3 is inescapably a reference to relations between spheres of government and organs of state within those spheres. An intergovernmental dispute is therefore a dispute between parties that are part of government in the sense of being either a sphere of government or an organ of state within a sphere of government.

The Court, in refusing to declare this an intergovernmental dispute, held that the IEC is an organ of state in that it exercises public powers and performs public functions in terms of the Constitution (Section 239 of the Constitution), without necessarily being a part of government. The holding of free and fair elections is a public function and therefore a state function performed by a state institution. The Court stated that the IEC is not an organ of state within a national sphere of government for several reasons. First, the IEC cannot be a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with Section 85.2 of the Constitution. Secondly, the Constitution describes the IEC as a state institution that strengthens constitutional democracy and there is no indication in Chapter 9 from which to draw an inference that it is a part of the government. It was also noted that the term "state" is broader than "national government" and embraces all spheres of government. Thirdly, the IEC is independent, subject only to the Constitution and the law (Section 181.2 of the Constitution). It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated to all other spheres of government. Independence cannot exist in the air, and it is clear that the Chapter intends to make a distinction between the state and government. The independence of the IEC is intended to refer to independence from the government, whether local, provincial or national.

The Court held that it is true that the IEC must manage the elections of national, provincial and municipal legislative bodies in accordance with national legislation (Section 190.1.a of the Constitu-

tion). However, this legislation cannot compromise the independence of the IEC, which is clearly a state structure. The fact that a state structure has to perform its functions in accordance with national legislation does not mean that it falls within the national sphere of government.

The Court found that the very reason the Constitution created the IEC and other Chapter 9 bodies was so that they should be, and manifestly be seen to be, outside government.

The Court accordingly held that the dispute between Stilbaai and the IEC could not be classified as an intergovernmental dispute. Therefore an organ of state suing the IEC would not have to comply with Section 41.3 of the Constitution.

#### *Cross-references:*

Chapter 9 institutions:

- *The New National Party v. Government of the Republic of South Africa and Others*, 1999 (3) *South African Law Reports* 191 (CC), 1999 (5) *Butterworths Constitutional Law Reports* 489 (CC), *Bulletin* 1999/1 [RSA-1999-1-003].

#### *Languages:*

English.



#### *Identification: RSA-2001-2-009*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 04.07.2001 / **e)** CCT 54/2000 / **f)** *Moise v. Transitional Local Council of Greater Germiston* / **g)** / **h)** CODICES (English).

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

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

Fundamental right, exercise, deterring or discouraging / Action, procedure for instituting.

*Headnotes:*

Obliging plaintiffs wishing to sue an administration, local authority or any of its officers for damages for a wrongful act, to serve a written notice on the defendant within ninety days of the cause of action arising constitutes a violation of the right to access to courts.

*Summary:*

This judgment confirmed a finding of the Witwatersrand High Court per Acting Justice Hofmann that Section 2.1.a of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act of 1970 (the Act) is unconstitutional. The section obliges plaintiffs wishing to sue an administration, local authority or any of its officers for damages for a wrongful act, to serve a written notice on the defendant within ninety days of the cause of action arising.

The Constitutional Court per Acting Justice Somyalo found that the section constituted a violation of Section 34 of the Constitution. This section guarantees the right to have disputes that can be resolved by the application of law decided in a fair public hearing before a court. The Court found that the ninety day time period was short particularly since the notice had to contain considerable detail of the particular occurrence and its consequences. The Court therefore concluded that Section 2.1.a of the Act in the context of the composite scheme of things consisting of the specific notice, within a short period and with limited scope for condonation for non compliance, does constitute a material limitation of an individual's right of access to a court of law under Section 34 of the Constitution. The Court also found that the possibility of applying for condonation to serve the notice out of time did not render the limitation immaterial, especially considering the prevalence of disadvantaged people in the country, who often lack the resources to initiate legal proceedings within a short period of time.

Moreover, a bill which aimed to replace placing the offending Act had already been adopted by the National Assembly. The government had not put forward the requisite material or policy considerations

necessary to justify the limitation. Therefore, considering the central importance of the right of access to court, the Court found that the violation could not be justified under Section 36 of the Constitution.

Having declared the section invalid on the basis of Section 34 of the Constitution the court said that it was unnecessary to consider the argument raised by the Women's Legal Centre, (as *Amicus curiae*) that the section infringed the right to equality (Section 9 of the Constitution).

*Cross-references:*

Access to courts:

- *Mohlomi v. Minister of Defence*, 1997 (1) *South African Law Reports* 124 (CC), 1996 (12) *Butterworths Constitutional Law Reports* 1559(CC), *Bulletin* 1996/3 [RSA-1996-3-018].

Limitation exercise:

- *The National Coalition for Gay and Lesbian Equality and Another v. The Minister of Justice and Others*, 1999 (1) *South African Law Reports* 6 (CC), 1998 (12) *Butterworths Constitutional Law Reports* 1517 (CC), *Bulletin* 1998/3 [RSA-1998-3-009].

Justiciability:

- *Beinash and Another v. Ernst & Young and Others*, 1999 (2) *South African Law Reports* 116 (CC), 1999(2) *Butterworths Constitutional Law Reports* 125 (CC), *Bulletin* 1998/3 [RSA-1998-3-012].

*Languages:*

English.



*Identification:* RSA-2001-2-010

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 16.08.2001 / **e)** CCT 48/2000 / **f)** Carmichele v. The



Minister of Safety and Security and Another / g) / h)  
CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

*Keywords of the alphabetical index:*

Common Law, development.

*Headnotes:*

Failure by the court *a quo to mero motu* develop the common law principle of delictual duty to act amounts to a denial without just cause of the applicant in her claim for damages against the state.

*Summary:*

The applicant sought to recover damages from the Minister of Safety and Security for injuries arising from an assault on her by one Coetzee. Coetzee was known to have had problems of a sexual nature from an early age. In 1994 he committed an indecent act on a 25 year old acquaintance and in 1995 he attempted to rape and murder another woman for which he was arrested and appeared before court. The police officer who investigated the matter stated in a note to the state prosecutor that there were no reasons to deny him bail and recommended that he be released on warning.

In June 1995 the applicant noticed Coetzee snooping around the house trying to gain entry. At the request of the applicant, one Mrs Gosling approached the police and the prosecutor fearing that Coetzee might commit the same crime again. The prosecutor indicated that their hands were tied unless Coetzee committed another offence. On the 6th August 1995 the applicant went to Gosling's house but was confronted by Coetzee who attacked her viciously. He was convicted and sentenced to twelve-and-a-half years imprisonment for attempted murder and housebreaking.

The applicant founded her case in the common law of delict (tort). The trial court held that she had not established a cause of action and dismissed her case. On appeal she was also unsuccessful. Before the Constitutional Court she argued that the relevant members of the South African Police Services and the state prosecutor had owed her a duty of care to ensure that she enjoyed her constitutional rights to: life (Section 9 of the interim Constitution), human dignity (Section 10 of the interim Constitution), freedom and security of the person (Section 11 of the interim Constitution), privacy (Section 13 of the interim Constitution) and freedom of movement (Section 18 of the interim Constitution). She contended that both the High Court and Supreme Court of Appeal erred in not applying the relevant constitutional provisions in determining whether the police or the state prosecutor had owed her a legal duty of care in the law of delict. It was submitted that the Constitution imposes a particular duty on the state to protect women against violent crimes in general and sexual abuse in particular. She relied upon the constitutional obligation on all courts to "develop the common law" with due regard to the spirit, purport and objects of the Bill of Rights in terms of Sections 173 and 39.2 of the interim Constitution.

Writing for the unanimous court Justices Ackermann and Goldstone, held that it follows from Section 39.2 read with Section 173 of the interim Constitution that where the common law deviates from the spirit, purport and object of the Bill of Rights, the courts have a general obligation to develop the common law by removing that deviation.

There are two stages to the inquiry:

- a. whether the existing common law requires development in accordance with the objectives of Section 39.2 of the interim Constitution, and, if this inquiry is in the affirmative;
- b. how such development is to take place in order to meet these objectives.

They held further that there is a duty imposed on the state and all its organs not to perform any act that infringes these rights and that in some instances there would be a positive obligation to provide appropriate protection to everyone through the laws and structures. There is a positive obligation on members of the police force both under the interim Constitution and the Police Act 7 of 1958. The court held that although each case must ultimately depend on its own facts, there seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and

has threatened to do violence to her if released on bail, should not be held liable for the consequences of a negligent failure to bring such information to the attention of the court.

The Court concluded that in light of the evidence available, it was sufficient to justify a conclusion that if bail had been opposed and if all relevant information pertaining to Coetzee's background and sexual problems had been placed before the magistrate, bail might have been refused. That was sufficient to have put the respondents on their defence.

The Court indicated that it would not be desirable for it to decide these issues of fundamental importance concerning the development of the common law of delict as a court of first instance. The order of absolution from the instance was dismissed and the matter was referred to the High Court so that the trial could continue.

#### Cross-references:

Development of the common law:

- *Amod v. Multilateral Motor Vehicle Accidents Fund*, 1998 (4) *South African Law Reports* 753 (CC), 1998 (10) *Butterworths Constitutional Law Reports* 1207 (CC);
- *Du Plessis and Others v. De Klerk and Another*, 1996 (3) *South African Law Reports* 850 (CC), 1996 (5) *Butterworths Constitutional Law Reports* 658 (CC), *Bulletin* 1996/1 [RSA-1996-1-008];
- *Gardener v. Whitaker*, 1996 (4) *South African Law Reports* 337, 1996 (6) *Butterworths Constitutional Law Reports* 775 (CC).

Equality:

- *S v. Baloyi* (Minister of Justice and Another Intervening), 2000 (2) *South African Law Reports* 425 (CC), 2000 (1) *Butterworths Constitutional Law Reports* 86 (CC), *Bulletin* 1999/3 [RSA-1999-3-011];
- *Brink v. Kitshoff NO*, 1996 (4) *South African Law Reports* 197 (CC), 1996 (6) *Butterworths Constitutional Law Reports* 752 (CC), *Bulletin* 1996/1 [RSA-1996-1-009].

#### Languages:

English.



## Sweden Supreme Court

### Important decisions

*Identification:* SWE-2001-2-001

a) Sweden / b) Supreme Court / c) / d) 15.06.2001 / e) Ö 3448-00 / f) / g) / h).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Periodical, printed, owner / Internet, server, located abroad, responsibility / Editor, lack of appointment, owner's responsibility / Internet, content responsibility.

*Headnotes:*

According to Chapter 1 Article 9 of the Fundamental Law on Freedom of Expression, the provisions of this fundamental law concerning radio programmes apply also in cases in which a printed periodical makes available to the general public, in response to a special request and using electromagnetic waves, information taken directly from a register containing material for automatic data processing purposes.

The Supreme Court held that this provision was applicable when an owner of a Swedish printed periodical had made texts available on the Internet irrespective of the fact that the Internet server was localised in the U.S. As the owner had not appointed an editor responsible for the information on the Internet, he was consequently responsible himself for the said information.

*Languages:*

Swedish.



## Sweden

### Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 May 2001 – 31 August 2001.



## Switzerland

### Federal Court

#### Important decisions

*Identification:* SUI-2001-2-004

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 23.04.2001 / **e)** 2P.173/2000 / **f)** P. v. municipality of Luzern, Cantonal Buildings Department and Administrative Court of Luzern Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 84 / **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.  
 3.18 **General Principles** – General interest.  
 3.19 **General Principles** – Margin of appreciation.  
 3.22 **General Principles** – Prohibition of arbitrariness.  
 4.6.8 **Institutions** – Executive bodies – Sectoral decentralisation.  
 4.10.8 **Institutions** – Public finances – State assets.  
 5.1.1.5.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.  
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.  
 5.2 **Fundamental Rights** – Equality.  
 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.  
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

*Keywords of the alphabetical index:*

Censorship, prohibition / Public property, use for advertising / Advertising, restriction / Public transport, advertising.

*Headnotes:*

Articles 10, 14 and 18 ECHR; Articles 16 and 35.2 of the Federal Constitution; Section 84.1 of the Federal Judicial Organisation Act; private parties' use of

public transport vehicles for advertising purposes; freedom of opinion; ban on censorship.

Does state interference preventing the conclusion of a private-law contract desired by a private individual constitute an act of public authority within the meaning of Section 84.1 of the Federal Judicial Organisation Act (recital 4a)?

There is no fundamental right of access to an urban public transport vehicle for use as an advertising medium, in order to disseminate an opinion. Difference between use of public property and use of administrative assets (recital 4b).

The state must also respect citizens' fundamental rights in performing those of its tasks where it acts under private law. Scope of the equal treatment obligation when public property is used for commercial purposes (recital 4c).

An advertising slogan that is to appear on the outside of a bus may be refused on the ground that part of the population might perceive it as offensive (recital 4d).

### Summary:

The municipality of Luzern had granted *Société générale d'affichage* an exclusive licence to place adverts on the city's public transport vehicles. This included the possibility of painting the outside of a number of buses for advertising purposes.

With the aim of advertising in aid of animal protection, P. asked *Société générale d'affichage* to cover the whole of the outside of a bus with the following slogan "In the canton of Luzern, there are more pigs than people – why do we never see them?"

The urban public transport company turned down this request on the ground that the proposed slogan would shock the public and the contingent of buses available for this form of advertising was in any case used up. It was nonetheless willing to display posters bearing the slogan inside buses.

P. appealed to the municipality of Luzern, as the higher administrative authority, asking it to give permission for the disputed advert to be shown on the outside of a bus. The municipal authority decided not to proceed further with P.'s appeal on the ground that the public transport company's refusal was a private-law matter and did not amount to an act of public authority. It nonetheless treated the appeal as a complaint and upheld the public transport company's decision.

Subsequent appeals to the Cantonal Buildings Department and the Administrative Court of Luzern Canton were dismissed. P. then lodged a public-law appeal with the Federal Court, asking it to set aside the cantonal decisions. *Inter alia*, he alleged unacceptable censorship and discrimination and a violation of freedom of opinion, as guaranteed by Article 16 of the Federal Constitution and Article 10 ECHR. The Federal Court held that the appeal was inadmissible.

The Federal Court left open the question whether the public transport company's refusal constituted an act of public authority against which a public-law appeal could be brought. It pointed out that relations between *Société générale d'affichage* and private individuals came under private law. However, in the case under consideration it was the public transport company which had rejected the advert in question. It could not be ruled out that the refusal might be regarded as a decision by a public authority (since the municipality had supervisory authority over *Société générale d'affichage*) and therefore open to a public-law appeal.

Freedom of opinion, as guaranteed in Article 16 of the Federal Constitution and Article 10 ECHR, protect individuals against all forms of censorship, but do not grant them an unconditional right to make use of the media. This principle applied to both private media and means of communication in the hands of public authorities. With regard to public property, such as streets and public areas, used to disseminate opinions or carry on commercial activities, the established precedents recognised some right of increased use. The authorities were obliged to take into consideration the specific substance of the fundamental rights at stake. However, property forming part of the community's administrative assets, such as public transport vehicles, must be used in accordance with its primary purpose, which left little scope for private use. It followed that P. could not rely on the protection of fundamental rights.

Public authorities are in general obliged to respect fundamental rights. This also applies where they act under private law or delegate administrative tasks to private parties. Compliance with the principle of equality and the ban on arbitrary treatment could, however, prove incompatible with the necessary margin of discretion and room for initiative. In such cases a balance must be struck, regard being had to the actual circumstances.

An assessment of the interests at stake in the case under consideration showed that the public transport company was willing to display posters bearing P.'s slogan inside buses. From this point of view, the

allegation of unacceptable censorship was ill-founded. The public transport company was also entitled to take into consideration the fact that buses served above all as a means of public transport and were not intended for the distribution of posters that might shock members of the public. In addition, there was no evidence that the public transport company would have accepted other adverts similar to P.'s. The Administrative Court's judgment therefore did not violate P.'s freedom of opinion.

*Languages:*

German.



*Identification:* SUI-2001-2-005

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 18.06.2001 / **e)** 1P.145/2001 / **f)** Mr and Mrs W. v. Administrative Court of Geneva Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 115 / **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.  
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.  
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.  
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.  
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

*Keywords of the alphabetical index:*

Right, civil nature / Autopsy, order, review.

*Headnotes:*

Article 10 of the Federal Constitution and Article 6.1 ECHR; judicial review of an order to perform an autopsy.

Where the deceased's relatives subsequently challenge an autopsy order, the matter must in principle be submitted to the courts.

*Summary:*

On 2 April 1999 A., an eleven-year-old girl, was the victim of a road accident. She was rushed to the Geneva Cantonal University Hospital, where she died the next day of severe brain damage. She was declared dead on 3 April 1999 firstly at 10.23am and secondly at 6.30pm.

In accordance with their daughter's wishes, Mr and Mrs W. offered her organs for donation, and their removal was scheduled to take place on 4 April 1999. The parents went to the hospital on that date to keep vigil beside her body and were told that an autopsy had been ordered by the police chief pursuant to instructions issued by police headquarters. The autopsy was performed on 6 April 1999.

Mr and Mrs W. lodged a customary-law appeal with the Geneva Conseil d'Etat, with a view to having the autopsy order declared unfounded. The Conseil d'Etat transferred the case to the Administrative Court of Geneva Canton, which held that both the appeal against the autopsy order and any request for a declaration were inadmissible.

Mr and Mrs W. then lodged a public-law appeal, seeking to have the Administrative Court's decision set aside. They alleged a violation of personal freedom and of the right of access to a court (Article 10 of the Federal Constitution, Articles 6 and 8 ECHR). The Federal Court allowed the appeal.

The Administrative Court had decided not to proceed with Mr and Mrs W.'s appeal on the strength of the Judicial Organisation Act, the Administrative Procedure Act and the Code of Criminal Procedure of Geneva Canton. The Federal Court noted that this decision was not based on arbitrary application of cantonal law.

Personal freedom, guaranteed by Article 10 of the Federal Constitution, was not confined to an individual's lifetime but continued after death, allowing everyone to decide in advance what was to become of their body and to guard against unlawful interference of any kind. The body of a deceased person was also protected under Article 8 ECHR. These guarantees did not, however, entail unconditional access to a court, since Article 13 ECHR required that individuals should have an effective remedy before a national authority, but not obligatorily a judicial authority. Nor did the Constitution provide for a right to review by a court.

The question then arose whether Article 6 ECHR was applicable and entitled Mr and Mrs W. to have their case decided by a court. Since there was no criminal charge, it was necessary to assess whether the dispute concerned determination of civil rights and obligations.

Legal personality was in principle no longer protected after death, but the courts allowed of an extension of protection. This followed firstly from public law, which contained rules on the declaration of deaths and on interments. It was also recognised under private law, in particular by reason of a desire to safeguard surviving relatives' religious and emotional feelings. Relatives thus had a genuine individual right to protection against state interference with a deceased family member's body. The case therefore concerned a civil right within the meaning of Article 6 ECHR.

Under the established case-law the right to compensation for damage caused through wrongful action by a public authority qualified as a civil claim. The same held true where the persons concerned were not seeking financial compensation, but merely reparation of a declaratory nature. It followed that Mr and Mrs W.'s application came within the ambit of Article 6.1 ECHR and must in principle be brought before a court.

Access to a court could be limited by procedural rules. Since the case under consideration concerned the very essence of this right, cantonal law concerning applications to the Administrative Court, which had been applied in a non-arbitrary manner, was not a determining factor. The argument that Mr and Mrs W. had no real interest was also not decisive, as they were seeking a mere declaration.

The public-law appeal was therefore founded. Mr and Mrs W. were entitled to have their case decided by a court. Given the lack of explicit provisions in cantonal law, a cantonal remedy must be opened up in their specific case on the sole basis of the European Convention on Human Rights. It was for the cantonal authorities to designate an authority and determine the appropriate legal channel for dealing with Mr and Mrs W.'s application.

#### *Languages:*

French.



#### *Identification:* SUI-2001-2-006

**a)** Switzerland / **b)** Federal Court / **c)** Second Civil Court / **d)** 02.07.2001 / **e)** 5C.157/2001 / **f)** A. v. Administrative Court of Luzern Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 III 385 / **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.  
 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.  
 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.  
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.  
 5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

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

Speediness, principle / Assistance, procedure / Hospitalisation, forced.

#### *Headnotes:*

Deprivation of liberty for purposes of assistance. Procedure at cantonal level (Article 397e of the Swiss Civil Code [CC]); direct access to a court (Article 397d CC). Principle of speediness (Article 397f.1 CC; Article 5.4 ECHR).

In view of the provisions of the European Convention on Human Rights, federal law guarantees speedy, direct access to a court. The Luzern Canton regulations are incompatible with these principles of federal law, since they provide that a provisional committal order shall first be reviewed by an administrative authority and access to a court shall be allowed only at a later stage (recital 2). It is not possible to determine in broad, abstract terms, based on uniform, explicit criteria, which procedures fail to satisfy the requirement of speed laid down in Article 397f.1 CC. The decision must be based on all the specific circumstances of a case, as specified in the case-law concerning Article 5.4 ECHR (recital 3a). In the case under consideration there was no breach of the principle of speediness (recital 3b).

*Summary:*

On 2 April 2001 a doctor ordered that A., who was born in 1976, be provisionally committed to a psychiatric clinic. The reason given for this deprivation of liberty for purposes of assistance was A.'s state of acute psychosis, which posed a danger to himself and to those close to him, and the burden that A. represented for his family while in that state. The Luzern district prefect was informed of the hospitalisation on 3 April 2001 and interviewed the patient on 9 April 2001. In a decision of 10 April 2001 the prefect upheld the hospitalisation order and dismissed an application for release.

On 12 April 2001 A. filed an application with the Administrative Court of Luzern Canton, seeking his release. The court heard the case on 26 April 2001 and turned down the request the very same day.

A. appealed to the Federal Court, asking it to overturn the impugned judgment. He maintained that the cantonal procedure was inconsistent with federal private law and had taken too long. The Federal Court dismissed the appeal.

The provisions of the Swiss Civil Code concerning deprivation of liberty for purposes of assistance guaranteed a person committed to hospital or a person close to him or her a right of appeal to the courts. Federal private law did not draw any distinction between ordinary and provisional hospitalisation. Since the rules applied in Luzern provided that a committal order should be issued by a doctor, subject to subsequent review by the prefect, they prolonged the procedure and were at variance with federal law. However, this fact alone did not mean that the appeal must be allowed, since the case had in the meantime been heard by a court.

Under the Swiss Civil Code the courts decided cases according to a simple, rapid procedure. As with the prompt decision required under Article 5.4 ECHR, the speed of judicial proceedings must be assessed in the light of all the circumstances of the specific case. In this respect, it could be noted that A. had filed his application on 12 April 2001 and the Administrative Court had begun to prepare the case for hearing on 17 April 2001, the first working day after Easter, by asking for copies of the medical report, the case-files of the lower authorities and their assessment of the case. After receiving the necessary documents, the court had contacted both the doctor at the clinic and a psychologist and had granted the patient a hearing on 26 April 2001. It gave its decision on that same date. In the light of the above, the court could not be criticised for having delayed the proceedings or for failing to take a sufficiently speedy decision. The

complaint of a breach of federal law was accordingly ill-founded.

*Languages:*

German.



# “The Former Yugoslav Republic of Macedonia” Constitutional Court

## Important decisions

*Identification:* MKD-2001-2-005

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 23.05.2001 / e) U.br.196/2000 / f) / g) / h) CODICES (Macedonian).

*Keywords of the systematic thesaurus:*

3.18 **General Principles** – General interest.  
 3.25 **General Principles** – Market economy.  
 4.7.15.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar.  
 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.  
 5.2 **Fundamental Rights** – Equality.  
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

*Keywords of the alphabetical index:*

Competition / Tax, incentive / Tax, value-added tax / Bar, junction of public service.

*Headnotes:*

Having a free market, entrepreneurship and legal equality of all market entities does not restrict the legislature from determining distinct tax bases for the sale of goods and provision of services exercised by different market entities. The legal bar, as a public service, whose status and organisation are regulated by the law, performs activities that differ from those exercised by other subjects in the marketplace. Therefore, the charging of different VAT rates to attorneys and other entities providing legal assistance under certain circumstances does not violate the principle of the free market and entrepreneurship and the legal equality of market entities.

*Summary:*

An individual from Skopje lodged a petition with the Court, challenging the constitutionality of Arti-

cle 30.2.3 of the Law on value-added tax and Article 6.2 of the Decision regulating goods and services charged at a lower VAT rate.

In the petitioner’s opinion, the provisions at issue infringed Article 55.2 of the Constitution, because they created inequality among attorneys and other individuals, associations and companies entitled to provide legal assistance in certain areas and under certain circumstances. This is due to the lower VAT rate of 5% charged for services rendered by attorneys, compared to those of other entities, charged at the general tax rate of 19%.

In making its decision, the Court took into consideration the legal position and status of the legal bar and Article 55 of the Constitution, which regulates the matter of competition and the equal legal position of entities in the market.

Article 55 of the Constitution provides for free market and entrepreneurship. It also binds the state to safeguard the equal legal position of all market entities. It forces it to undertake measures against monopolistic behaviour and abuse of dominant positions on the market.

Article 53 of the Constitution defines the status of the bar. It is an autonomous and independent public service that provides legal assistance and carries out public mandates, in accordance with the law.

The Law on value-added tax defines it as one of general consumption being calculated and charged in each stage of the production and marketing of all goods and services, unless otherwise stated. Any sale of goods or provision of services for remuneration is liable to become the subject of taxation. A taxable person is one who independently performs a commercial activity on a permanent or temporary basis. The law also states the meaning of commercial activity: it is any activity undertaken by manufacturers, tradesmen and service providers, with the aim of gaining income.

The principles of market freedom, entrepreneurship and legal equality of all entities in the marketplace do not restrict the legislature from determining a distinct tax basis for the sale of goods and provision of services exercised by different market entities. This is due to the fact that the role of state, in safeguarding the legal equality of market entities and taking measures against monopolistic behaviour in the market, presupposes an equal position and status of the entities concerned. In this case, contrary to other entities providing legal assistance, the bar has an important and significant role within the system of constitutional guarantees in the protection of human



rights and freedoms. It is defined as an autonomous and independent public service providing for legal assistance and carrying out other public mandates. Its organisation and working practices are regulated by a specific law. Moreover, certain rights and responsibilities provided for in distinct laws, such as the Law on Criminal Procedure and other procedural laws, are reserved solely for attorneys. That implies that the bar cannot be treated equally with other entities providing legal assistance in certain domains, since their legal status and position are different.

Therefore, the Court found that the statutory provision prescribing a lower tax rate for attorneys' services (5%) does not infringe the constitutional principles of market freedom and entrepreneurship, because different tax rates charged to distinct entities result from their different legal positions and status the different duties they perform.

Consequently, the Court rejected the alleged unconstitutionality of the disputed provisions.

#### *Languages:*

Macedonian.



#### *Identification:* MKD-2001-2-006

**a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 06.06.2001 / **e)** U.br.141a/2000, U.br.141b/2000, U.br.141v/2000 / **f)** / **g)** / **h)** CODICES (Macedonian).

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

3.13 **General Principles** – Legality.  
 3.16 **General Principles** – Proportionality.  
 3.18 **General Principles** – General interest.  
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.  
 5.2 **Fundamental Rights** – Equality.  
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

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

Competition, economic, protection / Legitimate aim / Media, broadcasting, licence, granting / Measure,

justification / Media, audiovisual / Media, broadcasting, monopoly / Media, television, licence, fees / Monopoly / Telecommunications / Time-limit, right, condition.

#### *Headnotes:*

The terms and procedures for rendering telecommunication services, which is an activity in the public interest, are regulated by statute. The ban on other legal entities and individuals exercising such activities up until a certain period of time (31 December 2005) represents a statutory way of meeting the public interest. By charging commercial radio stations a fee for the transmission and broadcast of programmes, whilst at the same time exempting public networks from this duty, the legislature does not breach the constitutional framework. The principle of equality of radio broadcasting organisations refers to access for the use of the state radio broadcasting network, but this principle does not apply to other radio and television networks.

#### *Summary:*

A lawyer from Stip lodged a petition with the Court challenging the constitutionality of several legal provisions referring to telecommunication services and radio and television networks: Article 22.4 and Article 33.2 of the Law on Telecommunications, Article 7 and 13 of the Law on the Establishment of the Public Undertaking, "Macedonian Radio Broadcasting", and Article 11 of the Law on the Establishment of the Public Undertaking, "Macedonian Radio Television".

According to Article 22.4 of the Law on Telecommunications, up until 31 December 2005, no legal entity or individual besides the current public telecommunication operator may:

1. provide, organise, advertise, promote or otherwise participate in organising call back services, or
2. provide fixed telephone call services, telegraph services, telex and other services involving line rental, nor construct, own or work with established public telecommunication networks.

In the petitioner's view, this provision was in contradiction to Article 55 of the Constitution, which safeguards the principle of market freedom and entrepreneurship.

In rejecting the alleged unconstitutionality of the provision at issue, the Court took into consideration the nature of the telecommunication services and the

statutory provisions that regulate the way they are exercised, as a public utility service.

Article 1.2 of the Law on Public Undertakings provides for the meaning of commercial activities of the public interest: these are those "which are essential for the life and work of citizens, and for the work of legal entities and state bodies". Amongst others, Article 2 of this law describes telecommunications, as well as the system of radio and television networks, as a public utility service. Pursuant to this law, the terms under which these services are exercised and the way in which the element of "public interest" is attained should be regulated by statute. As a *lex specialis*, the Law on telecommunications regulates exactly the terms under which telecommunication services are exercised, as well as the attainment of the public interest element in this sphere. In the Court's opinion, the provision that bans other legal entities and individuals from exercising the services mentioned above up until 31 December 2005, does not put the current telecommunication operator in a monopolistic position. It just specifies the way in which the public interest element is attained in this sector.

According to Article 33.2, the Minister for Transport and Communications, upon the prior proposal of the Directorate, passes the regulations for the allocation of operating licences for radio stations.

The petitioner claimed that radio operating licences are goods of public interest. Therefore, he alleged the provision at issue contradicted Article 56 of the Constitution, according to which a law, and not a ministerial regulation, should define the method and the terms under which certain goods or rights in the public interest sphere can be given out for use.

The Court found that the disputed provision did not violate the constitutional arrangement of use of goods pertaining to the public interest. It judged that the provision only aimed to enforce the law itself, and that it was the law which originally set up the methods for issuing radio operating licences – Article 27.1.5 of the Law on the Organisation and Work of State Administrative Bodies states that the Ministry of Transport and Communications covers the issues related to telecommunications and telecommunication infrastructure.

The next provision, which the petitioner claimed as unconstitutional, was Article 7 of the Law on the Establishment of the Public Undertaking, "Macedonian Radio Broadcasting". This law stipulates that the public undertaking is to transmit and broadcast radio and television programmes of Macedonian Radio Television (MRT), covering the whole territory of the

state via two radio and television networks free of charge. The public undertaking (Macedonian Radio Broadcasting) also transmits and broadcasts programmes free of charge for public radio broadcasting undertakings, which perform public interest activities on a local level and which re-broadcast programmes delivered by MRT. Paragraph 3 of this article prescribes that public undertakings should charge a fee to commercial radio broadcasting companies (those which obtained concessions for performing radio broadcasting activity) for the transmission of programmes.

The petitioner raised the question of the unconstitutionality of this provision because in his opinion it put MRT in a privileged position in the market with respect to other, commercial radio stations, which violated Article 55 of the Constitution.

The Court also described radio and television networking as public interest activities and referred to statutory provisions, according to which the methods for the exercise of these activities, as well as the attainment of the public interest element, should be determined by statute. Therefore, the Court ascertained that the legislature did not infringe the constitutional framework by prescribing the fees to be paid by commercial broadcasting companies to the public undertaking for the transmission of programmes.

Article 13 of the Law on the Establishment of the Public Undertaking "Macedonian Radio Broadcasting" was challenged because in the petitioner's view it empowered the government to appoint and dismiss members of the Board for the Supervision of Finances, whereas this competence should have been exercised by the National Assembly.

The Court rejected the alleged unconstitutionality of this provision as well. The reason for its decision was that it held that the Law on Public Undertakings stipulates that on behalf of the state, the government establishes public undertakings. Since the law at issue is a *lex specialis* in respect to public undertakings in the sphere of radio broadcasting, the Court judged that there are no constitutional infringements in the law entrusting the government, as founder of the public undertaking, with the right to appoint and dismiss the members of the body which supervises its financial operations.

The Court did not commence the procedure for judging the constitutionality of Article 11 of the Law on the Establishment of the Public Undertaking "Macedonian Radio Television". In the petitioner's view, this provision infringed Article 55 of the Constitution, because it enabled MRT to use the

aforementioned network of the public undertaking to broadcast radio and television programmes free of charge. Therefore, it put this entity in a privileged position in the market with respect to other radio broadcasting companies.

According to Article 8.13 of the Law on Radio Broadcasting, this activity is based on the principle of equality of companies in their access to the basic state radio broadcasting network for the transmission, broadcast and distribution of radio and television programmes. The Court found that the disputed provision referred to the right of MRT to transmit and broadcast radio and television programmes free of charge via three UVF radio and television networks. Therefore, it stated that the aforementioned principle refers only to access to the basic radio broadcasting network and not to any other radio or television network, which is excluded from the basic one.

#### *Languages:*

Macedonian.



#### *Identification:* MKD-2001-2-007

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 18.07.2001 / e) U.br.20/2001, U.br.69/2001 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 58/ 2001 / h) CODICES (Macedonian).

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

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.15 **General Principles** – Publication of laws.
- 3.20 **General Principles** – Reasonableness.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
- 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

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

Administrative decision, unlawful / Employee, discrimination / Employer, rights / Freedom of contract / Labour law / Public employment, appointment / Worker, fundamental right.

#### *Headnotes:*

The attainment of employees’ rights and their status are regulated by statute and collective agreements. The government is not entitled to pass a decision by which it regulates the establishment of employment in the public sector (state budget beneficiaries, public undertakings and institutions, and local self-government units) in a way that contradicts the provisions set out in the relevant statutes.

Employers decide on the need for new workers and on selection among applicants independently, whereby the Institute for Employment is obliged to register each labour contract. It is not authorised to judge whether and when to register such contracts.

#### *Summary:*

The Court repealed the government decision on the temporary cessation of employment in bodies benefiting from state budget funds, in local self-government units, and in public institutions and public undertakings. The decision at issue referred to a limited period of time: from the adoption of the decision up to the introduction and implementation of a treasury system.

According to disputed decision, only in the case of urgent necessity, can the above mentioned entities employ persons by virtue of prior written approval by the Office of the President of the Government of Macedonia and with a prior positive opinion, issued by the Ministry of finance clearing the finances. Applications for new employment or for replacement should be lodged with the Office of the Prime Minister directly. The decision also obliged the Institute of Employment not to register new employees without the prior written approval from the government. The decision entered into force after being adopted.

In Court’s opinion, the decision was not in conformity with the principle of the rule of law and citizens’ equality, nor with the principle of publicity, i.e. the promulgation of regulations before they enter into force, nor the constitutional right of each citizen to work, including openness, fairness and equality of employment. The Court found that decision intruded upon the work, independence and autonomy of local self-government and constituted an additional

competence of inspection for the Institute of Employment, which was *ultra vires* its powers.

According to Article 68.1.2 of the Constitution, the Assembly adopts statutes, which implies that only the legislature regulates issues in the realm of employment, including its establishment.

The government is responsible for law enforcement. In this respect it adopts decrees, decisions, instructions, programs, rulings and conclusions, but it is not entitled to settle issues related to employees' rights and their position. Since the act at issue referred to a strictly defined category of people from the public sector, the Court judged that it contradicted the constitutional guarantee according to which citizens must be treated equally and not discriminated against. In the Court's opinion, the decision created legal uncertainty and violated the principle of the rule of law, because it permitted the application of subjective will out of the statute-determined objective criteria for employment. This manifests itself through the preliminary approval given by the Office of the Prime Minister and the positive opinion by the Ministry of Finance.

According to Article 114.5 of the Constitution, local self-government is regulated by statute. Article 4.2 of the Law on local self-government states that local self-government units cannot be restricted by acts of the central government while performing their duties, except in cases and under terms stated by law and in accordance with the Constitution. Since no law authorises the government to pass a decision by which it interferes in the activities of local self-government units and restricts their jurisdiction, the Court found this decision incompatible with the law as well.

Since the position of employees in public undertakings should be equal to that of employees in private companies (in pursuance to Article 37 of the Law on public undertakings), the Court stated that the government is not entitled to regulate, i.e. to restrict, the legal status of employees in public undertakings.

According to the Law on Labour Relations and Law on Labour Inspection, the state administrative body competent to carry out employment inspections supervises the application of laws and other regulations in the domain of employment. As regards statutory provisions, the Institute of Employment has no inspection jurisdiction. As an intermediary in the employment field, it is only authorised and obliged to record each conclusion and termination of employment. Therefore, the Court found that the act in question constituted an additional inspection jurisdiction for the Institute insofar as it entitled it to

estimate whether and when to attest the labour contract. In the Court's opinion, it restricted the constitutional right to work and employer's right to decide independently on the need for new employment and for recruitment of new employees.

The Court found the disputed regulation incompliant with Article 52 of the Constitution, according to which laws and other regulations are published before they enter into force.

Since Article 4 of the decision stipulated that it enters into force on the day of its adoption, the Court found that it violated the constitutional principle of publication of regulations before they enter into force.

Therefore, the Court found that decision at issue was not in conformity with Article 52 of the Constitution, nor with the Law on Civil Servants, the Law on Public Undertakings, the Law on Employment and Unemployment Insurance, the Law on Labour Relations, the Law on Labour Inspection, the Law on the Government of Macedonia nor, finally, with the Law on Local Self-Government.

*Languages:*

Macedonian.



# Turkey

## Constitutional Court

### Important decisions

*Identification:* TUR-2001-2-005

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 26.06.1996 / **e)** 1996/26 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

4.15 **Institutions** – Exercise of public functions by private bodies.

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:*

Legal person, tax payer, differential treatment / Tax advisor, exclusive rights / Tax authority, powers.

*Headnotes:*

It is not contrary to the equality principle of the Constitution to differentiate between tax-payers according to their fields of activities and types of tax declarations. Taxes and other financial obligations are imposed by the legislative power. Requiring some procedural rules for taxpayers is not contrary to this principle.

*Summary:*

The Council of State referred some provisions of the Tax Code of Procedures to the Constitutional Court in order for them to be annulled. These provisions required taxpayers to give their tax declarations to the Tax Administration Office after they had been filled out by a financial adviser or an accountant. The Council of State objected that Article 227 of the Procedural Tax Code is unconstitutional. The Constitutional Court found that only one part of Article 227, namely Article 227/1-1, should be applied to the case before the Council of State. For this

reason, the Constitutional Court rejected the request in relation to other provisions that could not be applied to the case. Article 227/1-1 requires that tax payers hand in their tax declarations after they have been filled out by a financial adviser or by an accountant. The power to make regulations on this issue was vested in the Tax Administration Office, which may exempt certain taxpayers from the obligation to have their declarations filled out by other people. The Constitutional Court did not find this arrangement to be unconstitutional, since taxpayers have different legal situations and different tax status. Therefore the disputed provision was not contrary to the equality principle under Article 10 of the Constitution. Under Article 73 of the Constitution, tax and other financial duties may only be imposed by law, but it is within the competence of the government to make arrangements using different methods of tax collection. Parliament may regulate these issues in detail, using legislation, or it may leave this competence to the government. For that reason, the legislative power was not delegated to the government. Article 48 of the Constitution provides that every person have freedom of contract. The disputed provision stipulated that taxpayers should make a contract with the aforementioned professionals when handing in their declarations to the government. According to the Constitutional Court, it was not a new legal phenomenon to prepare, control and ratify documents to be submitted to the public authorities. Documents prepared by notaries and other technical services are among examples of this. Financial advisers or accountants are included within Article 135 of the Constitution, which regulates public professional organisations having the nature of public institutions. For those reasons, the disputed provisions were not contrary to Article 48 of the Constitution. The request was rejected by a majority vote.

*Supplementary information:*

- Case no. E.1996/5, K.1996/26, Official Gazette, 30.06.2001 - 24448.

*Languages:*

Turkish.



**Identification:** TUR-2001-2-006

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 15.10.1996 / **e)** 1996/37 / **f)** / **g)** / **h)** CODICES (Turkish).

**Keywords of the systematic thesaurus:**

1.5.6 **Constitutional Justice** – Decisions – Delivery and publication.

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

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

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

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

**Keywords of the alphabetical index:**

Law, provision, retroactive effect / Court decision, effects.

**Headnotes:**

Judgments of the Constitutional Court do not have retrospective effect. If the Court decides that any annulled law, or decree having the force of law, shall be valid until a certain time, acts realised until that time shall not be deemed null and void.

**Summary:**

The Constitutional Court annulled certain provisions of the Law on Judges and Public Prosecutors and decided that those provisions shall remain to be valid for six months after promulgation of the judgment in the Official Gazette. Law no. 4141 (annex article of the Law on Judges and Public Prosecutors) stipulates that appointments made according to the annulled provisions shall be valid provided that they have been made before the judgment of the Constitutional Court came into force. The Council of State, while examining a case, objected to this provision before the Constitutional Court. Under Article 153 of the Constitution, "laws, decrees having the force of law, or the Rules of Procedure of the Turkish Grand National Assembly or provisions thereof, shall cease to have effect as of the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette".

According to the Constitutional Court, the disputed law provided that appointments made until the date of annulment were valid. This rule is in conformity with Article 153 of the Constitution. On the other hand, Article 36 of the Constitution stipulates that "everyone has the right to legal redress, either as plaintiff or defendant, before the courts, through lawful means and procedure". In the field of administrative justice, annulment of acts and actions means that the particular administrative organ, while using its authority, does not have competence to act. It is clear that the disputed provisions do not prevent the review of the administrative acts and actions. Therefore, this rule is not contrary to Article 36 of the Constitution. The submission was rejected by a majority vote.

**Supplementary information:**

- Case no. E.1996/50, K.1996/37, Official Gazette, 29.06.2001 - 24447.

**Languages:**

Turkish.

**Identification:** TUR-2001-2-007

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 08.10.1998 / **e)** 1998/62 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

**Keywords of the systematic thesaurus:**

3.13 **General Principles** – Legality.

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

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

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

**Keywords of the alphabetical index:**

Fine / Law, defined aim, clarity.

**Headnotes:**

Offences must have been determined by law. Since the disputed law provided for sanctions against

persons who act contrary to the decisions of the Council of Ministers, the principle, that nobody may be punished for an act which is not expressly defined by law as a crime and that no-one may be subjected to punishment not prescribed by law, is respected.

### Summary:

Article 3 of Law 1567 (Law on Preserving the Value of the Turkish lira) provided that persons who acted contrary to the decisions of the Council of Ministers were liable to a certain fine. Those decisions should have been taken in conformity with Article 1 of the Law 1567. The Trabzon no. 1 Peace Court referred this provision to the Constitutional Court in order for it to be annulled because of its perceived unconstitutionality. Under Article 7 of the Constitution, the power to legislate is vested in the Turkish Grand National Assembly. Article 1 of Law 1567 delegated competence to the Council of Ministers to take decisions on preserving the value of the Turkish lira. Those decisions include importation and exportation of precious goods and other valuables. According to the Constitutional Court, the legislature may leave certain regulations to be made by the executive branch, if such regulations are executed according to economic principles or if it is necessary to make decisions without delay. Therefore the disputed provision was not contrary to Article 7 of the Constitution. Under Article 38/3 of the Constitution, "penalties, and security measures in lieu of penalties, shall be prescribed only by law". Article 3 of the Law 1567 stipulates that persons who act against the decisions of the Council of Ministers, taken according to Article 1 of the Law 1567, shall pay a heavy fine. The Constitutional Court decided that the legal element of the offence is acting contrary to the decisions taken by the Council of Ministers. After determining the legal elements of the offence, the competence given to the Council of Ministers does not violate the principle of "no crime and punishment without law" (*nullum crimen sine lege*). Therefore, the Court did not find the disputed provision to be unconstitutional and the objection was rejected by a majority vote.

### Supplementary information:

- Case no. E.1997/53, K.1998/62, Official Gazette, 04.07.2001 - 24452.

### Languages:

Turkish.



### Identification: TUR-2001-2-008

a) Turkey / b) Constitutional Court / c) / d) 25.11.1999 / e) 1999/45 / f) / g) *Resmi Gazete* (Official Gazette) / h) CODICES (Turkish).

### Keywords of the systematic thesaurus:

- 1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
- 1.5.4.4.1 **Constitutional Justice** – Decisions – Types – Annulment – Consequential annulment.
- 1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
- 4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.

### Keywords of the alphabetical index:

Privatisation, evaluation methods / Privatisation, pricing / Privatisation, procedure / Annulment, effects.

### Headnotes:

Only those provisions of laws which are applicable in a particular case before an ordinary court may be brought to the Constitutional Court for review. Inapplicable provisions may not be brought to the Court for review. If provisions of a given law are annulled by the Constitutional Court, the replacement provisions should be in conformity with the reasoning of the Court. The power to legislate within this framework is vested in the Turkish Grand National Assembly.

### Summary:

The Erzincan Administrative Court made an application to the Constitutional Court for it to annul certain provisions of Law 4046 on Privatisation. The disputed provisions regulated the valuation of the establishments to be privatised, the structure of adjudication commissions and their procedures. According to Article 152 of the Constitution and Article 28 of Law 2949 (the Law of the Organisation and Procedures of the Constitutional Court), only those provisions of laws or of decrees having the force of law, which are applicable to the particular case, may

be referred to the Constitutional Court for annulment due to their unconstitutionality. Since some of the provisions referred to the Constitutional Court did not apply to a particular case, objection to them should be dismissed. The court which referred the case to the Constitutional Court objected that certain similar regulations had been annulled by the Constitutional Court. Because of the binding effect of the judgments of the Constitutional Court, the disputed provisions should also be annulled. According to the Court, in order to determine whether any provision is the same as the annulled provision, the Court should examine whether there is a similarity in the "identity" of the provisions, i.e. if their concept, characteristics, technique, content and scope are similar. After the Judgment of the Constitutional Court E.1997/35, K.1997/45, Law 4232 regulated Article 18/B-C in a different way. In the disputed provisions, the structures of the valuation commissions, of the adjudication commissions, and the working procedures of each, were set out. Moreover, the new law regulated which kind of adjudication shall be applied to a certain privatisation method. Therefore, the aim was that legislation should be in line with the Constitutional Court judgment. Under the Constitution, legislative power is vested in the Turkish Grand National Assembly. In the disputed provisions, the structure of the valuation commissions, their working procedures, and that of the adjudication commissions and their actions, were regulated in detail. Within this framework, giving some authorities to administrative bodies did not mean that the power to legislate was delegated to those bodies. Therefore, the objection was rejected by majority vote.

#### *Supplementary information:*

- Case no. E.1999/38, K.1999/45, Official Gazette, 03.07.2001 - 24451.

#### *Languages:*

Turkish.



#### *Identification: TUR-2001-2-009*

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 27.03.2001 / **e)** 2001/57 / **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.

1.4.3.2 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings – Special time-limits.

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

1.6.5 **Constitutional Justice** – Effects – Temporal effect.

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

Procedure, rule.

#### *Headnotes:*

The case concerns a declaration of inadmissibility by the Court.

#### *Summary:*

In 2001, the Amasya no. 2 Peace Court referred one of the provisions of the Civil Code to the Constitutional Court in order for it to be annulled. This provision stated that "the domicile of the husband is the domicile of the wife". The Constitutional Court found that the disputed provision of the Civil Code was already referred to the Court in 1993, when it dismissed the case on its merits. According to Article 152 of the Constitution and Article 28 of the Law 2949 (the Law of the Organisation and Procedures of the Constitutional Court), "no allegation of unconstitutionality shall be made with regard to the same legal provision until ten years have elapsed after the publication in the Official Gazette of the decision of the Constitutional Court, dismissing the application on its merits". Since this 10-year time limit had not yet passed, the objection was rejected.

#### *Supplementary information:*

- Case no. E.2001/184, K.2001/57, Official Gazette, 26.05.2001 - 24398.

#### *Languages:*

Turkish.





# Ukraine

## Constitutional Court

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### Important decisions

*Identification:* UKR-2001-2-003

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 23.05.2001 / **e)** 6-rp/2001 / **f)** Constitutionality of the provisions contained in the third, fourth, and fifth paragraphs of Article 248-3 of the Code of Civil Procedure of Ukraine (case: Constitutionality of Article 248-3, CCP of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 22/2001 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

*Keywords of the alphabetical index:*

Administrative act, appeal, procedure / Human rights, exercise / Association, appeal to court.

*Headnotes:*

Article 124.2 of the Constitution, which states that the jurisdiction of the courts shall cover any and all legal relations which arise in the state, and Article 55.1 and 55.2 of the Constitution, give grounds for concluding that the courts have jurisdiction over any petition of a person as to the protection of his/her rights and freedoms. Therefore, the court may not refuse to exercise its jurisdiction if a Ukrainian citizen, an alien or a stateless person feels that his rights and freedoms have been violated or infringed, or that obstacles have been or created to his exercising them, or where there are any other infringements of his rights and freedoms.

In case of disputes concerning violation of human rights and freedoms by civic associations, their officials and servants, citizens shall have the right based on Article 55 of the Constitution to apply for protection of such rights and freedoms in court. The determination of the matters belonging to internal organisation activities or of the exclusive competency of civic associations, as the case may be, shall be made by the court.

*Summary:*

The provisions of Article 248-3.5 of the Code of Civil Procedure conform to the Constitution. The provisions state that the courts have no jurisdiction as to petitions “on acts and actions of civic associations, which for the purposes of the statutes or by-laws, belong to their internal organisational activities or their exclusive competence”.

However, Article 248-3.3 and 248-3.4 of the Code of Civil Procedure is unconstitutional.

The Constitutional Court was involved in settling a dispute on the constitutionality of the provisions laid down in Article 248-3.3, 248-3.4 and 248-3.5 of the Code of Civil Procedure of Ukraine.

The protection of human rights and freedoms determines the contents and scope of the activities of the state (Article 3.2 of the Constitution). The state, by employing different legal means, provides protection of the rights and freedoms of all citizens via legislative authorities, executive and judicial authorities and other public bodies, which are to exercise their powers in the framework specified by the Constitution and according to the laws of Ukraine. The provisions laid down in Article 8.2 of the Constitution specify that these norms have direct effect.

The right to petition the court for the protection of the constitutional rights and freedoms is directly based on the Constitution and is guaranteed by it. This constitutional right may not be repealed (Article 22.2 of the Constitution).

According to Article 55.1 of the Constitution, human rights and freedoms are protected by the courts. Citizens have the right to appeal to court for protection of their rights and freedoms.

The right to judicial protection applies to fundamental, inalienable human rights and freedoms, and no limitation of this is allowed even under martial or emergency law (Articles 8, 55 and 64 of the Constitution). This completely conforms to Article 8 of

the Universal Declaration of Human Rights, whereby any person, in the case of violation of his fundamental rights, provided by the Constitution and the law, shall have the right to an effective renewal of such rights by the competent national court.

The Constitution, having specified the right of citizens and others to judicial protection of their rights and freedoms, guarantees to any person the right to appeal to the court against the judgments, activity or inactivity of state authorities, local devolved government authorities, officials and civil servants.

According to Article 248-1.3 of Chapter 31-A of the Code of Civil Procedure, the subjects whose decisions, activity or inactivity may be appealed against in the court, shall include: "public authorities and their servants; local devolved government authorities and their servants; managers of institutions, organisations, corporations and other associations irrespective of ownership; government authorities and managers of civic associations, and also servants performing organisational and executive, administrative and business duties or carrying out such responsibilities according to special powers". The subject of judicial appeal under this Chapter may be acts or omissions – regulatory or otherwise – of any of the above authorities, which have taken such decisions to act (or not to act) either individually or on a collegiate basis.

The provisions laid down in Article 55 of the Constitution regarding the ability of citizens to appeal against decisions affecting the protection of their human rights and freedom applies equally to judicial decisions, investigative and administrative actions or inactions, and actions of officials in the Office of the Prosecutor. It is also possible to appeal against the decisions of pre-judicial investigative agencies.

Appeals may also be made against procedural actions of judges, concerning issues related to the jurisdiction of courts over disputes, preparatory procedures before cases are heard, and first instance and appellate procedural decisions. Such appeals may only be made, subject to the judicial procedure according to the procedural law of Ukraine.

In conformity with Article 248-3.5 of the Code of Civil Procedure, no court shall be eligible to receive petitions "on acts and actions of civic associations, which for the purposes of statutes or by-laws, relate to their internal organisational activities or their exclusive competence".

According to Article 92.1.11 of the Constitution, the law is to set out the grounds for the organisation and

activities of political parties and other civic associations.

No intervention of public authorities and civil servants is allowed in the activities of civic associations, except for cases stipulated in Article 8.2 of Law on Civic Associations. Such prohibition on interference in the activities of political parties and their local units, with some exception, is provided also by Article 4.3 of the Law on Political Parties in Ukraine. Civic associations are to act based on laws, statutes and regulations. Therefore, the internal organisation and relationships between the members of the civic associations, their subdivisions, and statutory responsibility of the members, are governed by the corporate norms set forth by the civic associations themselves based on the law; they are to specify the matters which belong to their internal activities or exclusive competency and are subject to independent judgment. Therefore no intervention in the activity of the civic associations carried out in the framework of the law is allowed.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2001-2-004*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.05.2001 / **e)** 7-rp/2001 / **f)** Official interpretation of the provisions laid down in Article 92.1.22 of the Constitution of Ukraine, Article 2.1. 2.3, and Article 38.1 of the Code of Administrative Offence of Ukraine (case: responsibility of legal entities) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 24/2001 / **h)** CODICES (Ukrainian).

#### *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.

3.13 **General Principles** – Legality.

5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.

5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.

5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Prohibition of *reformatio in peius*.

*Keywords of the alphabetical index:*

Tax, evasion / Legal entity, responsibility / Limitation period / Responsibility, administrative, interpretation, official / Offence, administrative.

*Headnotes:*

Provisions contained in Article 92.1.22 of the Constitution must be interpreted in such a way that they do not directly dictate the type of legal responsibility applicable. These provisions state that the laws of Ukraine shall set forth the grounds for civil law actions being criminal, or administrative offences based on the level of criminal or administrative responsibility manifested by the perpetrator. This can not be subject to regulation by subordinate legislation regulatory and legal acts.

Under the Administrative Offences Code, the subject of the administrative responsibility is an individual. Article 2.3 of the code states that “the legislation, not yet included into the code” shall be understood as being those laws which specify the responsibility of the individuals for committing administrative offences.

The provisions contained in Article 38.1 of the code shall be understood so that the limitation period stipulated by this article shall not apply where legal entities claim responsibility for violation of currency or tax legislation.

*Summary:*

VABank JSC appealed to the Constitutional Court with a request for them to give an official interpretation of the provisions laid down in Article 92.1.22 of the Constitution, Article 2.1, 2.3 and Article 38.1 of the Administrative Offences Code (“CAO”) and to explain whether the concepts of civil, criminal, administrative, and disciplinary responsibility (as defined in the Constitution) cover all types of legal responsibility in Ukraine. The petitioner also asked the Court to explain whether it was possible to apply the limitation period, stipulated in Article 38.1 of the code, for imposing an administrative penalty upon legal entities where they were responsible for breaches of currency, tax and other legislation, if such legislation set forth no such limitation period or timeframe.

It was necessary to seek an official interpretation of the said norms of the Constitution and CAO since

their interpretation was ambiguous when applied by the arbitration courts when considering the proceedings on the responsibility of legal entities for violation of currency or tax legislation.

According to Article 92.1.22 of the Constitution the laws set forth the basis for the degree of responsibility in civil law actions, which would constitute a criminal, administrative or disciplinary offence.

The Constitution has fixed the principle of responsibility of the state on persons carrying out state activities. Such levels of responsibility are present first and foremost in the constitutional determination of the duties of the state (Articles 3, 16, and 22 of the Constitution). Such responsibility is not reduced only to a level of political or moral responsibility of the public authorities before the public, but instead it carries an element of legal responsibility on behalf of the state and authorities thereof for non-compliance or inadequate performance of their duties. In particular, Article 55 of the Constitution grants to any person the right, having exhausted all national means of the legal protection, to appeal for protection of his rights and freedoms to the relevant international judicial institutions of which Ukraine is a member, and Article 152 of the Constitution obliges the state to compensate for any physical or moral damage, caused to individuals or legal entities by actions recognised as unconstitutional. The state is also to compensate for damage caused by false accusation and imprisonment in cases where a court sentence has been overturned as illegal (Article 62 of the Constitution).

Emphasising the importance of the protection of human rights and freedoms, the Constitution states that the element of the offence, which subjects individuals to a particular level of legal responsibility, shall be specified exclusively by statute rather than by any other regulatory and legal acts and measures of the state enforcement; that the legal responsibility of the persons or entities shall have an individual and subjective character; and that criminal law shall not be applied retrospectively, nor shall someone be tried for the same crime more than once (Articles 58.61, 92.1.1, 92.1.22 of the Constitution).

The provisions contained in Article 92.1.22 of the Constitution do not list the various types and levels of legal responsibility. Instead, they determine that only statutes shall govern the grounds of civil and legal responsibility (general grounds, conditions, forms of responsibility etc.), as well as the basis of criminal, administrative and disciplinary responsibility. The Constitution forbids such matters to be dealt with by subordinate regulations and legislation. It provides that only the Parliament of Ukraine (*Verkhovna Rada*)

has the right to specify what offences shall be recognised as administrative or criminal offences, and the measures of responsibility for each.

Article 2.3 CAO also deals with the types and levels of responsibility involved in administrative offences provided for in those laws not yet included in the CAO. Specifying the content of this norm, the Constitutional Court considered it expedient to go back to the origins of the institution of administrative responsibility.

Both natural and legal person have for a long time been recognised as being liable for administrative offences. However, under the conditions of supremacy of the state-owned property imposing fines on legal entities made no sense, and so the legal doctrine was biased towards not recognising the companies, institutions, and organisations as the subjects of the administrative responsibility. This doctrine was embodied in the Resolution of the Presidium of the Supreme Council of the USSR dated 21 June 1961 “On further limitation of the application of fines, which are imposed subject to the administrative procedure” and the similar Resolution of the Presidium of the Supreme Council of the Ukrainian SSR dated 15 December 1961. These regulatory and legal acts abolished administrative fines for companies, institutions, and other organisations. Specifically, this concept was realised in the Code of Administrative Offences of the Ukrainian SSR adopted on 7 December 1984, whereby the subject of administrative responsibility may be only a natural person (Articles 9, 12, 13, 14, 15, 16, 17, 27, 30, 31, 32 of the General part and Special part of the code). This opinion of the legislators remained the same, as is evidenced by numerous amendments made to the CAO since its enactment, including but not limited to the Law “On making amendments to the Administrative Offences Code of Ukraine” dated 5 April 2001, ratified in order to make the code conform to the Constitution and other laws. The laws on making amendments to the General and Special parts of the code, which, in particular, set forth a new definition of administrative offences and the penalties for these, only recognised natural persons as being subjects of responsibility for these offences.

Therefore, the amendment to Article 2.3 CAO, which states that “the provisions of this code cover also administrative offences, the responsibility for committing of which is stipulated by the legislation, not yet included into the code”, concerns only those laws which specify the administrative responsibility of persons.

As a result, public authorities imposing sanctions on companies, institutions, and organisations for

violation of currency or tax legislation, and courts considering such disputes, may not, by reference to Article 2.3 of CAO, apply the norm of Article 38 of the code, which defines the limitation period for imposing administrative penalties only on natural persons and officials.

Article 2.1 of CAO contains a list of regulatory and legal acts, including but not limited to subordinate legislation, which at the time of ratification of the code constituted the legislation of the former USSR and Ukrainian SSR on administrative offences. This norm has in a sense lost its legal meaning and, therefore, the Constitutional Court considered it necessary to cancel the legal proceedings regarding the official interpretation of Article 2.1 CAO.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2001-2-005

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 04.07.2001 / **e)** 2-v/2001 / **f)** Conformity of the draft Law of Ukraine “On making amendments to the Constitution of Ukraine” with requirements laid down in Articles 157 and 158 Constitution of Ukraine (case on making amendments to Article 81 of the Constitution of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 43/2001 / **h)** CODICES (Ukrainian).

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

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

4.1.2 **Institutions** – Constituent assembly or equivalent body – Limitations on powers.

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

4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

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

Immunity, parliamentary / Constitution, revision / Parliament, group, deputy, withdrawal.

### *Headnotes:*

The Court considered whether the draft Law “On making amendments to the Constitution of Ukraine”, conformed to the requirements laid down in Articles 157 and 158 of the Constitution. The draft Law called for the following words to be added to Article 81 of the Constitution: “In the case of the withdrawal of a parliamentary deputy elected from the election list of a political party or bloc of political parties, his/her authorities will be terminated early, according to law”.

This amendment to Article 81 of the Constitution does not limit or cancel human rights and freedoms, in particular the constitutional rights to freedom of thought and speech, and free expression of views and beliefs (Article 34.1 of the Constitution); free declaration of intent at the time of elections (Article 71.2 of the Constitution); the right to freedom of association of political parties and civic organisations for the implementation and protection of human rights and freedoms and satisfaction of political, economic, social, cultural and other interests. Political parties in Ukraine assist in the formation and expression of the political will of the citizens. The parties take part in elections, including elections to parliament (Article 36.1, 36.2 of the Constitution). In addition, these amendments do not limit the rights and freedoms of the deputies as people or as citizens, as they relate exclusively to their special status, which follows from the nature of the authorities vested in the them in connection with their carrying out of state functions.

The draft law does not provide for cancellation or limitation of human rights and freedoms, including the rights of voters and other citizens of Ukraine, and is not oriented towards destroying the independence or violating the territorial integrity of Ukraine.

### *Summary:*

The Parliament of Ukraine (*Verkhovna Rada*) applied to the Constitutional Court for a decision on the conformity of the draft Law “On making amendments to the Constitution of Ukraine” to the requirements laid down in Articles 157 and 158 of the Constitution.

The draft law suggested that the following be added to Article 81 of the Constitution: “In the case of the withdrawal of a parliamentary deputy elected from the election list of a political party or bloc of political parties, his/her authorities will be terminated early, according to law”.

The representatives of the parliament justified making amendments to Article 81 of the Constitution by the

necessity of settling the matter of the early termination of the authorities of parliamentary deputies elected from the election list of political party, bloc of political parties, if such deputies withdrew from a faction of such party or bloc of parties. The letter of the President of Ukraine to the Constitutional Court noted that such amendments are aimed at the “specific protection of the rights and freedoms of the voters, and act as a guarantee of the national declaration of intent”, and as such, conformed to the requirements laid down in Articles 157 and 158 of the Constitution.

According to Article 85.1.1 of the Constitution, the authorities of parliament include making amendments to the Constitution in the framework and subject to the procedure stipulated by Chapter XIII of the Constitution.

The requirements of the grounds and procedures for making such amendments are specified in Articles 157 and 158 of the Constitution. Under Article 157.1, it is impossible to make any amendments to the Constitution, if these envisage the cancellation or limitation of human rights and freedoms or are oriented towards removing of independence or violation of the territorial integrity of Ukraine.

In accordance with Article 158 of the Constitution, it is forbidden to submit in the same year to the parliament draft laws on making amendments to the Constitution, which have already been considered by the parliament where such laws have not been ratified.

During a single term of office, parliament may not make amendments to the same provisions of the Constitution twice.

The draft Law on making amendments to the Constitution were to be considered upon the conclusion of the Constitutional Court as to the law’s conformity to the requirements laid down in Articles 157 and 158 of the Constitution (Article 159 of the Constitution).

The Constitutional Court proceeded from the fact that the currently elected parliament did not consider the draft law and had not changed the provisions laid down in Article 81 of the Constitution regarding the early termination of the authorities of parliamentary deputies. Therefore, the requirements laid down in Article 158 of the Constitution were complied with.

*Languages:*

Ukrainian.

*Identification:* UKR-2001-2-006

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.07.2001 / **e)** 3-v/2001 / **f)** Conformity of the Constitution of Ukraine to the Rome Statute of the International Criminal Court (the Rome Statute case) / **g)** *Ophitsynyi Visnyk Ukrayiny* (Official Gazette), 28/2001 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.  
 2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.  
 4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.  
 5.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals.

*Keywords of the alphabetical index:*

International Criminal Court / Prosecutor, office, authority / Punishment, service / Official, immunity / Extradition, national.

*Headnotes:*

The Rome Statute of the International Criminal Court, signed on behalf of Ukraine on 20 January 2000, and submitted to the Parliament of Ukraine (*Verkhovna Rada*) for its consent, does not conform to the Constitution, since it provides that “the International Criminal Court ... complements the national criminal justice authorities”.

*Summary:*

The subject of the right to constitutional petition – the President of Ukraine – appealed to the Constitutional Court for a decision as to conformity of the Rome Statute of the International Criminal Court (“the Statute”) to the Constitution.

According to Article 124.1 of the Constitution, justice in Ukraine shall be provided exclusively by courts. Delegation or assignment of the functions of the courts is not allowed (Article 124.1 of the Constitution). Also prohibited is the organisation of extraordinary and special courts (Article 125.5 of the Constitution).

Article 1 of the Statute, indicating that the International Criminal Court shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, at the same time emphasises that the Court shall be complementary to national criminal jurisdictions. This quality of the International Criminal Court is enacted in a number of different articles of the Statute.

This essentially distinguishes the International Criminal Court from other international courts of justice, in particular the European Court of Human Rights, the right to apply to which is specified in Article 55.4 of the Constitution. No possibility of such complementing of the Ukrainian judicial system is stipulated by Chapter VIII of the Constitution (on the issue of justice).

By its nature, the International Criminal Court is an international judicial institution established with the consent of the member states of the constituent document – the Statute – whose provisions are based on the principle of respect for human rights and freedoms. Therefore, the International Criminal Court may not be referred to as an extraordinary or special court whose establishment is not allowed according to Article 125.5 of the Constitution.

According to its Article 27.1, the Statute shall apply equally to all persons without distinction based on their official capacity. The provisions of the Statute do not prohibit the establishment of, and do not cancel the provisions of the Constitution regarding the immunity of parliamentary deputies of Ukraine, the President of Ukraine and judges, and only proceed from the fact that immunity of such persons concerns national jurisdiction and may not bar the Court from its jurisdiction over those of them who have committed crimes stipulated by the Statute.

In conformity with the Statute's fundamental principle of complementing national criminal law (Article 17), the International Criminal Court shall not undertake proceedings if the accused has already been convicted by a different court (including but not limited to the national court), having observed the proper legal procedure, for actions prohibited by the Statute (Article 20).

Establishing the level of responsibility required for the commission of the overwhelming majority of crimes stipulated by the Rome Statute is an international legal obligation of Ukraine according to other international and legal documents which are binding on the country (many of which have bound Ukraine long before the Constitution took effect).

Ukrainian foreign policy activities are based upon universally recognised principles and norms of international law (Article 18 of the Constitution). One such principle is that of diligent performance of international obligations, which came to existence in the form of international legal practice at the early stages of the development of the state, and which is today embodied in a number of international treaties.

The Statute effectively reproduces the overwhelming majority of the provisions, defining various criminal acts, contained in the conventions to which Ukraine joined. This is in completely conformity to the international and legal obligations of Ukraine.

In conformity with Article 25.2 of the Constitution, the citizens of Ukraine may not be extradited to face criminal charges abroad. However, this only applies to crimes on a national rather than an international level. This is intended to guarantee fair judicial proceedings and justice and legitimacy of punishments for the citizens of Ukraine.

The International Criminal Court may not be thought of as a foreign court. The prohibition on extradition in Ukraine is circumvented in relation to the International Criminal Court by application of the relevant provisions of the Statute developed or approved by the member states. These provisions are based on international conventions on human rights, and Ukraine has already given its consent to be bound by such conventions.

Therefore, the constitutional prohibition on extradition may not be considered as being separate from the international legal obligations of Ukraine.

International treaties become a part of Ukrainian domestic legislation, after consent to be bound by the treaties which was given by the parliament (*Verkhovna Rada*). In this way, the issue of national sovereignty is reconciled with the fact that the jurisdiction of the international courts of justice covers Ukrainian territory (provided that the provisions of the statutes of the international courts do not contradict the Constitution). Therefore, binding Ukraine to the provisions of the Statute will not contradict the requirements laid down in Article 75 and Article 92.14 of the Constitution.

While Article 120 of the Statute prohibits amendments to this international treaty, its Articles 103 and 124 allow the member states to make declarations, which allow them to derogate from their treaty obligations for certain periods of time, or which set out special conditions for cooperation according to the framework of the Statute.

This raises the possibility of limitations on the rights and freedoms of the citizens of Ukraine when serving jail sentences. It is also necessary to consider the provisions laid down in Article 103.3 of the Statute, which provide that the International Criminal Court, in determining the state in which the person convicted by the Court may serve his sentence, shall consider, among other things, the opinion of the person on which the sentence was made, his/her citizenship, and also the standards of treatment for prisoners recognised by the international treaties.

Article 121.1 of the Constitution provides that support of those in custody is delegated to the Office of the Prosecutor of Ukraine. This is a unified system. According to the Statute, the International Criminal Court has a separate authority of the Office of the Prosecutor, responsible for obtaining information on crimes under the jurisdiction of the Court, for investigation and possible prosecution in the Court. Settling this dispute, the Constitutional Court proceeded, first, from the fact that support by the Office of the Prosecutor in Ukraine of people in custody for the purposes of Article 121 of the Constitution, concerns internal rather than international and legal jurisdiction. Secondly, according to Article 42.4 of the Statute, the prosecutor providing the criminal prosecution in the Court and charged with proving the guilt of the accused, shall be elected by the member states of the Statute, and their declaration of intent is not limited. Therefore, the relevant provisions of the Statute, which concern the support of those in the custody of the International Criminal Court, may be implemented in the law without making amendments to the Constitution.

#### *Languages:*

Ukrainian.



## United Kingdom

### House of Lords

### Privy Council

Summaries of important decisions of the reference period 1 May 2001 – 30 August 2001 will be published in the next edition, *Bulletin* 2001/3.



## United States of America

### Supreme Court

### Important decisions

*Identification:* USA-2001-2-003

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 04.06.2001 / **e)** 00-6677 / **f)** Penry v. Johnson / **g)** 121 *Supreme Court Reporter* 1910 (2001) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

- 3.16 **General Principles** – Proportionality.
- 4.7.2 **Institutions** – Judicial bodies – Procedure.
- 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
- 5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial by jury.
- 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

*Keywords of the alphabetical index:*

Death penalty / Circumstance, mitigating / Instruction, jury / Mental retardation, evidence.

*Headnotes:*

Under the constitutional prohibition against cruel and unusual punishments, the sentencer in a death penalty case must be able to consider and give effect to mitigating evidence so that the sentence imposed reflects a reasoned moral response to the defendant's background, character, and crime.

*Summary:*

In 1980, a jury in a state court in the State of Texas, comprised of twelve laypersons, found Johnny Paul Penry guilty of murder. Under the Texas Penal Code, a separate penalty hearing is held following a determination of guilt. At the end of the penalty



hearing, the judge imposes the sentence; however, before doing so, he or she is required by the Penal Code to instruct the lay jury to answer three factual questions called "special issues":

1. whether the defendant's conduct was committed deliberately and with the reasonable expectation that death would result;
2. whether it is probable that the defendant would be a continuing threat to society; and
3. whether the killing was unreasonable in response to any provocation by the victim.

The expression of the jurors' views on the appropriate sentence is limited to the answering of these three questions. If the jury unanimously answers all three special issues affirmatively, the Penal Code requires the judge to impose the death penalty. In the case of Johnny Paul Henry, the judge sentenced Mr Penry to death after the jury unanimously answered each of the three special issues affirmatively.

In 1989, in connection with a *habeas corpus* petition to the federal courts challenging Mr Penry's death sentence, the U.S. Supreme Court in the case of *Penry v. Lynaugh* ruled that the sentence was invalid under the Eighth Amendment to the U.S. Constitution, which prohibits the infliction of "cruel and unusual punishments". The Court's decision was grounded in the fact that Mr Penry had offered extensive evidence during the guilt-innocence phase of the trial that he was mentally retarded and had been severely abused as a child. Although the judge at the end of the penalty hearing instructed the jury that it could consider all evidence submitted during the guilt-innocence and penalty phases of the trial in answering the three special issues, the judge did not expressly instruct the jurors that they could consider the evidence offered by Mr Penry as mitigating evidence. Therefore, the Supreme Court concluded, the jury had not been adequately instructed with regard to the mitigating evidence because, among other factors, the wording of the special issues was not broad enough to allow the jury to consider and give effect to that evidence. The Court vacated Mr Penry's sentence, stating that in a death penalty case, the sentencer must be able to consider and give effect to mitigating evidence so that the sentence imposed reflects a reasoned moral response to the defendant's background, character, and crime.

Mr Penry was tried again in a Texas state court in 1990 and again found guilty of murder. During the penalty hearing, his defence again included the presentation of extensive evidence similar to that submitted in the first trial. At the end of the penalty

phase, the judge again instructed the jury, to determine the sentence by answering the same three statutorily-mandated special issues that had been presented to the jury in the first trial. However, this time, the judge also gave the jury, orally and in writing, a "supplemental instruction", which stated in part:

"[W]hen you deliberate on the...special issues, you are to consider mitigating circumstances, if any, supported by the evidence...If you find [such] circumstances...you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues."

The form upon which the jurors were asked to present their answers to the special issues, however, did not include the supplemental instruction. Instead, the form itself (to which the supplemental instruction was attached) contained only the text of three special issues and spaces for the recording of "yes" or "no" votes on each of the issues. Following their deliberation, the jurors unanimously answered each special issue affirmatively, and the judge as a consequence imposed the death sentence.

Following unsuccessful appeal in the state court system, Mr Penry petitioned for *habeas corpus* relief in the federal courts, contending among other claims that the jury instructions at his second penalty hearing did not satisfy the U.S. Supreme Court's holding in *Penry v. Lynaugh* that a jury must be provided with a vehicle for expressing its reasoned moral response to mitigating evidence as to mental retardation and childhood abuse. The U.S. District Court and Fifth Circuit Court of Appeals rejected his petition. However, in a 6-3 vote, the U.S. Supreme Court overruled the lower federal courts. In so doing, the Supreme Court stated that the key to its holding in *Penry v. Lynaugh* was its directive that the jury must be able not only to consider a defendant's mitigating evidence, but to give effect to it in determining the appropriate sentence. The Court concluded that the judge's supplemental instruction was contradictory and did not rectify the constitutional infirmities of the three special issues. According to the Court, the mitigating evidence did not fit within the scope of the special issues, and therefore answering the three questions in the manner prescribed by the verdict

form would have required the jurors to ignore the command of the supplemental instruction. On the other hand, to answer the special issues in the manner prescribed by the supplemental instruction would have meant that the jurors should have ignored the verdict form instructions, thereby making their power to avoid the death penalty dependent on their willingness to place greater emphasis on the supplemental instruction than on the verdict form. In conclusion, the Court decided that a reasonable juror could have believed that there was no vehicle for expressing the view that Mr Penry did not deserve to be sentenced to death based on his mitigating evidence. The Court therefore vacated the sentence imposed by the Texas trial court and remanded the case for further proceedings.

#### *Cross-references:*

- *Penry v. Lynaugh*, 492 *United States Reporter* 302, 109 *Supreme Court Reporter* 2934, 106 *Lawyer's Edition Second* 256 (1989).

#### *Languages:*

English.



#### *Identification:* USA-2001-2-004

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 11.06.2001 / **e)** 99-8508 / **f)** *Kyllo v. United States* / **g)** 121 *Supreme Court Reporter* 2038 (2001) / **h)** CODICES (English).

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

3.17 **General Principles** - Weighing of interests.  
 5.3.13.16 **Fundamental Rights** - Civil and political rights - Procedural safeguards and fair trial - Rules of evidence.  
 5.3.33 **Fundamental Rights** - Civil and political rights - Inviolability of the home.

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

Thermal imager / Search / Technology, sense-enhancing / Search, warrant.

#### *Headnotes:*

Physical intrusion into an individual's residence constitutes a "search" under constitutional protections against unreasonable searches and seizures.

The constitutional guarantee against unreasonable searches and seizures is implicated if information from the interior of a residence is obtained by means of a sense-enhancing device not in general public use, and such information could not otherwise have been obtained without a physical intrusion into the home.

A search by government agents of an individual's residence without issuance of a search warrant by the judiciary is presumptively an unconstitutional search.

The constitutional guarantees against warrantless searches of a home apply to gathering of all information about activities inside the residence, and not just intimate details.

#### *Summary:*

United States government investigators used a thermal imager (a device that reveals the relative heat in the different rooms of a building) to perform a heat scan of the residence of Mr Danny Kyllo. The federal agents had not sought a judicial warrant, approving such an activity, before conducting the search. The scan, which was conducted across the street from Kyllo's house, revealed abnormal heat coming from his garage, suggesting the cultivation of illegal marijuana plants. Based in part on the results of this imaging, a Federal Magistrate Judge issued a warrant for investigators to enter Kyllo's home, where marijuana was found growing.

A criminal charge of manufacturing marijuana was filed against Kyllo. During the proceedings, he moved to suppress the evidence obtained from the search of his home based on the argument that the government had obtained the information in violation of his right, under the Fourth Amendment to the U.S. Constitution, to be free from "unreasonable searches and seizures". The first instance court denied his motion on the grounds that a "search", as that term is used under the Fourth Amendment, of his home had not taken place.

Kyllo appealed the first instance court's decision admitting the evidence obtained from the search of his home to the Ninth Circuit Court of Appeals. The Court of Appeals upheld the lower court's decision that the heat scan did not constitute a search under the Fourth Amendment. In doing so, the Court applied

the two-part test set forth by the U.S. Supreme Court in the 1967 case of *Katz v. United States* for determining whether a search has occurred. That test has subjective and objective elements. It establishes that a search arises when: (1) the individual has manifested a subjective expectation of privacy in the object of the challenged search; and (2) society recognises that expectation as reasonable. Using the Katz test, the Court of Appeals concluded that Kyllo did not have a subjective expectation of privacy in the heat emanating from his house because he had not taken steps to conceal the heat. The Court also stated that, even if he did have a subjective expectation of privacy concerning the heat in his house, society would not consider this expectation to be reasonable because the heat scan did not reveal any “intimate details” of his life.

The U.S. Supreme Court reversed the decision of the Court of Appeals. The key issue for the Court, as it had been for the lower courts, was whether a search had taken place under the Katz test, since a search of a person's home without a judicial warrant is presumptively a violation of the Fourth Amendment. In this regard, the Court noted that in earlier cases it had ruled that visual surveillance of a home, including surveillance from the air, does not constitute a search. Therefore, the Court framed the issue in the instant case as one centering on the concept of physical intrusion: if information, obtained by means of sense-enhancing technology, could not otherwise have been obtained without a physical intrusion into the constitutionally-protected space, then the use of that technology constitutes a search, at least when the technology in question is not in general public use. Based on this analysis, the Court concluded that the information obtained by the thermal imager was the product of a search, and that the search was unreasonable because a search warrant had not been obtained. In arriving at this conclusion, the five-member majority of the Court rejected the U.S. Government's argument, adopted by the four dissenting Justices, that the thermal imager detected only heat radiating from the external surface of the residence. The Court declined to recognise a fundamental difference between “off the wall” observations and “through the wall” surveillance, stating that adoption of such a distinction would place individual rights “at the mercy of advancing technology.”

The Court also rejected another government argument that sought to establish the constitutional validity of the heat scan, even if deemed to be a search, on the grounds that the heat scan did not reveal any “intimate details” regarding Kyllo's home. The Court stated that such a limitation would be wrong in principle because the Fourth Amendment's

protections had never been linked to assessment of the quality of the information obtained. In addition, the Court said, such a limitation would be impractical in application, failing to provide a workable accommodation between law enforcement needs and those interests protected by the Fourth Amendment, and would require development of a jurisprudence identifying those home activities which are “intimate” and those that are not. On the latter point, the Court added that such a jurisprudence could never provide prospective guidance to police officers on the question of intimate details.

Thus, to comply with the Fourth Amendment, the Court ruled that the government must obtain a judicial warrant before employing sense-enhancing devices such as thermal imagers. The Court therefore remanded the case to the first instance court to determine if the “probable cause” requirement for judicial issuance of a search warrant (probable cause to believe that a violation of criminal law had occurred) would have been satisfied even without the results of the heat scan of Kyllo's residence.

#### *Cross-references:*

- *Katz v. United States*, 389 *United States Reporter* 347, 88 *Supreme Court Reporter* 507, 19 *Lawyer's Edition Second* 576 (1967).

#### *Languages:*

English.



# European Court of Human Rights

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## Important decisions

*Identification:* ECH-2001-2-005

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.07.2001 / **e)** 25702/94 / **f)** K. and T. v. Finland / **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** – Proportionality.

3.19 **General Principles** – Margin of appreciation.

3.20 **General Principles** – Reasonableness.

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

*Keywords of the alphabetical index:*

Child, public care / Parent, rights / Emergency order / Child, custody, order / Family, reunification, positive measures.

*Headnotes:*

The taking of a new-born baby at birth into public care where this was not justified by extraordinarily compelling reasons and was not an emergency, constitutes a violation of the right to respect for family life.

The public care of a child should be regarded as a temporary measure. The ultimate aim of public care should be family reunification. The restrictions and prohibitions imposed on parents' access to their children, hindering a possible family reunification, constitute a violation of the previously mentioned right.

*Summary:*

The applicants, a mother, K., and her cohabitant T., are Finnish nationals. K. is the mother of four and T. is the father of two of the children.

Prior to the events, K. had been hospitalised on several occasions, having been diagnosed as suffering from schizophrenia. In May 1993, when she was expecting her third child J., the Social Welfare Board, considering that K. was unable to care for her second child M., placed M. in a children's home as a short-term support measure consented to by the applicants. As soon as J. was born in June 1993, she was, by virtue of an emergency order, placed in public care in the children's ward of the hospital, given K.'s unstable mental condition and the family's long-lasting difficulties.

In a further emergency order, issued a few days later, M. was likewise placed in public care. K.'s unsupervised access to the children was prohibited and she was again hospitalised on account of her psychosis. The emergency care orders were replaced by normal care orders in July 1993. These were confirmed by the County Administrative Court. The Supreme Administrative Court rejected the applicants' appeals.

In September 1993, the access restriction was prolonged and in 1994 the children were placed in a foster home some 120 kilometres away from the applicants. Social welfare officials allegedly told both the applicants and the foster parents that the children's placement would last for years. The applicants proposed, in vain, that the care arrangements take place in the home of relatives and that the arrangements should, in any case, be aimed at reuniting the family.

In May 1994 both applicants' access to the children was restricted to one monthly supervised visit to the foster home. In December 1994 the Social Director informed the applicants that there were no longer any grounds for the access restriction. Nevertheless, only supervised meetings with the children held once a month on premises chosen by the Social Welfare Board were authorised. The Board confirmed this decision in January 1995 and the applicants' appeal was rejected.

Meanwhile, in May 1994, the applicants had also requested that the care orders be revoked. This request was rejected by the Social Welfare Board in March 1995. In April 1995 K. gave birth to a fourth child, who was not placed in public care. Shortly afterwards K. was taken into compulsory psychiatric care for six weeks, again on account of her schizophrenia.

The care plan was again revised in May 1996 and in April 1997 but the access restriction was maintained. In December 1998 the social authorities considered that the reunification of the family was not in sight. In November 2000 the applicants and the children were

nevertheless allowed to meet once a month without supervision. The current access restriction remains valid until the end of 2001.

Regarding the emergency care order concerning the applicants' child J., the Court accepted that when an emergency care order had to be made, it was not always possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child. Nor was this desirable, if those having custody of the child were seen as the source of an immediate threat to the child. The Court had however to be satisfied that the Finnish authorities were entitled to consider that in relation to both J. and M. there existed circumstances justifying their removal from the care of the applicants without prior consultation. In particular, it was for Finland to establish that a careful assessment of the impact of the proposed care measure on the applicants and the children, as well as of the possible alternatives to taking the children into public care, had been carried out before implementing any care measures.

The Court found it reasonable for the authorities to believe that if K. had been forewarned of the authorities' intention to take either M. or the expected child J. away from her, there might have been dangerous consequences both for herself and her children. The authorities' assessment that T. would not on his own have been capable of coping with the mentally ill K., the expected baby J. and M. was likewise reasonable. Associating only T. in the decision-making process was not a realistic option for the authorities either, given the close relationship between the applicants and the likelihood of their sharing information.

However, the Court considered that the taking of a new-born baby into public care at birth was an extremely harsh measure. There needed to have been extraordinarily compelling reasons before a baby could be physically removed from the care of its mother, against her will, immediately after birth, as a consequence of a procedure in which neither she nor her partner had been involved. The Court considered that such reasons had not been shown to exist. The authorities had known about the forthcoming birth of J. for months in advance and were well aware of K.'s mental problems, so the situation was not an emergency in the sense of being unforeseen. The Finnish Government had not suggested that other possible ways of protecting J. from the risk of physical harm from K. had even been considered. When a measure so drastic as to immediately deprive a mother of her new-born child was contemplated, it was incumbent on the national authorities to examine whether some less intrusive interference into family

life, at such a critical point in the lives of the parents and the child, was possible. The reasons relied on by the authorities were relevant but not sufficient to justify the serious intervention in the applicants' family life. Even having regard to the national authorities' margin of appreciation, the Court concluded that the emergency care order in respect of J. and the methods used in implementing that care order were disproportionate. While there may have been a "necessity" to take some precautionary measures to protect J., the interference in the applicants' family life could not be regarded as having been "necessary" in a democratic society. Article 8 ECHR had been violated.

Regarding the failure to take proper steps to reunite the family, the Court recalled the guiding principle that the public care of a child should in principle be regarded as a temporary measure, to be discontinued as soon as circumstances permitted. Any measures implementing such temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible became more pressing the longer the period of care lasted, subject always to its being balanced against the duty to consider the best interests of the child.

The Court noted that some enquiries had been carried out in order to ascertain whether the applicants would be able to bond with J. and M. They did not, however, amount to a serious or sustained effort to facilitate family reunification. The minimum to be expected of the authorities was that they examined the situation anew from time to time to see whether there had been any improvement in the family's situation. The possibilities of reunification would progressively diminish and eventually disappear if the biological parents and their children were not allowed to meet each other at all, or only so rarely that no natural bonding between them was likely to occur. The restrictions and prohibitions imposed on the applicants' access to their children hindered rather than helped a possible family reunification. In the present case, the exceptionally firm negative attitude of the authorities was striking. Article 8 ECHR had been violated.

#### *Cross-references:*

- *Ireland v. the United Kingdom*, 18.01.1978, Series A, no. 25, § 157; *Special Bulletin ECHR* [ECH-1978-S-001];
- *Gustafsson v. Sweden*, 25.04.1996, *Reports of Judgments and Decisions* 1996-II, §§ 47 and 51; *Bulletin* 1996/2 [ECH-1996-2-008];

- *Cruz Varas and Others v. Sweden*, 20.03.1991, Series A, no. 201, § 76; *Special Bulletin ECHR* [ECH-1991-S-002];
- *McMichael v. the United Kingdom*, 24.02.1995, Series A, no. 307-B, § 73; *Bulletin* 1995/1 [ECH-1995-1-004];
- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31, § 31; *Special Bulletin ECHR* [ECH-1979-S-002];
- *Johansen v. Norway*, 07.08.1996, *Reports* 1996-III, §§ 52 and 64;
- *Olsson v. Sweden* (no. 1), 24.03.1988, Series A, no. 130, §§ 68 and 81; *Special Bulletin ECHR* [ECH-1988-S-002];
- *Olsson v. Sweden* (no. 2), 27.11.1992, Series A, no. 250, § 90;
- *Hokkanen v. Finland*, 23.09.1994, Series A, no. 299-A, § 55; *Bulletin* 1994/3 [ECH-1994-3-015].

#### Languages:

English, French.



#### Identification: ECH-2001-2-006

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.07.2001 / **e)** 42527/98 / **f)** Prince Hans-Adam II of Liechtenstein 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.
- 3.1 **General Principles** – Sovereignty.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
- 5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

#### Keywords of the alphabetical index:

Painting, possession, again / War, occupation / Claim, inadmissibility / Jurisdiction, exclusion.

#### Headnotes:

The rejection as inadmissible, under the Convention on the Settlement of Matters arising out of the War and the Occupation, of court proceedings in order to gain possession of a painting, confiscated by former Czechoslovakia in 1946, constitute an objective limitation on the right of access to a court.

The Court is not competent to examine the circumstances of an expropriation which took place in 1946 or the continuing effects produced by it up to the present date.

#### Summary:

A painting “*Szene an einem römischen Kalkofen*”, by Pieter van Laer, owned by the applicant's father, was confiscated by former Czechoslovakia, while it was on Czechoslovak territory, under Decree no. 12 on the “confiscation and accelerated allocation of agricultural property of German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people”, issued by the President of former Czechoslovakia on 21 June 1945.

When, in 1991, the Municipality of Cologne received the painting on loan from the Czech Republic, the applicant instituted court proceedings against the Municipality in order to gain possession of the painting.

The German civil courts declared his application inadmissible on the ground that they did not have jurisdiction. The inadmissibility decision was made under Chapter 6, Article 3.1 and 3.3 of the Convention on the Settlement of Matters arising out of the War and the Occupation, signed in 1952, as amended in 1954, according to which claims or actions against persons having acquired or transferred title to property on the basis of measures carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of specific agreements, are not admissible. The courts considered that the confiscation of the applicant's father's property under Decree no. 12 constituted a measure within the meaning of Chapter 6, Article 3.3.

The Federal Constitutional Court refused to entertain the applicant's constitutional complaint on the ground that it offered no prospect of success, considering, among other things, that the exclusion of jurisdiction did not amount to a violation of the right to property as these clauses and the Settlement Convention as a whole served to settle matters dating back to a time before the entry into force of the German Basic Law. The Court also confirmed that Chapter 6, Article 3.1 and 3.3 of the Settlement Convention had not been set aside by the Treaty on the Final Settlement with respect to Germany.

The painting was subsequently returned to the Czech Republic.

In the application lodged with the Court, the applicant alleged, in particular, that he had had no effective access to court concerning his claim for restitution of the painting at issue.

He also complained that the German courts' decisions to declare his action inadmissible and the return of the painting to the Czech Republic violated his right to property. He relied on Article 6.1 ECHR and Article 1 Protocol 1 ECHR, taken alone and together with Article 14 ECHR.

In respect of access to a court, in the Court's view, the exclusion of German jurisdiction under Chapter 6, Article 3 of the Settlement Convention was a consequence of the particular status of Germany under public international law after the Second World War. The Court found that it was only as a result of the 1954 Paris Agreements with regard to the Federal Republic of Germany and the Treaty on the Final Settlement with respect to Germany of 1990 that the Federal Republic obtained the authority of a sovereign state over its internal and external affairs for a united Germany. In these unique circumstances, the limitation on access to a German court, as a consequence of the Settlement Convention, had a legitimate objective.

Moreover, in the Court's view, it could not be said that the interpretation of Chapter 6 Article 3 of the Settlement Convention in the applicant's case was inconsistent with previous German case-law or that its application was manifestly erroneous or was such as to reach arbitrary conclusions.

The Court further concluded that the applicant's interest in bringing litigation in the Federal Republic of Germany was not sufficient to outweigh the vital public interests in regaining sovereignty and unifying Germany.

Accordingly, there was no breach of the applicant's right of access to a court within the meaning of the Court's case-law.

In respect of fairness of the Federal Constitutional Court proceedings, the Court found that the applicant had the benefit of adversarial proceedings before the Federal Constitutional Court and that he was able to submit the arguments he considered relevant to his case. There was no indication of unfairness in the manner in which the proceedings at issue were conducted.

In respect of the alleged violation of Article 1 Protocol 1 ECHR, the Court considered that it was not competent to examine the circumstances of the expropriation in 1946 or the continuing effects produced by it up to the present date. The expropriation had been carried out by the authorities of former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951, that is before 3 September 1953, the entry into force of the Convention and before 18 May 1954, the entry into force of Protocol 1.

The Court further observed that the applicant brought proceedings before the German courts claiming ownership of the painting which had once belonged to his father, challenging the validity of the expropriation carried out by authorities of former Czechoslovakia. The Court noted that, subsequent to the expropriation, the applicant's father and the applicant himself had not been able to exercise any owner's rights in respect of the painting which was kept by the Brno Historical Monuments Office in the Czech Republic. The Court concluded that the applicant as his father's heir cannot, for the purposes of Article 1 Protocol 1 ECHR, be deemed to have retained a title to property nor a claim to restitution against the Federal Republic of Germany amounting to a "legitimate expectation" in the sense of the Court's case-law.

The Court recalled that the applicant could allege a violation of Article 1 Protocol 1 ECHR only insofar as the impugned decisions related to his "possessions" within the meaning of this provision which, according to the established case-law of the Convention organs, "possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right.

In the present case, the Court found that the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession" within the meaning of Article 1 Protocol 1 ECHR.

The Court concluded that there had been no violation of Article 1 Protocol 1 ECHR.

#### Cross-references:

- *Golder v. the United Kingdom*, 21.02.1975, Series A, no. 18, § 36 and 59; *Special Bulletin ECHR* [ECH-1975-S-001];
- *Waite and Kennedy v. Germany* [GC], 18.02.1999, no. 26083/94, §§ 50, 54 and 67-68, ECHR 1999-I; *Bulletin* 1999/1 [ECH-1999-1-005];
- *T.P. and K.M. v. the United Kingdom* [GC], 10.05.2001, no. 28945/95, § 98, ECHR 2001; *Bulletin* 2001/1 [ECH-2001-1-004];
- *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 93, ECHR 2001;
- *United Communist Party of Turkey and Others v. Turkey*, 30.01.1998, *Reports of Judgements and Decisions*, 1998-I, pp. 17-18, § 29; *Bulletin* 1998/1 [ECH-1998-1-001];
- *Matthews v. the United Kingdom* [GC], 18.02.1999, no. 24833/94, §§ 29, 32-34, ECHR 2000-I; *Bulletin* 1999/1 [ECH-1999-1-004];
- *Streletz, Kessler and Krenz v. Germany* [GC], 22.03.2001, nos 34044/96, 35532/97, 44801/98, § 49, ECHR 2000; *Bulletin* 2001/1 [ECH-2001-1-002];
- *European Commission of Human Rights*, Appl. no. 235/56, Déc.10.06.1958, *Yearbook* 2, pp. 257 and seq., p. 301;
- *European Commission of Human Rights*, Appl. no.°6231/73, Déc.28.05.1975, DR2, p. 72;
- *Drozd and Janousek*, 26.06.1992, Series A, no. 240, p. 34, § 110;
- *APEH Üldözötteinek Szövetsége, Ivanyi Roth and Szerdahelyi v. Hongrie*, 05.10.2000, no. 32367/96, § 39, ECHR 2000-X;
- *Loizidou v. Turkey*, 18.12.1996, *Reports* 1996-VI, p. 2230, § 41; *Bulletin* 1996/3 [ECH-1996-3-016];
- *Malhous v. the Czech Republic*, no. 33071/96, 13.12.2000, ECHR 2000-XII;
- *Mayer and Others v. Germany*, Appl. nos. 18890/91, 19048/91, 19342/92 and 19549/92, Commission decision of 04.03.1996, D.R.85, pp. 5-20;
- *Cha'are Shalom Ve Tsedek v. France* [GC], 27.06.2000, no. 27417/95, § 86, ECHR 2000-VII; *Bulletin* 2000/2 [ECH-2000-2-006];
- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31, p. 23, § 5; *Special Bulletin ECHR* [ECH-1979-S-002].

#### Languages:

English, French.



#### Identification: ECH-2001-2-007

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.07.2001 / **e)** 44759/98 / **f)** Ferrazzini v. Italy / **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.  
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.  
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

#### Keywords of the alphabetical index:

Tax, assessment, setting aside / Tax authority, decision, litigation / Right, civil nature.

#### Headnotes:

Tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.

#### Summary:

The applicant is an Italian citizen who was born in 1947 and lives in Oristano (Italy).

The applicant and another person transferred land, property and a sum of money to a limited liability company, which the applicant had just formed and of which he owned – directly and indirectly – almost the entire share capital and was the representative. The company, whose object was organising farm holidays for tourists, applied to the tax authorities for a reduction in the applicable rate of certain taxes payable on the above-mentioned transfer of property,



in accordance with a statute which it deemed applicable, and paid the sum it considered due.

The present case concerns three sets of proceedings. The first concerned in particular the payment of capital gains tax and the two others the applicable rate of stamp duty, mortgage registry tax and capital transfer tax and the application of a reduction in the rate.

In the first set of proceedings, the tax authorities served a supplementary tax assessment on the applicant on 31 August 1987 on the ground that the property transferred to the company had been incorrectly valued. They requested payment of an aggregate sum of 43,624,700 Italian lire comprising the tax due and penalties. The applicant applied to the Oristano District Tax Commission for the supplementary tax assessment to be set aside. The case was struck out in 1998.

In the other two sets of proceedings, the tax authorities served two supplementary tax assessments on the company on the ground that it was ineligible for the reduced rate of tax to which it had referred. The tax authorities' note stated that the company would be liable to an administrative penalty of 20% of the amounts requested if payment was not made within sixty days.

The two applications for the above-mentioned supplementary tax assessments to be set aside were still pending on appeal on 27 October 2000.

The applicant complained that the length of the proceedings had exceeded a "reasonable time" contrary to Article 6.1 ECHR.

The Court, in respect of applicability of Article 6.1 ECHR, considered that pecuniary interests were clearly at stake in tax proceedings, but merely showing that a dispute was "pecuniary" in nature was not in itself sufficient to attract the applicability of Article 6.1 ECHR under its "civil" head.

The Court considered that there might exist "pecuniary" obligations vis-à-vis the state or its subordinate authorities which, for the purpose of Article 6.1 ECHR, were to be considered as belonging exclusively to the realm of public law and were accordingly not covered by the notion of "civil rights and obligations".

Apart from fines imposed by way of "criminal sanction", this would be the case, in particular, where an obligation which was pecuniary in nature derived from tax legislation or was otherwise part of normal civic duties in a democratic society.

It was incumbent on the Court to review whether, in the light of changed attitudes in society as to the legal protection that fell to be accorded to individuals in their relations with the state, the scope of Article 6.1 ECHR should not be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions.

Relations between the individual and the state had clearly developed in many spheres during the fifty years which had elapsed since the Convention had been adopted, with state regulation increasingly intervening in private-law relations. This had led the Court to find that procedures classified under national law as being part of "public law" could come within the scope of Article 6 ECHR under its "civil" head if the outcome was decisive for private rights and obligations. Moreover, the state's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, had required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as "civil".

The Court considered that, in the tax field, developments which might have occurred in democratic societies did not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention had been adopted, those developments had not entailed a further intervention by the state into the "civil" sphere of the individual's life. The Court considered that tax matters still formed part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. It considered that tax disputes fell outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produced for the taxpayer.

The principle according to which the autonomous concepts contained in the Convention had to be interpreted in the light of present-day conditions in democratic societies did not give the Court power to interpret Article 6.1 ECHR as though the adjective "civil" (with the restriction that the adjective necessarily placed on the category of "rights and obligations" to which that article applied) were not present in the text.

Accordingly, Article 6.1 ECHR did not apply under its "civil" head to tax proceedings.

*Cross-references:*

- *Bendenoun v. France*, 24.02.1994, Series A, no. 284, p. 20, § 47; *Bulletin* 1994/1 [ECH-1994-1-004];
- *König v. Federal Republic of Germany*, 28.06.1978, Series A, no. 27, pp. 29-30, § 88-89 and p. 32, § 94-95; *Special Bulletin ECHR* [ECH-1978-S-003];
- *Baraona v. Portugal*, 08.07.1987, Series A, no. 122, pp. 17-18, § 42;
- *Maaouia v. France* (GC), no. 39652/98, §§ 34, 37 and 38, ECHR 2000-X;
- *Pierre-Bloch v. France*, 21.10.1997, *Reports of Judgments and Decisions* 1997-VI, p. 2223, § 50 et 51; *Bulletin* 1997/3 [ECH-1997-3-009];
- *Pellegrin v. France* (GC), 08.12.1999, no. 28541/95, § 60, 66 and 67, ECHR 1999-VIII; *Bulletin* 1999/3 [ECH-1999-3-009];
- *Editions Périscope v. France*, 26.03.1992, Series A, no. 234-B, p. 66, § 40;
- *Schouten and Meldrum v. The Netherlands*, 09.12.1994, Series A no. 304, p. 21, § 50 and p. 24, § 60;
- Application no. 11189/84, Commission decision of 11.12.1986, *Decisions and Reports* (DR), 50, pp. 121, 160;
- Application no. 20471/92, Commission decision of 15.04.1996, DR 85, pp. 29, 46;
- *Johnston and others v. Ireland*, 18.12.1986, Series A, no. 112, p. 25, § 53; *Special Bulletin ECHR* [ECH-1986-S-006];
- *The Ringeisen v. Austria judgment* of 16.07.1971, Series A, no. 13, p.39, § 94;
- *Sporrong and Lönnroth v. Sweden*, 23.09.1982, Series A, no. 52, p. 19, § 79; *Special Bulletin ECHR* [ECH-1982-S-002];
- *Allan Jacobsson v. Sweden*, 25.10.1989, Series A, no. 163, pp. 20-21, § 73;
- *Bentham v. The Netherlands*, 23.10.1985, Series A, no. 97, p. 16, § 36; *Special Bulletin ECHR* [ECH-1985-S-003];
- *Tre Traktorer Aktiebolag v. Sweden*, 07.07.1989, Series A, no. 159, p. 19, § 43;
- *Feldbrugge v. The Netherlands*, 29.05.1986, Series A, no. 99, p. 16, § 40;
- *Deumeland v. Germany*, 29.05.1986, Series A, no. 100, p. 25, § 74; *Special Bulletin ECHR* [ECH-1986-S-001];
- *Salesi v. Italy*, 26.02.1993, Series A, no. 257-E, pp. 59-60, § 19;
- *Gasus Dosier und Fordertechnik GmbH v. The Netherlands*, 23.02.1995, Series A, no. 306-B, pp. 48-49, § 60;

- *The “Belgian Linguistic” case*, Series A, no. 6, pp. 33-34, § 9-10.

*Languages:*

English, French.







## **Systematic thesaurus** \*

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<sup>1</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court etc).

<sup>2</sup> E.g. Rules of procedure.

<sup>3</sup> Including the conditions and manner of such appointment (election, nomination etc).

<sup>4</sup> Including the conditions and manner of such appointment (election, nomination etc).

<sup>5</sup> Vice-presidents, presidents of chambers or of sections etc.

<sup>6</sup> E.g. State Counsel, prosecutors etc.

<sup>7</sup> Registrars, assistants, auditors, general secretaries, researchers etc.

<sup>8</sup> E.g. assessors, office members.

<sup>9</sup> Registrars, assistants, auditors, general secretaries, researchers etc.

<sup>10</sup> Including questions on the interim exercise of the functions of the Head of State.

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<sup>12</sup> Enactment required by law to be reviewed by the Court.

<sup>13</sup> Review *ultra petita*.

<sup>14</sup> Horizontal distribution of powers.

<sup>15</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>16</sup> Decentralised authorities (municipalities, provinces etc).

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<sup>20</sup> As understood in private international law.

<sup>21</sup> Including constitutional laws.

<sup>22</sup> For example organic laws.

<sup>23</sup> Local authorities, municipalities, provinces, departments etc.

<sup>24</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>25</sup> Political questions.

<sup>26</sup> Unconstitutionality by omission.

<sup>27</sup> For the withdrawal of proceedings, see also 1.4.10.4

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<sup>29</sup> May be used in combination with Chapter 1.2 Types of claim.

<sup>30</sup> For the withdrawal of the originating document, see also 1.4.5.

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<sup>35</sup> Presumption of constitutionality, double construction rule.

<sup>36</sup> Including the principle of a multi-party system.

<sup>37</sup> Includes the principle of social justice.

<sup>38</sup> See also 4.8.

<sup>39</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature etc.

<sup>40</sup> Including maintaining confidence and legitimate expectations.

<sup>41</sup> Principle according to which sub-statutory acts must be based on and in conformity with the law.

<sup>42</sup> Prohibition of punishment without proper legal base.

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<sup>43</sup> Including compelling public interest.

<sup>44</sup> Only where not applied as a fundamental right. Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.

<sup>45</sup> Including questions of treason/high crimes.

<sup>46</sup> Including prohibition on monopolies.

<sup>47</sup> For the principle of primacy of Community law, see 2.2.1.6.

<sup>48</sup> Including the body responsible for revising or amending the Constitution.

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<sup>49</sup> For example presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>50</sup> For example nomination of members of the government, chairing of Cabinet sessions, countersigning of laws.

<sup>51</sup> For example the granting of pardons.

<sup>52</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>53</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>54</sup> In particular commissions of enquiry.

<sup>55</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

<sup>56</sup> Obligation on the legislative body to use the full scope of its powers.

<sup>57</sup> Representative/imperative mandates.

<sup>58</sup> Presidency, bureau, sections, committees etc.

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<sup>59</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>60</sup> Including their creation, composition and terms of reference.

<sup>61</sup> State budgetary contribution, other sources etc.

<sup>62</sup> For the publication of laws, see 3.15.

<sup>63</sup> For example incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility see 4.9.5.

<sup>64</sup> For local authorities see 4.8.

<sup>65</sup> Derived directly from the constitution.

<sup>66</sup> See also 4.8.

<sup>67</sup> The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.

<sup>68</sup> Civil servants, administrators etc.

<sup>69</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

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<sup>70</sup> Other than the body delivering the decision summarised here.

<sup>71</sup> Positive and negative conflicts.

<sup>72</sup> For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

<sup>73</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

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<sup>75</sup> And other units of local self-government.

<sup>76</sup> See also keywords 5.3.39 and 5.2.1.4.

<sup>77</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>78</sup> For aspects related to fundamental rights, see 5.3.39.2.

<sup>79</sup> E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>80</sup> Tracts, letters, press, radio and television, posters, nominations etc.



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<sup>82</sup> E.g. signatures on electoral rolls, stamps, crossing out of names on list.

<sup>83</sup> E.g. in person, proxy vote, postal vote, electronic vote.

<sup>84</sup> E.g. Panachage, voting for whole list or part of list, blank votes.

<sup>85</sup> E.g. Auditor-General.

<sup>86</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission etc.

<sup>87</sup> E.g. Court of Auditors.

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<sup>88</sup> Institutional aspects only: questions of procedure, jurisdiction, composition etc are dealt with under the keywords of Chapter 1.

<sup>89</sup> Including state of war, martial law, declared natural disasters etc; for human rights aspects, see also keyword 5.1.4.

<sup>90</sup> POSITIVE AND NEGATIVE ASPECTS.

<sup>91</sup> For rights of the child, see 5.3.42.

<sup>92</sup> The question of "Drittwirkung".

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<sup>94</sup> Taxes and other duties towards the state.

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<sup>95</sup> Here, the term "national" is used to designate ethnic origin.

<sup>96</sup> For example, discrimination between married and single persons.

<sup>97</sup> This keyword also covers "Personal liberty" It includes for example identity checking, personal search and administrative arrest.

<sup>98</sup> Detention by police.

<sup>99</sup> Including questions related to the granting of passports or other travel documents.

<sup>100</sup> May include questions of expulsion and extradition.

<sup>101</sup> Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

<sup>102</sup> This keyword covers the right of appeal to a court.

<sup>103</sup> Including the right to be present at hearing.

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<sup>104</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>105</sup> This keyword also includes the right to freely communicate information.

<sup>106</sup> Militia, conscientious objection etc.

<sup>107</sup> Aspects of the use of names are included either here or under "Right to private life".

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<sup>108</sup> Including compensation issues.

<sup>109</sup> For institutional aspects, see 4.9.5.

<sup>110</sup> This keyword also covers "Freedom of work".

<sup>111</sup> 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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